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(PAGES 18145 TO 19490)

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON, 1990

(l) EXEMPTIONS.—The order shall exempt Class I fluid milk products exported from the United States.

On page 50, line 13, strike "(l)" and insert "(m)".

On page 50, line 16, strike "130" and insert "129".

On page 50, strike lines 20 through 25.

On page 51, line 1, strike "(c)" and insert "(b)".

On page 51, line 6, strike "(d)" and insert "(c)".

On page 51, line 17, strike "(e)" and insert "(d)".

On page 51, line 21, strike "(f)" and insert "(e)".

On page 52, line 4, strike "(g)" and insert "(f)".

On page 52, line 8, strike "131" and insert "130".

On page 54, line 4, strike "137(b)" and insert "136(b)".

On page 54, line 6, strike "132" and insert "131".

On page 55, line 20, strike "133" and insert "132".

On page 55, line 21, strike "133" and insert "132".

On page 59, line 1, strike "134" and insert "133".

On page 60, line 9, strike "135" and insert "134".

On page 62, line 1, strike "136" and insert "135".

On page 62, line 10, strike "135(a)" and insert "134(a)".

On page 63, line 2, strike "135" and insert "134".

On page 63, line 4, strike "137" and insert "136".

On page 63, line 11, strike "135(a)" and insert "134(a)".

On page 63, line 20, strike "131(e)" and insert "130(e)".

On page 64, line 2, strike "135" and insert "134".

On page 64, line 4, strike "138" and insert "137".

On page 64, line 22, strike "139" and insert "138".

On page 56, strike lines 13, through 21 and insert the following new paragraph:

(1) CIVIL PENALTIES.—Any person who violates any provision of this subtitle or a regulation issued under this subtitle may be assessed—

(A) a civil penalty by the Secretary of not less than $500 nor more than $5,000 for each such violation; or

(B) in the case of a willful failure or refusal to pay, collect, or remit any assessment or fee duly required of the person under this subtitle or a regulation issued under this subtitle, a civil penalty by the Secretary of not less than $10,000 nor more than $100,000 for each such violation.

Each violation shall be considered as a separate offense.

On page 60, line 22, after "products", insert the following: "represented in the referendum".

On page 63, lines 21 through 24, strike "class I processors voting in the referendum who represent, as determined by the Secretary, 60 percent or more of the volume of class I fluid milk products" and insert "class I processors representing 60 percent or more of the volume of class I fluid milk products represented by the processors voting in the referendum ".

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Minnesota.

The amendment (No. 2332) was agreed to.

Mr. LEAHY. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. LUGAR. I move to lay that motion on the table.

NOMINATION OF JUDGE SOUTER

Mr. LEAHY. Mr. President, I understand that the President has nominated Judge Souter of the first circuit for a position on the U.S. Supreme Court.

Mr. President, I hope that we will not see a rush of Senators saying that they will vote automatically for him, or automatically vote against him.

I remind my colleagues that we should have a full confirmation hearing where everybody can be heard. The President deserves to have his nominee looked at seriously. If we are going to fulfill the constitutional requirements of advice and consent, then we should be prepared to consider the nomination carefully.

The President will state what he sees as the strong reasons for his nominee. The Senate will consider them, read the opinions the judge wrote both on the New Hampshire Supreme Court and on the First Circuit Court of Appeals, and then honestly make up our minds.

The President has said he did not use litmus tests in selecting this nominee, and the U.S. Senate will not use litmus tests. Instead we will follow the normal constitutional—advice and consent. Senators should listen to the evidence, make up their minds, then declare their positions. Not the other way around.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

FOOD, AGRICULTURE, CONSERVATION, AND TRADE ACT OF 1990

The Senate continued with the consideration of the bill.

Mr. BOSCHWITZ. Mr. President, I have gone through my State of Minnesota many years and have made hundreds of onfarm visits. Starting with the drought in 1988, I did so very systematically. I made 62 onfarm stops that year in 62 different counties throughout our State, all the counties that were affected by the drought.

One of the things that I said as I proceeded along there is that I am going to come back next year, and see whether or not the drought package that we passed was adequate so that you can attend the meeting next year. The drought package that we passed did not enrich the farmer, but nevertheless allowed him to get through what was a very, very difficult year.

It was a sad thing to see the farms and the crisis that occurred that year. What a difference this year is. Minnesota is all in bloom. Minnesota's crops look as beautiful as I have ever seen them. There is a feeling of buoyancy just as there was a feeling of despondency in 1988 when everything was just dry as a bone.

So I had gone from farm to farm back in 1989, and have been back to many of them in 1990. In 1989, and again this year, we talked about the 1990 farm bill. At each stop I would ask, "What do the farmers want? What do they seek in the 1990 farm bill?"

They would, almost without exception say—certainly there were some exceptions, if you get three or four farmers together, they seem to have quite a variety of views—but it really was certainly with a much larger majority than usual that people would say, "Why do you not just continue the 1985 farm bill?"

There were many who felt that in the event this whole procedure of trying to pass a new 5-year farm bill fell upon too great a contention we would indeed just continue the 1985 farm bill. It would have been a very popular act in rural Minnesota, and all of rural America.

What was there about the 1985 farm bill that made it so successful? If there was a very successful element to that farm bill, is that element in the 1990 farm bill?

One of the principal elements that was in the 1985 farm bill was the ability of the Secretary of Agriculture to establish competitive loan rates. Loan rates really are the market floor. Loan rates are the price that the farmer will get in any event. He makes a loan from the Federal Government, and in the event that the market is lower than that loan rate, he simply surrenders the crop to the Government and is excused from repaying the loan and the interest on that loan.

So the loan rate, plus the interest that is accumulated, really is the base of the market. Make that loan rate high, and you will encourage producers to produce more. Make that loan rate high, and you will encourage producers not only in the United States but in other parts of the world. And indeed, the loan rates during my stay in the Senate have often been so high that they began to farm further and further out on the Outback of Australia, closer and closer to the Arctic Circle in Canada. Production increased throughout Europe, and other parts,

SENATE—*July 24, 1990*

(Legislative day of Tuesday, July 10, 1990)

The Senate met at 9 a.m., on the expiration of the recess, and was called to order by the President pro tempore [Mr. BYRD].

The PRESIDENT pro tempore. The Senate will be led in prayer this morning by the Senate Chaplain, the Reverend Richard C. Halverson.

Dr. Halverson.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

Except the Lord build the house, they labour in vain that build it: except the Lord keep the city, the watchman waketh but in vain.—Psalm 127:1.

Eternal God, Creator, Sustainer, Consummator of history, guide the Senate in its work that its labor be not in vain. As it builds laws to provide social, moral, economic, and fiscal order, let not its building be a house of cards which collapses under the weight of reality. As the Senators struggle with the pragmatism of politics, help them to accept the limitations of legislation at its best, remembering that even the perfect law of God cannot produce a perfect society. And in the awareness of that limitation, grant them grace to allow Thee to intervene and work Your will in and through them. We pray in the name of the Lord and Giver of life. Amen.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the time of the two leaders has been reserved.

MORNING BUSINESS

The PRESIDENT pro tempore. There will now be a period for the transaction of morning business until the hour of 9:30 a.m., with Senators permitted to speak therein for not to exceed 5 minutes each.

Mr. SPECTER addressed the Chair.

The PRESIDENT pro tempore. The Senator from Pennsylvana [Mr. SPECTER], is recognized for not to exceed 5 minutes.

Mr. SPECTER. Mr. President, point of inquiry. Is there a vote certain set this morning at 11:30 under the unanimous-consent agreement?

The PRESIDENT pro tempore. There is a vote set for the hour of 10:30 a.m. on the Bradley amendment.

Mr. SPECTER. Is there any unanimous-consent agreement for a further vote after the vote at 10:30?

The PRESIDENT pro tempore. Following the vote on the Bradley amendment, there will be 40 minutes on the Cohen amendment, at the completion of which time there will be a vote.

Mr. SPECTER. Was that established, Mr. President, by unanimous consent?

The PRESIDENT pro tempore. It was.

Mr. SPECTER. Mr. President, I had come to the floor this morning for two purposes. One was to inquire on that unanimous-consent agreement and I shall await the arrival of the distinguished majority leader, for the concern that I have is the scheduling of matters for today which had been set for yesterday. I had an extended discussion with the distinguished majority leader on Friday on the subject of the regular order. It was this Senator's position, having been available on Mondays as the majority leader had advised some time ago, that I was concerned about the rearrangement of the schedule to the middle of Tuesday, when President Bush was scheduled to be in Philadelphia and had requested my presence along with my colleague's.

I had said to the majority leader I did not intend to ask for any special dispensation, realizing his own scheduling concerns, but at the same time did not want to see prejudice to this Senator by rearrangement of Monday's business to Tuesday. Having discussed that on Friday and again yesterday, I was somewhat surprised to find the unanimous-consent agreement entered into yesterday at the close of business. I was in the Capitol but not notified. But I shall await the arrival of the distinguished majority leader, Mr. President, to pursue that issue.

NOMINATION OF JUDGE SOUTER

Mr. SPECTER. At this time, Mr. President, I choose to make some observations about the nomination of Judge Souter for the Supreme Court of the United States, with specific reference to the controversy which has arisen as to whether a nominee should be required to answer a specific question. In the context of this nominee's presentation to the Senate and to the country, a controversy has already arisen as to where he stands on the abortion issue.

I suggest, Mr. President, that it is inappropriate to call for any nominee to answer any specific question on two grounds: First, it calls for a prejudgment of an issue and, second, it suggests selling or shading of his vote. Selling or shading of the vote, Mr. President, is especially applicable in the context of this specific nomination where there is such a divided country on the issue of abortion. It has been accurately stated that there has not been such a divisive issue in this country since slavery.

I further suggest, Mr. President, that our President, President Bush, acted entirely properly when he did not ask Judge Souter what his position was on abortion, as the President stated in his announcement yesterday, because to have asked Judge Souter that question would have been to raise the suggestion of looking for an answer favorable to the President's position. In that context, it would be only natural for the nominee to perhaps shade his answer in seeking the job. The nominee might not do that, but that temptation would, obviously, be present.

The nominee owes the country, the Court, the Constitution, his best judgment on constitutional issues, and he should not be confronted at the outset either on questions from the President or from the Senate on how he stands on a specific issue which might affect his getting that job. If the President is to ask the question, the nominee has reason to know what the President's predisposition is and the nominee would be very tempted to shade an answer to sell his vote on the question.

The same process occurs when a nominee appears before the Judiciary Committee, and a Senator may ask a question where the Senator has already expressed himself on the abortion issue, for example. That has been tabbed in some circumstances as "confirmation conversion" when a nominee shades his answer.

So I say, Mr. President, that it would be inappropriate for the nominee to have been asked the question by the President. It would be inappropriate for the nominee to be asked the question by the Senate because the nominee ought to come to that constitutional issue unfettered to render his best judgment on the constitutional interpretation without being called

upon to affect his own self-interest for the job.

Mr. President, the second reason why I suggest it is inappropriate to ask how a nominee would cast a specific vote is because it calls for a prejudgment. It is not realistic to answer a question on abortion or any other question in the abstract. When cases come before the Supreme Court of the United States or when cases come before any court, they arise in the context of a specific factual situation. That is when a case is ripe for decision.

The PRESIDENT pro tempore. The 5 minutes of the Senator has expired.

Mr. SPECTER. Mr. President, I ask unanimous consent that I be permitted to speak for an additional 3 minutes.

The PRESIDENT pro tempore. Is there objection?

Mr. NUNN. Mr. President, will the Senator repeat the request?

Mr. SPECTER. I ask unanimous consent for an additional 3 minutes.

Mr. NUNN. Mr. President, what is the standing order of the Senate?

The PRESIDENT pro tempore. The standing order, until 9:30 a.m., there will be a period for the transaction of morning business, with Senators permitted to speak therein for not to exceed 5 minutes each and with the Senator from Georgia [Mr. NUNN] being recognized for 15 minutes.

Mr. NUNN. I will not object for a couple minutes, but I want to have time for my colleague from Virginia to speak, and my remarks are going to take at least 15 minutes. We are pressed for time. As I understand, at 9:30, there will be another item of business.

So I will not object if the Senator will change it to 2 minutes.

Mr. WARNER addressed the Chair.

The PRESIDENT pro tempore. Is there objection?

Mr. WARNER. I should not object, Mr. President, but I ask unanimous consent that I might have 3 minutes following the remarks by the distinguished Senator from Georgia.

The PRESIDENT pro tempore. Is there objection to the request of the Senator from Pennsylvania? The Chair hears none. It is so ordered. The Senator is recognized.

Mr. SPECTER. Do I have 2 minutes or 3 minutes?

The PRESIDENT pro tempore. The Senator's request was for 3 minutes.

Mr. SPECTER. I thank the Chair.

The PRESIDENT pro tempore. If the Senator will allow the Chair, is there objection to the request of the Senator from Virginia [Mr. WARNER]? The Chair hears no objection, and it is so ordered. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I was developing the point that it is not realistic to answer a question in the abstract because when a matter comes before the Supreme Court or any other court, it is phrased in the context of the specific factual situation and then it is ripe for decision.

When the matter comes before a court, briefs are submitted, presumably read, and argument is heard. Then the Justices confer among themselves. Only at that juncture is a decision made. So that it is not realistic to ask someone how that prospective Supreme Court Justice is going to answer a specific question.

Mr. President, it is my hope that the nomination of Judge Souter would not degenerate into a single issue litmus test. It is understandable that people on both sides of that controversial issue would like to know where Judge Souter stands. But a litigant is not entitled to a judge who is predisposed to his position. A litigant is not entitled to know what a judge's position is. A litigant is entitled to an unbiased judge. But that is all. It is not necessary for a judge to articulate in advance his predisposition on any issue.

There are many very important matters to be considered by a Supreme Court Justice. The baseline question is Marbury versus Madison and the finality of the Supreme Court as the arbiter of the Constitution. Civil rights are very important, as are the questions of Federal-State jurisdiction, criminal rights, and many other issues.

So it is the hope of this Senator, serving on the Judiciary Committee, that the nomination process will not degenerate into a single issue. It is my further hope, Mr. President, that Senators will approach this nomination with an open mind, unlike the proceedings on Judge Bork, where 11 of the 14 Judiciary Committee members had announced positions in advance of the hearings and more than 51 Senators had announced their positions in advance of the time the matter came before the floor of the Senate.

I suggest that while abortion is tremendously important, perhaps the most important issue facing the Court, there are many other issues of great importance and it is not proper to inquire about a judge's specific position on a specific issue because his answer may suggest selling or shading of his vote, and it simply is not ripe for decision in the absence of a specific case.

I thank the Chair for the additional time. I yield the floor.

The PRESIDENT pro tempore. The Senator from Georgia is recognized for 15 minutes under the order.

FISCAL YEAR 1991 DEFENSE AUTHORIZATION BILL

Mr. NUNN. Mr. President, on Thursday, July 12, the Armed Services Committee voted unanimously to report S. 2884, the fiscal year 1991 authorization bill, to the Senate. The bill was filed last Friday and the bill and report are available to all Members.

The majority leader has indicated that he intends to call up this bill next week. In anticipation of the Senate's debate on this important bill, I am going to be making several speeches over the next few days highlighting what I consider to be some of the major features of the bill.

MAJOR THEMES OF THE COMMITTEE BILL

The fiscal year 1991 Defense authorization bill reported by the Armed Services Committee is the most far-reaching defense bill since I came to the Senate in 1972. It is based on a careful assessment of the dramatic changes in the threat to our national security that have taken place in the last year, and the changes that are needed in our military strategy and our defense budget in light of this changed threat.

The bill puts the Defense Department on a responsible and manageable glidepath toward a smaller and restructured defense establishment over the next 5 years. As preparation for the decisions made during our week-long markup, the committee conducted 64 hearings and received testimony from more than 220 witnesses.

The committee's recommendations can be grouped under five major themes:

First, maintaining nuclear deterrence with forces lower in levels and more stable in structure than those currently proposed at the START negotiations;

Second, shifting to a reinforcement strategy in which the United States would reduce its forward-deployed forces, encourage specialization with its allies, and emphasize a reinforcement capability, including the use of Reserves to augment the remaining forward-deployed forces;

Third, making greater use and more innovative use of the National Guard and Reserve forces;

Fourth, adjusting the readiness of certain forces to reflect the changed threat, the amount of warning time, the likelihood that the forces will go into action, and the availability of airlift and sealift to transport these forces of the United States to the battle;

And finally, developing a stable and effective resource strategy around the theme suggested by former Ambassador David Abshire: "Think smarter, not richer."

Mr. President, in preparation for our markup, the Armed Services Committee adopted a specific set of markup guidelines designed to carry out these major themes. I ask unanimous consent that these guidelines be printed in the RECORD at this point.

There being no objection, the guidelines were ordered to be printed in the RECORD, as follows:

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(PAGES 19491 TO 20963)

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THE RETIREMENT OF MISS RUTH

Mr. MITCHELL. Mr. President, I take this opportunity to pay tribute to a very special person who today is retiring after 43 years of Government service.

Miss Ruth Martin began her work in Government as a printer's helper at the Bureau of Engraving. She then moved to the Senate restaurant, where for 37 years she has had the pleasure to serve many members of the national media who work in the Senate press galleries.

Miss Ruth, as she is known to her many friends here in the Capitol, has a quiet and gentle manner. She takes great pride in her work and offers a nice break in the middle of the day to those she serves.

The press has good reason to miss Miss Ruth. I am told that she has always saved the best desserts for members of the media.

On behalf of all the Members of the Senate, I wish Miss Ruth Martin all the best as she begins her retirement and extend to her the gratitude of all Senators for her many years of dedicated service.

The PRESIDING OFFICER. Under the previous order, the Chair recognizes the Senate Republican leader.

TRIBUTE TO RUTH MARTIN; LONGTIME EMPLOYEE OF SENATE RESTAURANT

Mr. DOLE. Mr. President, I rise today to pay tribute to a woman of uncommon dedication and outstanding service to the Senate. For the past 37 years, Ruth Martin has been a cheerful and hard working employee of our Senate restaurant. In fact, she worked there for more than 8 years before the Senate actually took over the restaurant's operation in 1961.

For much of her tenure at the Senate restaurant, Ruth Martin has served food at the press table reserved for the reporters covering Congress; for that alone, she deserves a medal of honor. You might say that when reporters were not feeding on debate here on the Senate floor, they were feeding on fine food served by Ruth. In her day, she gave the press their share of scoops—ice cream, mashed potatoes, and otherwise.

Mr. President, combined with several years of service at the Bureau of Engraving in the 1940's, Ruth Martin retires today with 43 years of Government service. I know my colleagues join me in congratulating Ruth and wishing her all the best as she begins her well-deserved retirement.

NOMINATION OF DAVID SOUTER

Mr. DOLE. Mr. President, it is maybe not surprising but somewhat frustrating to read a story this morning, that Justice Marshall suggested that the Souter nomination may be politically motivated, and made other remarks regarding President Bush.

I believe Justice Marshall stepped over the line yesterday with his cheap shots of President Bush and Judge Souter, who is the nominee for the Supreme Court and could be on the bench serving with Justice Marshall.

Unfortunately, Justice Marshall has a habit of criticizing Republicans. He is a very partisan liberal Democrat.

In my view America does not want its Supreme Court playing politics. When Justice Marshall starts making partisan statements, you can guess they will also be reflected in his judicial opinions.

The botton line is, as far as I am concerned, Judges should not be sitting on the highest court in the land making partisan pot shots and demeaning political statements and judgments.

ORDERS FOR MONDAY, JULY 30, 1990

Mr. MITCHELL. I ask unanimous consent that when the Senate completes its business today, it stand in recess until 12:30 p.m. on Monday, July 30; that following the time for the two leaders; that there be a period for morning business not to extend beyond 1 p.m., with Senators permitted to speak therein for up to 5 minutes each, and that at 1 p.m. the Senate resume consideration of S. 137, the Campaign Finance Reform Act.

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

PROGRAM

Mr. MITCHELL. Mr. President, if I might at this time advise Members of the Senate of the plans for the schedule on Monday, following a discussion between the distinguished Republican leader and myself.

We will go back to the campaign finance bill at 1 o'clock. I understand that the Republican Senators will be present to offer three amendments during the day. We anticipate that two of those will require rollcall votes on Monday, and that those rollcall votes will not occur prior to 7 p.m.

It is not definite that they will occur right at 7 p.m. but they will occur not prior to that. We will give plenty of notice by agreement of consultation between the distinguished Republican leader and myself, so that Senators will be able to make those votes on Monday evening. But Senators should be aware that there will be opening statements and debate on three amendments. Then we anticipate that the vote on the third amendment will likely be scheduled for early Tuesday morning.

Mr. DOLE. That is correct.

RECESS UNTIL MONDAY, JULY 30, 1990 AT 12:30 P.M.

The PRESIDNG OFFICER. Under the previous order, the Senate now stands in recess until Monday, July 30 at 12:30 p.m.

Thereupon, the Senate, at 6:29 p.m., recessed until 12:30 p.m., Monday, July 30, 1990.

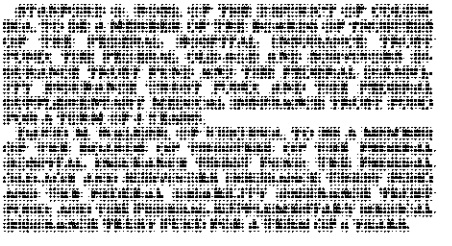
CONFIRMATIONS

Executive nominations confirmed by the Senate July 27, 1990:

DEPARTMENT OF AGRICULTURE

LEON SNEAD, OF MARYLAND, TO BE INSPECTOR GENERAL, DEPARTMENT OF AGRICULTURE.

FEDERAL INSURANCE TRUST FUNDS



DEPARTMENT OF JUSTICE

STEVEN D. DILLINGHAM, OF SOUTH CAROLINA, TO BE DIRECTOR OF THE BUREAU OF JUSTICE STATISTICS.

JIMMY GURULE, OF UTAH, TO BE AN ASSISTANT ATTORNEY GENERAL.

ROBERT C. BONNER, OF CALIFORNIA, TO BE ADMINISTRATOR OF DRUG ENFORCEMENT.

THE ABOVE NOMINATION WAS APPROVED SUBJECT TO THE NOMINEE'S COMMITMENT TO RESPOND TO REQUESTS TO APPEAR AND TESTIFY BEFORE ANY DULY CONSTITUTED COMMITTEE OF THE SENATE.

DEPARTMENT OF JUSTICE

ALBERT Z. MOORE, OF OHIO, TO BE U.S. MARSHAL FOR THE NORTHERN DISTRICT OF OHIO FOR THE TERM OF 4 YEARS.

UNITED STATES  OF AMERICA

Congressional Record

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mony, the 37-year-old Begin recalled exulting as a child whenever he heard Brine announce, "No school in Woonsocket."

"There's a special relationship between Salty and this state," Begin said.

Alluding to the renaming of the beach and his upcoming 27th wedding anniversary with his wife, Mickey, Brine broke down briefly, then recovered his composure to say, "I could conclude with, 'Brush your teeth and say your prayers,' but I think I'm the luckiest guy in Rhode Island."

RESIGNATION OF JUSTICE WILLIAM BRENNAN AND THE APPOINTMENT OF DAVID SOUTER AS ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. SIMPSON. Mr. President, I rise to comment on the resignation of Associate Justice William Brennan from the U.S. Supreme Court, and the nomination of Judge David Souter to take his place.

Let me begin by sincerely commending Justice Brennan for 34 years of dedicated public service. While I have disagreed with some of Justice Brennan's decisions, I salute him for the force of his intellect, the vigor with which he has advanced his beliefs, and the personal, warm, human qualities he possesses which helped to make him one of the most influential Supreme Court Justices of our time. Anyone who has taken a constitutional law class knows that Justice Brennan is one of the true legal giants of the last 30 years. I wish him all the best for a healthy and happy retirement. He has been very kind to me in my time here. A most interested observer of my activities on illegal immigration reform. A delightful man. This action will give him and his very steady and pleasant helpmate, Mary, the time to enjoy retirement as much as they enjoy each other. Ann and I wish them well. They are very special people.

Now we must focus on the nomination and confirmation of his successor, Judge David H. Souter. Even before his name was announced by President Bush, all of us could see the various pressure groups drawing their battle lines over the views of Justice Brennan's successor—but only on specific issues. I can only imagine how many hundreds of Senate staffers, interest groups, and other advocates are at this moment sedulously studying the correspondence, memoranda, hearing transcripts, and legal opinions of Judge Souter, seeking evidence of some gross failure of one of their various litmus tests. I have read and seen the news accounts of activists warning us all in dire terms that the balance of the Court is in jeopardy, and that if another conservative is appointed to the Supreme Court, it will be a tragedy not only for the Court, but for the entire Nation. Whew!

Mr. President, I would like to share with my colleagues my views about this idea of balance on the Court.

Balance, referring to political ideology, is unimportant if the Justices have the appropriate "judicial philosophy." If their judicial philosophy is proper, then the members of the Court will preserve every essence of the balance that is most important to the maintenance of democratic government: the balance between the Supreme Court and the elected branches of Government.

The only legitimate reason for the Supreme Court to overrule the actions of the elected representatives of the people is that such actions are inconsistent with the Constitution—a much more authoritative expression of the will of the people.

Ideally, the Supreme Court should not contain one single justice who believes himself or herself able to know how the people should be governed—any better than their own elected representatives. A judge must look only to the Constitution for direction in determining the validity of a statute. It has been said, "in a constitutional democracy, the moral content of the law must be given by the morality of the framers or the legislator, never the morality of the judge. The sole task of the latter—and it is a task large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances."

A Justice's political ideology is not in any manner determinative if he or she shares the judicial philosophy that I describe. Courts are required to accept the value choices and judgments of the legislature, and they must not decide cases in a fashion in any way favorable to their own individual ideological preferences.

The ideal nominee, in my own view, is a person of integrity, rectitude, intelligence, superior legal scholarship, and proper judicial temperment; and in addition to this legal competence, and equally as important, is the nominee's judicial philosophy.

We will know much more about David Souter after the hearings which have been scheduled for September 13—but from what I have been able to discern in these last few days, Judge Souter is a person who, in the performance of his duties as a judge, has always done his very level best to follow the law, and not press on others his own personal policy preferences—isn't this what we all really want—conservatives and liberals alike?

I certainly appreciate the President's expeditious selection of a nominee, and I trust that we will be expeditious in acting upon the nomination. As a member of the Senate Judiciary Committee, I am looking forward to the process.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Kalbaugh, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nomination received today are printed at the end of the Senate proceedings.)

MESSAGES FROM THE HOUSE

At 1:18 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has passed the following joint resolutions, each without amendment:

S.J. Res. 256. Joint resolution to designate the week of October 7, 1990, through October 13, 1990, as "Mental Illness Awareness Week"; and

S.J. Res. 316. Joint resolution to designate the second Sunday in October of 1990 as "National Children's Day."

The message also announced that the House has agreed to the concurrent resolution (S. Con. Res. 142) to waive the provisions of the Legislative Reorganization Act of 1970 which require the adjournment of the House and Senate by July 31, without amendment.

The message further announced that the House has passed the bill (S. 1230) to authorize the acquisition of additional lands for inclusion in the Knife River Indian Villages National Historic Site, and for other purposes; with an amendment, in which it requests the concurrence of the Senate.

The message also announced that the House has passed the bill (S. 2461) to reauthorize appropriations to provide for and improve the drug treatment waiting period reduction grant program under the Public Health Service Act, and for other purposes; with amendments, in which it requests the concurrence of the Senate.

The message further announced that the House has passed the following bills and joint resolutions, in which it requests the concurrence of the Senate:

H.R. 2921. An act to amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment for advertising and solicitation purposes;

H.R. 2949. An act to authorize a study of nationally significant placed in American Labor History;

H.R. 4983. An act to amend title 5, United States Code, with respect to certain pro-

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NOMINATION OF JUDGE DAVID SOUTER

Mr. SPECTER. Mr. President, 2 days from now, on September 13, the Judiciary Committee will commence hearings on Judge David Souter for the position of Associate Justice of the Supreme Court of the United States.

Since the opening statements at the committee hearings are necessarily limited, I think it is useful to take the floor today to discuss in some greater length two very important issues which are before the Judiciary Committee and will be before the Senate on Judge Souter's nomination.

The public discussion today, Mr. President, is focused largely on a way questions appropriately may be formulated to determine Judge Souter's views on abortion. That proposition, I suggest, encompasses two principal topics. First, should one issue, however important, dominate the selection of a Supreme Court Justice? And, second, has the Supreme Court's increasing activity in deciding major public policy issues as contrasted with their traditional interstitial interpretation of constitutional and statutory provisions given the public and the Senate the right to know the nominee's ultimate positions? I answer both of those questions in the negative.

Mr. President, it is understandable that there is deep concern in this country on the abortion question. I think it fair to say that no issue has divided our Nation, with the exception of slavery, since its inception.

In my open house town meetings, as I believe in yours, Mr. President, this issue dominates the agenda, and each year, on January 22, Washington is the site of numerous demonstrations on the anniversary of Roe versus Wade, and hundreds and sometimes more than a thousand of my constituents from Pennsylvania come to talk about the issue.

With the Court evenly split and the next Justice in a position to perhaps cast the deciding vote on this tremendously important matter, there has been virtually exclusive focus on what Judge Souter may or may not do on this subject. But I suggest that beyond what the news media has covered and beyond what has been discussed on cocktail circuits and perhaps in the bars across America—I think this nomination is being widely discussed at all levels in our society—there are many, many other issues of tremendous importance.

Judge Souter dominated the news in late July, but by August Saddam Hussein replaced Judge Souter, and at the present time there is a deployment of tens of thousands, perhaps more than 100,000—the exact number not being publicized—as to how many United States troops are present in Saudi Arabia.

It may well be that the critical questions under the War Powers Resolution deciding whether the President has the authority to send those troops without congressional consent may be before the Court. The War Powers Act provides that unless Congress gives specific authorization within 60 days troops must be withdrawn if they are in a position of peril or there are hostilities. Of course, there are complex legal issues as to whether the War Powers Resolution is applicable. But an even more complicated subject is the constitutionality of the War Powers Resolution.

Balancing perhaps the two most important parts of the Constitution or, as important as any, is the exclusive prerogative of the Congress to declare war and the authority of the President as Commander in Chief to dispatch U.S. troops. That issue has not been decided, but it might well be decided by the Supreme Court, and it might well be that Justice Brennan's replacement will cast the critical vote.

There are enormously important questions on the death penalty, with a long series of decisions being decided five to four, and in the balance hangs our society's right to a very important measure for deterrence in law enforcement and, obviously, very important interests on the part of the accused who faces the death chamber, and again Justice Brennan's replacement may cast the decisive vote.

Similarly, in the civil rights area and on quotas, there is a long series of decisions, five to four, this year in the Metro Broadcasting case, the rights of minorities prevailing by a thin 5-to-4 vote, contrasted with Croson, the decision striking down the minority set-asides, very recently. Again, Justice Brennan's replacement is in a critical position.

This year the Supreme Court decided, in a surprising adjudication, that district courts can order that taxes be imposed, again by 5-to-4 decision. It may be there is no more controversial decision in the history of the Court than that one. And that comes on the heels of the decision on holding legislators, councilmen, the city of Yonkers in contempt of court, an extraordinary application of judicial authority given the traditional separation of legislative responsibilities in taxing authority.

So these are just a few of the critical issues before the Court. And there are many other 5-to-4 decisions, as in the right-to-die case. So I suggest, as forcefully as I can, that there not be overemphasis on any single issue, and I do believe that abortion has unreasonably dominated the agenda as we look to what Justice Brennan's successor may be called upon to decide.

Mr. President, there is another very vexing question that is pending before the Senate and that is how far may Senators go in their questions? Or perhaps more accurately stated, what must a nominee answer if he is to be confirmed? There are no hard and fast rules on this subject. During the course of the past 10 years we have seen a fascinating series of nominations. We saw Justice O'Connor decline to answer many, many questions on the ground that the issue might come before the Supreme Court. Her confirmation candidly was never in doubt and she was confirmed.

Chief Justice Rehnquist declined to answer many questions. He finally did answer some on the issue of the authority of Congress to take away court jurisdiction on first amendment issues. He finally said, after extensive interchanges, that the Congress did not have that authority. But he refused to answer many other questions. There is a sense that goes through these Supreme Court nomination processes, at least as I see it, that the Justices, the nominees, tend to answer as many questions as they feel necessary for confirmation. Of course, that is a hard factor to evaluate. It was reported that Chief Justice Rehnquist felt he ought not to appear before the Judiciary Committee at all, as a sitting Justice coming before the Senate seeking the higher position as Chief Justice.

When Justice Scalia came before the Judiciary Committee, he answered virtually no questions, and following that proceeding, Senator DECONCINI and I had prepared a resolution to try to set a minimum standard, if that is possible—perhaps it is not possible, given the individuality of the 100 Senators—which would try to establish a minimum standard as to what a Supreme Court nominee would have to answer.

Before we could proceed, Judge Bork was nominated, and his proceedings, I think, established a standard or an attitude that a nominee has to answer very wide-ranging questions on judicial philosophy.

Interesting, Mr. President, as we now debate whether Judge Souter has to answer fundamental questions as to how he is going to decide the next case on abortion, overrule or sustain Roe versus Wade, that 3 years ago there was considerable debate as to whether we could even inquire into Judge Bork's judicial ideology. That was the first question I asked when he came to my office on the so-called courtesy call. I said, "Judge, do you think it appropriate to discuss judicial ideology?" He said, "I don't like the term ideology, but I think it is appropriate to answer questions on judicial philosophy." And of course there were wide-ranging questions.

Again, I think Judge Bork's proceedings illustrated the proposition, at least in my sense, that he had to answer wide-ranging questions, because he had written and spoken ex-

tensively on so many subjects, if he were to have any chance of confirmation.

Justice Kennedy, although his confirmation was never in doubt, also answered a wide range of questions.

So I think there has been established a Senate standard, perhaps a Senate attitude that could be generalized that a nominee does have to answer questions on judicial philosophy and specific questions on his writings, his speeches, and opinions if he is a lower court judge, unless they go to his inclination or his decisionmaking function in a case likely to come before the Court.

Even there, Mr. President, there is evolving a considerable body of thought that when the Supreme Court functions as a super legislature, and if it is to continue to move in that direction, that it may be appropriate or the temptation may be irresistible—although I personally hope we do not get that far, either by the Court's movement or by the Senators pressing—but if it continues to act as a super legislature, it may be that the pressure would be irresistible if the Justices were going to impose their own personal views as super legislators, then it may be that Supreme Court nominees will come very, very close to congressional candidates, to what Senators have to answer.

I would illustrate that, Mr. President, with the decision by the Supreme Court in 1989 in Wards Cove, where the Justices took the issue of the civil rights standard of proof on disparate impact. In the brief time today, I will not go into any detail as to what that complex concept means.

Suffice it to say that in the case of Griggs in 1971, a unanimous Court, speaking through Chief Justice Burger established a standard on burden of proof on the employer and a definition of business necessity. That decision stood for 18 years until 1989 when the Supreme Court reversed it 5 to 4.

Eighty percent of that majority, four of those Justices, had appeared before the Judiciary Committee and had articulated views of judicial restraint and nonactivism; they were not going to make the law, they were going to interpret the law.

I speak, of course, only for myself. That is all any Senator can do, any person can do. But I think it is plain that Wards Cove overruled Griggs and that there was a conclusive presumption of congressional intent that Griggs accurately interpreted the various provisions of the Civil Rights Act starting in 1964—Congress had not sought to amend it—and that was I think judicial activism.

Now, if judges are going to act as super legislators, then the question arises why should they not have to answer how they stand on matters of public policy. There is a fascinating evolution, Mr. President, and there are only two matters which I will discuss, because time is growing short, on federalism.

In 1976, the Supreme Court decided in National League of Cities versus Usery that the Federal Government did not have the power to control the States on certain issues. That was reversed in 1985 in Garcia versus San Antonio; 5 to 4, both decisions. But in the Garcia case, Chief Justice Rehnquist said we are going to move back to National League of Cities versus Usery at the next chance. Justice O'Connor said the same thing.

Now, if the judges are not waiting for the formulation of the facts of a specific case, not waiting to read the briefs, not waiting to hear the arguments, not waiting to confer with their colleagues in a traditional sense for a traditional decision, then it seems to this Senator that it is highly personalized, and Justice Brennan's successor can make the difference to go back to Usery.

This is an unemotional, bloodless case, Mr. President. But in a sense what more does Judge Souter have to do than read National League of Cities and read Garcia versus San Antonio, perhaps some other materials, to say where he stands philosophically on Federal-State relations.

But this is illustrative. If the Court, as articulated by the Chief Justice and another Justice, highly personalizes these matters, simply waiting a change in Court personnel, then how different are they from a Member of the House or a Member of the Senate?

Now it is my hope, Mr. President, that Justice Brennan's successor will follow the admonition of the President when he made the nomination that the Supreme Court should not legislate. We all agree with that, or at least that is a dominant thought. It is not easy to apply that.

We know that in Brown versus Board of Education the Supreme Court had to interpret the equal protection clause in the face of persistent refusal from the Congress of the United States and State legislatures to end segregation. And even the strict constructionists on interpretivism agree that that was a correct decision.

Mr. President, my time is about to expire. Might I ask, since, in fact, there are no Senators on the floor, that I have leave to speak an additional 3 minutes.

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

Mr. SPECTER. I thank the Chair.

I refer to the segregation case in Brown versus Board of Education and also Bolling versus Sharper for even those who oppose an application of substantive due process of law said that their decisions were correct, and that we had to end segregation in the District of Columbia even though the equal protection clause did not apply.

So there are those types of comportment, Mr. President. But I would suggest strongly that if the Court continues to move ahead in areas of public policy where it functions as a super legislature, that it may be that in the future, if that trend continues, that when nominees come before the Senate they may be compelled to answer specific questions about how they are going to decide the next case, judging from the way the Court functioned in Wards Cove and judging from the lineup of Justices ready to overrule Garcia as a matter of personal philosophy. It would be my hope that we do not move in that direction, Mr. President, because of the importance of separation of powers; that the legislative bodies like the Congress establish principles of public policy and the courts with interpretation of the Constitution or the statutes.

There is sufficient room, Mr. President, to avoid having a robe as a judicial straitjacket, that there is sufficient flexibility as to when stare decisis applies, to handle complex questions even where there are precedents on the boards. But there is a strong sense to the contrary, or there is a continum of U.S. Supreme Court jurisprudence on concepts like liberty so that it is not left to the total uncharted discretion of the judges, that there are norms and standards to be applied.

Since opening statements in the Judiciary Committee hearings on the nomination of Judge David Souter for the position of Associate Justice of the Supreme Court of the United States will be limited, I believe it is worthwhile to take some additional time in this floor statement to comment on the broad framework of issues which, in my view, will be before the Senate on this nomination.

The public discussion to date has focused largely on the way questions appropriately may be formulated to determine Judge Souter's views on abortion. That proposition encompasses two topics:

First, should one issue, however important, dominate the selection of a Supreme Court Justice; and

Second, has the Supreme Court's increasing activity in deciding major public policy issues, as contrasted with interstitial interpretation of constitutional and statutory provisions, given the public and the Senate the right to know the nominee's ultimate positions?

I answer both questions in the negative.

The pendency of so many issues of tremendous legal importance makes the first question easy to answer; but it requires going far beyond media commentary or conversations in the cocktail circuit to the Court's docket

to understand the broad range of prospective issues.

While the Supreme Court has assumed prerogatives which frequently make it much like a super legislature, our basic and important doctrine of separation of powers precludes demanding that nominees prejudge cases which are likely to come before them. If nominees to the Court are to retain immunity from such disclosures, the Supreme Court of the future must exercise much greater restraint.

The genius of our constitutional separation of powers does not give bright line divisions to preclude arguable invasions by one branch into the other's area; but if justices of the Supreme Court act like legislators, the movement may one day prevail to compel Court nominees to answer the questions now required of congressional candidates.

I. NUMEROUS CRITICAL QUESTIONS FOR THE COURT

The powerful feelings on the abortion issue are evident and understandable. No issue has so divided our Nation in this century and probably none in U.S. history with the exception of slavery. In 10 years in the Senate, I have seen the dominance of pro-life and pro-choice positions at hundreds of open-house town meetings and from thousands of Pennsylvanians who fill our largest Senate hearing rooms each January 23d, the anniversary date of *Roe* v. *Wade*, 410 U..S 113 (1973).

But there are many other critical legal issues where the results are uncertain on important matters affecting millions of Americans.

THE AUTHORITY TO COMMIT U.S. TROOPS TO COMBAT

In July it appeared that Judge Souter's nomination would dominate the national news through his September hearings. That changed abruptly in August with Iraq's invasion of Kuwait. With the President's success to date and the Congress in recess, there has been relatively little public focus on the long-standing constitutional controversy of the relative authority of the President as Commander in Chief contrasted with the ultimate authority of the Congress to declare war.

The constitutionality of the War Powers Act may soon eclipse abortion as the most important pending constitutional issue.

CIVIL RIGHTS AND EMPLOYMENT VERSUS QUOTAS

Five decisions by the Supreme Court of the United States last year fomented enormous national controversy on the proper standards for hiring Afro-Americans, women, and other minorities. Without considering all five cases at this time, it is sufficient to refer to Senate and House action on the issues of business necessity and burden of proof in seeking to overturn the Supreme Court's 5-to-4 decision in *Wards Cove Packing Co., Inc.* v. *Atonio*, 109 S.Ct. 2115 (1989), and to reinstate the Court's 1971 ruling in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), where Chief Justice Burger spoke for a unanimous Court.

Weeks of negotiations among top White House officials and Senators from both parties produced no results before the Senate passed a bill which the President is likely to veto. The House has since passed a similar bill. Gridlock is likely unless continuing negotiations produce an answer to these vexing issues.

On closely related issues, the Supreme Court has teetered back and forth on 5-to-4 decisions on other minority rights which again raise the quota controversy. This summer the Supreme Court by a 5-to-4 vote in *Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 110 S.Ct. 2997 (1990), affirmed FCC policies upholding minority ownership preferences. That decision swung the pendulum back from the Court's 1989 5-to-4 decision in *City of Richmond* v. *J.A. Croson Company*, 488 U.S. 469 (1989), which declared unconstitutional a 30-percent set-aside to minority businesses.

These two opinions, covering 92 pages in West's Supreme Court Reporter, require an anlysis of every semicolon to discern the differences. The complexities are overwhelming. In Croson, Justice O'Connor delivered the opinion of the Court with respect to parts I, III-B, and IV of her opinion. The Chief Justice and Justices White and Kennedy joined Justice O'Connor in parts III-A and V and overall six opinions were filed with Justices concurring in the judgment, dissenting and joining each other in various parts of their opinions.

Justice Brennan's replacement will provide a key role on the litigation which is certain to continue on these important bread and butter economic issues.

THE DEATH PENALTY CASES

A closely divided Supreme Court has established a complex maze of procedural rules on reviewing State convictions resulting in the death penalty. The issue of the death penalty involves complex legal and moral issues and a judgment on the deterrent effect of capital punishment.

In 1972 in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the Supreme Court invalidated all pending death penalty sentences on constitutional grounds and further enlarged constitutional protection in 1976 in the cases of *Woodson* v. *North Carolina*, 428 U.S. 280 (1976, and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), again invalidating intervening convictions resulting in the death penalty.

At the present time, there are approximately 2,500 pending death penalty cases with approximately 125 executions having been carried out since 1976. Pennsylvania, which has the death penalty, has not implemented a jury's capital verdict since 1962, and now has approximately 125 inmates on death row.

During the last two terms, in an area of great relevance to the application of the death penalty throughout the country, the Supreme Court has established new rules for determining whether newly created constitutional rights should be applied retroactively to State criminal convictions pending in the Federal courts on collateral review; that is, habeas corpus petitions. In *Teague* v. *Lane*, 489 U.S. 288 (1989), the Court held, 5 to 4, that a rule of constitutional law established after a habeas petitioner's conviction has become final may not be used to attack the conviction in a habeas corpus proceeding unless the new rule falls within two narrow exceptions. Most recently, in three cases decided by a 5-to-4 vote in the last term, the Court applied Teague in *Sawyer* v. *Smith*, 110 S.Ct. 2822 (1990); *Saffle* v. *Parks*, 110 S.Ct. 1257 (1990); and *Butler* v. *McKellar*, 110 S.Ct. 1212 (1990).

Justice Brennan's successor will doubtlessly have a key role in our evolving legal standards on the death penalty.

FREEDOM OF THE PRESS

Another issue of continuing importance to free speech and a free press is the constitutional protections established under the first amendment governing actions for defamation. Last term, in a 7-to-2 decision authored by the Chief Justice, the Supreme Court held that a separate constitutional privilege for "opinion" in addition to extant constitutional safeguards against liability for defamation was not required under the first amendment. *Milkovich* v. *Lorain Journal Co.*, 110 S.Ct. 2695 (1990). Since *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court has decided a series of such first amendment cases and Justice Brennan's successor will doubtless have considerable impact in this area.

FREEDOM OF RELIGION

Like the Metro Broadcasting-Croson cases, the 5-to-4 Supreme Court decisions on freedom of religion must be read under a microscope to understand their nuances. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Supreme Court decided by a 5-to-4 vote that there was no violation of the first amendment right to freedom of religion when the city of Pawtucket, RI, erected a nativity scene in the Christmas season.

Five years later in 1989, the Supreme Court decided, again 5 to 4, in *County of Allegheny* v. *American Civil Liberties Union*, 109 S.Ct. 3086 (1989), that a nativity scene in Pittsburgh did

violate the establishment clause of freedom of religion under the first amendment because of the overall context; but at the same time, the Court ruled, 5 to 4, that a Jewish menorah and a Christmas tree in the holiday season were permissible.

Again, the various Justices' opinions had to be dissected to find five Justices in agreement on the various issues with Justice Blackmun delivering the opinion of the Court with respect to parts III-A, IV, and V of his opinion with the Justices filing five separate opinions joining others in part, concurring in part, concurring in the judgment, dissenting in part, and dissenting.

With a 5-to-4 decision, the Supreme Court decided in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 110 S.Ct. 1595 (1990), that the free exercise clause of the first amendment permits the State of Oregon to prohibit sacramental peyote use and accordingly to deny unemployment benefits to persons criminally charged with the use of that drug.

Again, Justice Brennan's successor may cast the vote on critical cases involving both the establishment clause and exercise clause of freedom of religion under the first amendment.

FEDERALISM

The Supreme Court may be awaiting Justice Brennan's successor to reverse direction again on the basic question of federalism involving the relative powers of States versus the U.S. Government. The Supreme Court by a 5-to-4 vote in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), ruled that the commerce clause does not authorize Congress to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act. Nine years later, the Court reversed that decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), again by a 5-to-4 decision.

That, of course, is hardly the end of the controversy. In dissenting, Justice—now Chief Justice—Rehnquist remarked that Garcia would be reversed. Referring to the holding of National League of Cities versus Usery, Justice Rehnquist stated:

> I am confident, [that] in time [*National League of Cities* will] again command the support of a majority of this Court.—469 U.S. at 580.

Similarly, Justice O'Connor, in dissent, predicted that Garcia would be reversed and the doctrine of National League of Cities would be reinstated.

If Justice Brennan's successor agrees with Chief Justice Rehnquist and Justice O'Connor then that important doctrine will again be reversed.

THE SUPREME COURT REQUIRES TAXES AND CONTEMPT CITATIONS

In a pair of 5-to-4 decisions involving the enforcement of constitutional rights, the Supreme Court last term upheld the broad remedial powers of the Federal courts. In *Spallone* v. *United States*, 110 S.Ct. 625 (1990), the Court ruled in a housing discrimination case that the district court had abused its discretion in imposing contempt fines on individual city council members who had refused to vote in favor of the remedial plans ordered by the district court. Instead, the Court held that the district court should first have imposed contempt fines only against the city before fining the individual council members. If such fines did not work, however, the Court implied that fines against council members could be imposed.

In a second 5-to-4 decision, the Court upheld the power of Federal courts to order localities and States to increase taxes to pay for remedial measures imposed after a finding of constitutional violation. In *Missouri* v. *Jenkins*, 110 S.Ct. 1651 (1990), the Court affirmed an order requiring the Kansas City School District to submit a proposed property tax increase to pay for court-ordered remedies required to overcome a finding of racial discrimination in the Kansas City schools to State taxing authorities. The Court also upheld the power of Federal judges to enjoin the operation of statutes that would have prohibited the school district from raising the taxes as ordered by the district court.

These cases are extremely difficult. In one, the issue was: Could a court sanction a legislator for voting a certain way; in the other, the issue was: Could a court, directly or indirectly, increase taxes. Such questions may not arise with frequency, but they are critical to the enforcement of constitutional and civil rights and are integral to the role of the courts in our system of government.

Again, Justice Brennan's successor could provide the key vote on a closely divided Court.

RIGHT TO DIE

Last term, a new issue that has been percolating in State courts for several years finally came before the Supreme Court, and it resulted in a 5-to-4 decision on a question of fundamental importance: What evidentiary standard may a State impose before allowing an individual being kept alive only by medical intercession to be disconnected from a feeding tube and allowed to die?

In *Cruzan* v. *Director, Missouri Department of Health*, 110 S.Ct. 2841 (1990), the Court held that an individual has a constitutionally protected liberty interest in refusing unwanted medical treatment. The Court then upheld a Missouri statute requiring an incompetent person's wishes as to the withdrawal of life-support systems to be proven by clear and convincing evidence. The case, involving such fundamental issues, drew five separate opinions. No doubt this issue and other issues arising from the continuous advance of science and medicine will come before the Court, where Justice Brennan's successor may cast key votes in a series of 5-to-4 decisions.

II. HOW MUCH DOES THE NOMINEE HAVE TO SAY?

There has been no standard or absolute answer to this question with the responses differing from an interaction of various nominees and Senators. If any valid generalization may be gleaned from the record, at least as I see it, it is that nominees for the Supreme Court answer as many questions as they feel necessary to win confirmation. That is my sense of studying the history of Supreme Court nominees and participating in the past decade in the confirmation hearings of Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, Judge Bork, and Justice Kennedy.

There may be some significance to the historical fact that the Founding Fathers at an early stage in the Constitutional Convention decided to have the Senate select Supreme Court Justices. A broad sense of senatorial authority may have been responsible for the Senate's rejection of John Rutledge in 1795 by a vote of 14 to 10 on the purely political grounds that he supported the Jay Treaty.

In 1930, the nomination of Judge John Parker was rejected after strong opposition was voiced by organized labor.

During President Nixon's administration, Judge Haynesworth and Judge Carswell were rejected by the Senate in part because of questions of ethics and competency, and in part for political reasons. Judge Haynesworth was opposed by organized labor and civil rights groups; Judge Carswell was also opposed by civil rights groups.

While the Senate has rejected some nominees for political reasons, it has been generally viewed by the middle of the 20th century that the Senate should defer to the President's selection of a nominee who was qualified without regard to judicial philosophy.

The limited role of the Senate in inquiring into a nominee's views was demonstrated by the fact that Harlan Fiske Stone was the first nominee to testify before the Senate in 1925, and it was not a common practice for nominees to appear before the Judiciary Committee until the 1950's. Prof. Felix Frankfurter did so in 1939, but he said very little beyond discussing his background and personal activities, especially his membership in various organizations.

Of the next 10 nominations, only Robert H. Jackson testified before the Judiciary Committee; Sherman Minton was asked to testify in 1949, but refused. All these nominations were confirmed. Only since 1955, with the nomination of John Marshall

Harlan, has every nominee to the Court testified before the Judiciary Committee.

My participation in and observations of other Members' questioning in Judiciary Committee hearings since 1981 has led me to conclude that nominees say as much as they feel necessary to win confirmation. Justice O'Connor's confirmation was never in doubt and she declined to respond to many questions on the ground that they might involve cases which would come before the Court.

In his confirmation hearings for Chief Justice, Justice Rehnquist at first declined to answer questions about congressional authority to limit the jurisdiction of the Supreme Court, but later relented and answered some of those inquiries. He stated that the Congress did not have the authority to limit the Court's jurisdiction on first amendment issues but left open the question as to other parts of the Bill of Rights. I personally found sufficient reassurances in the answers which he gave to vote for confirmation; but I sensed Chief Justice Rehnquist's strong preference to say as little as possible.

Justice Scalia answered virtually nothing in his confirmation hearings, where he appeared totally safe for many reasons including the just-concluded bruising Rehnquist hearings. As a result of those hearings, Senator DECONCINI and I prepared a resolution seeking to establish minimum standards on what a nominee must answer; but that resolution was never pursued because Judge Bork's hearings intervened and resolved the issue.

Judge Bork's circumstance was unique because he had written and spoken so extensively on so many subjects. Immediately following his nomination, there was wide public debate as to whether it was appropriate to inquire into "judicial ideology." When Judge Bork came to my office for his first so-called courtesy call, my first question was whether he thought it was appropriate to discuss "judicial ideology" and he responded that he did not like the term "ideology" but he though it was appropriate for the Senate to inquire into his "judicial philosophy."

In my view, Judge Bork had little choice but to respond to questions on the wide range of issues which he had previously addressed. There was so much known about Judge Bork before he said his first word at his confirmation hearing that 11 of the 14 Judiciary Committee members announced their positions in support or opposition. I believe Judge Bork responded to the broad range of Senator's questions because he concluded it was indispensable in order to win confirmation.

Although Justice Kennedy's nomination was never in doubt, again for many reasons including the bruising process on Judge Bork, Justice Kennedy answered a wide range of Senators' questions.

In my judgment, a Senate standard or perhaps attitude has been established requiring the nominee to discuss his judicial philosophy in general terms including specific responses on his prior writings, speeches, and judicial opinions, if any, at least to the extent that the questions do not encroach on his judgment on legal issues likely to come before the Court. In my opinion, Justice Scalia's proceeding was almost as influential in establishing that Senate attitude or standard as was the process involving Judge Bork.

While not determinative, Judge Souter has already begun to answer some questions about his judicial philosophy. In our meeting on July 27, we discussed a variety of legal issues including his May 13, 1981, letter to a New Hampshire House Committee which was considering abortion legislation. I was impressed with the report that he had given advance notice to the President's advisers that he even would not travel to Washington for interviews if he was to be asked about his views on reversing Roe versus Wade.

In the intervening weeks, Judge Souter has been reported to have studied the videotapes of prior confirmation hearings and been questioned in practice sessions by the so-called murder board, so he has obviously given considerable thought to his position on responding to the Senators' questions.

The American people, including prospective litigants, Senators, commentators, and so forth, have a right to be concerned about judicial activism and whether a new Justice will apply his or her own personal views on public policy on cases that come before the Court outside of the continuum of U.S. constitutional interpretation.

During my 10 years in the Senate, the Judiciary Committee has been assured by four nominees, who have been confirmed, that they were philosophically opposed to judicial activism and they would only interpret and not make new law.

While I am obviously only giving one person's view, it is my legal judgment that, notwithstanding those protestations of nonactivism, those four members of the Supreme Court wrote new law as super legislators in *Wards Cove* v. *Atonio*, 109 S.Ct. 2115 (1989). In *Griggs* v. *Duke Power*, 401 U.S. 424 (1971), the Supreme Court of the United States, in a unanimous opinion written by Chief Justice Burger, had established the law on disparate impact cases.

That law stood for 18 years without any congressional effort to change it, establishing a conclusive presumption on congressional intent approving the doctrine of Griggs as amplified by later decisions. On what virtually all would agree was a rewriting of the law, the Supreme Court overruled Griggs in Wards Cove. Other examples, on all sides of the judicial-philosophical spectrum, could be cited. While perhaps unusual or impolitic to be so specifically critical, I think it appropriate to be this specific in reminding sitting justices that many, including their confirmers, remember their commitments and carefully watch their performances.

The stage is set on the Supreme Court docket for reconsideration of many far-reaching constitutional doctrines where Justice Brennan's successor could rewrite the law. Take, for example, one bloodless, unemotional issue involving Federal-State relations. As noted above in National League of Cities versus Usery, the Supreme Court ruled, 5 to 4, that Congress could not compel the States to pay minimum wages and overtime provisions required by Federal legislation. In 1985, the Court reversed itself in Garcia versus San Antonio Metropolitan Transit Authority by a 5-to-4 decision. Both Chief Justice Rehnquist and Justice O'Connor wrote in dissents in Garcia that Garcia would be reversed and National League of Cities would be reinstated as the law of the land mandated by the U.S. Constitution.

If constitutional law is to depend upon the personal views of the men and women who sit on the Court, then why is it inappropriate to find out what a nominee thinks about federalism as interpreted by Garcia? Since Justice Brennan was in the Garcia majority, his successor will have the power to make the Rehnquist/O'Connor prediction come true. Is anything more realistically required for Justice Brennan's replacement than the studying of the Garcia and National League of Cities decisions, plus perhaps other related cases or materials, to fairly state how he or she would decide that issue.

Chief Justice Rehnquist and Justice O'Connor have flatly stated that they will reverse Garcia at the next opportunity which implies no concern for the specific facts of the case, the briefs, the oral arguments, or judicial conference.

It is in this setting that there is so much public and senatorial concern about a nominee's judicial philosophy. The legal scholars write extensively about interpretivism contrasted with noninterpretivism. Some commentators argue that it is required that Supreme Court decisions must be based on specific constitutional provisions—interpretivism—as opposed to more generalized statements which give greater leeway to personal predilections. Thus, it is argued, that the Jus-

tices overstep their bounds if their decisions are based on unstructured constitutional concepts—noninterpretivism—like "fundamental fairness" or "essential to the concept of liberty."

There is obviously no conclusive compartmentalization or bright line to keep Justices interpreting rather than making new law; and there are, of course, endless differences on what those words mean.

The Supreme Court adds credence to the demands for specific answers from nominees on future cases when it moves in the direction of becoming a super legislature. To the extent that Justices are result-oriented or articulate their own personal views, the arguments become stronger that the public and the Senate are entitled to answers on future decisions involving subjects like Garcia or even Roe versus Wade.

President Bush is conclusively correct when he has stated that judges should not legislate. The balance even for strict constructionists on interpretivism, however, is not easy to find. No one today questions the correctness of the Supreme Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), ending school segregation. Yet that decision directly contradicted the obvious original intent of the drafters of the equal protection clause, who established that generalized right at a time when segregation was commonplace including schools and even the U.S. Senate gallery.

The strongest advocates of original intent like Judge Bork agreed with the Court in Brown even though Federal and State legislatures had refused to make the public policy decision to end segregation. Similarly, the strongest advocates against the Supreme Court's use of the due process clause, again like Judge Bork, agreed with the Court's use of due process in *Bolling* v. *Sharp*, 347 U.S. 497 (1954), to strike down segregation in the District of Columbia schools where no other constitutional doctrine could be cited to achieve that result.

At the end of the relevant legal analysis, we find no automatic, self-executing standards. It comes down to judgment, which is why we have judges.

The constitutional continuum provides the norms and values for balanced judgment. Supreme Court Justices must exercise greater restraint, regardless of whose agenda is at stake, in not legislating like the Court did in Wards Cove if nominees are to retain immunity from answering Senators' questions on specifically how they will vote on an issue which is heading for the Court. Similarly, the Court cannot personalize the law as some would do on Garcia/Usery without future nominees failing at confirmation in default of answering specific questions on their ultimate views.

Even with such restraints, there remains sufficient fluidity within the constitutional continuum on interpretivism on "liberty" or the flexibility of when stare decisis applies for the Justices to exercise judgment without being bound by robes which function like straitjackets.

Interest groups, like litigants, are not entitled to a new Justice who they know is predisposed to their views.

Retention of an independent judiciary requires restraint by the public and Senators in asking for the nominee's ultimate views. By not asking such questions, the Senate will be reinforcing the basic doctrine of separation of powers.

Accordingly, I would not ask Judge Souter about his judgment on issues likely to come before the Court but would await his decision in the traditional course after he reads the briefs, listens to oral argument, and confers with his colleagues.

Mr. President, I see my colleague, the distinguished chairman of our judiciary subcommittee, has come to the floor, so I will conclude at this point.

I think the Senate does realize the range of issues beyond abortion. But I would urge the public at large not to focus unduly on abortion in the face of so many other major issues which could involve war and peace, or life and death. I would further urge my colleagues that at this stage of evolution it is not appropriate to ask the ultimate question as to what Judge Souter will do on reversing or sustaining Roe V. Wade. At the same time, as I have amplified the admonition, the caveat, if a nominee to the Court is to avoid being treated like a candidate for Congress, the justices are going to have to exercise restraint and decide cases in the tradition of the judiciary within the broad U.S. constitutional continuum.

Mr. President, I thank the Chair and yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Delaware [Mr. BIDEN] is recognized for not to exceed 45 minutes.

The Chair will advise the Senator from Delaware that under another previous order, morning business is to conclude at 10 a.m., which under any form of mathematics is a dilemma.

Mr. BIDEN. Mr. President, I ask unanimous consent to have morning business extended until 10:15.

The PRESIDING OFFICER (Mr. ROBB). Without objection, it is so ordered.

Mr. BIDEN. I hope that solves our mathematical dilemma.

The PRESIDING OFFICER. It does.

THE SENATE AND JUDGE SOUTER: A CRITICAL ENCOUNTER AT A CRITICAL TIME

Mr. BIDEN. I am delighted to see the Senator from Pennsylvania and hear his statement. He has provided great insight for other members of the Judiciary Committee and the Senate as a whole on matters of great consequence, not the least of which has been the selection of Supreme Court nominees, and an insight into the great and hallowed traditions of the Court and what in fact does and does not constitute a judicial philosophy that falls within the mainstream of the last 70 years of deciding cases, and how one can reasonably determine the extent of—and the certainty one can be guided by—stare decisis.

He also has been extremely skillful and fair in the way he has probed nominees to find out, totally legitimately, their judicial philosophy and to determine whether or not they fall within the broad mainstream. That has encompassed liberals and conservatives, but all of them seem to have shared one sense of progression, and very few have been inclined to regression. That is my characterization, not his.

It may be unfair to my friend from Pennsylvania, but I would like to—it may be unfair to say expand on—but I would like to continue the discussion along the lines he began this morning.

As we all know, on July 20, 1990, the Nation—at least this Senator and I believe the Nation—was saddened by the retirement of what I believe to be one of the greatest figures ever in American law, Associate Supreme Court Justice William J. Brennan. No person, selected by any President, could ever replace Justice Brennan. His contribution to our system of constitutional government is staggering. The list of significant decisions he authored over the 34 years of his career on the Court is overwhelming.

The responsibility for nominating someone to fill Justice Brennan's seat on the Court fell to President Bush, to state the obvious. Four days after Justice Brennan retired, the President discharged that responsibility by naming Judge David H. Souter as his nominee. Now, under article II of the Constitution, the responsibility falls to this body to offer our advice and consent on the President's nomination.

It is a solemn duty, and made all the more solemn by the loss to the Court of Justice Brennan's wisdom, by the important role the Court now plays in our society, and by the close division on the Court with respect to many critical constitutional issues, some of which have been mentioned earlier this morning.

Later this week, the Judiciary Committee will open its hearings on the Souter nomination. Before these hear-

ings commence, I wanted to address some of the questions concerning the nomination, particularly those that are being widely debated in the corridors of the Congress and the country as a whole, because my colleagues in the Senate in my view should be clear on what is at stake on this nomination and how we should go about our role in determining how to fulfill our responsibility and what lies before us. My remarks today will be divided into two parts.

First, I will address an issue that has been the subject of lively debate since the nomination of Judge Souter, both here in Washington and across the Nation, and that is what types of questions can properly be asked of the nominee. What are the types of questions to which the committee has a right to expect answers from a nominee?

I might note, parenthetically, the committee staff went back and looked at every question ever asked of any nominee in the history of the United States of America so that we could get some historical perspective.

In the second part of these remarks, I will offer some initial thoughts about what we know and what we do not know about Judge Souter's philosophy. At this point, there are more blank spaces than answers in Judge Souter's record. I do not say that critically, just as a matter of observation. But some of the things we do know emphasize to me, at least, how important it is to have Judge Souter closely questioned by our committee on his constitutional and judicial philosophy, not on his personal background.

Before I address either of these matters, however, I want to make one observation. We are a long, long way from where we were in July 1987 when I took the floor to address the question of whether the Senate had the right and the responsibility to consider the nominee's judicial philosophy before giving our advice and consent to a Supreme Court nomination. At that time, that proposition should we investigate the judicial philosophy, was being hotly debated, notwithstanding the fact that our history pointed to one consistent conclusion: consideration of a nominee's substantive views is a proper part of the Senate deliberation on a Supreme Court nomination.

Today, though some still wish to debate questions raised in the Bork nomination, this question seems to have been put to rest among judicial scholars, among editorial writers, among our colleagues, among all who have paid any attention to this process. I hear no one taking the Senate floor—although now that I have said that, there may be some Senator who will come forth—but up to now, I have heard no one taking to the floor or the television airwaves or the editorial pages to tell us it is not the Senate's place to look into Judge Souter's views on constitutional matters. I hear no one saying that the Senate lacks the right or the responsibility to weigh these views when we vote to confirm or reject that nomination. That debate, at least, appears to be settled. We should look at his judicial philosophy.

But the consensus over that issue has given rise to another issue: What kinds of questions can members of the Judiciary Committee properly put to Judge Souter in an effort to exercise our aforestated constitutional responsibility of determining what his philosophy is?

To put it another way, everyone agrees we can consider the nominee's views when we vote on his confirmation. But there is sharp division over what we can do to find out his views before our dispositive hour comes. And that is the first issue I would like to address today: the scope of questioning.

Although the Constitution sets our responsibilities for reviewing Supreme Court nominations and grants us broad powers to do so, it offers us no specific guidance on how we should go about exercising that power. Thus, it falls to us to determine how we will discharge our constitutional duty.

Before I offer my thoughts on this matter, it may interest my colleagues to know something about how, historically, our predecessors have exercised their role in this area.

First, it is worth noting that there is no necessary link between considering a nominee's views on substantive issues and questioning the nominee on those issues. Several nominees—John Rutledge in 1795 and John Parker in 1930, to just name two—have been rejected for their views on pending issues of the day without ever having been asked a single question by the Senate about those views. Still, for the better part of the latter half of this century, the Senate Judiciary Committee has invited nominees to appear before it and to answer questions about their views on matters of judicial philosophy.

I point this out because, contrary to popular perceptions, the practice of detailed questioning of the nominee about his or her legal views did not start with the Bork nomination. I emphasize that. It did not start with the Bork nomination.

The list of nominees questioned in great detail about their views on legal philosophy reads like a "Who's Who" of the modern Supreme Court: John Marshall Harlan, in 1955; Thurgood Marshall, in 1967; Lewis Powell, in 1971; John Paul Stevens, in 1975. Questions have come from liberal and conservative Senators alike, from advocates of strong national Government and from exponents of States rights, from proponents of the war and Court's jurisprudence, and from the staunchest critics of that Court.

So what can we learn from these older precedents and newer ones as well? Generally we see that three factors, often acting in combination, have shaped the extent to which a nominee will be questioned about his or her judicial philosophy. The first of these factors is how the President and his administration has exercised their responsibility in selecting the nominee. The second is how the nominee's expected impact upon the Court or institution is likely to be viewed. And the third is what is known of the nominee's views before the hearing.

I would like to look at each of these three factors and particularly at their influence on the questioning of the recent nominees.

Mr. SPECTER. Will the Senator be willing to yield for a question? I make this interruption with reluctance because I know the distinguished chairman is developing his approach. I was due in another Judiciary Committee hearing on the savings and loan issue 10 or 15 minutes ago. I wanted to hear the Senator's comments.

Now that I have heard the three issues Senator BIDEN has formulated on the broad question of what questions may be answered, I do not think I am precluding or anticipating or interrupting the chain as to any one of those questions which I would like to raise, and that is a matter I discussed very briefly before the Senator came to the floor; and that is the ultimate issue of a question where the Court is moving toward functioning as a superlegislature. I interrupt at this time because I do not think the Senator is going to reach that. I do not think it will interrupt his train of thought. If it does, I regret it.

I would be interested in the Senator's views in the context of the two cases I have discussed, and there are many more which could be discussed. One is the decision of the Court last year in Wards Cove which upset Griggs. Griggs had established the burden of proof and definition of business necessity in title VII cases in 1971. Congress let it stand giving rise to the conclusive expression that was the expression of intent under the 1964 Civil Rights Act. Then five Members of the Court overruled Griggs. Four of them came before our Judiciary Committee in the decade I have been here. The Senator has been here longer. He was here when Justice Stevens was confirmed.

My point is this: If the Court is going to function as a superlegislature and decide questions of public policy as opposed to what has traditionally been called interstitial interpretation of the Constitution and statutes, to use a fancy word, because this is not

quite like interstitial, if they are going to decide questions of public policy, then why should not Justices have to answer the ultimate question of what they are going to do in the next case? I do not think they should, and I hope the Court does not come to that. But if the Court insists on functioning as a superlegislature, then I would be interested in Senator BIDEN's views as to why not the ultimate question?

Mr. BIDEN. Quite frankly, in that context, there is no historical reason why not, there is no constitutional prohibition why not. There is no prohibition whatsoever, and there is an overwhelming inclination on the part of those of us who serve in this body when the Court, which claims to be a court that does not legislate—that is the sort of catchword which I am going to discuss later—this notion that somehow if we say, "I have appointed a Justice who will not legislate from the bench," I will argue that a number of those 4-to-5 decisions that have been reversed—and as the Senator points out—you need not only pick the Griggs case, you can pick a half dozen others and can pick a half dozen others that are hanging in the balance at this moment. It seems to me we are in a timeframe, someone suggested time warp, when it is increasingly appropriate, not inappropriate, to seek the views of a nominee on the very issues the Senator has raised.

So let me say, to answer briefly, (a) I know of no constitutional prohibition, (b) there is no historical precedent that would suggest that it would be inappropriate, and (c) the nature of the times and the tenor of the Court and the debate that is about to ensue in the Nation may very well dictate it.

Mr. SPECTER. I thank the Senator for that answer. Again I repeat, as I amplified earlier, I do not think we should ask Judge Souter the ultimate question. I hope the Court will reverse the trend of being a super legislature.

I know I am intruding on the Senator's time. I shall be brief.

On the federalism issue where National League of Cities v. Usery held that the Federal Government did not have the authority to dominate the States, reversed in Garcia, 5 to 4 again, the Federal Government does have the authority. Chief Justice Rehnquist, in Garcia, and Justice O'Connor, in Garcia, said, just wait; we are going to put back National League of Cities once there is a change of personnel. If the Court is to be personalized and is to apply judicial philosophy, pre-existing, without weighing the facts of the case or reading the briefs, hearing the arguments, conferring among their colleagues, why should not Justice Brennan's successor be asked that question if there is to be personalized interpretation of those major constitutional issues?

Mr. BIDEN. There may be numerous reasons in the context of the hearing why he should or should not be asked. Let me emphasize again, there is no prohibition that I can find, nor staff has found anywhere in precedent, in the way in which we have conducted hearings over the last several hundred years to the extent they have been conducted or in practice as we have acted in the near past.

I do think there are other ways to get at it. The Senator used the phrase "ultimate question," and I will speak to that in a moment. We may well learn a great deal more by asking our colleague to explain in detail his views of section 5 rather than precisely how we would rule on one case or another. There are other ways to deal with getting at what is legitimately, in my view, an area of inquiry.

Let us cut through it all for just a moment. The fact of the matter is, long after the Persian Gulf situation is resolved, long after the savings and loan scandal has been dealt with, and the legislation the Senator and I have worked on has, hopefully, done its job, long after we have worked out a compromise on the budget, Justice Souter, if confirmed, God willing, will be healthy and sitting on the Court. In the year 2020 or 2035, if he sits there as long as some Justices have, or 2030, a generation will be looking back and wanting to ask, "Wait a minute, why, in that context, didn't those folks back then figure out what this guy was all about?" They will not even have on their plate the issues that are now consuming us because this Justice is going to impact more on the future of this country than anything any of us are going to do and almost anything short of the declaration of war that the President of the United States will do in our tenure in Washington, DC.

So, for a whole range of reasons, it makes overwhelming sense for us to find out as much as we can about this gentleman's judicial philosophy, the reasons the Senator from Pennsylvania has raised and ones which I hope to explore, if I can get back to my statement.

Mr. SPECTER. I thank the chairman for permitting the colloquy and responding.

Mr. BIDEN. Let me move back to the issue, with a little more precision, about what is appropriate and inappropriate to ask.

There is no question that the President's approach in selecting a nominee has always shaped the Senate's approach in reviewing that nomination. Where a President has made a choice for political reasons, such as President Madison's choice of Alexander Walcott or President Cleveland's nomination of William Hornblower or Wheeler Pectin, he can expect a political response such as the Senate's outright rejection of all three of the nominees I just mentioned.

More generally, when the perception exists that the President has selected a nominee to advance a political agenda, particularly an agenda that has been stymied in Congress and in the country, that President can also expect the nominee to be scrutinized rigorously by the Senate Judiciary Committee and by the Senate as a whole.

Undoubtedly, that was an important factor in the Senate's consideration of the nominations made during the Reagan administration. In that period, our committee developed a sense that the nominating process had been deeply politicized by an administration committed to a detailed ideological agenda for the courts. Remember, it was the Reagan administration that added a new phrase to our judge-picking vocabulary, and that new phrase was "litmus test." This is why, especially when the two other factors pointed in the same direction, President Reagan's nominees for the Supreme Court and other courts as well were so carefully screened. Simply put, the Senate that had rejected the Reagan civil rights agenda, the Reagan agenda on rights for women, the Reagan agenda on a host of social issues, was not about to let that agenda, the Reagan agenda, be smuggled into the Constitution via the Court selections.

To President Bush's great credit, this is not the situation we face today. I have not yet had to vote against a single nomination made by President Bush to any Federal court. Our committee has passed on 59 men and women that this President has nominated to the Federal bench, and I have been able to vote for every one of those nominees. While there is no doubt that the President's nominees have overwhelmingly been conservative Republicans, and men I might add, there is no strong sense that he has been intent on politicizing the nominating process.

However, some troubling facts still suggest that we have to examine Judge Souter closely with regard to this factor, for while the Bush administration does not appear to have the Reagan administration's approach to judicial selections, it does not appear to have the Eisenhower approach either. President Bush ran on, and has never repudiated, a Republican Party platform that pledged to appoint only "judges who respect the sanctity of innocent human life," a term understood to mean opposition to choice for women.

Many wonder if Judge Souter's nomination represents a deliverance on that promise or, instead, as the President's remarks in introducing Judge

Souter suggest, a willingness to set that issue aside.

This concern was exacerbated when reports surfaced of a memo from a conservative activist who claimed to have been assured by the President's Chief of Staff that conservatives would be pleased with Judge Souter's performances on the Court.

Now, again, this hardly represents a return to the Reagan days, but it is grounds for some fears that politics may be seeping deeper into the process. It certainly suggests that Judge Souter must be prepared to answer specific questions about his views on important constitutional issues.

The second factor which covers the extent to which a nominee will be questioned about judicial philosophy is the nominee's expected impact on the Court, a little bit about like what the Senator from Pennsylvania and I were talking. When a nominee's ascension to the Court would open the door to powerful changes there, it is only natural that the Senate is more interested in knowing with precision what sort of changes the nominee is likely to make. Not a one of us, when we went back home on the recess, have not had our constituencies ask us what that impact will be. The question directed at the issue on which the Court has been divided has long been our practice.

When Thurgood Marshall was nominated to a Court divided 5 to 4 on many key criminal law issues, he was questioned at length on those very issues when he appeared before the committee. This was a Court divided 5 to 4 on issues that were still alive, still lively, still new, and he was questioned specifically on those issues. Some questions he answered, some he did not. But the point is that specific and detailed questions were asked.

Today, on a variety of critical issues, the Court is narrowly divided. No one doubts that replacing Justice Brennan with Justice Souter will impact profoundly on the direction of the Court. The little we know of Judge Souter strongly suggests he will differ in constitutional philosophy from Justice Brennan with respect to many, if not most, if not all of the issues, thus the replacement of Justice Brennan with Judge Souter seems certain to represent a landmark change in the Court's direction and role in our society.

This is certainly why there is so much interest in Judge Souter's philosophy and views and why close questioning about those views is essential and appropriate.

Finally, we move to the third factor governing questioning about judicial philosophy, and it is key. It is what do we know about the nominee's views? Just think about that. What do we know? The less we know, the more we have to ask. The more we know, we may have reason to differ, but the less we have to ask about judicial philosophy the more it is laid out.

It should come as no surprise that two kinds of nominees lead Senators to ask many detailed questions: Those such as Judge Bork, with extensive and provocative records which give rise to great controversy, not merely here but in the legal community among jurisprudential philosophers, among teachers, among anybody, and all those who have any views about the law. That is the one kind of nominee that generates a great deal of questioning. The other is those such as Judge Souter with very limited records that give rise to almost total uncertainty.

Nominees Scalia and Kennedy or, long before them, Felix Frankfurter could point to an extensive collection of writings and opinions reflecting their philosophies and say quite reasonably; "Here is my record. Know my views from these articles and opinions. Judge me on this public evidence of my philosophy." But Robert Bork, who wished to explain and limit the significance of his previous statements on many constitutional issues, or David Souter, who lacks such extensive statements, cannot take this approach. In such cases, detailed and thorough questioning is the only way that the Senate's consent to a nomination can be deemed informed consent.

Such are the factors that dictate how specific a committee feels obliged to ask the questions and how specific the questions are likely to be. I will not take the time to debate which of these is most important, which of these three factors, or how we proceed if one or two but not all three of the factors I mentioned are present, because to some greater or lesser extent all of the three relevant factors are present in this case. We have some cause for concern about the nature of the administration's approach.

We know that Judge Souter's impact on the Court is likely to be profound, and we know almost nothing about his views on critical constitutional issues of the day. All signs point to the need for very extensive, detailed questions on this nominee, Judge David Souter.

The conclusion that Judge Souter will be and should be questioned specifically and at length is inescapable, but it does not tell us precisely which questions should be asked and which answers he should be expected to provide. Historically, several nominees have been willing to answer extremely specific questions about their views, especially when the various factors I have discussed earlier made such questions appropriate and necessary.

Potter Stewart, testifying 5 years after the case was decided, was asked if he agreed with the "premise, reasoning and logic expressed by the Supreme Court in arriving at its decision in Brown." Understand how specific that question is. Brown versus Board of Education, the famous desegregation case, landmark decision, was only 5 years old, the Nation was grappling with its implementation, there was continuing debate as to whether or not it was right or wrong, and a nominee 5 years after, while that case was still in controversy, was asked—let us say it again: "Do you agree with the premise, reasoning and logic expressed by the Supreme Court in arriving at its decision in Brown?" Justice Potter Stewart replied "Basically, the answer is yes." It is a very specific answer.

Lewis Powell, appearing at a time when the Court's criminal law cases were under attack told the committee he thought that in one of those cases, Escobedo versus Illinois, "The Court decided the case plainly correctly." Those were very controversial cases at the time, and those were very direct answers.

Judge Kennedy told the committee that with respect to one important free speech decision, Brandenburg versus Ohio, which Judge Bork had criticized, he knew of "no substantial responsible argument which would require the overruling of that case"; very direct answer, very specific case.

But even if Judge Souter should decline to answer questions such as these regarding specific cases I believe he must expect to be asked questions concerning quite specific aspects of his judicial philosophy, and we have a right to expect answers. The long tradition that our committee establishes, especially when the factors I discussed above are present, is that nominees will be questioned about specific aspects of their judicial philosophy, and that they will provide answers to those questions, even highly controversial ones.

Harry Blackmun, Justice Blackmun, testifying at a time when the Nation was deeply divided over law and order issues, told the Judiciary Committee that he believed the death penalty to be constitutional punishment for murder. It was a major, major issue at the time, and still is. Yet he came forward with his view of the extent to which it was permissible or impermissible under the Constitution.

William Rehnquist, Chief Justice Rehnquist, appearing at a time when the Nation was torn over the Vietnam war and the administration's reaction to dissent against that war, detailed to the committee several constitutional limits he perceived on the President's power to maintain surveillance over those who oppose his policy. I ask my colleagues to think back at that time. This is at a time when the Nation was in overwhelming turmoil, when everyone was debating the limits and extent of severally legally engaging in civil disobedience, and when cases were being decided. Justice Rehnquist, then

nominee, laid out the details for maintaining surveillance over those who oppose the President's policy.

Justice Kennedy appearing after the profound debate during the Bork nomination on the scope of the right to privacy expressly told the committee that he believed the Constitution recognized the right to marital privacy.

These precedents and many others which I will not bore my colleagues with, nor burden the RECORD with, suggest that there is nothing wrong in putting to Judge Souter some rather specific questions about the constitutional issues, including religion, speech, civil rights, and abortion, and expect some rather specific answers as have been given by Justices Kennedy, Rehnquist, Blackmun, and many others in the recent past.

At this fateful moment in our history, we have a right to know, and I believe a duty to discover, precisely what David Hackett Souter thinks about the great constitutional issues of our time, not how he will rule on a future case but what is his thought process. How is he going to arrive at decisions on the great constitutional issues of the day?

I do not know how the Senate could say that it had faithfully and meaningfully exercised its constitutional duty if we did not find out the answers to these questions. Simply knowing that Judge Souter adheres to a general philosophy such as interpretism or strict constructionism does not provide us with an adequate basis upon which to exercise our constitutional responsibility of advice and consent. We must know and we must be specific about his views on four critical areas about which the Court is divided, four vital aspects of the Constitution that the Court is grappling with, and has an interest in interpreting. And the first is the first amendment, and particularly its guarantee of freedom of speech and religion; the fourth, fifth, and sixth amendment provisions on criminal law and civil liberties and the delicate balance between them; the 14th amendment, equal protection clause, particularly its guarantee of civil rights and equal rights for all Americans, and the 14th amendment's due process clause as it establishes a constitutional right to privacy, other unenumerated rights, and, yes, the right to reproductive freedom.

Let me be clear. We are not looking for promises on any of these matters. I do not want, and we should not ask for, assurances as to how Judge Souter would vote on any of these matters if he were confirmed to the Court. Indeed, I would be appalled if Judge Souter were to offer such assurances to us or anyone else.

Rather we only want to know, and we are entitled to know, and I have no reason to believe that Judge Souter will not let us know, how he views these questions at this time, how he approaches them as a matter of constitutional reasoning, and what he thinks about them as he appears before us seeking a seat on the Court.

We must know these things. Let me stress this point not so as to apply a litmus test or a checklist as to the views of the nominee. Rather it is only by knowing how Judge Souter views specific constitutional issues that can we arrive at any real understanding of what is meant by the more general description of his philosophy.

Thus, while the ultimate issue always is how does Judge Souter view the Constitution at a broad philosophical level, the only way to get at any solid grip on this question is to go beyond the bumper sticker slogans of strict constructionism or original intent or a more meaningful understanding to a more meaningful understanding of judicial philosophy.

And that is to ask how his general philosophy leads him to understand and to interpret specific issues. I offer a very rough analogy from our experience in the Senate. We learn very little about a colleague by putting a label on him like "liberal" or "conservative." The only way to know what someone means by using that description of one of us is to know where the person stands on specific issues. Only then can we say he is that sort of liberal, or she is that type of conservative.

The same is true of judicial philosophy. Only by asking Judge Souter with thoroughness and detail about his views on specific constitutional questions can we come to understand how he approaches the most important task of any Supreme Court Justice, and that is giving meaning to the broad and majestic, yet ambiguous, phrases of the Constitution like due process of law, equal protection of the law, freedom of speech, freedom of religion, and so on. In this general observation, it is particularly true when one considers what we know about Judge Souter's general philosophy and how much we know about it.

That leads me to the second part of my remarks. What do we know about Judge Souter's philosophy? We know very little of Judge Souter's views on matters of Federal constitutional law, with the possible exception of Justice O'Connor, and that is debatable. David Souter has the slightest record on constitutional law of any Supreme Court nominee in a quarter century, going back to the nomination of Abe Fortas in 1965.

So in preparing for this week's hearings, we have been looking for any indication of Judge Souter's constitutional philosophy, not to take issue with it, but to determine what it is. Among the things that we found was one statement, perhaps the most sweeping definition of his own views, that Judge Souter made in a newspaper report earlier this year:

> On constitutional matters, I am of the interpretivist school. We are not looking for the original application, we are looking for meaning here.

What does this mean? Labels that friends have attached to Judge Souter, such as "strict constructionist" or "opposed to legislating from the bench," what do any of these broad terms mean? It is very difficult to discern.

Many people with many different views travel under the banner of interpretivism. That is what Judge Souter says his philosophy is. He is of that school. But there are many different interpretivists. To use another phrase Judge Souter himself has employed to describe his views, the philosophy of "judicial restraint in the construction of the Bill of Rights." In fact, two jurists could both be called interpretivists when both claim to be applying the same constitutional theory of reasoning and yet come to exactly opposite results with regard to very specific and critical constitutional questions.

Thus, some types of interpretivism are very troubling and profoundly misguided, in my view, while others are not. Because it is only certain varieties of interpretivism that are highly problematic, and because two people who both like being interpretivists can wind up with two positions on constitutional issues, it is vital to learn what type interpretivist Judge Souter holds himself out to be.

In my remarks for the day, I do not mean to suggest or even imply that Judge Souter shares the views of other interpretivists. He has chosen to attach that broad label to himself. During this week's hearings, we will, hopefully, find out what that label means.

During these hearings we are about to find out, by looking at specific issues, what David Souter means when he uses the phrase "interpretivist." What I am about to say applies only to a particular application of this philosophy, an application that I hope, very strongly, in my innermost heart Judge Souter does not subscribe to.

But before the hearings start, I think it is important to lay out for the American people and my colleagues the full consequences of some phrases that are thrown around without detailed explanation. Then once these phrases are better understood, we can all better appreciate the consequences, if Judge Souter should tell us he adheres to them.

If we explain why some types of interpretivism are so troubling, perhaps people can better understand why we must question Judge Souter extensively on specific issues in order to ensure that his brand of interpretivism is not the troubling sort.

I ask unanimous consent that morning business be continued for 15 more minutes.

The PRESIDING OFFICER. Without objection, the period for morning business is extended until 10:30.

Mr. BIDEN. What I want to do now is to tell you what the purists who call themselves interpretivists believe. Well, perhaps it is simplest to look at the decisions which adherence of this purest interpretivist view have criticized. Brown versus the Board of Education is the landmark civil rights case.

One of the most influential texts of the interpretivist school by Learned Hand—the name of the book is "The Bill of Rights"—criticized the Court's decision in Brown for "overruling the 'legislative judgment', of the States by its own reappraisal of the relative values at stake."

Learned Hand, an interpretivist, in his book, "The Bill of Rights," or his series of lectures on the Bill of Rights, criticized the landmark civil rights case, basically saying it was wrongly decided, because it was overruling the legislative judgment of the States by its own reappraisal of the relative values at stake. He went on to say of Brown that "It was not necessary for the courts to go to such extremes."

That is one of the most learned interpretivists. Does our learned friend from New Hampshire share this view that Brown versus the Board of Education was wrongly decided, an interpretivist view, a purist view, who leads one to that conclusion? I want to know, and the country should know. For if he does, he will not be on the bench, and he should not be on the bench, in this Senator's view. But that is an interpretivist view.

Bolling versus Sharpe was the case that ended segregation in the District of Columbia at the same time the Brown decision was made. Judge Bork, another influential interpretivist, called this decision "a clear rewriting of the Constitution by the Warren Court." He went on to suggest that because he said, basically, look, you cannot find anywhere in the fifth amendment that it applied to segregation.

An interpretivist goes back and looks at the document, in large part as it was read at the time.

And interpretivist Judge Bork said, "Hey, Bolling versus Sharp wrongly decided" or precisely he said the decision was a clear rewriting of the Constitution by the Warren court and interpretivists said they do not want to rewrite the Constitution.

Another case, Griswold versus Connecticut, the case that established the marital right to privacy and guaranteed married couples access to contraception. The State of Connecticut passed a law that said married couples cannot use contraceptive devices, that they cannot be sold in drug stores. The Court came along and said "Wrong, wrong." Although the Constitution does not mention the word "privacy," there is a marital right to privacy.

Criticizing the outcome in that case, the grandfather of modern interpretivism, Justice Hugo Black, said, "I like my privacy but the Government has a right to invade it unless prohibited by some specific constitutional provision."

An interpretivist says unless you can find a specific provision you do not have the right. So Justice Black applied that interpretivist view, said rightly from his perspective, "I do not see 'privacy' written in the Constitution. The word never appears. So we interpretivists only look at the document. The document does not say anything about privacy. Therefore, Connecticut can pass a law that says married couples cannot decide whether or not to procreate." That is an interpretivist view. Is that a view held by our friend from New Hampshire? I do not know.

Baker versus Carr, the case that established one person/one vote, established that principle, applied interpretivist reasoning. Former University of Chicago law professor Phil Neal has written that there is "an imposing case against Baker and a total absence of support in the Constitution's text for that decision."

That is a lawyer's way of saying, a professor's way of saying Baker versus Carr was wrongly decided.

It the States want to allow the rural areas to have the same representation with one-tenth the population in State legislatures, so be it. You do not find anything in the Constitution that says States cannot do that. I am an interpretivist. That is what some interpretivists say.

And finally, there is a host of gender discrimination cases in the 1970's where the Court made clear that it would aggressively police laws that discriminate against women.

Taking the strict interpretivist view in these cases, Justice William Rehnquist criticized the Court's decision as "So elastic as to invite subjective judicial preferences, masquarading as judgments." That is an interpretivist view.

The 14th amendment is the one we are talking about, equal protection. At the time it was written they were talking about slaves. They were not talking about women. So what in the Constitution says you cannot discriminate against women? And if you are going to discriminate against women, what kind of burden should the State have to overcome? Is it a reasonable basis, which says they can think of any reason, like they do not want a woman to be a bartender because it is just not nice for a woman to be a bartender? That meets the reasonable basis test. Or is it a strict scrutiny test that says you better have an overwhelming reason to tell a woman she cannot do something?

What is our overwhelming reason for saying you cannot do something? It all depends on whether or not you are an interpretivist, how you view those things. I, for one, do not want to see someone on the Court who says the 14th amendment as it applies to women gives the State the power to do anything to women they can reasonably think of, and I suspect if it were put to a vote here on the floor of the Senate my view would prevail 99 to 1. I do not know who the one would be, but there is bound to be one.

But we are back to the question. Bumper sticker slogans, like interpretivists, do not serve justice well. If Justice Souter came before me and said, "I am an interpretivist; that is all I will say to you," I not only would vote against him; I would do everything in my power to defeat him because I must assume in the absence of an explanation this is a man who thinks Brown versus Board of Education was wrongly decided, that desegregating the public schools of Washington, DC, cannot be found in the Constitution, that there is no right of married couples to use contraceptive devices, that there is no reason why there should be a philosophic notion of one man/one vote in the State legislatures.

So there you have it. Cloaked in the mantle of history, some interpretivists reject the legacy of historical Supreme Court decisions. Fortunately, these harsh interpretivist critiques are not prevalent at the Court, for if they had been, the Supreme Court would have tolerated continued racial segregation, tolerated and limited the freedom of couples to plan their families and have control over their lives, eliminated the democratic principles of one man/one vote, undermined the principle to protect against gender discrimination in this country, and more.

That is what some interpretivists, if they get their way at the Supreme Court, would do to and how they would read the Constitution.

As I said, again, I, for one, am profoundly opposed to this vision of constitutional law. I, for one, have spent my life fighting for a profoundly different vision of America. And I, for one, am not prepared to yield an inch on these principles now.

Having said that, let me again reemphasize that we do not know which of these criticisms, if any, of his cointerpretivists that Judge Souter might agree with and which he may disagree with.

I am not trying, nor do I wish to be accused of, practicing guilt by association. As I said before, many scholars and jurists travel under this common

banner—and where in that panoply David Souter fits is the subject for our inquiry and in his interest to define for us, and that is why the questioning of Judge Souter must be thorough and specific.

This is especially so because what little we know of Judge Souter, and it was quite tentative, emphasizes how important it is that we thoroughly question him.

In the past—exercising a variety of roles that may have resulted in the views he expressed not necessarily being his own—David Souter has made statements that would place him among the more rigid of these interpretivists.

For example, as attorney general, David Souter described the Supreme Court's standard for dealing with gender discrimination, the rule the Supreme Court used to strike down a variety of restrictions on women's rights, he defined it as lacking "definition, shape, or precise limits * * * inviting subjective judicial judgment and possible abuses."

The one thing interpretivists hate the most, their boogeyman is subjective judicial judgments.

That is what he said. What did he mean? That is what David Souter said as attorney general and he said about the Supreme Court gender case.

But he was attorney general. He was taking the State's case. Did he agree with that or disagree with that? In what context was he saying those things? We must know if David Souter, Supreme Court nominee, holds this view.

As a trial court judge, writing to a State legislator about a pending bill, David Souter repeated, apparently favorably, the criticism that the modern judiciary has been engaged in "judicial activity in the application of constitutional standards that is no more than the imposition of individual judges' views in the guise of applying constitutional terms of great generality." What does he mean by that?

He could be right there with Learned Hand and I could have a much more enlightened view from my perspective than that.

That is what David Souter, trial judge, said in echoing some of the words of the most strident of Supreme Court rulings, some of which I discussed earlier.

We must know if David Souter, Supreme Court nominee, shares these criticisms.

As a State supreme court justice, David Souter wrote that a court's "task is * * * to determine the meaning of [constitutional] language as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text * * * in June of 1784."

Awfully limiting. In fairness to David Souter, he was talking about the New Hampshire constitution, not the U.S. Constitution. But does he share the same view about interpretation of the U.S. Constitution? I do not know.

That is what David Souter, supreme court justice, said in detailing his philosophy of interpreting the New Hampshire constitution. We must know if David Souter, Supreme Court nominee, intends to apply this theory of interpretation to the Federal Constitution and our venerated bill of rights.

Mr. President, I ask unanimous consent that morning business continue for another 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered. The period for morning business is extended for an additional 15 minutes.

Mr. BIDEN. Finally, Mr. President, as a nominee for the Supreme Court, David Souter has already told this committee that judges must be sure "to honor the distinction between personal and judicially cognizable values" and read the "expansively phrased provisions of the Constitution * * * in light of its divisions of power among the branches of Government"—words, though perhaps harmless enough, that could suggest an aversion to the critical role the Court has played in giving life to those "expansively phrased provisions of the Constitution."

We must know what David Souter, potential Supreme Court Justice, means by these words.

And let me emphasize one point about all the quotations from Judge Souter that I have cited. Each of these comments may have an explanation that significantly diminishes their significance. Some were said about New Hampshire law and may not have been meant to apply to the Federal Constitution. Some were spoken while Judge Souter was serving in positions that required him to advocate views that were not his own. And some may reflect the application of precedent that Judge Souter felt he was bound to adhere to: All logical explanations.

But coupled with his definition of himself as an interpretivist, and knowing what other interpretivists, the best known among them in this century, have said about the profoundly significant cases that have been overwhelmingly accepted by the body politic of Americans, coupled with that reading, they may mean something different.

I say all this only to emphasize, Mr. President, that is why this is not merely an idle exercise we begin on Thursday. My purpose is to give Judge Souter a full opportunity to lay out for us what his judicial philosophy is. We simply do not know whether and to what extent these comments reflect David Souter's constitutional views as they are relevant to his nomination.

Finding that out, among other things, is the task of our hearings, for the position of Associate Justice of the U.S. Supreme Court inures to no one by birthright or by virtue of a Presidential nomination alone. To attain a post on the Supreme Court, a nominee must persuade the Senate that he or she is the person in whose hands we should agree to vest such awesome power and responsibility.

No one is entitled to be a Supreme Court Justice, anymore than any of us are entitled to be a U.S. Senator. The burden of proof is on the nominee, as the burden of proof is on you and me when we go before the electorate and say, "I wish to be a Senator." No one says to us, "Well, you can be a Senator unless we can make a case against you." They say to us, as the Constitution requires, and should, and representative government demands, "Tell me why—the burden of proof is on you, Senator ROBB, on you Senator BIDEN, to tell me, the voter, why I should give you the power to go back and make decisions that affect my life."

The Constitution says the burden is on the nominee to say to the Senate why they should be on the Court, why you and I should vote for them, to give them such awesome power over the future direction of the United States of America. We are one of 535 in the Congress. He will be one of nine. It is an equal branch of the Government in every respect. The power is awesome. The responsibility is profound. The obligation is his. The responsibility is ours.

A Supreme Court Justice can assume this post only if we are persuaded that the nominee is the right person for that position at that juncture in our history.

In closing, Mr. President, let me reemphasize that I have made no judgments about David Souter and his nomination. A number of questions have been raised in my mind, but I have made no judgment.

All I am saying today is that we in the Senate have a right and a duty to ask him detailed questions to learn his views on specific constitutional issues of our time. That is the reason I took the floor, because there is a debate that is taking place, not unlike the debate that took place 3 years ago when I was required to take the floor then.

Then, by way of refreshing the recollection of my colleagues, the debate was: What is the role of the Senate? Major editorials were written saying all we had the responsibility and obligation to look at is whether or not they were bright, whether they committed any crime of moral turpitude, and whether or not they had a background in the law.

That was profoundly wrong, historically unsubstantiated, and ultimately rejected by this body. A similar debate is taking place, and I wanted to come to the floor to at least give my view clearly on it prior to the Souter nomination. And the debate is: because we know so little about him, how much can we ask of him?

There are those who suggest that if there is any case in controversy which he may have an impact on at any time—and if the actuarial tables are right, and, God willing, he lives to vindicate them, he will be on the Court well into the 20th century. That will cover a lot of ground. There are those who say we cannot ask him certain questions. That is the reason I came to the floor today to hopefully put to rest that argument, as we did 3 years ago in the role of the Senate.

Mr. President, let me add as an aside here that the fact the Senate recently confirmed Judge Souter for the court of appeals is not at all relevant to the issues I have been speaking to today. As long as an appeals court nominee meets the other requirements for the position, dedication is applying precedents of the Supreme Court is the most important criterion for the candidates of choice for that office.

As such, Judge Souter and all judges are bound by their oath to apply existing Supreme Court decisions. As a result, the Senate has approved a variety of men and women for the lower courts whose constitutional philosophy might very well make them totally unsulted for the Supreme Court. Or, to put it another way, constitutional views are far less important for the court of appeals, which is required by law to apply existing Supreme Court cases, than for a Supreme Court Justice, who can decide what the law will be.

It will not be a faithful application of lower court judge's responsibility to attempt to overrule, and he cannot overrule, a Supreme Court case. Only the Supreme Court can do that. He or she is bound by precedent. A Supreme Court Justice is not necessarily bound. So the fact that one is totally acceptable for the lower court in no way speaks to the ultimate question of whether or not they should or should not be on the Supreme Court. Suitability for the first task does not make someone, necessarily, suitable for the second.

I know these remarks have consumed a good deal of the Senate's time, but in my view the Souter nomination is the most important item of business before the Senate this year. Yes, I know that more time will be spent debating budget deficits and troop deployments, clean air conferences, and the fate of Kuwait. But let me be very blunt about it. Long after Saddam Hussein has bitten the dust, long after the current budget crisis has been replaced by some other fiscal dilemma, long after the phrases, "S&L," "campaign reform," and "burden sharing" are tossed into the scrap heap of historical political trivia, long after President Bush is gone from Washington and almost all of us are gone from the Senate, far into the 21st century David Hackett Souter, if he is confirmed, will be making fundamental decisions about the kind of country our children and our grandchildren will live in. And, if David Souter is confirmed and if he serves as long as Justice Brennan did, it will not be until the year 2024 that the next debates on a nomination for this seat on the Supreme Court will take place.

When that day comes, do we really want our successors closing out the first quarter of the 21st century to look back on us and say: Those fools, they thought that—whatever—was more important than questioning and debating Judge Souter's record. What a supreme act of folly to ignore the supreme importance of the Court.

Let his not be the legacy of the 101st Congress, Mr. President. Let us do our duty, our constitutionally prescribed duty, as our Founders mandated the duty, and do it with dignity and fairness to the nominee.

I thank the Chair for its indulgence and yield the floor.

TERRY ANDERSON

Mr. MOYNIHAN. Mr. President, I rise to inform my colleagues that today marks the 2005th day that Terry Anderson has been held captive in Beirut.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. HEINZ. Mr. President, what is the pending business?

The PRESIDING OFFICER. The period for morning business has about a minute and a half before it expires, at which time we will take up, under the previous order, H.R. 5241.

Mr. HEINZ. Mr. President, I see no other Senator seeking time in morning business. I ask that morning business be considered to have expired.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. The period for morning business is closed.

TREASURY, POSTAL SERVICE, EXECUTIVE OFFICE OF THE PRESIDENT, AND INDEPENDENT AGENCIES APPROPRIATIONS ACT, FISCAL YEAR 1991

The PRESIDING OFFICER. The Senate will now resume consideration of H.R. 5241, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 5241) making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1991, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Heinz/Bond amendment No. 2625, to express the sense of the Senate that Saddam Hussein should be tried for war crimes in the event of hostilities between the Government of Iraq and the United States.

Mr. BYRD. Mr. President, today we are considering H.R. 5241, the Treasury, Postal Service, and General Government appropriation bill for fiscal year 1991. This measure provides funding for the programs of the Department of the Treasury, including the Customs Service, the U.S. Mint, the Secret Service, the Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms.

In addition the bill provides funding for the payment to the Postal Service fund, the various offices within the Executive Office of the President, and certain independent agencies including the General Services Administration, the Office of Personnel Management, the National Archives, and the U.S. Tax Court.

The bill, as recommended by the Committee on Appropriations, provides total obligational authority of $20,709,910,800. This represents a decrease of $2,547,200 from the President's request and a decrease of $10,183,200 from the House-passed bill. With respect to the subcommittee's 302(b) allocation, the bill as recommended is within both the budget authority and outlay ceilings.

I commend Senator DECONCINI, chairman of the subcommittee, and Senator DOMENICI, the ranking minority member, for their excellent work in accommodating the priorities of the Senate within the constraints of the budget. Their work was in no little part assisted by the cooperation of their colleagues on the subcommittee and on the full Committee on Appropriations.

Mr. President, I would also like to compliment both the majority and minority staff for their months of hard work in connection with this legislation: Patty Lynch, Rebecca Davies, Shannon Brown, and Judee Klepec.

The managers have explained in much greater detail the contents of the measure as recommended to you. I will not review again those highlights so that we can get down to the business of considering and passing this bill today. The bill, as reported by the Appropriations Committee, deserves the support of the Senate.

waste management problems under control.

After reviewing our amendment. I am sure you will agree that Senator COATS and I have made a good faith effort to address the concerns expressed by some with out earlier bills. We believe this approach represents compromise and we intend to move ahead. State likes Kentucky and Indiana cannot affort to wait until next Congress to get control over out-of-State waste and I urge my colleagues to support us in our effort.

Mr. President, before yielding the floor I would like to ask for the yeas and nays on this amendment.

The PRESIDING OFFICER. Is there is a sufficient second?

There is not a sufficient second.

Mr. LAUTENBERG. 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. HATCH. Mr. President, I ask unanimous consent that the order for the quroum call be rescinded.

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

Mr. HATCH. Mr. President, I ask unanimous consent that I be granted 15 minutes as if in morning business to make a speech.

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

THE SOUTER NOMINATION

Mr. HATCH. Mr. President, tomorrow the Senate Judiciary Committee begins hearings on the nomination of Judge David H. Souter, of the Court of Appeals for the First Circuit, to be an Associate Justice of the Supreme Court. His nomination raises anew the question of the proper role of the judiciary, including the Supreme Court, in our Federal system. The Senate also faces, once again, the question of its proper role in confirming a Supreme Court nominee.

Judge Souter has authored many opinions as a State court judge in New Hampshire. He has not ruled on, nor written about, a number of issues of concern to a variety of groups across the ideological spectrum. This factor has sparked anticipation about the type of questioning Judge Souter will face tomorrow, and what kind of questions he should answer.

I have been a member of the Judiciary Committee for nearly 14 years, as it has approved hundreds of lower Federal court judges. Some of them have generated controversy, but most have not. I have also had the opportunity to sit through five Supreme Court confirmation hearings in the last 9 years.

Since the nomination of Judge Souter, I have tried to step back and review my experiences as well as the broader history of Supreme Court nominations and confirmations in order to focus my own thinking about the Senate's role in this very important task we are about to undertake. I want to set forth my view on the Senate's role in the Souter nomination. While I have often expressed my observations on the role of the judiciary in our Federal system, I will discuss them here briefly because they are related to my view of the Senate's confirmation role.

I share President Bush's view that a Supreme Court Justice should interpret the law and not legislate his or her own policy preferences from the bench. The role of the judicial branch is to enforce the provisions of the Constitution and the laws we enact in Congress as their meaning was originally intended by their framers.

Any other philosophy of judging requires unelected Federal judges to impose their own personal views on the American people, in the guise of construing the Constitution and Federal statutes. There is no way around this conclusion. This approach is judicial activism, plain and simple. And it can come from the political left or the right.

Let there be no mistake: The Constitution, in its original meaning, can readily be applied to changing circumstances. That telephones did not exist in 1791, for example, does not mean that the fourth amendment's ban on unreasonable searches is inapplicable to a person's use of the telephone. But while circumstances may change, the meaning—the principles—of the text, which apply to those new circumstances, does not change.

Even Alexander Hamilton, an advocate of a vigorous central government, in defending the judiciary's right to review and invalidate the legislative branch's acts which contravene the Constitution, made clear that Federal judges are not to be guided by personal predilection. He rejected the concerns that such judicial review made the judiciary superior to the legislature:

> A constitution, is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. * * * It can be of no weight to say that the courts, on the pretense of a repugnancy [between a legislative enactment and the Constitution], may substitute their own pleasure to the constitutional intentions of the legislature. * * * The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. [This] observation * * * would prove that there ought to be no judges distinct from that body. (Federalist 78.)

And this commingling of the legislative and judicial functions, of course, would tend to start us down the road to the kind of tyranny the framers warned about when the separate executive, legislative, and judicial functions are united in the same hands.

When judges depart from these principles of construction, they elevate themselves not only over the executive and legislative branches, but over the Constitution itself, and, of course, over the American people. These judicial activists, whether of the left or right, undemocratically exercise a power of governance that the Constitution commits to the people and their elected representatives. And these judicial activists are limited, as Alexander Hamilton shrewdly recognized over 200 years ago, only by their own will—which is no limit at all.

As a consequence of judicial activism, we have witnessed, in an earlier era, the invalidation of State social welfare legislation, such as wage and hour laws. Since the advent of the Warren Court and its successors, judicial activism has resulted in the elevation of the rights of criminals and criminal suspects, resulting in the strengthening of the criminal forces against the police forces of our country; the Orwellian twisting of the constitutional guarantee of equal protection of the law into a license to engage in reverse discrimination—racially preferential treatment in the dispensation of Federal governmental benefits, whether labeled goal, or quota, or set-aside; prayer being chased out of the schools; evenhanded efforts to assist private religious schools on a neutral basis getting struck down; and the Court's creating out of thin air a constitutional right to abortion on demand, and more. One of the objectives of the judicial activists for the future is the elimination of the death penalty.

The Constitution, as it has been amended through the years, in its original meaning, is our proper guide on all of these issues. It places primary responsibility in the people to govern themselves. That is why appointing and confirming judges and Supreme Court Justices who will not let their own policy preferences sway their judment is so important.

Judge Souter is not running for political office. Nor has the President nominated him to a policymaking position in the executive branch. He has been nominated for the highest Court in a coequal branch of the Federal Government.

In my view, the Constitution clearly gives the President principal responsibility for judicial selection. The framers rejected vesting the appointment power in both Houses of Congress or in the Senate alone. Article II, section 2 reads in relevant part: "* * * he shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * Judges of the Supreme

Court. * * *" The President is entitled to nominate a person who reflects the President's view of the general role of the judiciary in our tripartite system of government. He is not entitled to seek assurance on how a nominee will vote on particular issues. The very function of judging requires independence to weigh the facts of individual cases, to consider the arguments of counsel, and to change one's mind when confronted by both.

The Senate is given a checking function through its "advice and consent" power. It does not have a license to exert political influence on the other branches or to impose litmus tests on nominees. Nor is the Senate entitled to seek the assurances on how a nominee will decide particular issues that the President may not seek.

As Alexander Hamilton wrote in Federalist 76 about the Senate' advice and consent function in general, the Senate's "concurrence would have a powerful, though, in general, a silent operation. It would be an execellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."

I note that prior to 1925, no Supreme Court nominee had testified before the Senate. The few nominees who appeared before the Judiciary Committee in the following 30 years were not questioned about judicial philosophy or their views on legal matters. When Felix Frankfurter accepted an invitation to testify before the Judiciary Committee in 1939, he made clear that he did not want to do so. Indeed, he declined to appear on the initial day of the committee hearings, sending Dean Acheson in his place, because he did not wish to miss a day of teaching. So, he showed up before the committee on the second day.

[Thorpe, "The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee," 18 Journal of Public Law, 371, 376, 377 n.29 (1969) [hereinafter, "Thorp".]

In his opening statement, Frankfurter said,

I, of course, do not wish to testify in support of my own nomination * * *. While I believe that a nominee's record should be thoroughly scrutinized by the Committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself.

I should think it improper for a nominee * * * to express his or her views on any controversial issues affecting the Court." He mentioned that his attitude and outlook had been expressed over a period of years and are readily accessible. Frankfurter said that it would be "inconsistent with the duties of the office * * * for me to attempt to supplant my past record by personal declarations.

One nominee, Sherman Minton, even refused an invitation to testify altogether, explaining that "personal participation by the nominee in the committee proceedings relating to his nomination presents a serious question of propriety, particularly when I might be required to express my views on highly controversial and litigious issues affecting the Court."

Since the 1950's, I think it is fair to say without oversimplifying, that when some conservative Senators had concerns that a Supreme Court nominee would rule in a manner displeasing to them, in some cases they asked the nominee questions about current legal issues of interest to them. Similarly, since the 1950's, when some liberal members of the committee had concerns about the way a particular nominee might rule in the future, they have asked questions addressing current legal issues.

One commentator has remarked that the appearances of the nominees before the Senate "have tended on occasion to subject nominees to hostile questioning, character assassination, and ridicule." [Thorp.] And that comment was made in 1969.

In my view, while Senators are free to ask a nominee any question they wish, a Supreme Court nominee should answer questions related only to his ethics, competence, legal ability, general view of the role of the Supreme Court in our Federal system; and independence of mind, that is, did he make any commitments on issues that might come before him in order to be nominated—or confirmed.

If the Senate probes into the particular views of a nominee on particular legal issues or public policies, let alone imposes direct or indirect litmus tests on specific issues or cases, the Senate impinges on the independence of the judiciary. It politicizes the judging function. The confirmation process becomes a means to influence the outcome of future cases on issues of concern to particular Senators. And a nominee may feel that in order to be confirmed he must agree with this or that Senator on particular legal issues that are within the province of the judiciary. An appearance of a lack of impartiality will arise when those issues later come before the justice. This course is as inappropriate as it would be for the President to seek such influence. The judiciary is the one branch which should be above politics.

A few years ago, the Twentieth Century Fund assembled a distinguished task force to consider the way the Federal judiciary is selected. Former New York Gov. Hugh Carey chaired the task force. Its other members included Prof. Walter Berns of Georgetown University and the American Enterprise Institute; former Secretary of Health, Education, and Welfare, Joseph A. Califano, Jr.; Lloyd N. Cutler, former counsel to President Carter; University of Chicago Law Prof. Philip B. Kurland; Jack W. Peltason, chancellor of the University of California, Irvine; Nicholas J. Spaeth, attorney general of North Dakota; Michael W. Uhlmann, former Reagan White House official; and Robert F. Wagner, the former mayor of New York City.

In 1988, the task force issued its report, Judicial Roulette. With Mr. Califano and Mr. Cutler dissenting, the task force recommended "that Supreme Court nominees should no longer be expected to appear as witnesses during the Senate Judiciary Committee's hearings on their confirmation. * * * The task force further recommends that the Judiciary Committee and the Senate base confirmation decisions on a nominee's written record and the testimony of legal experts as to his competence." The task force added, with Mr. Califano dissenting, "But if nominees continue to appear before the Committee, then the task force recommends that senators should not put questions to nominees that call for answers that would indicate how they would deal with specific issues if they were confirmed."

My fear is that if the Senate continues the trend begun in the 1950's, which seems to have accelerated since then, with both liberal and conservative Senators pressing Supreme Court nominees beyond the bounds I have described, we could permanently undermine the independence of the judicial branch. We will move closer to the circumstances described by Alexander Hamilton, wherein the courts exercise will rather than judgment and tend to become a mere extension of the legislature.

Earlier, the chairman of the Judiciary Committee, Senator BIDEN, suggested that the standard for judging nominees should be whether they are out of the mainstream of legal thought of "the past 70 years." That's a highly selective, artificial, and arbitrary timeframe, reflecting nothing more than a preference for certain Supreme Court precedents and antagonism to others. And, of course, there are always a select few on our law school faculties and editorial boards who are ready to tell us what the legal mainstream is in all of its particulars and details. What that amounts to, according to the self-selected arbiters of the mainstream today, is the current liberal political agenda.

Sixty or seventy years ago some would have argued that the legal mainstream dictated that social welfare statutes, such as wage and hour laws, were beyond the power of State governments to enact. But I wonder what would have happened if the ar-

gument about deference to the legal mainstream had been used then to derail the Justices who eventually overturned that line of cases? For a long time, many regarded the odious doctrine of separate but equal as the legal mainstream. Many persons, in the first half of this century, including Members of the Senate, believed in this doctrine. Would it have been appropriate to insist in the 1930's, right down to 1954, that Supreme Court nominees adhere to that element of the legal mainstream? I think not.

In response to a question from Senator SPECTER asking why the Judiciary Committee should not ask the most specific imaginable questions if the Court is to function as a super-legislature, the chairman answered, "Why not, indeed." He claimed that there is no historical precedent, no tradition, no basis whatsoever for Judiciary Committee restraint in asking questions of Supreme Court nominees. That is simply incorrect, in my view. As I have pointed out, the members of the Judiciary Committee have refrained from such questioning for a very long time. No nominee ever appeared before the Senate until 1925. Moreover, one reason a nominee should not answer such questions is that he might have to recuse himself on a case later.

When the chairman claims that there are no prohibitions, he overlooks all of the reasons for restraint—many cited in past hearings—that Senators have recognized in the past. Principal among these are considerations of legal and judicial ethics. I frankly believe that a judge has a responsibility not to comment on cases or legal issues that may come before him or her on the Court. Many others have taken this view as well. It may be that some Senators can find no historical principle or tradition that constrains him or her in questioning Supreme Court nominees, but it is not because these precedents do not exist—it is because they have decided not to follow them.

The chairman complains that in the Bork nomination President Reagan attempted to "smuggle" the Reagan agenda onto the Supreme Court. In fact, President Reagan was selecting judges that reflected an approach to interpreting the Constitution and our laws. This approach, relying on the meaning of these provisions as intended by their framers, gives deference to the people and their representatives. And he did not hide this view. He made clear that this philosophy of judging would be the criterion for appointment to the Supreme Court, and he was overwhelmingly elected twice. What has happened is that judicial activists on the High Court, sitting as a superlegislature, have enacted a vast range of the modern liberal political agenda. Some such decisions may be so embedded in our way of life, with institutions and expectations built up around them, that overturning them is imprudent. But there are those who wish to make of all of these overreaching decisions sancrosanct. Decisions, for example, like *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (exclusion of confessions/fifth amendment) and *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusion of evidence/fourth amendment) which exalted the rights of criminal defendants and suspects, and the *United Steelworkers* v. *Weber* decision 443 U.S. 193 (1979), which twists title VII into a statute permitting rather than forbidding reverse discrimination. And many want to see the rest of that agenda imposed by the courts. That is why the jurisprudence of original meaning is under furious assault by those in our political system who have been unable to enact that liberal agenda through the political process or to elect a President who will nominate justices they prefer—justices who will impose that agenda by judicial usurpation.

The chairman attempts to establish precedent for a supposed rule that Supreme Court nominees are expected to answer specific questions about substantive issues. He cites Potter Stewart's answer to a direct question concerning the case of Brown versus Board of Education. That example, and the others he cites, establishes nothing. If prior practice provides any precedent, then the overwhelming authority supports the view that nominees need not answer such questions. As Senator SPECTER established in his remarks on Tuesday, for example, Justice Scalia answered virtually nothing of this sort.

But another point must be made. The fact that one nominee has chosen, for his own personal reasons, to answer a particular question has absolutely no relevance to another nominee's decision on what questions to answer. As I developed in my earlier remarks, the digression in the Senate's practice in reviewing nominees has not been a good development.

The chairman has several times expressed the sweeping view that this nomination is going to affect this country more than the careers of any of us here in the Congress, possibly more than that of the President himself. He stated that a Supreme Court Justice confirmed today will be making fundamental decisions about the kind of country we have far into the next century. While all of these statements may be true, I believe that the alarmist manner in which the chairman has made these statements ignores that the reason the Supreme Court has become so powerful is precisely because it has sat as a superlegislature in the last two generations enacting a liberal political agenda. And, I might add, that I am disturbed by the suggestion that one nominee should be judged by not only how he would vote but how four other Justices would vote as well. Judge Souter lacks the power to decide cases alone.

I do not view the future with the alarm expressed by the chairman. We have the power to bring the Court back to its historical role of interpreter of the Constitution and away from its recent stance as a superlegislature. We can do this by confirming nominees to the bench who will not rewrite the Constitution and who will not appropriate to themselves the powers of the legislature. These individuals have no concern for telling us what kind of country our grandchildren will inherit—their only desire is to enforce the will of the people as embodied in our Constitution and the laws passed by our elected representatives. So to the extent that the chairman fears that our present Supreme Court nominee will have some unforeseen impact on our country into the next century, I believe the nominee will allay those fears. All he will do, if confirmed, I believe, is enforce the people's political will as we indicate it should be done. Now, maybe that is a fearful prospect—that some of the laws that we pass here in Congress will actually be enforced as written. But at least we will live with our own mistakes; and, we will have nothing left to fear but ourselves.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. DODD). The Senator from New Jersey.

Mr. BRADLEY. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

DISTRICT OF COLUMBIA APPROPRIATIONS ACT, 1991

The Senate continued with the consideration of the bill.

Ms. MIKULSKI. Mr. President, I rise as a member of the Appropriations Committee in support of the District of Columbia appropriations. I hope that we move expeditiously on this legislation and keep to a minimum amendments really related to social controversy that would be best dealt with either in authorizing committees or other forums.

But, Mr. President, I rise today to really bring to the Senate's attention that a new day has come to the District of Columbia. For all intents and purposes I think we have a new mayor and that mayor's name is Sharon Pratt Dixon, a distinguished woman, who comes to us from the private

With regard to Vietnam, Secretary Baker has already stated that Vietnamese occupation troops have been withdrawn from Cambodia and our discussions in New York with Vietnam have clearly contributed to agreement on a comprehensive peace settlement in Cambodia. These were the United States preconditions to normalization of relations with Vietnam. The time is ripe, I think, to end our trade embargo with Vietnam.

Secretary Mosbacher recently suggested that the trade embargo would be lifted. The American Chamber of Commerce in Hong Kong has recommended the lifting of the embargo against Vietnam trade and investment.

With regard to Cambodia, given the agreements now achieved in Indonesia and in the United Nations and our decision to open direct talks with the Phnom Penh government, no purpose is served by continuing to isolate the Cambodian people now suffering economic deprivation. The economic price the Cambodian people pay for our isolation of them is also a political price by giving the Khmer Rouge an additional advantage as they point to the economic failure of the Phnom Penh regime.

Mr. President, last night the President talked about an emerging new international order. I agree that this must be achieved. But it won't be achieved by adhering to failed policies and old thinking. Thankfully there are signs of new thinking by Secretary Baker who has opened a new dialog in Indochina. There needs to be both more talk and more action.

TRIBUTE TO M. STUART BARNWELL

Mr. THURMOND. Mr. President, I rise today to pay tribute to a promising young South Carolinian who recently passed away, Mr. M. Stuart Barnwell. Mr. Barnwell served his State with ability and dedication as director of transportation in the Governor's office. He was a kind man with a bright future, and it is a tragic loss to many that he was not able to fulfill his potential.

Mr. Barnwell faced his illness with sheer courage that inspired and touched the people around him. In the face of this hardship, his spirits refused to flag. This kind of determination is a rare quality in today's world.

Nancy and I extend our sincere condolences to the Barnwell family: his parents, Nathaniel and Nancy Barnwell; his wife, Jill Clary Barnwell; and his three brothers, John P. Barnwell, Francis P. Barnwell, and N. Elliot Barnwell.

I ask unanimous consent that certain articles regarding Mr. Barnwell be printed in the RECORD.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

[From the Charleston (SC) Evening Post, July 25, 1990]

M. STUART BARNWELL, GOVERNMENT OFFICIAL, DIES AT AGE OF 36

COLUMBIA.—Middleton Stuart Barnwell, formerly of Charleston, director of transportation at the governor's office, died Monday in a local hospital.

The funeral will be at 11 a.m. today in St. Michael's Episcopal Church, Charleston. Burial, directed by Stuhr's Downtown Chapel, will be in Magnolia Cemetery.

Mr. Barnwell was born Oct. 8, 1953, in Charleston, a son of Nathaniel L. Barnwell and Nancy Parker Barnwell. He attended Christ School in Arden, N.C., and graduated from the College of Charleston.

In a statement Tuesday, Gov. Carroll A. Campbell Jr. said, "I have known Stuart for more than 16 years. He was a loyal ally and friend. As an official in my office, Stuart brought to the job determination and his unique ability to get along with people."

Mr. Barnwell was active in politics and ran as a Republican candidate for the House District 110 seat in 1988. Vaughn Howard, chairman of the Charleston County Republican Party, said Mr. Barnwell's death was a "very tragic loss to the Republican Party. To lose someone so young and active is a tragedy not only to the Republican party, but to the community as well."

He was a former partner in the insurance business of Stalling, Barnwell and Associates and had been associated with the American Mutual Insurance Co. He was also former deputy director for public safety for the governor's office. He was a member of the Carolina Yacht Club, the St. Andrew's Society, the Hibernian Society, the St. Cecilia Society and St. Michael's Church.

Surviving are his parents of Charleston; his wife, Jill Clary Barnwell; and three brothers, John P. Barnwell, Francis P. Barnwell and N. Elliot Barnwell, all of Charleston.

[From the Charleston (SC) Evening Post, July 25, 1990]

M. STUART BARNWELL

M. Stuart Barnwell was a political enthusiast who cast his lot with the Republican Party. He worked hard for candidates and ran once for public office himself. He was in the prime of life, newly married and working in the governor's office when he became ill. Before his death this week at age 36, his courage had inspired those around him.

Known for his affability, he got compliments even from his defeated opponent in a 1988 primary race for House Seat 110. Thomas Ravenel told a reporter the night of his defeat, I couldn't have chosen a nicer guy to run against."

Active in Carroll A. Campbell Jr.'s 1988 gubernatorial campaign, he also was among those Republicans who have been exerting an effort to attract black politicians and voters to the GOP. He moved into the governor's office after the election as director of transportation.

A Charlestonian with deep roots in the community, Mr. Barnwell had, according to the governor, a "unique ability to get along with people." "Stuart's passing," Gov. Campbell said, "Leaves many voids, but we will all especially remember his courage in the face of adversity. He inspired me and many others."

NOMINATION OF DAVID H. SOUTER

Mr. DOLE. Mr. President, tomorrow morning, the Senate Judiciary Committee is scheduled to begin its confirmation hearings on the nomination of Judge David Hacket Souter. The media will be out in full force, the cameras will click, and Judge Souter will undoubtedly face several days of tough questioning by the members of the committee.

DON'T POLITICIZE THE CONFIRMATION PROCESS

Unfortunately, some interested observers would expect Judge Souter to go beyond explanations of judicial or legal philosophy and answer specific questions about specific cases that may come before him as a sitting member of the Supreme Court. If the answers are not the correct ones, if Judge Souter does not mark the right box, then he should not be confirmed—or so the reasoning goes.

Needless to say, this litmus-test approach to the confirmation process is out of sync with historical practice. It allows the brazen intrusion of politics into the judicial selection process. And, most importantly, it gravely endangers the very independence of the Federal judiciary—an independence that has been cherished by Americans for generations.

In an article appearing in next Sunday's edition of Parade magazine, former Chief Justice Warren Burger will give us ample warning against transforming Federal judges into politicials. The Chief Justice writes:

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 laws agreeable with the Constitution. The wisdom or desirability of a statute is not for the judge to decide; the judge is confined to deciding whether a particular statute is permitted by the Constitution.

Mr. President, these are very important words—words that I hope will guide the Judiciary Committee as it discharges its responsibilities during the next several days.

JUDGE SOUTER IS NO CIPHER

Some critics have complained that Judge Souter is a "cipher," that there are "more blank spaces than answers." I reject this assessment, and I say "take a look at the record."

Throughout his legal career—as New Hampshire Attorney General, as an associate justice of 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, he 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 agenda from the bench.

So it is no wonder that the American Bar Association unanimously gave Judge Souter its highest rating—"well qualified." And it is no wonder that last April the Senate unanimously confirmed him for a seat on the First Circuit Court of Appeals.

Mr. President, to assist the American public in evaluating Judge Souter's personal and professional qualifications, I have compiled a sampling of references from some of the judge's former associates and colleagues as well as several newspaper and magazine articles. I am confident that these materials will confirm what I and so many others already know—that Judge Souter is eminently qualified to sit on our Nation's highest court, the Supreme Court of the United States.

Mr. President, I ask unanimous consent that the full text of the references and the articles be printed in the RECORD immediately after my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

"JUDICIAL AND INTELLECTUAL EXCELLENCE," WHAT AMERICA'S LEADERS ARE SAYING ABOUT JUDGE DAVID SOUTER

Raised in Boston and on his grandparents' New Hampshire farm, Judge David Souter attended local public high schools and then went on to earn further, superb academic credentials: Phi Beta Kappa at Harvard, Rhodes Scholar at Oxford, and a graduate of Harvard Law School.

It's an education that's been matched by real world experience. During a decade of distinguished law enforcement service, he rose to succeed Senator Warren Rudman as New Hampshire's Attorney General, the state's chief law enforcement official.

In 1978 he stepped up to the bench to begin a career of exceptional judicial service, as a hands-on trial judge (Associate Justice, New Hampshire Superior Court), elevated to the state's highest court (Associate Justice, Supreme Court of New Hampshire), and unanimously approved by the United States Senate for the U.S. Court of Appeals. With 12 years on the bench, he would bring to the Supreme Court more judicial experience than all but one of the current Justices had at the time of their elevation.

Judge Souter has already won high praise from Republicans, Democrats, and his professional colleagues. A sampling of published comments on Judge Souter's nomination is included below.

DAVID SOUTER THE JUDGE: "EXTRAORDINARILY TALENTED, IMPECCABLY FAIR"

New Hampshire Bar Association President John Broderick, a Democrat: He's the finest legal mind I have ever encountered. He gets to the bottom line faster than anybody I've ever seen." (Boston Globe, July 24, 1990.)

Broderick adds: "He's a judge's judge, extraordinarily talented and impeccably fair. . . . He will not cast his lot with the conservatives on the court merely because they're conservatives. He's fiercely independent in his legal reasoning. . . ." (Washington Times, July 25, 1990.)

David Broder, The Washington, Post: "President Bush's appointment of Judge David H. Souter to the Supreme Court has every indication of being a superb choice—both substantively and politically. What the country should care about is that the New Hampshire jurist—by the unanimous testimony of those who know him—brings a powerful, superbly trained legal intellect, disciplined work habits and genuine independence of judgment to the issues before the high court."

Cathy Green, president of the New Hampshire Association of Criminal Defense Lawyers, has tried numerous cases before Judge Souter. She says: "He was an excellent trial judge, though he was the kind of judge you knew was really going to hammer people at sentencing."

"I'm a liberal," Green concluded, but I have tremendous respect for Judge Souter. I think he will honor the Constitution." (Legal Times, July 30, 1990.)

Jame E. Morris, a Concorn (N.H.) attorney who served as an assistant attorney general under Judge Souter from 1975 to 1977: "(He is) a razor-sharp thinker' and "probably as apolitical a person as I ever knew. He's not one who aspires for publicity or breaking new ground or anything like that. He is just a sound thinker. He analyzes all aspects of the issues and reaches sound decisions." (Boston Globe, July 24, 1990.)

Clesson Blaisdell, a Democratic state senator from New Hampshire, said: "He'll interpret the law. He won't be there representing one side or the other" (the Wall Street Journal, July 24, 1990), and added: "[Souter] is a very fair . . . low-key jurist." (Chicago Tribune, July 24, 1990.)

Tom Rath, a friend of Judge Souter's and former New Hampshire Attorney General: "(Judge Souter) believes social policy should be made in the legislature, but he believes very much the judiciary should protect the rights of individuals." (Washington Post, July 27, 1990.)

U.S. Senator Gordon Humphrey (R-N.H.) concludes: "Everything about [Judge Souter] predicts judicial restraint." (Boston Globe, July 24, 1990.)

Manchester (N.H.) lawyer Jack Middleton recalled one case which illustrated Judge Souter's integrity. Faced with the case of a lawyer who had stolen money from a client, judge Souter wanted to send the lawyer to jail rather than simply have him pay the money back. "This wasn't just a bank transaction that you can pay back,' he kept saying," Middleton recalled. "It really upset him. That's the kind of justice he will be."

DAVID SOUTER THE LAWYER: "THE SINGLE MOST BRILLIANT INTELLECT I HAVE EVER MET"

Senator Warren B. Rudman (R-New Hampshire): "(Judge Souter' is) a brilliant intellectual, a classic conservative intellectual in the deepest sense of the word. He can't be classified as an ideologue in any way, shape, or fashion." Senator Rudman further stated that Judge Souter "is the single most brilliant intellectual mind I have ever met." (Washington Post, July 24, 1990.)

Paul McEachern, a Democrat and past president of the New Hampshire Bar Association: "My impression is that he's a first-rate scholar. He's going to . . . be confirmed, and deservedly so."

Representative Chuck Douglas (R-New Hampshire), a former N.H. State Supreme Court Justice and colleague of Judge Souter's: "(He is) one of the brightest individuals I have ever met." (Boston Globe, July 24, 1990.)

J. Joseph Grandmaison, a former Democratic party chairman in New Hampshire: "(Judge Souter has) an absolutely spectacular reputation." Mr. Grandmaison further described Judge Souter as "about 135 pounds—and about 120 pounds of brain." (New York Times, July 24, 1990.)

New Hampshire Supreme Court Justice William Johnson, who served on the bench with Judge Souter for four years: "He's always been a very bright guy—just plain exceptional." (USA Today, July 24, 1990.)

Ronald Snow, president of the Concord (N.H.) law firm of Orr & Reno, where Judge Souter worked after graduating from Harvard Law School in 1966: "He's absolutely an ethically superior guy, with an intellect to match" (Washington Times, July 24, 1990), as well as "charming, witty, and warm." (Baltimore Sun, July 27, 1990.)

DAVID SOUTER THE MAN: "A WARM, FRIENDLY PERSON . . . EXTREMELY CONSIDERATE"

R. Eden Martin, a prominent Chicago lawyer and a Democrat, worked with David Souter when they were both freshmen advisors at Harvard Law School in the mid-1960's. Writing in the Chicago Tribune on August 21, he talked about the human David Souter, his ready conversation, diverse friendships, and the kind of values that placed people above grades. He concluded:

"David Souter will obviously not bring an empty mind to the Supreme Court, but it will also not be a closed one. Like Justice [Oliver Wendell] Holmes, another Harvard Yankee and one of Souter's intellectual heroes, he is a judge capable of growth and change. He is not 'political' in any ideological or partisan sense of the word, and his mind and personality are too rich and complex to be assigned to a particular place on the traditional political spectrum."

Ellanor Stengel Fink, A Montgomery County (MD.) Democrat, community volunteer and mother of three, dated David Souter for several years during his law school days in Boston. She recently described him to the Washington Post as "a friendly, warm person . . . extremely considerate . . . very funny, loves to tell stories, loves Robert Frost. . . ."

She says: "[David Souter is] very much grounded in the day-to-day. He's somebody, I think, who would be really sensitive to different opinions and different backgrounds. He's not someone who's coming from his personal opinions and then twists the law accordingly. He really reveres the law." (Washington Post, July 27, 1990.)

William Bardel, a New York businessman, was a law school classmate of David Souter's and a fellow Rhodes Scholar during their student days. He says:

"What I remember is David . . . very gentlemanly, with his hands in the pockets telling stories and especially doing imitations with this New England accent." He added: "I'm pretty sure also that he climbed in a few windows with me after midnight when they locked the college gates." (L.A. Times, July 27, 1990.)

Judge Souter is godfather to the daughter of Jane Cetlin, a Boston lawyer who clerked for Judge Souter on the New Hampshire Supreme Court. She says: "It's not that he's insular because of his intellect, it's that it allows him to see life more broadly." (Legal Times, July 30, 1990.)

Steven Merrill, former New Hamsphire Attorney General, said that the "New

Hampshire bar is delighted that one of the best and brightest in New England, if not the whole country, was chosen." (Washington Times, July 25, 1990.)

And Arthur Mudge, a Hanover (N.H.) lawyer, sent a letter to the New York Times, saying: "As a New Hampshire lawyer, I can assure you that any poll of our bar would produce virtual unanimity, among Republicans and Democrats, males and females, that for this human, as well as his intellectual qualities, Judge Souter is New Hampshire's best candidate for the Supreme Court position," adding, "and we are just proud enough to think our best is plenty good." (New York Times, Aug. 19, 1990.)

[IACP News, Sept. 5, 1990]

IACP ENDORSES SOUTER NOMINATION

ARLINGTON, VA.—The International Association of Chiefs of Police today announced its endorsement of President Bush's nomination of Judge David Souter to be an Associate Justice of the United States Supreme Court.

Support for the Souter nomination was made formal at an August 18 meeting of the IACP's Executive Committee.

"The IACP's governing body carefully reviewed the background and experience of Judge David Souter," said IACP President Charles A. Gruber, Chief of Police in Elgin, Illinois. "We were deeply moved by the man, highly impressed with his legal training, and greatly swayed by his record as a jurist," Chief Gruber said.

Judge Souter clearly understands and stands for law enforcement, Gruber said. "We believe him to be extremely well-qualified to serve on the highest court in the United States and voted unanimously to endorse his nomination," he added.

The International Association of Chiefs of Police is the world's oldest and largest nonprofit membership organization of police executives. Established in 1893, the IACP currently has nearly 13,000 members in 71 nations around the world.

The Executive Committee of IACP is the governing body of the association and consists of 53 police executives representing international, federal, state and local government law enforcement agencies. An elected board of officers comprised of a president, six vice presidents, parliamentarian, treasurer, and division general chairmen carry out the regular business of the association.

For additional information, call IACP Headquarters at 703/243-6500 or write IACP at 1110 N. Glebe Road, Suite 200, Arlington, VA 22201.

NDAA ENDORSES JUDGE SOUTER FOR SUPREME COURT

ALEXANDRIA, VA.—The National District Attorneys Association has endorsed the nomination of Judge David H. Souter to the United States Supreme Court.

"Judge Souter has outstanding qualifications, having served with distinction as a trial court judge, a State Supreme Court Justice and a member of the U.S. Court of appeals for the First Circuit," said Richard P. Ieyoub, President of the National District Attorneys Association, in making the announcement.

"Additionally, Judge Souter has an excellent background in law enforcement which includes service as Attorney General of New Hampshire. His decisions as a State Supreme Court Justice indicate that he would be a tough anti-crime Justice who will interpret the Constitution rather than change it through judicial activism," Ieyoub added. "These facts make him highly acceptable to prosecutors to fill the Supreme Court vacancy."

Founded in 1950, the National District Attorneys Association is a 6500-member organization representing elected and appointed prosecutors nationwide. Together with its technical assistance affiliate, NDAA operates two national programs: The National Center for Prosecution of Child Abuse and the National Drug Prosecution Center.

INTERNATIONAL DRUG OFFICERS SUPPORT SOUTER

The International Narcotic Enforcement Officers Association [INEOA] representing over 12,000 drug officers throughout the United States, announced its support for Judge David Souter, nominee for the U.S. Supreme Court.

The matter of Judge Souter's nomination and record was reviewed by members of INEOA at the 31st Annual International Drug Conference held in San Antonio, Texas during the week of September 3rd through the 8th.

After careful consideration, INEOA voted unanimously to endorse and support the nomination of Judge Souter as Justice to the United States Supreme Court.

John J. Bellizzi, Executive Director of INEOA, stated Judge Souter is a tough, anti-crime Judge who has demonstrated a deep concern in society's battle against drug traffickers, and drunk driving.

Bellizzi added, "What we seek is protection of the constitutional rights of our law-abiding citizens and of our law enforcement agents and we also seek protection of the constitutional rights of the accused." "Judge Souter is capable and willing to do just that—ensure equal protection to all regardless of race, color, sex, religious or social background."

NATIONAL SHERIFFS' ASSOCIATION ENDORSES NOMINATION OF JUDGE SOUTER FOR SUPREME COURT

ALEXANDRIA, VA.—The 25,000 member National Sheriffs' Association has endorsed the appointment by President Bush of Judge David Souter as an Associate Justice of the United States Supreme Court.

"Judge Souter's distinguished career as a trial court judge, and his fine background in law enforcement makes him an excellent choice," said Sheriff Bob E. Rice of Polk County Sheriff's office, Des Moines, Iowa. President of the National Sheriffs' Association. "As law enforcement battles in the drug war and struggles with a rising tide of violent crimes nationwide, we need an anti-crime Justice with the qualifications of Judge Souter."

The National Sheriffs' Association, representing the nation's 3,096 sheriffs as well as thousands of other law enforcement officers, has been active in law enforcement matters since its founding in 1940. The Association has strong ties to state sheriffs' associations across the country whose more than 100,000 members are concerned with criminal justice issues.

The non-profit Association is governed by an elected Board of Directors, headed by a president and seven vice presidents.

NATIONAL TROOPERS COALITION,
Albany, NY, September 7, 1990.

A strong show of support was given to the nomination of Judge David H. Souter to the United States Supreme Court through the action of the Board of Directors of the National Troopers Coalition.

Any questions or comments concerning this endorsement should be directed to the undersigned at the Michigan office.

RICHARD J. DARLING,
Chairman, National Troopers Coalition.

[From USA Today]

DON'T LET ABORTION BE SOLE TEST FOR COURT

President Bush's nomination of Judge David Souter to replace Justice William Brennan could tip the Supreme Court's balance to the right for the first time in 50 years.

Conservatives would like to see the debate on social and legal issues shifted.

Liberals worry that such a shift would undo hard-fought victories on individual rights and minority protections.

There's no question the stakes are high. The decisions the court makes affect our daily lives:

It protects our right to wave the flag—and to burn it.

It protects our right to an equal opportunity to an education—and to a job.

It even protects our right to die—and determines under what circumstances it is permissible.

Some, including the writers elsewhere on this page, say that no nominee should be confirmed unless he or she answers correctly on the question of abortion. They say that is the overriding issue.

But as President Bush said on Tuesday, there was no one litmus test for his nomination of Souter, and there should be no one dominant issue determining whether Souter should be confirmed.

Approval of the nominee must be based on his integrity, competence and credentials.

It would be naive to expect Souter to say how he would decide a particular case or what his views are on issues such as abortion.

It would be wrong to base his acceptability on whether he does or does not think abortion is right.

Abortion is not the only issue, at least not to the women challenging fetal protection policies in the work place.

Or the civil rights leaders battling what they view as possible attempts to weaken integration policies.

Or the convict contesting whether a judge can exceed terms specified by federal sentencing guidelines.

Those cases, in addition to an abortion case, are to be argued before the Supreme Court in its new term starting on the first Monday in October.

For those who view this nomination as a serious test of our faith in our democratic process, take heart.

As Justice Harry Blackmun said, "That pendulum swings. It will stay this way now 40 or 50 years, I'm sure. We shouldn't resent it. That's the way the system works."

And it does work.

That's why justices get jobs for life, so they are obligated to no one, not even the president who appointed them.

That's why the FBI does background checks and the Senate holds hearings and votes up or down on the nomination.

That's why Congress can make new laws that override court decisions they—or their constituents—don't agree with, as is the case with the Senate's recent approval of a new civil rights bill.

Justices cannot legislate from the bench. They can only interpret the laws.

Our Constitution has made sure that there will always be checks to keep things in balance.

The court balance may be tipping, but as long as there are independent justices, the sales of justice are not.

[From the Legal Times, Aug. 27, 1990]

A PURIST AT HEART—SOUTER'S LEGAL FAITH: PROCESS OVER PRINCIPLE

(By Terence Moran)

Like hard-bitten prospectors sifting gravel for gold, activists on the left and right have spent the summer poring over the public record of Judge David Souter, President George Bush's Supreme Court nominee.

Squads of researchers have plowed through the microfilm files of The Manchester Union Leader and The Concord Monitor, looking for stories on Souter. Law professors have analyzed and assessed his 221 opinions as a justice on the New Hampshire Supreme Court. Senate staffers have even scrutinized his 1961 college honors thesis.

It is a patient search, one characterized not so much by a scamble to hit pay dirt—to catch Souter bluntly stating his position on abortion or some other issue—as it is an effort to flesh out the mind and faith of a cautious, elusive thinker.

"In many ways, it's like reading tea leaves," says Leonard Steinhorn, research director at People for the American Way, a liberal advocacy group. "You look through his career, and you see him drawing these fine lines between a dry, legal view of the world and what his personal views might be. It's difficult to reach many solid conclusions about him."

Adds George Kassouf of the Alliance for Justice, another liberal group: "This is a different kind of nominee. He's not pithy or easily quotable, so you have to read what he's written, think hard about it, and extrapolate from it."

Steinhorn, Kassouf, and their counterparts across the political spectrum have unearthed much new information about Souter's quiet career in the law. A picture of the 50-year-old jurist has begun to emerge from this research, and the outlines of that portrait stand in sharp contrast to many of the contentious approaches—both conservative and liberal—that have dominated debate over the high court in recent years.

PROCESS CONSERVATIVE

Souter's writings dating back to his college days reveal a man deeply devoted to slow, orderly development in the law. He depends upon explicit rules, settled precedents, and tested analytical methods for his conclusions, and he assiduously avoids basing his decisions on substantive principles or values. An adept logician and an exceedingly careful writer. Souter might best be described as a "process conservative," a jurist who finds the passive application of the mechanisms of the law the surest course to guide his thinking.

"First he wants to be a master of the facts in a case, and then he lets the process unfold to reach a conclusion," says Edward Haffer of Manchester's Sheehan, Phinney, Bass & Green, who served with Souter for six years in New Hampshire's Office of the Attorney General and who remains a good friend of the nominee. "He really is a legal purist."

Though Souter has never laid out his legal philosophy in a synoptic fashion, he has scattered hints about his general orientation throughout his career.

In a typically tantalizing fragment from the Souter file, a recent interview the nominee gave to The Massachusetts Lawyers Weekly sets him apart from the more doctrinaire disciples of the "original intent" school of judging. The paper reported in its May 28 issue that Souter "said that he views the constitution as a living document," and went on to quote him on the subject of original intent.

"On constitutional matters, I am of the interpretivist school," Souter explained, according to the Weekly. "We're not looking for the original application, we're looking for meaning here. That's a very different thing."

What kind of thing Souter might be talking about is indicated by his precisely worded Aug. 13 responses to a Senate Judiciary Committee questionnaire. In answering a query about his views on "judicial activism." Souter described a functional approach to the law that is distinct from the historical search for the intent of the framers that many conservatives embrace.

"The expansively phrased provisions of the Constitution must be real in light of its divisions of power among the branches of government and the constituents of the federal system," Souter wrote. (For the complete response to this question, and another excerpt from Souter's writings, see the accompanying box.)

That considered answer to a loaded question is typical of Souter. His cautious style is reminiscent of the justice he tells friends is his hero: Felix Frankfurter. Frankfurter's analytical conservatism and his belief in the limitations on judicial power parallel the views Souter briefly sketched in his Senate questionnaire.

"David thinks the world of Frankfurter," says Haffer.

MIXED SIGNALS

It is in the all-important area of privacy rights and the abortion controversy that the most fevered fortune-telling on Souter is taking place. In dribs and drabs over the past few weeks, the meager record of Souter's actions in the privacy area has been filled in. But the clues point in divergent directions.

On the one hand. Souter has talked about abortion in terms that few in the pro-choice camp would use. His 1977 interview dicussing a bill that would have removed all state restrictions on abortion up to the moment of birth sent a chill through the hearts of many pro-choice advocates, more for the language he used than for the unexceptional position he espoused.

"Quite apart from the fact that I don't think that unlimited abortions ought to be allowed. If the state of New Hampshire left the situation as it is now, I presume we would become the abortion mill of the United States," Souter said.

That uncharacteristically strong language troubles some liberals.

"That's not the kind of rhetoric that a pro-choice or even a neutral observer would use," says Kassouf of the Alliance for Justice.

On the other hand, Souter in the 1970s had to deal with Roe v. Wade, the 1973 case that legalized abortion, as a practical reality to be respected and worked with rather than as an abstraction to be * * * about the halls of * * *. This experience Souter shares with Justice Sandra Day O'Connor—who served in the Arizona legislature from 1975 to 1979.

"He might have a better sense of what goes on in the state house and state legislatures when it comes to abortion policy," says Kassouf

Few liberals, however, harbor many dilusions that in Souter they have a nominee who will staunchly defend reproductive rights. The mood, in fact, is decidedly gloomy on the left.

"There's a general anxiety about him, because when you believe something is a constitutional right, you want certainty," says Steinhorn of People for the American Way.

Certainty on abortion is not something to be found in Souter's record. But there are some aspects of the nominee's career that run against the grain of the conventional wisdom.

Souter has signed on to judicial opinions and legal briefs that embrace truly expansive readings of both Griswold v. Connecticut, the Court's 1967 ruling that enshrined the right to privacy, and Roe. Most passionate anti-abortionists are likely to be troubled by the sweeping conceptions of privacy rights enunciated in the briefs and opinions in at least two high-profile New Hampshire cases.

In one, Souter embraced the Supreme Court's privacy doctrine in a case challenging the authority of the federal government to force states to report the race, sex, and national origin of their employees by job category. In defending New Hampshire's refusal to comply with the order, Souter and his legal team relied heavily on the controversial Griswold and Roe procedures to thwart federal authority

"Whether directly, or indirectly through agents, government cannot lightly intrude into anything which is a matter of individual privacy, and this applies no less to racial and ethnic background than to psychiatric needs and sexual habits," reads the state's 1976 brief to the U.S. Court of Appeals for the 1st Circuit. The state lost the case.

Souter did not write the brief to that case, and like all his work as state attorney general, his positions were determined by the policy of the governor at the time, arch-conservative Meldrim Thomson Jr. And New Hampshire offered a number of other statutory and constitutional arguments aside from privacy.

But Haffer, who wrote the brief and argued the case, says Souter was supportive and involved in the effort to fend off federal power.

"David and I talked generally about the case, since it was an argument that had to be made very carefully," Haffer recalls.

Souter's support of Haffer's creative application of Roe does not worry some conservatives, who see the nominee's work as state attorney general born more of necessity than conviction.

"I don't put a lot of stock in his tenure as attorney general in terms of direct relevance to his work as a judge," says Thomas Jipping, legal affairs analyst at Coalitions for America, a conservative group. "Using Roe was just an attempt to make every kind of argument in pursuit of victory."

UNANSWERED QUESTIONS

The only New Hampshire high court case that dealt directly with a woman's constitutional rights under Roe has also typically, sent mixed signals to activists on the issue. In Smith v. Cote, a woman sued her doctor for not diagnosing rubella early in her pregnancy and not telling her of the potential birth defects her child might suffer as a result. Thus, the woman claimed, the doctor

had made her suffer a "wrongful birth," since had she known the risks she ran, she might have chosen an abortion.

The opinion in the 1986 case was written by Justice William Batchelder; Souter filed a special concurrence. Batchelder's opinion, while carefully declining comment on the merits of Roe, is nevertheless a generous reading of the landmark ruling. Emphasizing the court's need to vindicate "an interest in preserving personal autonomy, which may include the making of informed reproductive choices," Batchelder and the court found in favor of the woman on the "wrongful birth" issue.

"Under Roe, prospective parents may have constitutionally cognizable reasons for avoiding the emotional and pecuniary burdens that may attend the birth of a child suffering from birth defects," Batchelder concluded.

In his concurrence, Souter sought to reassure physicians "with conscientious scruples against abortion" who might fear malpractice actions under the court's ruling. As long as those doctors refer their patients to other specialists, Souter wrote, they could discharge their legal obligations.

But most pro-choice advocates remain unconvinced by these oblique indications of Souter's reasoning on the subject of privacy and abortion. They want the Senate to fill in as much as possible the skeletal understanding the country now has of just who Souter is and how he sees the law.

"That's where all the questions will come out, and no one knows how far he will go in answering them," says People for the American Way's Steinhorn.

When Souter faces the Senate Judiciary Committee Sept. 13, that process of definition will just be getting under way. And the final verdict on Souter, if he is confirmed, will only come with the years.

[From the Legal Times, Aug. 27, 1990]

TWO PAGES FROM THE SOUTER FILE

The Senate Judiciary Committee asks all judicial nominees for their views on the subject of "judicial activism." Souter's full response, submitted to the committee Aug. 13, follows.

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.

In a May 13, 1981 letter to a committee of the New Hampshire House that was considering abortion legislation, Souter described the position taken on the proposed bill by his colleagues on the New Hampshire Superior Court:

The judges do not believe it is appropriate for the Court to take a position on the basic question addressed by the bill, whether parental consent should be required before an abortion may be performed upon an unmarried minor. The Court's concern is directed, rather, to the provision of the bill that would require a justice of the Superior Court to authorize the performance of an abortion upon such a minor when there is no parental consent, if the justice determines "that the performance of an abortion would be in * * * [the] best interests" of a minor who is "not mature."

The members of the Court find two fundamental problems inherent in this provision. First, it would express a decision by society, speaking though the Legislature, to leave it to individual justices of this Court to make fundamental moral decisions about the interests of other people without any standards to guide the individual judge. Judges are professionally qualified to apply rules and stated norms, but the provision in question would enact no rule to be applied and would express no norm. In the place of a rule or a norm there would be left only the individual judge's principles and predilections. As carefully considered as these might be, they would still be those of only one individual, not those of society. Much criticism of the role of the judiciary in this country has characterized judicial activity in the application of constitutional standards as no more than the imposition of individual judges' views in the guise of applying constitutional terms of great generality. The provision that I have quoted from the present bill would force the Superior Court to engage in just such acts of unfettered personal choice.

The Court's second concern is with the necessarily moral character of such choice and the resulting disparity of responses to requests that judicial discretion be exercised. As you would expect, there are some judge who believe abortion under the circumstances contemplated by the bill is morally wrong, who could not in conscience issue an order requiring an abortion to be performed. There are others who believe that what may be thought to be in the "best interests" of the pregnant minor is itself just as necessarily a moral as a social question, upon which a judge may not morally speak for another human being, whatever may be that judge's own personal opinion about the morality of abortion. Judges in each such category would be obligated to indicate that they could not exercise their power in favor of authorizing abortions to be performed on immature pregnant minors. The inevitable result would be required shopping for judges who would entertain such cases. In other words, a principled and consistent application of the quoted provision would be impossible.

[From Washington Post, Aug. 1, 1990]

PREDICTING A JUSTICE'S FUTURE

Some consternation greeted the president's announcement of his choice for the Supreme Court because not much was known about the man and he had been chosen over various other distinguished judges who were thought to be more worthy of the honor. Fifty years old, a Harvard graduate, the candidate was acknowledged to have broad experience as a practicing attorney and a judge on both the trial and appellate levels of his state court—but only on state, not federal courts. And when senators, staffers and interest groups pored over his record of opinions, they found primarily assorted criminal, labor relations and land-use cases that are the stuff of state litigation. His supporters countered that the nominee had "a solid, rather than a spectacular record of hard work, painstaking preparation and independent judgment." This newspaper concurred, recommending confirmation of this "solid court worker" who was "an experienced judge with an excellent record." The nominee was William Brennan, and the year was 1956.

The burning political issue of the day related to Communists. Although Mr. Brennan had joined a unanimous opinion of the New Jersey Supreme Court upholding the constitutionality of the Communist Control Act of 1954, some senators sought reassurance of his reliability on the matter, because he had also criticized the activities of Senator Joseph McCarthy. Sen. McCarthy, though not a member of the Senate Judiciary Committee, was allowed to sit with the committee during the confirmation hearing and question the nominee. Did he believe, the Wisconsin senator asked, that the Communist Party is a conspiracy aimed at overthrowing the government? Mr. Brennan refused to reply, observing only that international communism was a threat to all free governments. In an editorial, this paper criticized the committee for quizzing the nominee about matters that were sure to come before the Supreme Court, and even chastised Mr. Brennan for answering in a limited fashion.

We review these historical facts not because we believe Judge David Souter is another Justice Brennan but because in some respects their situations at the time of nomination are similar. Both were little known nationally, and neither had a clear record on one side or the other on an important political matter. Combing state court decisions was not very productive in Mr. Brennan's case, nor was one apparently revealing opinion—on the Communist Control Act—a precursor of his Supreme Court opinions later. Imagine the consequences for liberal causes if Mr. Brennan had been denied his seat on the Supreme Court because this earlier ruling had not been liberal enough. The threat that seemed so important in 1956 receded quickly, and Justice Brennan served another 30 years deciding cases on other new and perplexing matters.

Judge Souter's record is now being combed for hints of a philosophy that might predict his future on the court. That's fine. But it will not be unprecedented if no clues are found in his state court opinions, and it would be a shame to jump to conclusions about his view of Roe v. Wade because of a limited and tangential aside in a New Hampshire case. More is at stake, and little is predictable.

[From the Philadelphia Inquirer, July 29, 1990]

IN NEW HAMPSHIRE, GLOWING PORTRAIT OF SOUTER

(By Christopher Scanlan)

WEARE, NH.—A warm, detailed—and admittedly biased—portrait of David Souter was painted by his friends and neighbors here last week after President Bush announced his nomination to the Supreme Court: an inspiring boss who opened the attorney general's office to women, a man unafraid to comfort a squalling infant, a friend devoted to an elderly woman who fostered his love of antiques.

Reporters in search of the clay feet they are accustomed to finding in public figures are on "a fool's errand," New Hampshire lawyer Steven McAuliffe says about his friend and former boss. "There is no smoking gun."

To be sure, those who know Souter best see at least a few idiosyncrasies, as well as virtues, when describing their admittedly private, often solitary and obsessively

single-minded, 50-year-old bachelor friend. But they say his aloof public image masks a witty, likable and compassionate man.

As a teenager in this rural village, Souter chauffeured Nellie Perrigo's mother around in her station wagon to hunt antiques for her shop—the reason his own home today is filled with Early American heirlooms.

Fifteen years later, when his old friend was confined to a nursing home and he was state attorney general, Souter spent an evening with her every week for three years until she died, even after she was so enfeebled that she did not recognize him. "That's the kind of fellow he is," says her daughter, Nellie Perrigo.

On the surface, at least, David Hackett Souter does seem a bit different. He doesn't have a car radio; he owns a black and white television set that he rarely watches. He lives alone in the weatherbeaten farmhouse where he grew up. He drives old cars and bragged that he owned one model for 14 years and never washed it. For enjoyment, he hikes to the top of mountains by himself. He spent a month's vacation one summer reading the works of Marcel Proust.

"David Souter is a man of letters in the classical sense," says Wilbur Glahn, a lawyer who has known Souter for 15 years. Another Souter friend notes that he has kept a diary since he was 7 or 8 years old and still handwrites thank-you notes "whether he stays an hour, for dinner or the weekend."

Always formal, he wears a shirt and tie to his chambers on weekends. Even to his friends, he is David, never Dave.

When Souter was named New Hampshire's attorney general in 1976 at the age of 36, his colleagues feted him with a cake inscribed "Foward into the 19th century." It was a testament to his style, friends say, not his mind-set. "He's modern in his thinking," says Glahn's wife, Hansi.

Although he entertains infrequently—Nellie Perrigo remembers a steak dinner and blueberry pie "made from scratch"—he's a dinner guest and hiking companion whose storytelling can spellbind the 16-year-old son of friends for hours.

His humor—the slash and wit of a quick one-liner rather than joke-telling—flashed last week on Capitol Hill. On Thursday, Sen. Patrick J. Leahy (D., Vt.) told Souter that he planned to spend the August recess reading the judge's opinions. "You'll have no trouble sleeping," Souter told him.

At the same time, so rigid are his principles that when the state historical society, a private, nonprofit agency where he is a longtime trustee, decided to build a museum, Souter told the director he would be glad to contribute personally, but wouldn't be able to participate in any fund raising events because his position as a justice might pose a conflict of interest. "He has a wonderful ethical sense of what's right," says society director John Frisbee.

Lawyers he hired remember the exhilaration of interviewing for a job with a then young deputy attorney general with a breathtaking passion and grasp for the intricacies of legal argument and the nobility of the profession. "It was like taking an exam," recalls one of them.

"A lawyer going before the Supreme Court in New Hampshire for the first time would be told to expect the most challenging questions from Justice Souter," agrees environmental lawyer Dave Harrigan of the Society for the Protection of New Hampshire Forests.

But questions about Souter's fitness remain.

Local divorce lawyer accused Souter of being out of step with the "real world" last week when the local Concord Monitor reported that in one of his last decisions as a state Supreme Court Justice, Souter ruled that a spouse could be considered an adulterer for having an affair even after filing for divorce. Such a determination could put the spouse at a disadvantage when a judge sets alimony, awards custody and divvies up community property.

Souter's supporters reject the notion that single status renders him unfit for the high court. Hansi Glahn tells this story:

Several years ago, Souter was hiking with the Glahns and their 7-month-old son, who rode on his mother's back. The baby grew tired and cranky. Glahn became upset that she could not stop the baby's walls. Souter relieved her of the baby and went down the mountain, Glahn recalls, the baby "screaming in his ear, leaving me behind where I couldn't hear him so I wouldn't be upset."

"He's single and he doesn't have kids, but he was sensitive to how a woman was feeling and sensitive to how a baby was feeling, and ready to step in, not say, 'Get me out of here,'" she recalls.

These are the people who may know Souter best. In New Hampshire last week, in Concord where he sat on the bench, in Weare where he still lives, these observers acknowledge their deep bias on his behalf. In the weeks to come, they are like to be his greatest champions.

Says lawyer Glahn, who has known the nominee since 1975, when Souter hired him to work in the state attorney general's office:

"He's a wonderful, warm human being who's widely read and fascinating to be with. He's got the highest moral, ethical and professional standards you can imagine. And he's going to put lawyers before that court through the wringer, which is what Supreme Court justices ought to do."

Supporters have ready—often lawyerly—explanations for everything. Why did Souter as attorney general insist on jail for Seabrook nuclear power plant protesters in 1977 after a judge had given them suspended sentences? That, says Tom Rath, who served as deputy attorney general under Souter, "reflects a person who believes in the rule of law. The Seabrook protester broke the law. It was his job to enforce it."

Souter's controversial opinion on a rape case—arguing that a victim's provocative behavior before the assault should have been introduced as evidence—actually was striking a blow "for defendants' rights," said Deborah Cooper, a former deputy attorney general hired by Souter on his first day as attorney general.

But, she added, "He's very supportive of women and women's role in the practice of law."

Why hasn't he stated an opinion on abortion? "He has understood that at any given moment the entire world could walk into that courtroom with any set of issues and a casual, idle, negligent comment at a social gathering, to a friend, could prejudge it," explains Rath. Souter takes his judge's oath "so seriously that he will not imperil his ability to render a fair and impartial decision by speculating about that kind of thing because that's his job."

"What he has is a compassion and an understanding that what he does impacts on everybody," Rath says.

His lawyer friends add that Souter is so wedded to the process of law—the careful reading of arguments, the study of precedents that underlie judicial review—that he couldn't say what he would do on abortion, even if he wanted to.

"He does not bring a political and social agenda to the bench," says McAuliffe. "He has an amazing ability to distinguish between his job as a judge and what he might feel like as a person. There's no doubt in my mind that David Souter has applied the law in ways that he personally wished he didn't have to apply, but he did it because that's the law."

Even Glahn, who says he has discussed, in general terms, Souter's moral and philosophic views on issues such as abortion, says he has no idea how his friend would decide an abortion case.

"He'll be hard to predict," says Glahn. "He may be the best judge on Earth for pro-choice because the precedent is there."

"I think the left is overlooking that and the right is overconfident of this label conservative," adds McAuliffe.

Within hours of Souter's nomination, hordes of reporters descended on Weare, a farm community turned suburb outside Concord, the state capital. By Tuesday, the narrow dirt road where Souter and three other families live, was clogged with cars.

"We needed a traffic cop," complained next-door neighbor Mary Gilman.

[From the New York Times, July 25, 1990]

THE LEGAL MIND CONSERVATIVE, BUT WHAT ELSE?

After law school, Mr. Souter returned to Concord, a move that surprised some who had expected him to settle in a more distant and exotic place. He joined the Concord law firm Orr & Reno, where he spent two unhappy years. In 1971 he became a Deputy State Attorney General.

He remained in that office for the next 12 years, much of it under Mr. Rudman's tutelage. "They were the two sides of a perfect public person: Warren Rudman was gregarious and great on his feet, and David Souter more thoughtful, careful," said Charles Leahy of Concord, a friend of Judge Souter's. "It was a chemical, intellectual and emotional match."

In 1976 Governor Thomson named Mr. Souter Attorney General, and during his two-year stint he took several controversial stands, often at Mr. Thomson's behest. He urged, for instance, that demonstrators arrested at the Seabrook nuclear power plant be given more than suspended sentences. He also argued, unsuccessfully, that it was constitutionally permissible to fly the American flag at half staff on Good Friday and that New Hampshire could force residents to use "Live Free or Die" license plates on their cars.

Mr. Thomson named him to the Superior Court in 1978. Five years later his successor, Gov. John H. Sununu, elevated him to the Supreme Court to replace Maurice Bois, who had retired. "I think when I'm old and gray, people will say 'This is one of the greatest things you did as Governor,'" Mr. Sununu said at Judge Souter's swearing-in ceremony.

Over the next seven years, he became known for writing forceful but increasingly long and complex opinions. "He has a tendency to disclose compulsively every twist and turn in his reasoning," Mr. Gross said. It is an odd fate for someone who, as Attorney General, handed out copies of Strunk and White's manual on English usage to lawyers working for him.

[From the New York Times, Aug. 8, 1990]

SOUTER HEARINGS WON'T BE USEFUL FOR PREDICTIONS, ONE JUSTICE SAYS

(By David Margolick)

CHICAGO, August 7.—Justice John Paul Stevens said today that it was fruitless and inappropriate to use the coming Senate confirmation hearings of Judge David H. Souter to predict how he would decide cases as a member of the United States Supreme Court.

Speaking before a session at the American Bar Association's annual meeting, Justice Stevens cautioned that for a President or senators to pin down a nominee in advance discouraged open-mindedness on the part of the judge, gave an appearance of impropriety and threatened an independent judiciary.

"It's a mistake to assume that this process is going to enable the senators or the other members of the Court or the bar generally to predict how a nominee will vote after he or she comes on the Court," Justice Stevens said.

Nor, he said, should it. "You really wouldn't want a judge who would say in advance how he or she would vote on particular issues," he said. "That's not part of the independent judiciary that's such an important part of our tradition and our history."

MEANINGLESS LABELS

Judge Souter's views on public issues are a matter of intense curiosity in part because he has not made them known as a state judge, and in part because he could provide the crucial vote to overturn Roe v. Wade, the 1973 Supreme Court decision that established a constitutional right to abortion. Several senators have said they intend to quiz the nominee about his specific views on abortion.

Justice Stevens urged participants in the confirmation process to eschew the use of labels like "judicial restraint" and "judicial activism," which, he suggested, are often meaningless or misleading.

At his own confirmation hearings in 1975, he recalled, "practically everyone asked me if I believed in judicial restraint, and I always said 'I did'—and I do." But, he added, "I'm not sure it means the same thing to me as it does to others."

He said one could read the opinions in a recent employment discrimination case to show, contrary to conventional wisdom, that Justice William J. Brennan Jr. believed in judicial restraint and Chief Justice William H. Rehnquist was a judicial activist.

"I'm not going to suggest that Justice Brennan was not an activist," he said. "But sometimes we use these words in ways that are more misleading than helpful in an analysis of the candidate."

Justice Stevens warned that it was a mistake to predict how a nominee would vote once on the Court either on the basis of the nominee's political sponsor or general philosophical views, since neither takes into account the circumstances of particular cases.

He cited the example of President Richard M. Nixon's first court appointee, Warren E. Burger, noting that the former Chief Justice had neither written or voted for rulings upholding the disclosure of the Watergate tapes, abortion rights, school busing to achieve racial balance and findings of sex discrimination. "Who would have expected President Nixon's appointee to be the author of that ground-breaking decision?" he said of the latter case.

PRAISE FOR BRENNAN

Justice Stevens did not mention Judge Souter by name. But he saluted the man to be replaced, Justice Brennan, calling him "a very special man" whose departure was "a very, very traumatic event" for his colleagues.

"He always put the interests of the Court at the forefront of his work," Justice Stevens said.

For Justice Stevens, who went to law school at the University of Chicago and was a longtime trial lawyer here, the appearance at the A.B.A. meeting was a return to his home turf, one punctuated by affectionate reminiscences. He spoke extemporaneously and affably.

During his remarks he commented on the Supreme Court's recent flag burning decisions and its caseload.

RESTRAINT AND THE DOCKET

The Justice, who dissented from the two rulings that struck down statutes prohibiting the burning of the American flag, criticized the High Court for taking the cases in the first place. Instead, he said, they should have been left to the state courts to decide.

"An awful lot of ink and a lot of heartache would have been saved," he said.

The reduced number of cases heard by the Court in the past two years, he said, was not part of a hidden agenda, as some Court watchers have hypothesized, but rather of the elimination of types of cases the Court was formerly bound to hear. In addition, he said, the Court was doing "a little better job of exercising judicial restraint in managing its discretionary docket."

What the development showed, he said, was that there was no need to create an intermediate appellate court between the Supreme Court and the Federal courts of appeals, an idea much talked about in legal circles a few years ago.

"I'm hopeful that that idea will be kept on the shelf for quite some time," Justice Stevens said.

[From the Washington Post, Aug. 2, 1990]

IN JUSTICES, MYSTERY IS ESSENTIAL * * *

(By Lloyd N. Cutler)

When the president was choosing his nominee to replace Supreme Court Justice William Brennan, I hope his advisers reminded him of what happened when President Abraham Lincoln faced a similar choice. The tale is also worth the Senate's attention.

Lincoln had a Supreme Court vacancy to fill at a time when the court was about to hear the Legal Tender Cases. These cases involved the constitutionality of the Civil War statute authorizing the Treasury to issue paper money and making it "legal tender" for the payment of existing as well as future obligations. The cases were of enormous importance to the solvency of the government, and the argument was likely to turn on the vote of the new chief justice Lincoln was about to nominate.

Lincoln wrote to a friend: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known." He then selected his Secretary of the Treasury, Salmon P. Chase, who had drafted the Legal Tender bill and had urged Congress to enact it. Chase was duly confirmed, but he confounded everyone by casting the decisive vote and writing the court's opinion holding the Legal Tender Act unconstitutional.

There are two morals to the story. The first is fairly obvious. While the president and the Senate both have the duty to consider a candidate's political and legal philosophy, they press this prerogative too far, as Lincoln recognized, if they ask how he or she would decide a particular issue such as whether to overrule *Roe* v. *Wade*.

The second moral is that thanks to the "good behavior" clause of the Constitution entitling a justice once appointed to serve for life, presidents and senators who try to make certain of how a nominee will vote are often disappointed. Lincoln is not the only president who made a wrong choice. Theodore Roosevelt was openly bitter that his nominee Oliver Wendell Holmes wrote opinions restricting the sweep of Roosevelt's antitrust legislation. Dwight Eisenhower, when asked if he had made any mistakes as president, replied: "Yes, two, and they [Earl Warren and William Brennan] are both sitting on the Supreme Court." As Homes, Warren and Brennan prove, presidents sometimes choose more wisely than they intend.

Moreover, justices usually serve more than a decade, and some, like Justices Holmes and Brennan, for more than three decades. No president or senator can predict what the important constitutional issues will be a decade or two ahead, and no nominee could reliably say how how he or she would resolve those issues. In selecting a Supreme Court justice, no president or senator with a sense of history would limit the focus to today's headline cases.

There is a further and even more important point. 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 that vital function, the court must be, and must appear to be, as independent of the president and of Congress as humanly possible. While the president must appoint and the Senate must confirm or reject each 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.

(The writer, a Washington lawyer, was White House counsel to president Jimmy Carter.)

[From the Los Angeles Times, July 27, 1990]

BEHOLDEN TO NONE, JUSTICES OFTEN CUT THEIR OWN PATHS

(By Ronald D. Rotunda)

The main news these last few days has not been about turbulence on Wall Street. Nor has it focused on the budget deficit or freedom in Eastern Europe.

The leading stories most often have concerned the resignation of Justice William J. Brennan Jr. and President Bush's nomination of David Souter to fill the Supreme Court vacancy. Liberals are wary of Souter, a federal judge and a former New Hampshire Supreme Court justice, for he is expected to be a staunch conservative like his friend and supporter, White House Chief of

Staff John H. Sununu. Conservatives hope that the liberals are right this time.

Supreme Court appointments were not always such newsworthy events. In grade school we learned that President John Adams appointed John Marshall to be our most famous chief justice. We weren't told that Marshall was Adams' third choice—the first two declined the honor. Even earlier this century, Supreme Court appointments were not the focal point of attention as they are now. On Sept. 4, 1922, Justice John Clarke resigned. The next day, President Warren Harding nominated George Sutherland to succeed him. The Senate confirmed him later that same day!

The Supreme Court now has become a much more important political institution and we tend to treat each new appointment as something like a political campaign. How will the new justice vote on the abortion issue, on the rules governing police seizure of evidence, on death penalty cases, on aid to parochial schools, on flag burning?

We should put things in a better perspective. We should expect Souter to be more conservative than Brennan. But that's not too hard to do, for Brennan was one of the most activist justices in our history. Other than that, history shows that Presidents, senators and the general public have a remarkably poor batting average in predicting how Supreme Court nominees are going to vote. Dwight D. Eisenhower appointed the liberal Brennan, while John F. Kennedy appointed the conservative Justice Byron White.

One reason why accurate predictions are so difficult is that the newly confirmed justice has lifetime tenure and salary protection, beholden to no one. History will be the final judge. That tends to make a man or woman an independent thinker. Perhaps that's why Hugo Black, the political crony of F.D.R. and a former member of the Ku Klux Klan, surprised a lot of people with his strong rulings in favor in civil rights.

Another reason why we predict so poorly is that the justice do not own the law. They are merely its custodians. Justices don't vote on an issue the way legislators do—a mere show of hands. The justices are supposed to reason from precedent and not be simply seismographs, registering public opinion. And the justices usually act the way they're supposed to act. That's why there was no judicial evolution when Chief Justice Warren E. Burger replaced Earl Warren. Some cases were no doubt decided differently than Warren would have decided them, but the law changes in degrees, not in upheavals. To the extent that time and experience shows some of the Supreme Court cases to have been poorly reasoned, to the extent that the cases are like judicial bricks made without straw, those cases will eventually be changed. Bad cases do not survive.

Finally, we should realize that we do not choose a new justice for today or tomorrow or even for next year. At 50, Souter is the same age Brennan was when he was appointed in 1956. If Souter's tenure on the court is as long, he will be deciding cases in the year 2024. We do not know what the major judicial questions will be five or 10 or 34 years from now. Even less do we know what the liberal or conservative answers to those questions will be.

If we realize that we are investing for the long term, we should worry less about how a nominee might vote on a particular issue (and our ability accurately to predict that vote is poor anyway), and concern ourselves more with what we think of the nominee's integrity, intellectual ability and good judgment.

(Ronald D. Rotunda is a professor of constitutional law at the University of Illinois and co-author of "Treatise on Constitutional Law.")

[From the Washington Post, July 27, 1990]

FORMER SOUTER GIRLFRIEND SAYS HE'S FAIR-MINDED

(By Judy Mann)

Ellanor Stengel Fink was a student at Wheaton College when she went out on a blind date with David Hackett Souter, a law student at Harvard, who had just returned from a Rhodes scholarship at Oxford. They dated for the next several years while he went through law school and she pursued a government major at Wheaton.

Today, she is the mother of three children who is very involved in volunteer activities with the Montgomery County schools, and she is chairman of the board of elections of the town of Somerset. She is a registered Democrat. Her husband is general counsel of the Investment Company Institute, the trade association for mutual funds. As she watches Souter going through the rituals of confirmation to the Supreme Court, one thought that goes through her mind is that "it is positively weird to see the face of your old friend looking out from the front page of your newspaper. It's especially strange realizing you're of an age for somebody to be nominated for the Supreme Court."

Fink, 45, has not spoken with Souter, 50, in 20 years, although they have corresponded on occasion. But she has vivid and extremely positive recollections of the man she, and other friends in those days, called Hackett.

Souter, with little federal court experience and, thus, almost no paper trail on where he stands, is one of the more mysterious nominees to have been named in recent times to the Supreme Court. He has never married. Fink is probably one of the women who has been closest to him during his life. Her recollections of the kind of man he was when she knew him well ought to reassure women and men who are concerned about how he will evaluate the great privacy issues of our time, such as abortion rights.

"I have no idea how he would vote on abortion," she says. "I doubt that anyone knows how he would vote. He's not an ideological person. What's characteristic of him is he's tremendously fair-minded. He wants to know and to listen to everybody and to reach a fair position based upon the law. The one thing you can say is he will be fair and he will listen to all sides and he will tell you how it is.

"Having never married, I know everyone is wondering does he have the empathy to understand women's issues, and I think he would. It's not as though he's lived in a cave for the last 25 years. He has many friends and I'm sure many women friends and I'm sure he's very aware of the impact of abortion on women's lives and men's lives, as well. He's very well-thought-of by his friends, both men and women."

Fink knew Souter's parents and describes them as "very warm, friendly, lovely people. A traditional, close family.

"To his toes, he loves New Hampshire and the rural life. He seems to get a lot of strength from the farm, from his roots. His idea of a great vacation was to put on a back pack and hike for seven days in the woods alone.

"He is exceptionally bright and wonderful to be with intellectually. What doesn't come across in the accounts I've read is what a warm, friendly guy he can be. He comes across as a steely intellectual. All head and no heart. He is a very bright person and very interesting, but he's not all brain. He's a friendly, warm person and extremely considerate.

"He's very funny, loves to tell stories, loves Robert Frost—at least when I knew him. He takes great delight in the life of the mind, but he's not an absent-minded professor at all. He's very much grounded in the day-to-day. He's somebody, I think, who really would be sensitive to different opinions and different backgrounds. He's not someone who's coming from his personal opinions and then twists the law accordingly. He really reveres the law.

"He is very much of an individualist, with strong feelings about the rights of individuals to control their lives, but I think he also has strong feelings about an individual's duty to the community. He feels very strongly about the country in a very quiet, unassuming sort of way.

"To understand Hackett, it's helpful to know what New Hampshire is like. It's a very special kind of place. It respects individualists and it's very tolerant of others. There's a strong streak of independence. All of those things are valued. It's such a physically beautiful place up there, you can understand very well how he loves it so. It gets in your blood."

She said he never spoke of a desire to be on the Supreme Court. "He wanted to go back to New Hampshire. He used to joke about wanting to be a pig farmer and how much he liked pigs, but all of us knew it was unlikely he was going to make that his life's work.

"I don't know what 20 years has done to him, but I think they're going to have to work very hard to find any blemishes," Fink says. "He's real class. There's a true quality to him."

[From the New York Times, July 25, 1990]

ASCETIC AT HOME BUT VIGOROUS ON BENCH

(By David Margolick)

WEARE, NH., July 24.—Whenever lawyers assess a candidate for the United States Supreme Court, they generally make comparisons to known judicial quantities. That is how the lawyers of New Hampshire are describing Judge David H. Souter, whom they have followed from private practice in Concord to the State Attorney General's office to the state and Federal bench.

Some see in Judge Souter the quirkiness of Justice John Paul Stevens. Others see the intellectual rigor of Justice Antonin Scalia, or the pragmatic conservatism of Justice Lewis F. Powell, Jr. And almost everyone reaches all the way back to the 1930's for a Justice of Judge Souter's ascetic style and monastic personal life: Benjamin N. Cardozo.

The one Justice to whom he is never compared here, either in temperament or judicial philosophy, is the one he would replace: William J. Brennan, Jr.

COTTAGE CHEESE AND AN APPLE

In this green and pleasant state, where lawyers number just 3,500 and State Supreme Court justices just five rather than the usual seven or nine, even someone as reclusive as Judge Souter cannot remain a remote Olympian figure.

Lawyers here can tell you what kind of cars he drives (and drives and drives): cheap subcompacts, most recently a 1987 Volks-

wagen Golf. They can tell you what he undeviatingly eats for lunch every day (cottage cheese and an apple); what he wears (his black judge's robe was said to add color to his attire), and how and where he lives (alone, in a weatherbeaten farmhouse in this southern New Hampshire town nine miles from the Supreme Court where he sat for seven years).

They know he is intermittently and selectively gregarious, a good storyteller who displays a dry New England wit to those who really get to know him. He is said to do a splendid imitation of former Gov. Meldrim Thomson, Jr., who named him Attorney General, and to tell great tales about Senator Warren Rudman, the New Hampshire Republican who is his long-term political mentor and sponsor.

Outside the courtroom, they say, he can cast aside judicial rigor for a measure of personal warmth. Each Sunday he walks the same elderly woman home from St. Andrew's Episcopal Church in Hopkinton, where he is a vestryman, and each Sunday he visits his mother at a Concord nursing home. He offered money to help rebuild a friend's barn after it burned down.

Neighbors like Martha Knox and Nellie Perrigo, as well as college classmates from his days at Harvard 30 years ago, describe him as courteous, loyal, unaffected and upright.

"He isn't stuck up, doesn't put on any airs and is very down to earth," said Howard Ineson, who lives a mile up Sugar Hill Road from the judge and has known him and his family for 40 years. "They're going to have to work very hard to find any blemishes."

On the New Hampshire Supreme Court, where unanimity is commonplace and whose spectrum runs less from liberal to conservative than from humanistic to hyper-logical, lawyers here say Judge Souter is at the far edge of the latter.

If there are any qualms at all about Judge Souter, it is a quiet concern over his circumscribed way of life. As a young man he was briefly engaged to the daughter of a State Superior Court Justice, but he never married, and even his admirers wonder whether his solitary style has limited his empathy or level of human understanding.

Almost no one here purports really to understand the small, buttoneddown figure who stood by awkwardly as President Bush nominated him to the nation's highest Court on Monday. Even by the laconic standards of this community, he is known for his reticence.

Few, including his fellow judges, have ever been inside his house, with its peeling paint, sagging porch, and lawn clogged with clover and Queen Anne's lace. Those who have say it is filled with books. By all accounts, he is much more interested in Tennyson than tennis, though he likes hiking in the White Mountains as much as either.

The Judge

Independence And Hard Work

But Judge Souter's reticence vanishes behind the bench. He is credited with bringing a new level of fire and vigor to the once-sleepy oral arguments that long characterized the court. He is also widely praised for his hard work, dedication, intellectual acuity and independence. "Souter does not carry this huge cargo of ideological precommitments that seems to have been a qualification for everyone who's been appointed to the Supreme Court for the last 10 years," said Martin L. Gross, a lawyer in Concord.

James E. Duggan, a professional at Franklin Pierce Law Center in Concord who has often argued before him, described Judge Souter as "very conservative, but with a streak of Yankee independence that makes him somewhat unpredictable."

"I'm disappointed that Brennan is leaving, but Bush could have done a lot worse," Mr. Duggan said. "Souter is not a blind right-wing law-and-order judge. On the other hand, he's not going to cut any breaks for criminal defendants."

Mr. Gross agreed. "David places a much stronger value on society's need to protect itself than most civil libertarians would like," he said. "What they'd better be rejoicing about is that they didn't get another right-wing nut. This is a guy who listens intently to what litigants have to say."

Bruce E. Friedman, director of the civil practice clinic at the Franklin Pierce Law Center in Concord, was less enthusiastic. "He's smart and diligent," Mr. Friedman said, but I don't think he will be a general in the war for a kinder, gentler America."

For the past day, New Hampshire residents have experienced a surge of pride as they did when two other New Hampshire natives, Alan Shepard and Christa McAuliffe, were selected for the space program. New Hampshire has not had a Supreme Court Justice it could call its own since Harlan Fiske Stone, in the 1940's. In Concord, WKXL radio's "Party Line" program, originally set aside for phone calls about big-band music, devoted today's show to Judge Souter, whom the moderator described as "squeakier than squeaky clean."

The Student

Formal, Reserved, Intensely Private

Judge Souter, an only child, moved here with his parents at the age of 11. His father, Joseph, was an official at the New Hampshire Savings Bank in Concord.

The younger Souter was a diligent student, whose only brush with juvenile delinquency, as one story has it, came when he was kicked out of the New Hampshire Historical Society for loitering after hours. At Concord High School where he was voted "most literary," "most sophisticated" and "most likely to succeed." The high school yearbook described him as "witty and in constant demand" and said he enjoyed "giving and attending scandalous parties."

Mr. Souter entered Harvard in 1957. From 1961 to 1963 he attended Oxford University on a Rhodes Scholarship, studying law and philosophy. He then moved to Harvard Law School, where he did well but did not make the Law Review.

When he graduated from Harvard College in 1961, several classmates came up with the perfect idea for a gift: a scrapbook filled with imaginary news stories about the blazing career everyone foresaw for him. In the book, someone pasted the headline "David Souter Nominated to the Supreme Court."

"MR. JUSTICE SOUTER"

It was a joke that said much about his classmates' affection for him, and about his single-mindedness. "All David ever wanted to be was a judge," said the Rev. John L. McCausland, an Episcopal minister who was one of his closest friends at Harvard College and Harvard Law School. He said Mr. Souter's friends used to call him "Mr. Justice Souter."

But just three weeks ago, when Mr. McCausland called Judge Souter to congratulate him on being confirmed to an appellate court seat in Boston and jokingly asked if this would just be a steppingstone to the Supreme Court, he said the judge replied: "No".

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Kalbaugh, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

MESSAGES FROM THE HOUSE

At 12:37 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House agrees to the amendment of the Senate to the bill (H.R. 1101) to extend the authorization of appropriations for the Water Resources Research Act of 1984 through the end of fiscal year 1994.

The message also announced that the House has passed the following bills, in which it requests the concurrence of the Senate:

H.R. 3764. An act to amend the Wild and Scenic Rivers Act to designate certain segments of the Delaware River in the States of Pennsylvania and New Jersey as components of the National Wild and Scenic Rivers System;

H.R. 4632. An act to amend title 14, United States Code, to impose penalties for inducing the Coast Guard to render aid under false pretenses, to impose liability for costs incurred by the Coast Guard in rendering that aid, and to authorize appropriations for use for acquiring direction finding equipment for the Coast Guard;

H.R. 4773. An act to authorize the President to call and conduct a National White House Conference on Small Business;

H.R. 5070. An act to amend the John F. Kennedy Center Act to authorize appropriations for maintenance, repair, alteration, and other services necessary for the John F. Kennedy Center for the Performing Arts, and for other purposes; and

H.R. 5558. An act to provide for the temporary extension of certain programs relating to housing and community development, and for other purposes.

MEASURES REFERRED

The following bills were read the first and second times by unanimous consent, and referred as indicated:

H.R. 3764. An act to amend the Wild and Scenic Rivers Act to designate certain segments of the Delaware River in the States of Pennsylvania and New Jersey as components of the National Wild and Scenic Rivers System; to the Committee on Energy and Natural Resources.

H.R. 5070. An act to amend the John F. Kennedy Center Act to authorize appropriations for maintenance, repair, alteration,

AMENDMENT NO. 2669 TO AMENDMENT NO. 2667

(Purpose: To provide a 2-year delayed effective date for application of title I to Federal employment and to require the Director of the Office of Personnel Management to study and report on the compliance of Federal agencies with title I)

Mr. PRYOR. Mr. President, I send this amendment to the desk at this time in behalf of myself, Senator GLENN, Senator METZENBAUM, and Senator STEVENS from Alaska.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Arkansas [Mr. PRYOR], for himself, Mr. GLENN, Mr. METZENBAUM, and Mr. STEVENS, proposes an amendment numbered 2669 to Amendment No. 2667.

Mr. PRYOR. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

In lieu of the matter proposed to be inserted, insert the following:

FEDERAL AGENCIES.—

(1) IN GENERAL.—With respect to any employee benefits provided by an employer that is a Federal agency, this title and the amendments made by this title shall apply 2 years after the date of enactment of this Act.

(2) FEDERAL AGENCY.—The term "Federal agency" means a Federal department, agency, or unit that is described in section 15(a) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(a)).

SEC. 106. STUDY OF COMPLIANCE BY FEDERAL AGENCIES.

(a) IN GENERAL.—The Director of the Office of Personnel Management shall conduct a study of the compliance of Federal employee benefit plans with the requirements of this title and the amendments made by this title.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Director shall submit a report to Congress that describes the results of the study conducted under subsection (a). If the Director determines that Federal agencies are not complying with the requirements referred to in subsection (a), the Director shall include in the report a detailed proposal for ensuring the compliance of Federal agencies with the requirements without reducing benefits to any Federal employee or annuitant.

(c) DEFINITION OF FEDERAL AGENCY.—As used in this section, the term "Federal agency" means a Federal department, agency, or unit that is described in section 15(a) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(a)).

THE SOUTER NOMINATION

Mr. PRYOR. Mr. President, I see my good friend and distinguished colleagues, the Senator from Utah. I understand that he has just returned from the hearings in the Judiciary Committee on Judge Souter. I wonder, before we get into this discussion, if he has any pronouncements on the outcome of his performance.

Mr. HATCH. Mr. President, I have to say, with the Senator's indulgence, I think Judge Souter has done very well, and I happen to believe he is an excellent choice for the Supreme Court. There are naturally a lot of questions he cannot answer because they involve future decisions, and that irritates some special interest groups. But he handled himself very well and I cannot speak for all Senators on the committee, but I think most of them at least with whom I have talked think he has done quite well.

OLDER WORKERS BENEFIT PROTECTION ACT

The Senate continued with the consideration of the bill.

Mr. HATCH. Mr. President, I appreciate the comments of my good friend and colleague, the Senator from Arkansas. I know he is trying to do right. I know he wants to correct a defect that really does exist as a result of the Supreme Court decision in Public Employees Retirement System of Ohio versus Betts.

But I have to caution him that there are very few areas of legislative law that are more complex than this area. I have to say that I do not think anybody fully knows what is in the bill now, the fifth version since the bill was reported out of committee, including the bill that was reported out of committee.

No one knows what the language is, and in something this complex, if we enact this into law in this form without making at least the minimal changes that I think have to be made, I guarantee you that within 5 years we will all be back in here screaming like we were on the catastrophic health bill because I can guarantee you the States are starting to catch on what we are going to do to them now and they are very, very upset.

With the amendment of the distinguished Senator from Arkansas, we are not going to have the Federal Government very, very upset because he is going to impose this bill upon the Federal Governemnt with a transition period, as I understand it.

Let me just say the amendment, which I offered yesterday, is simple and it is very straightforward. It would, notwithstanding any other provision of S. 1521, not subject State and local governments or private employers to liability if their benefit practices correspond to those permitted by the Federal Government with respect to its own employees. I think that amendment is a good amendment.

One of several areas in which the Federal Government practices do not conform to this bill is the integration of pension and severance benefits of Federal employees. Congress has previously acted at least four times to enact such a practice. For example: 5 U.S.C. 5595(a)(2)(B)(iv) provides that retirement eligible civil service employees do not receive severance pay; 10 U.S.C. 1186 and 1171(e) provides that retirement eligible members of the Armed Forces do not receive severance pay; 14 U.S.C. 286(d) provides that severance payments received are deducted from pension payments to Coast Guard officers; and 33 U.S.C. 853(h) provides that severance payments received are deducted from pension payments to commissioned officers of the National Oceanic Atmospheric Administration.

This is not the only area, however, where Federal practices differ from what this bill requires of State and local governments and Private employers. Disability is also a major area in which it appears that S. 1511 would be imposing requirements on private employers and State and local governments that might otherwise be consistent from practices observed with respect to Federal employees.

Suddenly, this morning, the response of sponsors of this bill is to offer a second-degree amendment to the amendment which I offer which appears to bring Federal employees under S. 1511 in 2 years. Amazingly, different versions of this bill have been around for 13 months, and none of these versions have previously applied to the Federal service. And now, in response to my amendment, sponsors are now urging Federal coverage.

This last minute effort, however, misses the point. It is offered, I assume, to respond to the argument that Congress is otherwise hypocritically and inconsistently treating the Federal Government, as an employer, differently than private employers and State and local governments. And, I must acknowledge, their amendment to cover the Federal Government would achieve some consistency. We would, however, be doing the wrong thing with respect to everyone. Mr. President, it just does not work.

I made the point yesterday that we were legislating in the dark. To suddenly extend coverage of this bill to Federal employees at the 11th hour demonstrates this point more than anything else I could or would point out.

I have been extremely concerned about this legislation because of the great cost and uncertain impact it would have on private and State and local employers and employees. As I mentioned yesterday, we are now on version five of this bill, 4 times longer and about 400 times more complicated than the bill originally introduced. The only hearings on this entire issue were held last fall on a much different first version. And, of course, those hearings did not even touch on the issue of Federal coverage, since earlier versions did not apply to the Federal Government.

Thus, it is no answer to the problems posed by this legislation to say

possible back in 1987. And then they confidently and deliberately built a winning case for Atlanta.

Indeed, because some other communities in Georgia are also involved, including in particular, Savannah, GA—they will host some events—this can be best described as a statewise victory.

Hard work and unity were clearly the key factors in securing this Olympic bid. Atlanta was by no stretch of the imagination a likely, much less an inevitable choice. In countless presentations, meetings, and communications the members of the IOC were slowly but thoroughly, in the final analysis, convinced mainly because the energy and enthusiasm that Atlanta displayed during the bid was proof to them that these same qualities would be brought to bear on actual preparations for the games.

Mr. President, thousands of Georgians contributed to this successful culmination from government, business, labor, and community organizations and volunteers from every walk of life.

I think we ought to focus a moment today, and I would like to point out in my remarks a few people who deserved particular thanks for their efforts:

Billy Payne, president of the Atlanta Olympic Committee, has been the driving force from the very beginning. Billy has personally persuaded hundreds of leaders from the public and private sector to adopt his faith and his confidence in the possibility of an Olympiad in Atlanta beginning with perhaps his most important recruit, former Mayor Andrew Young.

Andy Young placed his considerable international prestige at the full disposal of the Atlanta Olympic Committee, and he did more than anyone else to infect the entire community with a spirit of optimism about hosting the games. Mayor Young did not even let his historic campaign for Governor of Georgia this year interfere with his truly Olympian efforts. Just 2 days after his defeat in the Democratic gubernatorial primary runoff in August, undoubtedly exhausted and understandably disappointed since he did not emerge victorious, Andy Young went right back out on the campaign trail; went to countries all over Asia and Africa to help line up votes on the International Olympic Committee—a truly remarkable and successful effort.

Andy Young's predecessor, successor also, as mayor of Atlanta, Maynard Jackson, has been another key figure in this successful drive for the 1996 Olympics here in America. The summer games will virtually remake the face of Atlanta, GA. And Mayor Jackson's constant involvement in this overall bid process has helped assure the IOC that the facilities and support necessary for a successful Olympiad will be in place when the world comes to Atlanta in 1996.

Finally, Gov. Joe Frank Harris and the State of Georgia made it plain that the bid was a statewide project that extended a commitment of true southern hospitality from all 6 million Georgians. This morning's announcement represented an appropriate benediction on Gov. Joe Frank Harris' 8 years of work toward preparing Georgia to assume a leading role in the global economy and society of the future.

I would also add a word about Gov. George Busbee, who had preceded Governor Harris as Governor of Georgia, and who also played a key role both in the preparation of our State for this great honor and in soliciting the bid itself.

Mr. President, this is an historic day for Atlanta and for Georgia. We know full well that the Olympic bid could not have succeeded without the constant assistance of other Americans who became part of the Atlanta 1996 team the moment the U.S. Olympic Committee chose our city to represent the entire country in the selection process.

I also want to add my thanks to President Bush and to Vice President Quayle for personally contacting the IOC with timely expressions of support. Secretary of State Jim Baker also took considerable time and effort from an already overburdened schedule to contact key members of the IOC, and at my request he wrote the U.S. Ambassadors several months ago and urged them to do everything possible—once we had only one city competing—to push the American city, the city of Atlanta.

The U.S. Ambassadors to nations represented on the IOC made additional entreaties and assurances that Atlanta would hold an outstanding Olympiad.

Mr. President, Atlanta and Geogria will celebrate for probably the next 2 or 3 days, but beginning next week, at least by next week, we will all begin in earnest the enormous and painstaking task of preparing for the 1996 summer games.

We ask for continued support from our fellow citizens in the difficult work ahead, and certainly we are going to need some help from the House and the Senate, and the administration.

On behalf of the people of Georgia, I thank the International Olympic Committee for the honor and the privilege it has bestowed upon our State. We are ready to become part of the Olympic tradition. Georgia will do the games proud, for when the Olympic torch arrives in Atlanta in the summer of 1996 it will illuminate a community committed to our country's proud faith in the Olympic spirit of world peace and understanding.

Mr. President, I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. GRAHAM). The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

SUPPORTING THE NOMINATION OF JUDGE DAVID H. SOUTER

Mr. CHAFEE. Mr. President, as have most Americans over the past few days, I have been watching closely the hearings on the nomination of Judge David Souter to be an Associate Justice of the U.S. Supreme Court. I have watched these hearings closely in order to find out more about David Souter, the jurist, and also David Souter the individual. It has been a fascinating and illuminating process, one that has helped me to arrive at a decision. I have come to the conclusion that I will support the Souter nomination, and I will vote for his confirmation when it comes before the U.S. Senate.

More than any other Supreme Court nominee in recent years, David Souter, by virtue of his quite possibly being the "fifth vote," the swing vote between liberals and conservatives, has been under intense scrutiny. It may not be fair, but it is a fact, and that fact is on everyone's mind.

In that context, I would like to take note that, given the weight of this nomination and the issues at stake for both sides, I think the President has done an extremely good job in being fair. By his own account and by that of the judge himself, no "litmus testing" took place during the judicial selection process. We have become accustomed to the charge, true or not, that judicial nominees are ideologically vetted before they are announced. Of course, that means that nominees they are greeted with a hearty dose of skepticism, which is very human and very understandable.

However, no one grilled Judge Souter or took him through a battery of philosophical tests before his selection was announced. Indeed, according to the judge, since the President's announcement last July, administration officials have helped pull together the material requested by Judge Souter, but have been scrupulously careful to avoid briefing him. That kind of process is exactly what we asked for, and I strongly commend the President and his administration for its conduct.

Judge Souter's nomination set off a whirlwind of speculation about who he is, and more importantly, what his judicial philosophy is. Despite his years on the bench and a record of 200-plus

opinions, very little was known about his philosophy on the Constitution and the rights and freedoms guaranteed therein. Thus, he began his testimony last Thursday with what might truly be called a blank slate.

I listened very carefully when Judge Souter began testifying last week. Without a doubt, his intellect and his ability to reason are outstanding. I do not think anybody will argue with those qualifications. He is clearly a legal scholar who has a phenomenal understanding and command of legal terms, concepts, and cases. His exchanges with various committee members were fascinating to watch, and educational as well. He is, I think I can say without qualification or challenge, superbly qualified to be a Supreme Court Justice.

But I think we all agree—and certainly I believe—there is more to being a Justice than having the intellectual capacity for the workings of the law. I believe there are other virtues we look for in a judge, particularly when we consider a nominee to the highest court of appeal in our land.

Yes, to a certain extent the interpretation of statutes, regulations, the Constitution, or the Bill of Rights, must be objective. But clearly the law is also open to interpretation. The Founding Fathers did not include everything in the Constitution, a brief document, briefer even than the constitution of my State. And thus, clearly the law is open to interpretation. It is made for human beings. It affects human beings. Thus, special qualities are necessary for that aspect of excelling as a Justice.

I believe the hearing process that we have watched over the past several days has revealed a man capable of carrying out that interpretative aspect of being a Supreme Court Justice, and carrying it out well. He has demonstrated the thoughtfulness and the compassion needed to understand not only the situations of those people who appear before him, but the impact that his decisions will have upon countless others whom he will never see, the millions of Americans who would be affected by the votes that he would cast as a member of that nine-person Court. He has shown himself to be a person of scrupulous fairness, a man who will extend great efforts to ensure he approaches a case with an open mind, rather than with a preordained tilt.

An open mind linked with the ability to understand people, yet with a promise of objectivity and without a personal agenda to advance, is an important part of what we seek in an outstanding jurist.

Now, clearly, there are some constitutional issues that I am deeply concerned about. At the top of this list is the constitutional right of a woman to make her own decisions about reproduction. I belive in that. In addition, I care deeply about constitutional safeguards such as the wall of separation between church and State, and also our right to freedom of speech.

Judge Souter touched on many of the subjects that are important to me. Quite clearly, he refused to elaborate on some of those subjects; most notably, abortion. He was not going to answer any questions that would lead him into a discussion of the underpinnings of Roe versus Wade. It is not possible to predict how he will come down on a woman's right to choose. But I do take hope in some of the signs that he left us with along the way.

On the personal level, he spoke from the heart about the human impact of his rulings, saying that as a judge, he knew, and I quote, for I think these are rather moving words, "Whatever we are doing, at the end of our task some human will be affected, some life will be changed by what we do."

He went on to note that in that case, "We'd better use every power in our minds and beings to get these rulings right."

At the same time, he emphasized his dedication to being fair, to the fact that he has "not got an agenda" on abortion, and will not let personal moral views either way influence him.

On a legal level, Judge Souter repeatedly endorsed the notion that there are unenumerated rights protected by the Constitution; that the constitutional reference to liberty includes nonenumerated liberties; that a fair reading shows that there are values that were intended to be protected but were not set forth in detail by the framers; and that there is a judicial mandate in discerning and defining these values and these rights. He also concurred that there is a fundamental right to privacy.

Another element he mentioned that I believe is of importance is stare decisis, where a precedent has been set. In determining the value of those prior decisions, the judge includes as a factor for consideration the impact and the costs of overturning a prior ruling: Whether it has become the basis for later decisions, whether many have relied on it to a considerable degree, and whether to change it would constitute extreme hardship in many ways.

These points expressed by Judge Souter give me heart, not only because perhaps the judge may see things as I do, but also because they seem to me to be part of a fair and careful approach to judging. There is no promise inherent in any of the statements that the judge made, and that fact is worth repeating. But if we want to take a leap of faith, Judge Souter is the best candidate, in my judgment, to take that leap with. We cannot ask for a jurist with an agenda only in the areas we care about. I think that may be impossible.

None of the points that I have discussed are clear indications of how Judge Souter might cast a vote on cases related to Roe versus Wade. Yes, he said a lot, but he made no commitments. This is very worrisome to many women and men, and, as a Senator who is strongly pro-choice, I do not take that fear lightly.

I listened carefully during the testimony of the women's groups who testified. Yesterday afternoon, just 24 hours ago, I met with Kate Michelman, of the National Abortion Rights Action League, NARAL, and Faye Wattleton, of the Planned Parenthood Federation of America. Both women explained exactly where they saw the flaws to Judge Souter's testimony, and I do not disagree with them in many ways. Yet, I do not know if anybody really knows what his words boded for the right to choose.

So what I come back to again is his absolute promise to look at each case with an open mind, tinged with considerable humanity, yet with the promise of impartiality.

I would like to take a moment to pay tribute to the Judiciary Committee, its chairman, Senator BIDEN, its ranking member, Senator THURMOND, and the other members of the committee. I think the proceedings have been extremely fair, and I think they have reflected great credit on the U.S. Senate.

David Souter, in my judgment, is a superb scholar whose intellect and integrity is beyond question. He is a thoughtful, compassionate man who promises to be a caring and a fair jurist. So, Mr. President, I will give my support to his nomination with pride and enthusiasm.

Mr. WARNER addressed the Chair.

The PRESIDING OFFICER. The Senator from Virginia.

SUPREME COURT NOMINEE JUDGE SOUTER

Mr. WARNER. Mr. President, I am pleased to have the opportunity to join my distinguished friend of many years, Senator CHAFEE. We have served together in public office almost continuously since 1969, and I think this is a particularly significant occasion that today we join again.

I wish to express my views with respect to the President's nominee for the Supreme Court, Judge Souter, at this point, which I view as the midpoint in the Senate confirmation process.

I share with Senator CHAFEE his views that the Senate Judiciary Committee has done a very able, a very fair and thorough hearing. That procedure, as we speak this afternoon, is nearing completion. I want to state

that I will participate in the debate that follows.

I said the midway point. The Senate Judiciary Committee has conducted its hearings. It will then provide each of us with a report and record which we will study, and then, take part in the floor debate of the full Senate. Each of these steps is equally important as we reach this important decision. During the floor debate, I will join those who will speak out strongly, unhesitatingly in favor of Judge Souter. I will do so for these reasons.

Since the nomination on July 23, 1990, the press, in a very responsible way on the whole, in my opinion, has provided America with an abundance of analysis and a widespread reporting of the views of citizens and groups across this Nation, pro and con this nomination.

Most important, however, we viewed Judge Souter himself, as we say in judicial parlance, "in the box" being interrogated by the Members of the Senate, withstanding thorough, fair, and wide-ranging cross-examination without limitation. He has withstood that test admirably, and I think that he has gained the respect and admiration of the members of those on the committee, certainly with the majority.

This testimony was followed by other citizens coming forward supporting his nomination and, indeed, equally important, some who did not support his nomination, for reasons which I respect, but with which I disagree.

The Senate, now at its midway point, will soon begin its floor deliberation. My support will be predicated on the following facts which I have learned from the testimony, from the widespread reporting of the press, and from private conversations with many jurists and friends whose views I respect. Most significant, I have had the opportunity to discuss my thoughts with Judge Souter personally.

Judge Souter has impeccable academic credentials and he has been a sitting judge for 12 years, 7 of which have been spent on the supreme court of his State. He is articulate, he is intelligent and thoroughly knowledgeable of the law. He has that intangible quality that all of us search for as we recommend to Presidents, under the special responsibility that we as Senators have under the Constitution, persons for the Federal bench. That quality is known as judicial temperament. It does not lend itself to clear definition, but it is one's ability to judge another that that individual will be fair and impartial as he, in turn, takes up his role on the bench and sits in judgment of others.

His testimony before the committee demonstrated a clear, logical thought process that shows a very deep respect and reverence for the Constitution and our form of government and the role of the Federal judiciary. He is a strong believer that our Constitution, which represents 2 centuries of continuous government, longer, I am told, than any other democratic form of government existing today since its adoption in the year 1776 and following. It is the oldest continuing written constitution in the world, and Judge Souter recognizes that document embodies the very principles on which this country was founded. I am heartened by his understanding of and respect for this document and his commitment to his fellow citizens to preserve and uphold our Constitution and Bill of Rights.

Equally important, Judge Souter aptly displayed his understanding of the roles courts have had in protecting civil liberties. He showed compassion, another intangible but very important characteristic of one who is about to ascend to the highest judicial post, compassion, empathy, and a sincere caring for our society in general.

This 51-year-old jurist, who celebrated his birthday during the hearings, touched us all as he impressed upon us his ability to be compassionate when he related a counseling session some 24 years ago that he had with a young woman who was pregnant and unmarried.

While he would not—and should not—reveal how he would in the future vote on any case involving human life or any other case that came before the Court, he did show, in my judgment, that he has the compassion, the sensitivity, and the understanding that we would want in a person who will sit in judgment of such issues.

For those who question whether he is in tune with society or detached therefrom, I believe that his response to this case and to others should allay their fears. His community involvement is to be admired and emulated. He was a trustee for Concord Hospital for over 12 years and served as president of the board. He is an avid hiker and a member of the Appalachian Mountain chapter, an outdoorsman, one who shares and loves our environment. As a trial judge—and this is more important, having spent a number of years myself as a trial attorney—he was exposed to the full extent of life in cases that were brought before him, life in its best and, yes, in its worst forms. He also opened the door to women in the State attorney general's office by hiring the first two female attorneys, one of whom later served as the deputy attorney general for the State of New Hampshire.

I would like to close by reading a poem that has always meant a great deal to me, just a part of it, written by a fellow Yankee many, many years ago—Henry Wadsworth Longfellow. It is that passage with which all of us are familiar:

Thou, too, sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity with all its fears,
With all the hopes of future years,
Is hanging breathless on thy fate.

I dare say that when we complete the debate on this outstanding American, we, too, will remain somewhat breathless in this Chamber. But I am confident that this man, as we say in the Navy, I say to my friend, the former secretary whom I succeeded, this man has a keel that goes very deep in life. He has a center of gravity that will give him that balance not to be buffeted by the strongest of the storms of life which he will most certainly experience on this Court.

The Supreme Court is a part of that Ship of State. This man will take his position on that Court. I am optimistic that this Chamber will approve him, and he will sail on and provide us with that fairness, that equanimity which each American deserves.

I thank the Chair.

The PRESIDING OFFICER (Ms. MIKULSKI). The Senator from Rhode Island is recongized.

THE SOUTER NOMINATION

Mr. CHAFEE. Madam President, I commend the very moving statement of my friend for so many years, the distinguished Senator from Virginia. I think he has laid out the case extremely well for Judge Souter. I look forward, as does he, to that nomination coming soon on this floor.

I hope that that committee—and I suspect it will—will bring up the nomination fairly soon so it can come before us, because I hope we can get on with the filling of this vacancy on the Court. I think we will all look back and say we have done a good job for the United States with the confirmation of Judge Souter. So I again congratulate my distinguished friend.

Mr. WARNER. Madam President, I wish to extend my appreciation to my almost lifelong friend, the distinguished Senator from Rhode Island, JOHN CHAFEE.

THE NOMINATION OF JUDGE SOUTER

Mr. EXON. Madam President, I have listened with great interest to the very informative remarks of the Senator from Rhode Island and the Senator from Virginia. I wish to add my voice in support of the President's nominee to the Supreme Court.

I had an opportunity to read a great deal of the testimony. Not being a member of the committee, I took it upon myself to watch as much of the televised portions of that hearing as I could. I believe I had a chance to hear every member of the Judiciary Com-

mittee pose questions to the nominee and his generally excellent responses thereto.

I add my voice to what has been said and associate myself with the remarks made by the Senator from Rhode Island and my friend from Virginia, both of whom it has been my pleasure to serve with in this body for a considerable number of years. They have laid out the credentials of this individual very well. They have laid out his very exemplary record as a student and a student of the law, his distinguished career as a member of the court. I, too, feel this is an excellent nominee who should receive approval, and I will vote for the approval of Judge Souter when that nomination comes to the floor of the Senate, which I hope will be very soon.

I was asked by the press did I not think it was proper for the members of the committee to inquire in some detail about some of the views that the nominee held. My answer, Madam President, was that I certainly do think it is their responsibility to inquire. In those 3 days of testimony they inquired into about everything that one could imagine would be asked of a nominee to the Supreme Court. I was equally impressed with the excellent responses that were given by the nominee.

We do a lot of important things in the Senate, and the advise and consent process, in my view, is one of the most important, certainly with regard to the appointment of members of the Supreme Court, because members of the Supreme Court by and large are likely, by their decisions, to have a great deal to do with what laws are ruled upon, what laws and constitutional mandates are considered in the whole barrage of cases that are referred to the Supreme Court. Therefore, the Supreme Court and all of our courts of the land thereunder have a grave responsibility, the Court as a whole and individual members of that Court. There is little that we do in the advise and consent process that I take more seriously than the confirmation of members of the Supreme Court.

There was some disappointment in some circles that Judge Souter was not forthcoming, as some have phrased it, with the answers to many complicated, some of them controversial, issues that he was asked about. Some felt he should have spelled out his feelings more clearly than he did.

I concur with the general statements that have been made previously about this excellent nominee. That is, with his responses as guarded as they were, he showed above everything else a judicial temperament that I feel is critically necessary for a man in such a high, high place as a member of the Supreme Court.

I wish he had been more forthcoming on some issues. I personally would like to have seen it. But I think he was wise in making many of the statements that he did. And above everything else he showed his judicial temperament, that he would be fair in all that came before that Court for redress.

Madam President, I suggest that is all that we can ask. That is all we should expect from a member of the Supreme Court.

I was particularly impressed though with his candor, with his intellect, and emphasizing once again his judicial temperament.

Madam President, I said there is probably no more important role that we play in the U.S. Senate than the advise and consent and confirmation process of judicial appointees, most importantly the Supreme Court. As Governor of Nebraska for 8 years, I appointed more judges to the courts in Nebraska than any Governor before or that any Governor has since. I left the State of Nebraska after two terms and came here to serve Nebraska in the U.S. Senate. I judged my votes pro or con on nominees to all of the courts based on a set of guidelines that I used in appointing all of those judges in the State of Nebraska, most of whom are going to be around for a very long time dispensing justice.

I would just explain that as far as I was concerned the critical question that I asked myself as a Governor in charge of appointments was whether or not the individual—and there were men and women that I appointed, and there were members of various ethnic groups, but that was not the critically important thing. The critically important thing in my view was to have that individual as best I could judge pass the test. And the test, I said, was: If I as an individual who were appearing before this judge, would I be comfortable that this judge would fairly listen to the case presented to that judge that affected me, and would that judge be in my judgment fair and considerate in making his or her determination as the case may be?

Therefore, I have applied the same test to every vote that I have cast here, Madam President, on a member of the Federal courts. I believe that Judge Souter passes that test with flying colors. Yes. I am convinced that should I ever come before his Court I could be treated fairly and above everything else that seems to be the main criterion because if he would treat me fairly then I think it logically follows that he would very likely treat others fairly as well.

BARTER AND COUNTER TRADE WITH THE U.S.S.R.

Mr. EXON. Madam President, last week I wrote to President Bush congratulating him on the successful summit with the President of the Soviet Union and an excellent address to the Nation last week. I fully support the President's call for bipartisan cooperation, and in that spirit I offered the President a suggestion which I would like now to briefly discuss.

There is one area of potential cooperation between the United States and the Soviet Union which should be immediately pursued. Madam President, the Soviet Union sits atop of one of the world's largest supplies of oil. The United States, the breadbasket of the world, will soon harvest a bumper crop. The Soviet Union needs food, and the United States needs oil. Therefore, the simple equation of mutual benefit is good for both food producers and oil producers.

Trade with the Soviet Union and Eastern Europe and the Third World has been difficult for the United States because of the lack of hard currency in many of these markets. However, barter transactions like food for oil is a strategy which I recommend and one which I think could prove very helpful and be done with very little difficulty right now. Indeed, barter and counter trade and other similar nontraditional means of trade and finance present ideal opportunities for the United States and the Soviet Union to expand trade and development.

Not too long ago a Soviet food processing expert bound for a food conference in Nebraska said that if the United States waits for a convertible ruble, there will be no trade left. For quite some time official U.S. trade policy frowned upon barter and counter trade transactions while other trading partners in Europe and Asia used barter and counter trade to capture new and expanding markets.

Fortunately, a provision in the 1988 Omnibus Trade and Competitiveness Act, which I authored, fundamentally changed U.S. policy. U.S. trade law now encourages and supports the use of barter and counter trade to expand U.S. exports.

That legislation created an Office of Barter within the U.S. Department of Commerce and an interagency group on barter and counter trade to coordinate policy throughout several Federal agencies with trade and development responsibilities.

The Commerce Department office is now operational. And the interagency group is scheduled to have its first meeting early in October. In my letter I urged the President to instruct the Barter Office and the interagency group to immediately pursue the possibility of bartering or trading American food products for Soviet oil.

With expectations of a price depressing bumper crop of farm products, a food-for-oil strategy would be welcome news for the American farmer. Expanding the available supply of oil in

the United States would put downward pressure on oil prices.

For the Soviet Union, with its chronic food difficulties, such a transaction would prevent another winter of discontent which could cripple the process of perestroika. Certainly over the long term the United States must reduce its overall dependence on imported oil.

Like my food-for-oil strategy, the American farmer is a central force in meeting America's energy needs through the further development of ethanol fuels. However, food for oil is an option which should be pursued right now to replace oil formerly flowing from Iraq and Kuwait.

Madam President, an exchange of food for oil can help the Soviet Union reduce its bread lines and help the United States prevent future gas lines.

Madam President, I ask unanimous consent that a copy of my letter to the President be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, DC, September 12, 1990.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I congratulate you on your successful summit with President Gorbachev and your inspiring speech last night. I applaud your call for bi-partisan cooperation and in that spirit offer you a suggestion.

There is one area of mutual benefit to the United States and the Soviet Union which I encourage your Administration to immediately pursue. The Soviet Union sits atop the world's largest supply of oil and the United States is truly the bread basket to the world. The Soviet Union needs food and the United States need oil. The simple equation is for the United States to exchange food for oil.

Given the Soviet Union's lact of hard currency, barter, countertrade and other similar non-traditional means of trade finance present ideal opportunities to conduct commerce. Not too long ago, a Soviet food processing expert said that if the United States waits for a convertible ruble, there will be no trade left.

The Omnibus Trade and Competitiveness Act included legislation which I authored to encourage the use of barter and countertrade to expand U.S. exports. The Trade bill created an Office of Barter within the U.S. Department of Commerce and an Interagency Group on Barter and Countertrade to coordinate policy throughout several the federal agencies.

The Commerce Department Office is now operational and the Interagency Group is scheduled to have its first meeting early in October. I urge you to instruct the Barter Office and the Interagency Group to immediately pursue the possibility of bartering American products, especially food or American oil drilling technology for Soviet oil.

An exchange of food for oil can help the Soviet Union reduce its bread lines and help the United States prevent gas lines. By expanding the available supply of oil in the United States, there should also be downward pressure on oil prices as well.

Best wishes.

Respectfully,

JIM EXON,
U.S. Senator.

JUDGE DAVID SOUTER

Mr. SPECTER. Madam President, earlier this afternoon we concluded the nomination hearings for Judge David Souter to be Associate Justice of the Supreme Court of the United States. We had long days of hearings, and some extended into the evening. I attended, as a member of the Judiciary Committee, virtually all of those hearings.

I think it is timely to state a position on Judge Souter's nomination, in the hope that we may move the process along as expeditiously as possible. I think we should not rush to judgment, but after having studied Judge Souter's record extensively, read several dozen of his opinions, and having heard the testimony of Judge Souter for almost 3 days, and the testimony of other witnesses for 2 more days, I feel in a position to come to a conclusion. I do not think we ought to rush to judgment, as I say, but if it is possible for the Senate to conclude its work on the Souter nomination in time for the first Monday in October, I think it would be a good thing.

We are not able, on many occasions, to meet deadlines because of the complexity of what we have to do. If we can meet that deadline, I think we should, and I want to pursue that to the extent that I can cooperate in that process.

During these hearings, Judge Souter really had to run between the raindrops and through a veritable hurricane. When he articulated the position of judicial activism, there were some Senators satisfied that he was not close to the original intent or original meaning; when he went to interpretivism, which is a strict constructionist doctrine, he had another situation, according to the judicial activists. When he would not state his ultimate position on the abortion issue, when it comes to Roe versus Wade, he antagonized both sides.

So in our hearings, we had people who were in favor of choice opposing his nomination, in the absence of assurances that Judge Souter would vote to support abortion. We had those who oppose abortion who were opposing his nomination on the ground that he was not giving appropriate assurances that he would support their position.

In my judgment, Judge Souter is qualified to be an Associate Justice of the Supreme Court of the United States. He has an excellent academic background—Harvard College, Harvard Law, Rhodes scholar, extensive practice as a lawyer, Attorney General of the State of New Hampshire. He has been a trial judge and a judge on the Supreme Court of the State of New Hampshire. He has written many opinions, opinions of some depth and some power.

Judge Souter displayed a powerful intellect in his testimony before the Judiciary Committee, and he combined that with a sense of humor and balance. There remains an issue as to how extensive his experience is, and in an ideal world, it might be highly desirable for him to know about what happens in the inner city of Philadelphia or Baltimore. It might be desirable for him to understand in greater detail the problems of America or America's States.

He does not have the kind of experience that perhaps Senators get when attending town meetings and visiting all the settings that are possible within our own States and beyond. He is a man of great ability. It would be this Senator's hope that he might establish on the court, with his powerful intellect, a perspective which would add a dimension to the work of the Court, not saying which way he would necessarily rule, but would provide alternatives and ideas and stimulate discussion, as the Court has to tackle the toughest problems in our society. And the Court functions on 5-to-4 decisions on all of the tough issues—not only on the question of abortion—where he could be the decisive vote one way or the other: The right to die case was decided on a 5-to-4 decision; major decisions on civil rights such as Wards Cove, 5-to-4, and Metro Broadcasting, 5-to-4; death penalty cases, 5-to-4; freedom of religion cases, 5-to-4; taxation, directing local governments to impose taxes, 5-to-4; contempt citation of the council in the city of Yonkers, 5-to-4. It is desirable, at any rate, to advance the work of the Supreme Court.

In arriving at my conclusion and judgment, Madam President, on Judge Souter, I have relied more on his written opinions than I did on his testimony. As I said, in my questioning of Judge Souter, I found a variance between his written opinions, a significant difference, and in what he testified to. I think there is a license for a nominee as there is license for a poet. I think whether you take Judge Souter's opinions or whether you take Judge Souter's testimony, he is well within the continuum of constitutional jurisprudence. I do not like the word "mainstream." But I think "continuum" is a more appropriate description of our constitutional process than "mainstream."

In his opinions, most of them had a more restrictive view of the law. But some had an expansive view. In the Richardson case, he talked about a liberty interest. That was therefore not a new concept in his testimony before the Judiciary Committee, but his view of liberty was much more expansive

when he testified than had been expressed in a variety of his opinions on the New Hampshire State Supreme Court.

He said that the incorporation doctrine, the doctrine which says that the Bill of Rights is incorporated into the due process clause of the 14th Amendment and is applicable to the States, that that panoply of rights was not the end of it, that it was just the beginning.

When he took up Justice Cardozo's articulation in Palko versus Connecticut, of conduct "essential to the concept of ordered liberty," he said that was only a beginning point. He had written in the Dionne case, which received considerable analysis, about his own judicial philosophy, going back to what he said was original meaning; that it was not quite original intent, not only what the framers intended at the time they wrote the document, but what the meaning of the words they used and the principle at that time.

But that is a substantial variance from what interpretivism means, generally, as he articulated the broad expanse of a liberty concept. But regardless of where he is pegged on the spectrum of judicial philosophy, I do believe he is well within the continuum of constitutional jurisprudence.

His opinions on criminal law issues were balanced. Some were very strong on law enforcement, but he showed a keen appreciation of constitutional rights in the context of waiver of the right to a jury trial, and the context of a nolo contendere plea being entered. There was real balance there.

In my opinion, he gave significant insight into his judicial philosophy. Frankly, I would like to have seen him answer more questions, but he had his own view on what he wanted to testify to.

On the critical question of freedom of religion, the free exercise clause in the Smith case, I thought he gave a very significant answer, where he disagreed with the majority opinion and, instead, sided with Justice O'Connor, looking for a compelling governmental purpose, narrowly tailored result to satisfy a compelling governmental interest, which this Senator thinks is very important as a cornerstone of the free exercise clause of the freedom of religion.

His response on affirmative action could have been more expansive, but he did say that race was a factor to be considered in the decisions on affirmative action, picking up on a concept of Bakke, a concept of Metro Broadcasting Co., as opposed to the narrow view of City of Richmond versus Croson.

I would have liked to have seen him be more definitive on the establishment clause, when he testified that he would not endorse Thomas Jefferson's view of a wall between church and state, would not endorse Justice Black's articulation in Everson of Jefferson's view, but instead that he found, perhaps, some limitations on that principle; but in general his support of the establishment clause and the separation of church and state did pass at least a minimal test.

I would like to have seen him testify in more definite terms about the supremacy of the Supreme Court as the final arbiter of constitutional issues. He said he did support Marbury versus Madison. You would think that in 1990, or in 1986 for that matter, when we had other Supreme Court confirmation hearings, that there would have been unequivocal support for the 1803 decision of Marbury versus Madison that the Supreme Court had the final word on the Constitution, but some of the nominees who have come to the Judiciary Committee during my 10 years in the Senate have refused to answer that question.

There is a corollary question about the authority of Congress to take away the jurisdiction of the Supreme Court on constitutional issues. And Judge Souter did not answer that question to my satisfaction, would not go as far as Chief Justice Rehnquist went in 1986 in saying that the Congress could not take away the powers of the Court on first amendment issues. Chief Justice Rehnquist would not go beyond that on other issues inexplicably, but Judge Souter would not even go as far as Judge Rehnquist did.

I pressed Judge Souter on an issue of relative power of the President as Commander in Chief under the Constitution contrasted with the authority of the Congress to declare war. I asked him the historical question: Was the Korean war constitutional and legal in the absence of a declaration of war by the Congress of the United States? He declined to answer on the ground that it might implicate a decision under the War Powers Resolution and of course I had prefaced my question noting the presence of U.S. forces in the Mideast today and how there was a delicate question that might have to be answered concerning the War Powers Resolution.

But it seemed to this Senator that asking about the Korean war was sufficiently historical. The War Powers Resolution had not been passed at that time; it did not implicate that issue. So I asked him to think it over. He thought it over long enough from Friday to Monday to tell me that he did not know. I thought that was a pretty good answer. I said so. I think that more answers ought to be "I do not know."

I notice, Madam President, the smile on your face. But very frequently we do not know. I would have liked a little more on that, but I learned a great deal from the questions Judge Souter would not answer and the non-answers which he gave, which I think he was entitled to give.

The most contentious point of all, of course, was the question of abortion. I think it is fair to say that no issue has divided this country more in its history with the exception of slavery, and, as I travel through Pennsylvania's 67 counties and beyond, that is always the tough issue. Every year on January 22, the anniversary date of Roe, many Pennsylvanians come to Washington, DC, to seek to overturn the Roe decision. And Judge Souter could not satisfy everybody. He could not really satisfy anybody. But I thought he went as far as he could.

I think there you really come down to the nub of what a nominee really can answer. But it is inappropriate for a nominee or a Justice or a judge to state what his decision would be on a case which is not yet before the Court. The process requires a case in controversy, specific facts, briefing, oral argument, deliberation among Justices, and then in that context a decision.

He did discuss the privacy issue of Griswold versus Connecticut and he did say that he recognized the privacy interest for married couples on the contraception issue. He recognized the privacy interest or liberty interest beyond but would not be any more specific; and in that context he was criticized by those who wanted a flat commitment. And not all of those who opposed his nomination asked for a flat commitment that he would uphold Roe versus Wade, but asked that he at least recognize the privacy interest requiring high scrutiny and a compelling State interest. But many who opposed said they really wanted a commitment as to where he stood on the ultimate question of sustaining or reversing Roe versus Wade. And there were those who testified exactly on the opposite side.

I believe, Madam President, that Judge Souter showed a sensitivity to the issue. He had served on a hospital board and when Roe versus Wade came down he voted in favor of making the facilities of the hospital available for abortion in the context that it was the law of the land and adequate medical care required that decision. He was severely criticized in an opinion where he reached a question that was not squarely before the Court, when in another opinion he had stated the general rule that you do not reach such a question. In that opinion, he said that doctors need not necessarily counsel on the abortion alternative on a case which involved wrongful life and wrongful death.

We had a fascinating development of the law where there used to be a claim for wrongful death if somebody was killed in a tort action. Now there is a claim for wrongful birth if the mother or father could have been advised on

abortion rights. Someone was born where there should have been abortion, and there is a fascinating development of the law in the course of the past few years.

But in the case involving the issue of wrongful birth and wrongful life, Judge Souter went beyond the parameters of the case to say that a doctor who had conscientious scruples against abortion did not have to counsel for abortion but only had to make a referral, and for that he was criticized.

We had a contention that Judge Souter was insensitive to women's rights and had an exchange with two witnesses on this subject which I think is illustrative of the kind of criticism which Judge Souter received.

There was an extensive discussion both yesterday with a witness and today with another witness in a controversial case captioned State of New Hampshire versus Richard Colbath. It involved a fascinating issue where the rape shield law came into conflict with the constitutional right of a defendant in a criminal case to confront his witnesses and cross examination.

The rape shield law provides that the defendant has no standing to testify about a woman's prior sexual conduct on the principle that it is irrelevant, whatever the women's prior sexual conduct may have been, whether a defendant in a given case committed a rape, because a woman has an unquestionable right to say no to any man at any time. So that whatever may have happened as a generalization before should not come up.

But in this Colbath case we had a very strong contention raised of judicial insensitivity on the part of Judge Souter in describing the conduct of the complaining woman and the defendant. I shall not be explicit as I was yesterday and today in questioning the witnesses. The record is there about touching and contact with very private parts of the anatomy. This was characterized by one witness as flirtation at worse and did not justify submitting questions to the jury as relevant on the issue of consent, whether there was an appropriate consideration for prejudice to the woman as opposed to the defendant's rights.

Today there was a question of insensitivity in certain language used as to the "undignified predicament of the woman." I speak at some greater length about that because I think it is illustrative of the intensity of opposition. Careful analysis and context of what a judge may properly decide as to what goes to the jury shows that Judge Souter was well within the ambit of propriety in what he had done in conduct which was totally within bounds; not his statement, as to characterizing the woman, stereotyping the woman, but analysis of evidence which was appropriate for a jury to consider on the critical question of consent.

So, Madam President, at some greater length than I would ordinarily, because on this afternoon at 3:40, there is no other Senator on the floor—we have been in a quorum call a good bit of the day; efforts are being made to work out the pending legislation which is on the floor. I have spoken at somewhat greater length than I would have under other circumstances.

Madam President, I add an addendum as to the procedure that is being undertaken. I believe that the Senate is on the right track in pursuing the issue of judicial philosophy as we exercise our constitutional responsibility to consent or not to nominations by the President.

It was only 3 years ago that an issue was present as to whether we could make an inquiry at all. And that I think has been resolved appropriately. In Judge Scalia's case in 1986, now Justice Scalia, he answered virtually none of the questions, leading a number of us on the Judiciary Committee to formulate a resolution to try to establish a minimum standard of what a nominee had to answer.

That did not have to be pursued because the intervening nomination proceedings as to Judge Bork came down, and in the context of Judge Bork's extensive writings Judge Bork answered many questions and judicial philosophy was appropriately inquired into, as it was in the confirmation proceedings as to Justice Kennedy and again now as to Judge Souter.

There is a concern, Madam President, that we may go too far in pressing nominees, as many now are insisting on answers to the ultimate question as to how the nominee will decide the next case which comes before the Court. And for reasons which I have already given, I think that is not an appropriate range of inquiry.

But there may be justification to push that boundary if the Supreme Court of the United States is to operate as a super-legislature. And we have seen the case involving the Civil Rights Act where for 18 years, from 1971 until last year, 1989, the decision of the Court in Griggs withstood the finding of business necessity and the burden of proof as to who had to show what business necessity was in a case under the Civil Rights Act, without going into great detail.

And then last year, in the decision in Wards Cove, four Justices who appeared before the Judiciary Committee in the past decade, during my tenure in the Senate, who put their hands on the Bible and swore to be restrained and not judicial activists, overturned a decision where it was clear from the 18 years of congressional inaction that the Civil Rights Act was appropriately and accurately interpreted in the Griggs case.

If the Supreme Court is to operate as a super-legislature, then it may be that the pressures will mount for nominees to give the ultimate positions on where they will be on cases that come before the Court.

Or where you have Garcia versus San Antonio contrasted with the decision of National League of Cities versus Usury where in dissenting opinions in Garcia, Chief Justice Rehnquist and Justice O'Connor stated that Garcia would be overrruled when another Justice joined the Court disposed to their position.

So that if it is a matter of personality, then I think we may see the nominees pushed for that ultimate question. But I think that is highly undesirable, Madam President, because the court nominees ought not to have to answer questions as to specific issues because the judicial process requires arguments and deliberations in a case or controversy.

Madam President, there is another consideration which is worth a brief comment, and that is on the line that there is an effort to thwart the elective balance which has been created in our society. It has been noted that the American electorate, perhaps intuitively, has chosen a Republican President and a Democratic Congress. If there is to be an agenda with which the Court will thwart the will of the elective components, then there may be a necessity to go further in the Senate asserting a greater role in the selection process.

Many would be surprised to know that, in an original draft of the Constitution, the Senate was to select the Supreme Court nominess, a function which is difficult to fathom, given our problems in deciding even lesser questions where agreement is necessary. In an early case involving John Rutledge, the Senate rejected the nominee based solely on the political ground that he had voted against the Jay Treaty.

But in Judge Souter's nomination, Madam President, there has not been an effort by the President to carry out an agenda. There was no litmus test applied Judge Souter flatly stated, as did President Bush. There was no question asked about where Judge Souter stood on the abortion question.

So, Madam President, in sum, we have a nominee who comes to the Senate, through the Judiciary Committee hearings, with an extraordinary academic background, able experience as a practicing lawyer and as a jurist, who has given a view of his judicial philosophy both in his extensive writings, some 200 opinions, and his testimony, and, notwithstanding the variance, well within the continuum of constitutional jurisprudence. I intend to support him in the committee and on the floor.

It would be my hope, in conclusion, that we will find it possible in normal processes, without rushing to judgment, to complete our action on Judge Souter in time for the first Monday in October, so that he could take a seat on the Court, which has such very important work to do.

I thank the Chair and I yield the floor.

Noting the absence of any other Senator on the floor, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

PAYING FOR DESERT SHIELD

Mr. BYRD. Madam President, I support the actions that the President has taken thus far in response to the unprovoked and totally unjustifiable Iraqi invasion of Kuwait. He has acted forcefully, and, at the same time, he has helped to increase the stature of the United Nations by helping to build strong coalitions around resolutions to enforce an effective embargo against Iraq. In addition, the President and his Cabinet have engaged in a productive campaign to enlist the support of our allies and friends around the world to provide the necessary resources on the ground and in the waterways in the Middle East to deter further Iraqi aggression.

One can only speculate, but, without such expeditious and forceful actions by the President, the chances of further aggression by Iraq into Saudi Arabia may very well have already taken place.

The Department of Defense has incurred additional costs in fiscal year 1990 due to the extensive deployment of American men and equipment that has been made in the region of the Persian Gulf. I believe that we should support the request that has been submitted to the Congress for supplemental appropriations of $1.89 billion in funds to offset those heretofore unexpected expenditures at the end of the fiscal year.

The administration has made a strenuous effort to enlist financial commitments by many countries for the Desert Shield operation, and operation that very well may endure for many, many months in the next fiscal year. Reports vary on the size of the commitments to date, but they are fairly substantial, certainly running well over $10 billion. One report of Secretaries Baker and Brady's recent worldwide solicitation efforts to secure commitments of men, equipment, and financial resources indicated that the administration has set a goal of some $23 billion in such financial commitments. Other indications are that the administration expects Desert Shield to cost $15 billion in fiscal year 1991, and expects to offset that with at least $7 billion in foreign contributions. These are very large sums of money.

Madam President, I believe it is appropriate for all nations to shoulder as much of the burden, in men and money, as they can. Some countries have indicated, as have Saudi Arabia, Kuwait, the United Arab Emirates, Japan, Germany, France, and Great Britain, that they are prepared to commit large amounts of financial resources and in some cases very sizable numbers of men and equipment. I am gratified to hear of the commitments that have been made to date. These dollars will make the load on the American taxpayer easier to bear over the duration of this expensive enterprise.

However, Madam President, the existence of this emergency and the financial contributions that will be made do not provide any rationale for the President to circumvent the constitutional powers of the Congress to exercise its responsibilities over the purse. There is no legitimate reason for the administration to ask, as it has in the supplemental appropriation request, that the contributions be given directly to the Secretary of Defense so that he can dispense it pretty much as he likes without its first being appropriated out of the Treasury by the Congress.

The administration appears to be relying on the precedent of a little known statute enacted in 1954, the Defense Gift Act, chapter 26, 50 U.S.C. 1153, which was apparently enacted to allow patriotic citizens to donate small gifts into a special fund to be used for defense purposes. These small donations are supposed to go to the Treasury, which then disburses them to the Pentagon to be used in accordance with the wishes of the donating American citizens.

The statute certainly never contemplated that such a petty cash fund would be used to accept donations of billions of dollars from foreign countries, international organizations, or foreign citizens outside the normal process set up by the Constitution for the appropriation and accounting of funds.

The use of the Gift Act is completely inappropriate for this purpose. Even more inappropriate is the statutory language submitted by the administration, in its supplemental request, which would give sweeping new authority for the Secretary of Defense to accept property, services, or money from anyone and everyone to be used in the wide exercise of discretionary authority—in effect, to establish a military spending slush fund.

The Constitution, in article I, vests the power of the purse in the legislative branch. Article I, section 9, clause 7 contains a key foundation of our system of government, and it states, "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The administration has abided by this provision in submitting a request for $1.89 billion in supplemental appropriations to offset the increased defense expenditures associated with Desert Shield. I certainly support the request for appropriations contained in the supplemental.

In addition, as I have said, I support the financial commitments to help offset this operation by those countries and international organization that can afford it, as well as substantial commitments of forces and equipment by as many members of the international community as possible. Certainly, the Congress will want to take into account the contributions that are made to the U.S. Treasury for these purposes and will want to know about them, will want to know the amounts involved, and will want to expend them through the legislative process set forth in the Constitution.

The American people do not feel that they should foot the entire bill, so we should offset that bill as much as possible with the funds contributed from abroad. When it becomes clear how long the operation will last—and there is no way of knowing that—and how much it is costing, the administration will certainly get expeditious consideration of additional supplemental appropriations requests as we go down the road. All requests will be very carefully examined by the appropriations committees of the Congress, and the Congress will respond appropriately, I am sure.

All this, however, has nothing to do with altering the basic balance of powers of the respective branches in the Constitution. No amount of Desert Shield requirements can justify eroding the power of the legislative branch under the Constitution to appropriate money by setting aside that constitutional authority.

Madam President, I ask unanimous consent that an editorial on this subject from today's Washington Post be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

END RUN BY THE PENTAGON

Who should control the billions of dollars that foreign governments are contributing toward the cost of operation Desert Shield? The Pentagon has come up with the bright idea that it should. True, the Constitution says "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." But this is a special circumstance, the national interest is involved,

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PROCEEDINGS AND DEBATES OF THE 101st CONGRESS, SECOND SESSION

SENATE—*Monday, September 24, 1990*

(Legislative day of Monday, September 10, 1990)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the Honorable WENDELL H. FORD, a Senator from the State of Kentucky.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

Wherewithal shall a young man cleanse his way? by taking heed thereto according to Thy word. Thy word have I hid in mine heart, that I might not sin against Thee. Teach me, O Lord, the way of Thy statutes; and I shall keep it until the end.—Psalm 119:9, 11, 33.

Eternal God, perfect in all Thy ways, Creator, Sustainer, Consummator of history in these crucial, unpredictable hours lead us in Thy way.

Thou knoweth each of us; none is a stranger to Thee, whether they be leaders in the Middle East, Europe, Africa, Asia, or the Americas. History is known to Thee, to the end, from the beginning and where we are in between.

Give us grace, dear God, to seek Thy way, to take Thee seriously, lest we turn from Thee and lose our way. Lead us in Thine way everlasting.

In Jesus' name. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. BYRD].

The bill clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, September 24, 1990.

To the Senate:

Under the provisions of Rule I, Section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable WENDELL H. FORD, a Senator from the State of Kentucky, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. FORD thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the standing order, the acting majority leader is recognized.

SCHEDULE

Mr. CRANSTON. Mr. President, this morning following the time for the two leaders, there will be a period for morning business not to extend beyond 10 a.m. with Senators permitted to speak therein for up to 5 minutes each.

Today, from 10 a.m. to 5 p.m., the Senate will consider S. 1224, the CAFE standards bill. Any rollcall votes on amendments on which agreement can be reached will occur after the Senate completes action on S. 1511, the older workers bill.

Under the previous unanimous-consent agreement, the Senate will consider S. 1511 for 2 hours today, beginning at 5 p.m.

Therefore, Mr. President, there will be no rollcall votes before 7 p.m. If there are votes, they will commence at that time relative to S. 1511.

RESERVATION OF LEADER TIME

Mr. CRANSTON. Mr. President, I ask unanimous consent that the time for the two leaders be reserved for their use later today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business, not to exceed 10 minutes, with Senators permitted to speak therein for not to exceed 5 minutes each.

The Senator from California.

Mr. CRANSTON. Mr. President, I am about to speak on the nomination of Judge David Souter.

I believe following my remarks Senator MOYNIHAN, the distinguished Senator from New York, will speak on another matter of very, very grave concern to the gulf situation and the role of Congress in respect to that.

I ask unanimous consent that I may proceed for 18 minutes.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. MOYNIHAN. Mr. President, reserving the right to object, and I shall not object, I ask the distinguished acting majority leader, would it be possible that the time for morning business be extended to 10:30? And if so, I so request.

EXTENSION OF MORNING BUSINESS

Mr. CRANSTON. Mr. President, I think that is possible.

If there is no objection, I ask unanimous consent that the time for morning business be extended until 10:30 a.m.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The period for morning business has now been extended to the hour of 10:30 a.m.

SOUTER NOMINATION

Mr. CRANSTON. Mr. President, I rise to express my position on the nomination of David Souter to succeed Justice William Brennan as an Associate Justice of the U.S. Supreme Court.

The vote to confirm an individual to assume a lifetime position on the Supreme Court is one of the most important votes that any member of the Senate is ever called upon to cast.

The Constitution requires that those serving in two branches of our govern-

ment, the Congress and the Presidency, shall serve for fixed terms and shall be directly accountable to the electorate at regular intervals. In contrast, those serving in the third branch on the Supreme Court may serve for life. A Justice can be removed from office only upon impeachment and conviction of the severest of high crimes. The individual who succeeds Justice Brennan may serve for two and perhaps three decades, affecting the lives of millions of Americans and generations of future Americans. Those individuals who serve on the highest court of this Nation are entrusted with the responsibility of safeguarding the individual rights and liberties secured by the Constitution, and particularly the Bill of Rights.

Mr. President, the founders of the Constitution gave the U.S. Senate a very important check and balance: the power to approve or disapprove the nomination by the President of an individual to serve on the Supreme Court. Each individual Senator must determine what criteria he or she will apply when voting on a Supreme Court nomination.

Some take the position, espoused by former Attorney General Griffin Bell during his testimony supporting the Souter nomination, that there should be a rebuttable presumption in favor of confirming a nominee selected by the President.

In view of the eminently clear formula for checks and balances between the three branches of our government which is set forth in the Constitution, I have a very different view of the Senate's responsibilities.

In 1986, after extensive research and deliberation, I set forth my view on the responsibilities of the Senate in exercising its advise and consent with respect to a nomination to the Supreme Court. I did so in a Senate speech that appears in the CONGRESSIONAL RECORD of July 21, 1986. That view—expressed long before this nomination or even the Bork nomination—is that the Founding Fathers intended that the Senate should have a coequal responsibility with the executive branch in placing individuals on the Supreme Court. One of the framers of the Constitution, Gouverneur Morris, summed up the constitutional provisions on judicial appointments as giving the Senate the power "to appoint judges nominated to them by the President." Indeed, I believe that this coequal role generally has been recognized throughout most of our Nation's history, with nearly one in five of the nominations to the Supreme Court having been rejected by the Senate.

Thus, I approach this responsibility with much more gravity than merely approving a President's nomination. Way back in 1971 when the Senate considered the nomination of Justice Powell, I articulated a standard which I believe must be met by a nominee to win my vote for confirmation.

I have said in the past that the nominee must demonstrate "a basic commitment to and respect for individual rights and liberties inherent in the fabric of the Bill of Rights, for it is these rights that stand as the last bulwark between the force of government and individual freedom."

I believe that under the Constitution the burden of proof is on the nominee to establish a commitment to these fundamental rights which are protected by our Constitution.

The nomination of Judge Souter poses a perplexing dilemma. On the one hand, there is no question that he possesses the intellect and character appropriate for a judicial office. A former Rhodes Scholar, Judge Souter has impressed me with his impressive command of the law, his engaging personality, and his humility regarding the responsibilities of members of the judicial system to ensure the fair administration of justice.

The question for me is whether he has met the burden of proof in establishing his understanding of, and his commitment to, the concept of individual liberty, as embodied in the spirit and words of the Constitution.

In the case of Judge Souter, this task is complicated by the fact that although he has made the law his vocation and has performed admirably, he has virtually no prior record by which the presence or absence of that commitee can be measured. The nominee at the age of 51 has served as Federal judge for only a few months prior to his nomination to the Supreme Court and has participated in no decisions. His service as a trial court judge for 5 years and as a member of the New Hampshire Supreme Court for 7 years likewise resulted in few decisions of constitutional dimension.

Prior to his service in the New Hampshire State judiciary, Judge Souter served for a number of years in the State attorney general's office, eventually becoming the New Hampshire attorney general. Quite frankly, Mr. President, some of the positions he espoused as attorney general of the State of New Hampshire—particularly those relating to separation of church and state under the first amendment and the power of Congress to implement the 14th amendment's provisions relating to racial equility—are disturbing. Although I share some of the concern expressed by various members of the Judiciary Committee regarding positions he took as attorney general that appear inconsistent with his oath of office to defend the Constitution, it is important to distinguish between those positions he felt obligated to assert on behalf of his client and his personal views.

However, Judge Souter was unwilling to make that distinction clear in matters relating to abortion in his testimony before the Judiciary Committee. Of course, if an attorney cannot in good conscience represent the needs and views of his client, he can either refuse to handle the case or he can resign his post.

In the case of Judge Souter, the restraints upon evaluating what an attorney is obligated to assert for a client and the limited number of constitutional issues addressed in his opinions on the State court result in a very scanty prior record upon which the Senate must render its decision.

In contrast, Mr. President, the last nominee to be confirmed to serve on the Supreme Court, Justice Anthony Kennedy, although only 51, had served as a Federal judge for 12 years and had taught constitutional law for a number of years. His opinions on the Federal court and activities as a constitutional scholar provided the Members of the Senate with numerous examples of his reasoning and approach to fundamental constitutional questions.

This is not the case with regard to Judge Souter. Indeed, it is no secret that many believe that President Bush selected Judge Souter precisely because there was no prior record of his views on constitutional issues. It may well be that after he has served on the Federal bench for a reasonable time, he will have developed a distinguished record on constitutional issues that would establish him as an outstanding nominee for a future Supreme Court vacancy.

However, in the absence of any meaningful prior record that would help determine how Judge Souter approaches fundamental constitutional questions, Members of the Senate are left to make a judgment based almost exclusively on Judge Souter's 3 days of testimony before the Senate Judiciary Committee.

And here, Mr. President, lies the crux of the problem for me and, I presume for other Senators.

Judge Souter has determined that the Members of the U.S. Senate are not entitled to know his views on one particular area of constitutional law—the area involving the right to privacy in matters relating to procreation—before voting on his nomination.

He steadfastly and persistently refused to answer any questions relating to this complex area although he was forthcoming in various other areas of constitutional law which may come before the Supreme Court during his term. It is difficult for the Senate to advise and consent to a nomination when the nominee is not forthcoming during the very process which is clearly defined in the Constitution as our obligation to carry out.

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 could not 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 or the U.S. Senate, to my knowledge, has asked Judge Souter to state how he would rule on any prospective case.

That is not what this debate is about. What Judge Souter has declined to do is reveal any of his views on the line of cases involving the fundamental right to privacy, of which Roe versus Wade is part.

During the course of his testimony, Judge Souter conceded that he did have a view regarding Roe versus Wade at the time the decision was rendered in 1973, but he would not reveal to the members of the Judiciary Committee what that view had been.

He declined to state whether he agreed or disagreed with the specific holding in the 1963 Griswold decision relating to the right of married couples to use contraceptives. He was unwilling to address the question in Eisenstadt of whether the right of privacy encompassed the rights of unmarried individuals to utilize contraceptives, although he did acknowledge the existence of a marital right of privacy.

He declined to tell the committee what his personal views on the issue of abortion were on the grounds that some might not accept the fact that his personal views would have no impact upon his judicial views. I would note that Justice O'Connor answered precisely that question and told the Judiciary Committee that she was personally opposed to abortion. She was nonetheless endorsed by numerous women's groups and confirmed by the Senate which recognized that her personal views and her judicial views were distinguishable. Justice Kennedy also distinguished his personal views from his judicial views on this issue when he appeared before the Judiciary Committee.

Mr. President, it is important to note that Judge Souter did feel free to discuss his views on numerous other issues that will be coming before the Supreme Court in the years ahead. He did not hesitate to tell the committee that he found no basis for a constitutional bar against capital punishment. He talked at length about specific cases and legal principles relating to the free exercise and establishment clauses of the first amendment—issues which are the subject of heated contemporary constitutional debate and most likely to come before the Court in the very near future. He expressed his areas of discomfort with the Lemon decision relating to separation of church and state as well as his views on the appropriateness of the strict scrutiny test for free exercise cases.

Yet, illustrating the problem which troubles me about his nomination, he declined to discuss similar matters—including the level of scrutiny to be applied—in privacy cases.

My quandary, simply put, is whether I can vote to confirm a Supreme Court nominee who refuses to reveal his views on the legal doctrines involving one of the most important constitutional issues of our time.

Mr. President, I respect and do not challenge Judge Souter's conclusion that he cannot discuss what might be his ultimate decision on Roe versus Wade. I accept the sincerity of his statement that he will not go on the Court with a preconceived agenda on how he will rule before he hears the arguments of the parties.

However, I do not believe that I can fulfill my own constitutional responsibility as a member of this body to make a judgment on the basis of the record before me as to whether or not this nominee has an adequate understanding of and commitment to one of the most fundamental and important constitutional rights citizens of the country inherently possess—the right to privacy.

For that reason, I will vote against the nomination.

THE "SINGLE ISSUE" ISSUE

Mr. President, I want to address the question which has been raised as to whether it is somehow inappropriate to vote against a nominee because of problems relating to a "single issue."

First, let me make it clear that I am not voting against this nomination because I disagree with Judge Souter on the issue of abortion, since I have no idea what his views are on abortion.

I will vote "no" because Judge Souter will not reveal his views on a fundamental constitutional issue—the right of privacy.

I will vote "no" because I do not believe that I can exercise responsibly my constitutional duty to advise and consent to a nomination when the nominee has determined to carve out one special and controversial area of the law in which he refuse to reveal his opinions—for whatever reason.

Second, it is important to understand that it is not simply the single issue of abortion or the 1973 Roe versus Wade decision that Judge Souter has refused to discuss in his testimony. He has declared the entire line of cases involving the right to privacy off-limits for discussion.

Finally, Mr. President, I am dismayed that the issue of privacy is regarded by some as "just a single issue" lacking in the kind of substantive weight that would justify a negative vote on this nomination.

There is no question but that a nominee who would vote to overturn Brown versus Board of Education or refuse to discuss that case would be rejected on the basis of the single issue of desegregation.

There is no question but that a nominee who asserted that the establishment clause of the first amendment would not preclude state officials from placing crucifixes in every public school classroom or who refused to discuss his views on cases involving freedom of speech would be rejected on the basis of such "single issues."

The right of privacy, encompassed in the long line of cases that preceded Roe and which are inextricably entwined in the Roe holding, is as important to millions of Americans as are rights relating to race or religion.

The right of privacy—the right of each American to be left alone and to be free from government surveillance and the right of each American to determine the ways in which he or she lives his or her personal life—is one of the most fundamental liberties that each American expects to enjoy. The founding fathers sought to ensure these rights two centuries ago in the Bill of Rights.

The United States of America is not a nation like Romania where government officials forced women to submit to monthly pregnancy tests or like China where the government imposes sanctions on citizens who bear more than their allotted number of children. As Justice Douglas articulated in the Griswold decision, this is not a society where we would allow the police to search our bedrooms for the "telltale" evidence of contraceptive use.

To me, the right of privacy in matters relating to family life and procreation goes to the very essence of the liberty and freedom from Government control that Americans deeply cherish. The right of privacy is not just a single issue—it is part and parcel of the fabric of ideals and values that is unique to our Nation.

Mr. President, the Supreme Court cannot overturn the Roe decision without also dismantling the cases which preceded and follow it relating to the fundamental right to privacy. The Supreme Court cannot take away the constitutional basis for the right to choose in matters relating to termination of a pregnancy without endangering the constitutional protections laid out in Griswold and Eisenstadt that allow individuals, married or unmarried, the right to purchase and utilize contraceptives to prevent pregnancy. Judge Souter understands that

linkage and indicated that is precisely the reason that he will not discuss the holdings in the two Supreme Court decisions involving contraceptives, Griswold and Eisenstadt.

OTHER CIVIL RIGHTS CONCERNS

Mr. President, in focusing my remarks on the problems which arise for me as a result of Judge Souter's refusal to respond to questions relating to the constitutional issues involving the right of privacy, I am not unmindful that a number of other concerns also have been raised about his position relating to basic civil rights questions. I also am concerned that his statement that there are no racial discrimination problems in the State of New Hampshire suggests a surprising lack of awareness of the nature of these issues.

CONCLUSION

Mr. President, let me conclude by saying that my decision to vote "no" on the nomination of Judge Souter did not come about lightly.

I recognize that in many of the statements Judge Souter made during the course of his hearing he appeared to be willing to embrace an expansive reading of the nature of constitutional liberties. This is very encouraging to those of us who see the Court's role as a guardian of individual liberties. His acknowledgement that the Bill of Rights and the Constitution itself were intended to limit the powers of Government over the liberty of individuals in areas not specifically enumerated is also encouraging. I hope that if Judge Souter is confirmed that the promise of these statements will be borne out in his actions in specific cases before the Court. I also am keenly aware of the argument that Judge Souter's commitment to keep an open mind when the Court reconsiders Roe versus Wade is probably the best that I and millions of other Americans who believe in a woman's right to choose can hope for from any nominee proposed by a President who has asked the Supreme Court to overturn Roe versus Wade. But given my view of the obligation of a Senator in casting a vote to confirm a nomination to the Supreme Court and given my view of abortion as reflected in my authorship of the Freedom of Choice Act now pending in the Senate and given the fact that Judge Souter, if confirmed, may well be the swing vote on this issue, I cannot vote to confirm his nomination.

I cannot support a nominee who refuses to acknowledge that a woman's right to choose to terminate a pregnancy is a fundamental right or that the right of individuals, married or unmarried, to use contraceptives to prevent a pregnancy, is a matter of settled law. I cannot support a nominee who regards these issues as open questions.

My view of my responsibility under the Constitution to the generations of Americans who will be affected by those decisions—particularly the millions of young women whose very lives may well depend on the right to choose whether or not to carry a pregnancy—compels me to vote "no" on this nomination.

The ACTING PRESIDENT pro tempore. The Senator from New York.

Mr. MOYNIHAN. Mr. President, I just briefly want to thank the distinguished, able, learned, indefatigable Senator from California, the acting majority leader. He spoke this morning of various constitutional rights of the American people, and I would like to say, and I am sure he would agree, that there is one further right which might be alluded to here which is the right, the constitutional right of the American people, to know that the Supreme Court is formed jointly by actions of the President and the Senate. The Senator cited Gouverneur Morris' evocative and interesting phrase that the Senate appoints the Court from persons nominated by the President.

Any motion that there is a rebuttable presumption on behalf of a nomination—that the Senate ought to be basically pliant in response to a nomination—is altogether unconstitutional—even anticonstitutional, and speaks to a right of the American people. The American people have a right to know, a right that resides in the Constitution, to see that the procedures of the Constitution are maintained.

No one has spoken better, more forcefully, or in a more timely fashion to that issue than the Senator from California. I thank him.

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

Mr. CRANSTON. I wish to speak on the time of the Senator from New York for just 1 minute.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. CRANSTON. I thank my friend from New York for his very kind and thoughful remarks. He is a remarkable constitutional scholar, as well as a scholar on many other matters, and I think it is a rather remarkable coincidence that I came to the floor today to speak on a matter relating to the rights and prerogatives and responsibilities of the U.S. Senate and individual Senators on a matter of vast importance to the people of our country, the nomination of an individual to serve on the Supreme Court, and our joint powers in that matter, with the President of the United States.

The Senator from New York is here to speak on another grave constitutional issue at this very moment, what is occurring in the gulf, and the role of the Senate of the United States and the Congress, coequal with the President, in determining how force shall be used.

The Founding Fathers gave the Congress the right to declare war, and that is the subject upon which the Senator from New York is about to speak. I urge the Senate and the Nation to heed his words.

The ACTING PRESIDENT pro tempore. The Senator from Alabama is recognized.

JUDGE DAVID SOUTER

Mr. HEFLIN. Mr. President, the confirmation hearings on the nomination of Judge David Souter have been completed. They were comprehensive and thorough. These hearings reflected that careful study had been conducted by all members of the Senate Judiciary Committee during the August recess. Following the hearings I spent considerable time reviewing his writings and testimony, as well as further research on his background.

I am now persuaded that Judge David Souter should be confirmed for a seat on the U.S. Supreme Court. As I said in my opening statement before the committee hearings, the Senate must exercise its advise-and-consent responsibilities and in order to perform that role properly, we must have necessarily examined Judge Souter's background as to his legal competence, integrity, judicial temperament and the manner in which he would perceive his role as an Associate Justice on the Court.

There are those who testified before the committee who felt that the Senate needed to know Judge Souter's precise opinion on several issues of great interest, but I am of the opinion that this view is wrong—wrong especially for that of a judge whose prime function is to dispense justice fairly and impartially to those who come before his or her court and therefore not to prejudge issues without the benefit of briefs, research, and arguments.

Judge Souter's background—from excellent educational credentials to his experience as a State attorney general, trial judge, and Supreme Court Justice—has, in my opinion, more than adequately prepared him to sit on this Nation's highest court.

He perhaps ideally brings to the High Court 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.

In listening to the several days of testimony, including those who spoke on his behalf as well as those who spoke against him, I think it is noteworthy that those who know Judge Souter personally have the highest regards for his professionalism, his char-

acter and his integrity, and his humaneness. To a person, these witnesses, who have been practitioners and former associates of Judge Souter, have spoken highly of his fairness, impartiality, and willingness to listen. This listening quality must not be underestimated in the factors which go to make up a good judge. A judge may be brilliant, he or she may be a tireless worker, but if he or she has rigid predetermined notions, how can any citizen realistically expect a fair hearing of his or her case? I am persuaded that Judge Souter possesses this endearing quality of being willing to listen—to be fair and impartial.

I accept Judge Souter's response to our committee's questions on the issues regarding the doctrines of original intent, stare decisis, statutory construction, and judicial restraint. I believe he will respect precedent regarding previous interpretations of the Bill of Rights, the due process and the equal protection clauses of the Constitution, as amended. Judge Souter will not bring a scorched earth philosophy to the Court, but he will bring a sense of historical prospective and a clearheaded approach to the analysis of legal issues.

In the end we in the Senate must ask ourselves, what is the primary role of the Supreme Court of our Nation? It is the ultimate arbiter of the Constitution and last guarantor of our freedoms.

The late Supreme Court Justice Tom Clark in an articie on Justice Felix Frankfurter stated:

For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guaradians—those impersonal convictions that made a society a civilized community, and not the victims of personal rule.

[Mr. Justice Frankfurter: "A Heritage For All Who Love The Law" 51 ABAJ 330 (1965).]

The Senate's advise and consent function of the Constitution has required that we look into Judge David Souter's mind and heart and ask if he will dispense justice fairly and impartially to all of those who will come before him.

Judge Frankfurter perhaps stated a judge's function best in a tribute to the late Supreme Court Justice Robert Jackson when he said:

What becomes decisive to a Justice's functioning on the Court in the large area within which his individuality moves is his general attitude toward law, the habits of the mind that he has formed or is capable of unforming, his capacity for detachment, his temperament or training for putting his passion behind his judgment instead of in front of it. The attitudes and qualities which I am groping to characterize are ingredients of what compendiously might be called *dominating humility.*

[Frankfurter, Felix, Foreward, to Memorial Issue for Robert H. Jackson, 55 Columbia Law Review (April, 1955) p. 436.]

I am willing to chance that Judge David Souter possesses these qualifications. I hope he will be a faithful steward of our Constitution and will uphold the Supreme Court standard of equal justice under law.

The ACTING PRESIDENT pro tempore. The senior Senator from New York is recognized for 5 minutes.

Mr. MOYNIHAN. Mr. President, I ask unanimous consent that I be allowed to speak in morning business for as long as is necessary, in the absence of any other Senator seeking immediate recognition. I had thought we had an understanding that the acting majority leader planned to be speaking about 18 minutes and that I would take about the same amount of time. Will I be allowed 20 minutes?

The ACTING PRESIDENT pro tempore. Is there objection to the Senator's request? If not, without objection, it is so ordered. The Senator may speak until some Senator arrives, and that could be 6 minutes.

THE PERSIAN GULF AND A NEW WORLD ORDER

Mr. MOYNIHAN. Mr. President, on Thursday morning of last week our learned and hugely respected colleague, the senior Senator for Oregon, addressed the Senate on the subject of the recent deployment of American forces in the Persian Gulf. He began by expressing the pride which he felt, which we all feel, on the occasion that he took that majestic oath of office: "to support and defend the Constitution of the United States * * *."

He continued:

But today, Madam President, that pride has somewhat diminished, because, as tens of thousands of American men and women are being sent to defend Saudi Arabia and the nations of the Persian Gulf—as the largest United States military deployment since the Vietnam war is well underway—this very Congress is cheering with one hand and sitting on the other hand. With the responsibility entrusted to this body by the Constitution and the War Powers Resolution staring us in the face, we are turning the other way. Collectively and individually, we are turning our backs on that sacred oath of office that we have taken. We are turning our backs on the law that we swore to uphold—and we are turning our backs on the responsibilities given to us by the framers of the Constitution.

And he concluded:

As things stand now, U.S. soldiers are implementing only an executive branch policy.

And that is not enough. They should be implementing a U.S. policy that has the full support of the Congress of the United States and involves all of this Nation's people.

It happens that at the very hour Senator HATFIELD was speaking here, out Permanent Representative to the United Nations, Ambassador Thomas R. Pickering, was testifying before the Foreign Relations Committee on the subject of the Persian Gulf crisis and I raised with him precisely the same point. I come to the floor this Monday morning to continue with the matter.

I should perhaps state at the outset that Senator HATFIELD and I are not entirely of the same mind as regards the relevance of the War Powers resolution to the present situation. I would hold that the relevant statute, if indeed there is a relevant statute, would be the United Nations Participation Act of 1945. But this is a small matter alongside the great fact that the Constitution surely indicates that the Senate ought to—must—participate in this action through debate and, soon now, a formal statement.

Another cogent statement on this subject appeared in this morning's Post. In an editorial entitled "Action in the Gulf: Get Congress to Vote Now," our distinguished colleague Senator COHEN argues that—

President Bush would serve his own decision and America's cause well by complying with the formal provisions of the War Powers Act and asking the congressional leadership to schedule a vote in support or rejection of American forces being placed in circumstances involving imminent hostilities. It would not be impossible for Congress to reverse its course later and cast stones at the Oval Office, but it would be harder for it to do so once its members formally are on record in support of the operation.

The opening statements at the committee hearing led directly to this question. Senator PELL began

In his speech to the nation Tuesday evening President Bush spoke movingly of a "fifth objective" for our Persian Gulf policy. This objection is the creation of a new world order, a world, to quote President Bush, "quite different from the one we've known, a world where the rule of law supplants the rule of the jungle."

Ambassador Pickering responded in perfect harmony.

Two weeks ago Secretary Baker testified that "the Iraqi invasion of Kuwait is one of the defining moments of a new era—a new era full of promise, but also one that is replete with new challenges" Much of that promise and many of those challenges are to be found at the United Nations.

These are large pronouncements that respond, if anything, to even larger events. A new world order. A defining moment of a new era. The sudden reappearance of the United Nations as the setting of American foreign policy. We have not spoken in such terms for nearly half a century.

At one level events are simple enough. Almost half a century after it was founded, the United Nations appears to be working in the way we had hoped it would do. In the way we designed it to do, for the United Nations, after all, was preeminently the creation of President Franklin D. Roosevelt and his Secretary of State Cordell Hull. It embodied both the great hopes and the great anxieties that accompanied the end of the Second

Wing, Kentucky National Guard, Sergeant Orange's first exposure to our military was in the U.S. Marine Corps. While in the Guard, he has distinguished himself in the combat control field, and by successfully completing jump masters school.

Mr. President, I ask that a brief narrative of Sergeant Orange's accomplishments appear in the RECORD so that my colleagues may appreciate his commitment and dedication to our country's defense.

The narrative follows:

SMSgt. David M. Orange, Sr., Combat Control Supervisor, combat control team, 123d Tactical Airlift Wing, Kentucky Air NationaL Guard, Lousiville. The ANG is a second military career for Sergeant Orange, who first served in the Marine Corps. In the Corps, he was an E-6 by age twenty-two. In the Guard, Sergeant Orange has become a role model for those in the Combat Control field. This career path is new to the Reserve Forces, and Sergeant Orange has organized a complex schedule of tasks necessary to maintain the Combat Control Team's readiness. He coordinates his team's activities with the Joint Airborne Air Transportability monthly conferences, the National Guard Bueau, and Military Airlift Command.

Sergeant Orange completed the Combat Control training pipeline, which has a washout rate of eighty percent. In addition, he attended Jump Master School even before completing required minimum time on jump status and passed the course.

Sergeant Orange further distinguished himself at Combat Control School by earning two top honors: the Jerome Bennett Award for demonstrating the highest qualities of leadership and professionalism and the Honor Graduate Award for earning the highest academic and performance grades.

DEAR SENATOR MCCONNELL: I am honored to inform you that SMSgt David M. Orange, Sr., from Lousiville, KY, has been named one of the Air Force's 12 Outstanding Airmen of the year. These dozen airmen, presented each September at the AFA's National Convention, represent the best of the force.

Enclosed for your convenience is a brief narrative of the individual's accopmlishments.

LT. COL. JIM TAPP,
Chief, Senate Liaison.●

NOMINATIONS OF DAVID HACKETT SOUTER

● Mr. DECONCINI. Mr. President, I am announcing today my decision on the nomination of David Hackett Souter to be an Associate Justice of the U.S. Supreme Court. After studying his judicial record and participating in his confirmation hearings, I have decided to vote in favor of the nomination.

As I have so often said in the past, I believe that the constitutional responsibility to "advice and consent" on the President's nominee to the Supreme Court is one of the most important responsibilities granted to a U.S. Senator. For Judiciary Committee members, that duty becomes more acute since we are entrusted with the role of determining the nominee's identity and philosophy.

Once again, the hearings have proven to be a critical part of the nomination process. I would like to commend Chairman BIDEN and the ranking member, Senator THURMOND, for their stewardship in these hearings. They have done a remarkable performance in conducting these fair and impartial proceedings.

In Judge Souter, President Bush nominated an individual with intellectual ability, integrity, and judicial temperament. He has a wealth of experience as a State attorney general and a State supreme court justice. Indeed, he has devoted his life to public service. Over the 5-week period between the announcement of Judge Souter's nomination and the onset of his hearings, I had the opportunity to read numerous opinions written by Judge Souter. Opinion after opinion exhibited clear and concise legal reasoning. His writing reflected a great understanding of the legal issues before him.

In addition to his impressive credentials, Judge Souter received great accolades from his colleagues and lawyers who appeared before him. They praised his fairness, temperament and judicial skill. He was unanimously given the American Bar Association's highest ranking for this post.

My initial impression of Judge Souter was very positive. However, I stated at the outset of the hearings, there was still much to learn about Judge Souter. Supreme Court justices possess tremendous power in our system of government. Thus, it is essential that each Senator feel secure placing our individual liberty, freedoms and the future of our country in the nominee's hands. We needed to know how Souter would handle the great constitutional issues of our day.

Throughout the hearings, I personally believe that the nominee was forthcoming in his responses regarding issues that he was at liberty to discuss. During his 3 full days of testimony, Judge Souter was asked questions on a wide range of topics regarding his attorney general briefs, his State court decisions, and his opinion on settled constitutional law. At times, Judge Souter refrained from answering questions on controversial areas of the law. I do not challenge his prerogative to draw a reasonable line on the propriety of answering certain questions. We may quibble where he did in fact draw the line, but this Senator was left satisfied with his responses.

It was not too long ago when he had nominees who would stonewall this committee. That strategy will no longer be tolerated. As Chairman BIDEN so eloquently stated at the outset of these hearings, the Senate and the American public have a right to know where David Souter stands on these great issues. Now that the hearings have concluded, I believe we can envision what sort of Justice David Souter will become.

From the beginning he alleviated the concerns of many of my colleagues and myself in recognizing a general right-to-privacy in the Constitution. I believe that right does exist in the Constitution and that it is fundamental to the liberty and freedom that each American believes the Constitution protects.

It also became quite evident 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.

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. But I feel confident that he will not attempt to dismantle the protections the Court has provided in this area.

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 our country well.

We have no absolute assurances how any nominee or sitting Supreme Court Justice would vote. The Constitution does not entitle the Senate 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 feel confident that Judge Souter will guard these rights judiciously.

In the end, I believe the process worked. President Bush presented us with a nominee possessing intellectual excellence, integrity, judicial temperament and experience. The Committee thoroughly examined the nominee and questioned him on the great constitutional issues of our day.

I honestly believe that President Bush chose Judge Souter because he

will be a fair and open-minded 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 members of this committee 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. I urge my colleagues to confirm Judge Souter.●

IONA COLLEGE 50TH ANNIVERSARY

● Mr. D'AMATO. Mr. President, from one building and a total of 93 students, Iona College has grown over the last half-century both in size and diversity, as well as in the focus and reach of its programs.

Founded in 1940 by the Congregation of Christian Brothers, Iona takes its name from an island located in the Inner Hebrides, just off west coast of Scotland. There the Irish monk, Columba, established an abbey from which missionaries went forth to teach and evangelize. The island of Iona beame a beacon of faith and learning which contributed significantly to the civilization and cultural development of Western Europe.

The strength of this heritage still endures at Iona 50 years after its establishment, both in the commitment to its founding principles and in the resolve to discover new ways of expressing those principles in our everchanging time.

With an enrollment of 7,000 students from all over the Nation and around the world, Iona has emerged as the 16th largest independent college in New York State. And it has grown in strature as well as size. Iona has taken a leading role in harnessing the forces of technological and global change and tying them into the traditional liberal arts and business administration curriculum. Through alumni support and the backing of prestigious foundations and corporations, Iona has been able to build new academic facilities, such as the Murphy Science and Technology Center. They have also expanded the range of its academic programs, offering four undergraduate degrees in 47 major fields, 17 separate graduate degrees, four post-master's programs, and several other postgraduate programs.

Throughout this period of expansion, Iona has worked to preserve the spirit of individual self-esteem and mutual respect—the genuine spirit of community—which characterized the college in its early days. I would like to take this opportunity to commend Iona College for its 50 years of dedication to academic excellence. During the past half-century, Iona has grown into one of New York's most respected educational institutions, and has truly lived up to its goals of scholarship, vision, and service.

CIRCLE OF POISON

● Mr. WILSON. Mr. President, this morning I would like to set the record straight on the circle of poison provisions of the 1990 farm bill.

This long overdue legislation, which incorporates provisions found in several bills which I have introduced during the last 3 years, will protect our food supply and our environment from illegal pesticides. It does so in a manner that respects the legitimate needs and interests of manufacturers and provides the flexibility needed to meet serious emergencies such as famine or plague and to encourage the development of new, less hazardous products. The Senate farm bill's circle of poison provisions that I and my colleagues on the Agriculture Committee worked so hard to draft is a responsible solution to a pressing problem. The House has made less rigorous circle of poison provisions part of their farm bill and the conference committee will soon meet to iron out the differences.

Of course there will be spirited debate on the exact terms of the final version which both the House and Senate will adopt. This is as it should be. But the debate must be fair and honest. Sadly, there are signs that this may not be the case.

One chemical company has circulated a deceptive letter to "Friends of Agriculture" which warns that "The Senate version prohibits the export of unregistered pesticides—no exceptions." This is not true, and they know it. In addition to allowing the export of unregistered pesticides for research or in cases of plague or famine, the Senate farm bill allows the export of unregistered pesticides whose active ingredient is the subject of a food tolerance; that is, a determination that it may be safely allowed on food. This latest provision was added by the Agriculture Committee to deal with pesticides which are used on crops such as coffee and bananas which are a large part of the American diet but are not grown here.

It is not necessary to register pesticides for use in the United States if they are not used here, and the bill drafted by the Agriculture Committee and adopted by the Senate does not impose that sort of senseless, makework burden on American manufacturers. But we know that today Americans eat from a global food basket and that if a pesticide is exported for use on food grown overseas, it will surely find its way to our dinner tables. Such a pesticide must be proven safe for our children's food. Thus the Senate farm bill allows the export of unregistered pesticides that are the subject of a food tolerance under the Food Drug and Cosmetic Act. Chemical manufacturers know this and have discussed the consequences of this with Agriculture Committee staff. Why then is a letter circulating that denies the existence of this carefully crafted provision?

This same letter says that the Senate farm bill will require U.S. companies "to wait until registration is achieved in the United States before testing and marketing products in other countries", thereby chilling U.S. R&D efforts. Again, this is untrue. As I mentioned earlier, the bill which we on the Agriculture Committee drafted allows the export of unregistered pesticides for experimental use including field testing. It simply requires that the manufacturer give to the government of the country where the experiments will be conducted a package of product safety data that is comparable to the data that one must make available to Americans before one may conduct pesticide experiments in the United States. The government of the country to which the experimental pesticide is being sent must also consent to the experiments which the manufacturer proposes to conduct on its soil. These perfectly reasonable provisions were added to our committee's bill in response to specific comments by domestic manufacturers.

Trade groups have also contributed to the stream of misinformation concerning the circle of poison bill. One trade journal claims that the bill imposes a "ban on research shipments" of pesticides. Again, the persons involved now that this is patently false.

As I said earlier, all of us expect a spirited debate on this bill. However, we must not allow our debate to be corrupted by those who would place falsehoods before us. Whoever engages in such behavior should know that the truth will eventually come out. Indeed we must wonder why such tactics are ever used at all.

I would be deeply offended if misinformation is being spread for the purpose of frightening Senators and Congressmen in the hope of scuttling this bill. I am certain that all of my colleagues, especially my colleagues on the Agriculture Committee who worked so hard to draft a good bill, would be similarly offended by such cynical manipulation.

I ask that all Senators join with me in urging our conferees to ignore any calculated deceptions and to consider the circle of poison provisions on its merits. I am confident that, upon doing so, the conferees will report back to us with a strong bill that preserves the provisions that were carefully wrought by our Agriculture Committee and adopted by the Senate.●

AWARD GOES TO FATHER-SON TEAM

● Mr. LEVIN. Mr. President, I rise today to pay tribute to George Curis, Sr. and George Curis, Jr., the father-son team who are this year's recipients of the March of Dimes "Alexander Macomb Citizen of the Year Award."

This duo is well-known, throughout metropolitan Detroit, for their Elias Brothers Big Boy Restaurants. George Curis, Sr., opened his first Big Boy restaurant in 1960. Currently, his three sons operate one of the largest franchisee chains in the Big Boy family. George Curis, Jr., serves as president of this franchise. His father is now president of Curis Management, Inc., which manages six different companies.

Despite their incredibly busy business schedules, both of these men devote a very considerable portion of their time to voluntary public service. George Curis, Sr., spends a good amount of his time working with the Capuchin Soup Kitchen. He is also actively involved with a number of charities, including; Boy Scouts of America, March of Dimes, and the Easter Seals. His son belongs to a large number of Michigan State University organizations. George Curis, Jr., also maintains an active role in the United Communities Services, March of Dimes, and the Easter Seals. Additionally, both of these men have dedicated much time, energy and financial assistance to the Catholic Church.

It is evident that George Curis, Sr., and George Curis, Jr., have made a life long commitment to helping the less fortunate. A wonderful example of this teams' selfless character is the emphasis they put on the March of Dimes' Award Dinner. In a statement to the press, they said, "The real award that night is knowing that the moneys raised through the benefit dinner and a silent auction will go to further birth defect research." Both generations of the Curis family can take well deserved bows upon receiving their award. I join the people of my State in congratulating the corecipients of this year's March of Dimes "Alexander Macomb Citizen of the Year Award."●

THE NOMINATION OF JUDGE DAVID SOUTER

● Mr. SHELBY. Mr. President, I rise today in support of the nomination of Judge David Souter to be an Associate Justice of the U.S. Supreme Court.

The advise and consent function, in regard to Supreme Court nominations, is one of the most important powers that a U.S. Senator possesses. However, before expounding further on the reasons that I support Judge Souter, I would first like to briefly examine my own approach to judicial nominees. I believe that a judge's only legitimate exercise of power is to apply the law to the facts of the case brought before him, under the proper judicial process, and to render a reasoned, unbiased decision. In particular, the law that a Justice of the Supreme Court must apply includes the Constitution, Acts of Congress, and prior decisions of the Supreme Court. Just as an ordinary citizen is bound by these three sources of law, so a Supreme Court Justice is bound.

If a judge were to deem himself not bound by the law, and decided cases on the basis of morality, personal or public opinion, then we would not have a government based on law. We would be faced with one of the great fears of the Framers of the Constitution, a government of men. Simply put, a dictatorship of the Judiciary.

I do not espouse a theory that judges are mere machines who look at only the letter of the law to decide cases. However, I do believe that a judge must work to ensure that his personal views do not become the basis for decisions.

I support Judge Souter because I believe that Judge Souter not only has a profound understanding of American constitutional law, but has a keen understanding of the role the Supreme Court plays in our society. Judge Souter, in his testimony, stated that judges are bound by the law. I believe that Judge Souter demonstrated in his 3 days of intense testimony before the Senate Judiciary Committee that he possesses the character, intellect, legal ability, and judicial temperament to become a great Supreme Court Justice.

I understand those individuals who have expressed concern about Judge Souter's refusal to be more forthcoming in testimony about specific issues. However, I do believe that Judge Souter was correct in refusing to respond to questions on how he will rule on specific cases that will come before the Court.

In his testimony before the Judiciary Committee, Judge Souter provided the Senate with some insights into his judicial philosophy. Judge Souter stated that the two important lessons that he learned from his days as a trial court judge were that:

First, whatever court a judge is in, whatever that judge is doing, whether it is on a trial court or appelate court, at the end of his task some human being is going to be affected; and

Second, judicial rulings affect the lives of other people and if a judge is going to change peoples lives by what he does, he had better use every power of his mind, of his heart, of his being, to get that ruling right.

Judge Souter, I hope you will remember those two lessons. When you join the Supreme Court, they will be even more important for a Supreme Court Justice than a trial court judge.●

TRIBUTE TO ISAAC STERN

● Mr. SIMON. Mr. President, one of the people who has been an inspiration through the years for my wife and me is Isaac Stern.

I have never had the privilege of meeting him, though I have talked with him on the phone.

Not only is he one of the world's greatest artists, recently he was interviewed by U.S. News & World Report and showed such eminent common sense that I thought my colleagues and staff members and others who read the CONGRESSIONAL RECORD would find it of interest.

I ask to insert the interview in the RECORD at this point.

The article follows:

ENCHANTING YOUR CHILD WITH MUSIC

When should a child be introduced to music?

Music is the most natural activity for a human being, and it should be a part of everyday life. A child should learn music just as he learns reading, writing and arithmetic; it should be just as central in his education. From the moment a child is born, he can be put to sleep with a song and awakened with a quartet by Haydn or a Bach cantata. There are dozens of wonderful musical videotapes for small children.

I was at Yo Yo Ma's the other day, and he had 30 videos and tapes in a basket for his children, classic tales like Kipling's Just So Stories set to music. They're put out by Sesame Street and Disney, by Puffin and Caedmon and even by Bobby McFerrin. Yo Yo told me he puts his kids to sleep with Mozart symphonies and Beethoven quartets—only the best-quality Muzak. You see, I believe in the subliminal power of what surrounds a child. Parents should have respect for that marvelously rich and questing thing called a child's brain. It's like a huge dry sponge, ready to absorb any kind of moisture you put near it. The more you feed it with good things, the more it will search for them.

When should formal musicial training start?

You can't really count on the normal child's span of concentration to be sufficient till the child is about 5 or 6. I know many parents are influenced by the Japanese system of teaching masses of even younger children by rote, but I don't think it's a great idea, because it becomes like teaching a kid how to pick up a fork: The child is put through a set of automatic physical maneuvers. But the child isn't learning because he wants to learn, and I think that's important from the very beginning.

It is most important to find a teacher who is passionate about music and knows how to reach a child. Education should be about discovery, about the exultation of being alive, the ecstasy of knowledge.

As for the kind of instrument, that depends on the child. The piano is probably best, because it is the musical instrument most closely connected with the way music is written—vertically, with chord structure and harmonic differences. But I think singing is a great thing to teach. There's a Hungarian system called the Kodaly [pro-

SENATE—*Wednesday, September 26, 1990*

(Legislative day of Monday, September 10, 1990)

The Senate met at 9 a.m., on the expiration of the recess, and was called to order by the Acting President pro tempore [Mr. KOHL].

The ACTING PRESIDENT pro tempore. Today's prayer will be offered by Father Godfrey Kloetzli, Terra Sancta College, Jerusalem.

PRAYER

The Reverend Father Godfrey Kloetzli, Terra Sancta College, Jerusalem, offered the following prayer:

Let us pray:

Almighty God we ask You to look upon us here. We realize, all too well, our human frailties and imperfections and ask You to help us overcome these.

We ask You to make us rise above all self-seeking and seek the good for our people.

As God who bestows all power on the human race, make us realize that we have been given power to decide issues which will either benefit our fellow citizens and, indeed, the peoples of the whole Earth, or harm them. Give us the insight to know what You want us to do and the courage and conviction to do so.

Let us take for ourselves the prayer of humble Francis of Assisi who achieved so much in his own day and throughout all the days in the nearly eight centuries since his time.

Let us repeat with him:

"Lord make me an instrument of Your peace. Where there is hatred, let me sow love; where there is injury, pardon; where there is discord, unity; where there is doubt, faith; where there is error, truth; where there is despair, hope; where there is sadness, joy; where there is darkness, light.

O divine Master, grant that I may not so much seek to be consoled as to console, to be understood as to understand, to be loved as to love; for it is in giving that we receive; it is in pardoning that we are pardoned; it is in dying that we are born to eternal life.

Amen.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business not to extend beyond the hour of 10 a.m. with Senators permitted to speak therein for not to exceed 5 minutes each.

The Senator from New Jersey [Mr. BRADLEY]; the Senator from New Jersey [Mr. LAUTENBERG]; and the Senator from Maryland [Ms. MIKULSKI], may be recognized for not to exceed 15 minutes each.

The Chair recognizes the Senator from Illinois.

Mr. DIXON. Mr. President, I ask unanimous consent to proceed in morning business for not more than 5 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

NOMINATION OF JUDGE DAVID SOUTER

Mr. DIXON. Mr. President, I rise today to announce my intention to vote in favor of the nomination of Judge David Souter to serve on the U.S. Supreme Court.

Before coming to a final determination, I took a number of steps, including an analysis of court decisions and published articles authored by Judge Souter; I reviewed materials presented to me by groups who either supported or opposed Judge Souter's nomination; and, finally, I thoroughly examined the testimony of Judge Souter and witnesses before the Judiciary Committee.

At every step, I found Judge Souter to be a fair, able, and conservative jurist.

The nominee has revealed himself to be open, not rigid, not tied to a death path, but fully aware the Constitution is a living document.

Further, Judge Souter has shown himself to be pragmatic, not doctrinaire, and with a respect for the rights and liberties of the individuals the Constitution protects.

While one never knows how any Justice will decide cases in the future, Judge Souter seems to be a man of character and integrity. His intellect and background are beyond reproach. He well deserves the American Bar Association's most qualified rating.

He evidences a real judicial temperament in the best sense of the word, and I am pleased to support his nomination.

I yield back the remainder of my time.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from New Jersey is recognized for 15 minutes.

THE NOMINATION OF JUDGE SOUTER

Mr. LAUTENBERG. Mr. President, I rise to announce that I will vote against the confirmation of Judge David H. Souter, to be an Associate Justice of the Supreme Court.

The Supreme Court has a profound and lasting impact on the lives of every one of our citizens. It is bestowed with the responsibility to interpret our Constitution, and is vested with the duty to enforce its promises of liberty, and equality, and justice. As it shapes legal rights and liberties from its lofty perch in our scheme of government, the Court shapes the hopes and the futures of average people living everyday lives across our Nation.

Will a victim of discrimination have restored to her the opportunity to reach their greatest potential? Or, will he be forever burdened? Will Americans be protected from government intrusion in their most private, personal affairs? Or will a woman be forced to bear a child against her will—denied the right to make one of the most personal of decisions, guided by considerations of health, counseled by her family, her doctors, and her clergy.

These are not legalistic matters. They are fundamental questions about the kind of lives Americans will lead. These are questions the Supreme Court toils with every day. These are the questions David Souter would face, if confirmed to the Supreme Court.

It is my duty to consider how David Souter would approach those questions.

The Constitution says, in article II, section II, paragraph 2, The President "shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * judges of the Supreme Court."

I consider the duty to review judicial nominations to be one of my most important responsibilities as a Senator.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

This is especially true when it comes to the review of nominations to the Supreme Court.

We are here to give our advice. To give or withhold our consent.

First, we must determine whether a candidate has the personal qualifications to sit on the highest court in the land. Is the person intelligent, honest and learned? Does he have the temperament to sit in judgment of his fellow citizens?

Does he have experience in the law? Does he apply the law with a sense of compassion for those it affects? Is his judging done in the abstract, or is it tied to real lives and real circumstances?

Judge Souter's career has been focused in the State court system of New Hampshire. He has not been called upon often to rule on matters of Federal constitutional rights. Yet, I have no doubt that he has the intellectual capacity and the integrity to sit as a Federal judge. I am confident that, if not seated on the Supreme Court, he would continue to be an asset to the Federal Court of Appeals for the First Circuit, to which he was recently confirmed.

Yet, we must go beyond the personal qualifications of the candidate and consider whether he will inject life into the rights and liberties of our people, enshrined in our Constitution and laws. We must be guided by our concept of what America and its laws should be, and what kind of Supreme Court we should have to interpret those laws, and to give life to the rights and liberties we hold so dear.

We have a great responsibility. Just as the President is empowered to make nominations, we are entrusted with the power to reject them. Our roles are equal. I do not accept the argument some would make, that there should be some presumption in favor of a nominee. Quite the opposite. I believe the burden is on the nominee.

We sit in review of someone who would sit as one of nine members of a separate branch of Government. This is not some post within the executive branch, some post in the President's own administration with a fixed term. For that, perhaps we can permit more flexibility and tolerate more doubt.

We sit in review not of some nominee to a district or circuit court. For that, we have accepted a wider diversity of personal views. Judge Souter was confirmed to the Court of Appeals. We can rely on his obedience to precedent and the word of the higher courts.

We sit in review of someone nominated at a very special time in the history of the Court, a time when the Court is sharply divided on basic questions of constitutional rights. The confirmation of a single justice could set the Court down a path that has the most profound consequences. Thusly, we are called upon, perhaps, to apply even greater scrutiny to this candidate than we have to others.

I have looked carefully at the candidate's views—as he has expressed them as a government lawyer and a judge, and as a witness before the Judiciary Committee in his confirmation hearings.

Based on that record, I am not satisfied that Judge David Souter would amply protect the rights and liberties of the individual that lie at the very core of our Constitution.

I start with his most general statements of how he approaches the task of interpreting and applying the Constitution. I am concerned that Judge Souter would not apply a broad, expansive interpretation of the Constitution, shaping and stretching it to meet today's understanding of liberty and today's expectations of our people.

Judge Souter has said that his task as a judge, who is bound to interpret the Constitution, is not one of discovering the original intent of the framers. Yet, he concedes little in recognizing that the framers, despite their brilliance, could never have imagined or intended the application of the Constitution to the specific cases presented by modern America.

Rather, Judge Souter says that his task is one of discovering original principles or original meaning, which in turn, can be applied to modern cases. Judge Souter would attempt to determine the principle that the framers had in mind, examining historical materials and traditions. I am concerned that when the search is completed, the principle of liberty that would be found would be the principle envisioned then; not the principle of liberty envisioned and expected today.

My doubts about what Judge Souter had to say generally about interpreting the Constitution are only heightened by what he had to say, and refused to say, specifically, about the right to privacy.

We live in a changing world. Human relations are quite different from what they were 200 years ago. The notion of privacy extends far beyond privacy within a marital relationship. It extends to control over basic questions of the right to choose to proceed with an unintended pregnancy.

Judge Souter spoke at some length about the decisions of the Court which established the right to use contraception. But, in recognizing a marital right of privacy, and a right to determine whether or not to conceive a child, he traced his conclusion to an historical respect for the marital relationship. The framers were sensitive to the notions of marital privacy.

What about the rights of a woman once there is conception? What confidence can we have that these rights will enjoy any recognition under the method of interpretation set out by Judge Souter?

Mr. President, Judge Souter chose to refuse to answer questions that he believed touched too closely on the right to chose to terminate a pregnancy, as outlined in Roe versus Wade. That was his choice.

But, in so doing, he left unsaid his position on a fundamental individual right—the right to privacy. He refused to concede that a right exists that gives a woman the ability to choose whether or not to bear a child.

Mr. President, we would be troubled if a nominee came before the Senate and refused to recognize the right of free speech; or the right to assemble; or the right to be free from unreasonable searches and seizures. We should be just as troubled by Judge Souter's refusal to recognize a broad right of privacy inherent not in the marital relationship, but inherent in the individual.

Judge Souter's record as an attorney general, as a judge, raise questions about other important issues as well. Questions can be raised about his appreciation of the depth of the problem of racial discrimination in our Nation, and the steps that need to be taken to prevent it and to remedy it.

In some cases, we are asked to excuse statements he made or positions he took, because he was acting as an advocate for his Governor and his State, as attorney general. Yet, questions remain.

As I review the totality of the record of Judge Souter, I regret that I cannot vote to confirm him. He is a talented, even brilliant individual who has dedicated himself to a life in the law. Nevertheless, his approach to constitutional interpretation is one that moors him too tightly to the past. His testimony before the committee left blank spaces where rights and liberties should be written large and clear.

This is not a conclusion I have reached lightly or easily. I respect Judge Souter's integrity and his intelligence. But, for the reasons that I have outlined, when the question is presented to the Senate, I will vote against his confirmation to the Supreme Court.

I yield the floor.

Mr. BRADLEY addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from New Jersey [Mr. BRADLEY].

NOMINATION OF JUDGE DAVID SOUTER

Mr. BRADLEY. Mr. President, there is very little that the Constitution asks this body to do that cannot be undone. But there is one responsibility by which each of us as a U.S. Senator leaves a nearly indelible mark on the fabric of this Nation, not just as a government, but as a people. That is our role of "advice and consent" in the

confirmation of the nine Justices of the U.S. Supreme Court.

Our role in determining which nine fallible human beings should hold these unmatched powers over the direction of our society is a power we share with the President. It is nonetheless one that we must take very seriously.

The history of this century shows that the Court can be a force of reaction. For decades, the Court denied such basic freedoms as the right to criticize war or to organize a union, and such basic measures of justice as the minimum wage. The Court can also light the path of progress toward an open, free, and fair society, as it did when it ruled that segregated schools were unconstitutional or that people cannot be forced to pay a tax in order to vote. Most of what we do in this body involves shaping a part of America through the instrument of legislation; the Court, on the other hand, defines possibilities for an entire Nation.

Mr. President, the nomination that is presently before us requires, I believe, even more thoughtful scrutiny than most. President Bush chose to nominate a man whose views on most of the fundamental principles of constitutional jurisprudence were unknown. Judge David Souter has spent most of his career in the courts resolving basic conflicts among individuals. While this experience is in some ways preferable to that of a nominee whose whole life has been spent on a law school faculty, it does require us to demand answers to some very relevant questions that, for another nominee, might be answered by his record.

There are no clear guidelines about what a nominee to the Supreme Court should or should not talk about. The distinguished chairman of the Judiciary Committee put it quite succinctly to Judge Souter in saying that the committee reserved the right to ask any question and granted Judge Souter the right to refuse to answer any question. Some Court nominees have answered every question on every topic in excruciating detail, while others have eschewed all but the most general discussions of principle. I understand that a nominee might conceivably refuse to answer almost every question other than the biographical, on the grounds that it might become relevant to a case before the Court. Of course, I would not hesitate to vote against such a nominee, and I'm sure that a majority of my colleagues would join me. Every Senator understands that different circumstances require different standards of candor from the nominee. In the current circumstance—a nominee with no record on constitutional issues—a high degree of candor is required, but more importantly, a nominee must be consistently candid. It is not appropriate to discuss some pending legal questions, such as separation of church and state, in great detail, and then to decline to answer when the questions move to other areas of the Constitution.

Judge Souter provided the Judiciary Committee with thoughtful, thorough answers about several major areas of the law. He described the principles by which he would adjudge cases of discrimination based on race or gender. He described his views on the separation of church and state, the first amendment, and capital punishment. He was even willing to discuss specific cases, such as Lemon versus Kurtzman, which established a standard for church-State cases, even though there is a motion for rehearing pending before the court in that very case.

Before the hearings, I was disturbed to learn that Judge Souter had asserted that there was no need to examine the racial composition of New Hampshire's State government work force because he knew without checking that there was no discrimination in any department. And his statement that the rights of less-educated citizens somehow harmfully diluted the votes of the better educated betrayed a serious confusion about democracy's virtues. But by speaking in detail about these statements and committing himself to sustaining the precedents that outlaw discrimination in hiring and literacy tests for voting, Judge Souter offered assurance that the complacency and the elitism implied by his earlier statements would not inform his judicial thinking. Had Judge Souter not made clear that he appreciated at least the legal precedents regarding civil rights, I would not hesitate to urge the Senate to reject his nomination. But the method of analysis that he committed himself to in the Judiciary Committee hearings I have no reason to doubt will be his method if he sits on the Court. The point is, Mr. President, where he was not silent, I am prepared to take Judge Souter at his word.

There was one area, however, about which Judge Souter refused to describe his method, principles, or even his basic instincts. And that area happens to be the one that is of deepest concern to millions of Americans and the one on which the Court will almost certainly set a permanent direction for the Nation in the next few years. It is the question of a right to privacy.

Judge Souter said only one thing about the right to privacy—that married couples possessed such a right as described in the Griswold decision. Does this right belong to individuals or does it somehow inhere in the institution of marriage? Judge Souter would not answer. Does this right apply only to the purchase of contraceptives, as in Griswold, or does it extend to other deeply personal choices about reproduction? Judge Souter would not answer.

All of us know that, given the balance on the Supreme Court, we are being asked to give Judge Souter virtually sole authority over whether the Court will continue to recognize a right to privacy from the State's presence in our personal lives. All of us also know that one of the inseparable aspects of a right to privacy is the right for a woman to choose whether or not to have an abortion. Indeed when the question of the right to privacy was raised in the Judiciary Committee, Judge Souter appeared to presume that it was nothing more than a euphemism for the right to a safe and legal abortion. We further know that Judge Souter is the nominee of a President who made a clear political commitment to his party and to the American electorate that he would seek to wipe out that right. Is Judge Souter the agent by which George Bush seeks to keep his campaign pledge to make abortion illegal, or is he the agent by which George Bush seeks to break that pledge? Mr. President, the answer remains unclear.

What is clear is that the most immediate consequence of the Court's rejecting the right to privacy would be to deny millions of women the right to choose and to return us to the day when illegal, back-alley abortions put the lives of thousands of women at risk. That is a chance I am not willing to take.

I would also remind my colleagues that the right to privacy is no more a euphemism for abortion than the right to free speech is a euphemism for a particular statement. The right to privacy is a basic promise of American life, one that we will all intuitively want to see protected, particularly as advances in technology give the State vast new powers to intrude into the most private recesses of our lives. Without some notion of the right to privacy, judges will have an inadequate method by which to decide these cases fairly and humanely. Because the right to privacy will be the fulcrum of the relationship between the individual and the State as we approach the 21st century, we cannot entrust it to a jurist who, while he says he believes it exists, cannot make clear where it is found, what it means, and to whom it applies.

Mr. President, these are the fundamental issues for our time and for the future. To confirm a nominee who refuses to discuss them is to surrender our obligation to offer thoughtful advice and knowledgeable consent on the nomination of Justices who will hold awesome power over our lives. I will not do that and I will vote against the nomination of Judge David Souter.

The ACTING PRESIDENT pro tempore. The Chair recognizes the Senator from Maryland [Ms. MIKULSKI].

CONFIRMATION OF JUDGE DAVID SOUTER

Ms. MIKULSKI. Mr. President, among the most significant and far reaching votes a Senator casts is a vote on the confirmation of a Supreme Court nominee. Of the thousands of votes I will cast as a U.S. Senator, the vote on a Supreme Court nominee exercising the constitutional right of advice and consent is the only vote that I cast that is irrevocable and irretrievable.

A vote for confirmation of a Supreme Court nominee is a vote for a lifetime appointment to the highest court of our land. Once confirmed, a nominee bears no burden of accountability, unlike the President, unlike a Cabinet official in which we exercise other advice and consent functions.

And thus, it is incumbent upon this body, charged with the constitutional responsibility to advise and consent on such nominations, to ascertain beyond any reasonable doubt each nominee's fitness to serve and commitment to the law's most basic guarantees of individual rights and equality for all Americans.

As I see it, it is the paramount responsibility of the Supreme Court to protect and preserve the core constitutional values on which this great Nation stands: An independent judiciary speaking for freedom of speech, freedom of religion, the right to privacy, and equal protection of the law.

Ours is a government of limited power and a society wherein rights and freedoms reside in the individual. Through the Constitution, the guarantees of equality and liberty on which this Nation was founded are translated into the rule of law by which we live. And it is the Supreme Court that breathes life into the promise that is the Constitution.

In deciding how I will vote on this nomination, I used three criteria.

First, is the nominee competent?

Second, does the nominee possess the highest personal and professional integrity?

Third, will the nominee protect and preserve the core constitutional values and guarantees that are central to our system of Government, such as freedom of speech and religion, equal protection of the law, and the right of privacy?

I have considered the nomination of Judge David Souter as I have previously considered other Supreme Court nominations using exactly this same criteria. I have carefully reviewed and considered the hearing record, Judge Souter's testimony and the testimony of several of the other witnesses who appeared before the committee.

First, on the issue of competency, there is no doubt that Judge Souter is professionally competent.

Second, on the issue of personal integrity, there is no doubt that Judge Souter possesses personal integrity, living a quiet New England life of going to church and visiting his mother.

But missing from the record is a demonstrated commitment by Judge Souter to the Constitution's most basic guarantees of individual rights and equality under the law for all men and for all women. I must, therefore, oppose the confirmation of Judge Souter to the Supreme Court.

As I reviewed the hearing record, I took particular notice of two very striking patterns and I think contradictory patterns: First, Judge Souter was willing to discuss at great length many of the areas of the law that he, as a Supreme Court Justice, would likely to be called upon to consider.

He either had views or previous cases, like Brown versus Board of Education, or he would offer to the committee judicial principles that would guide his decisionmaking.

We now know, for example, that Judge Souter agrees that the death penalty is not prohibited by the Constitution's ban against cruel and unusual punishment. So we would at least know on that one point how he would rule on death penalty cases, or at least what would be the framework for his judicial reasoning.

We also know that Judge Souter is troubled by some of the Court's recent decisions on freedom of religion, something I know, Mr. President, you and I are deeply concerned about, and that he prefers the approach taken by Justice O'Connor over her colleagues. These are but two of the many areas of constitutional jurisprudence that Judge Souter felt it appropriate to discuss.

At the same time, there were certain areas of constitutional law that Judge Souter refused to discuss. To put it quite simply, Judge Souter refused to talk about whether, and how, the Constitution protects the women of the United States of America. He was either silent or he was vague, or he was evasive.

Mr. President, that is not good enough for us to be able to form an opinion on his nomination. When someone is evasive, when someone is vague, or he is deliberately silent, under those circumstances would you hope for the best? Absolutely not. So, therefore, we must fear the worst because why else would he be so uncharacteristically silent, evasive, or vague?

He refused to discuss how the Constitution's guarantee of equal protection under the law protects women against gender discrimination, either in the workplace, or in the school house.

He refused to discuss the fundamental right of privacy so central to our system of limited government that it protects a woman's right to decide whether and if to bear children, and on other areas of privacy, protecting family life.

The Senator from New Jersey [Mr. BRADLEY] outlined it in excellent reasoning, and I will not elaborate. I am going to associate myself with his remarks.

Let me just go on a few minutes more to say that Judge Souter's refusal to discuss the status of women under the Constitution stands in stark and disappointing contrast to the comprehensive discourse on the Constitution.

Mr. President, think of someone who can come before a committee and for 18 hours face tough, grueling questions from a variety of Senators, and he could dazzle the people either in the committee room or watching C-SPAN, that he could do this without a note. This is a man of intellect. This is a man of ability. So, therefore, you would think when Senators asked questions on this issue of privacy, on this issue of gender, there would have been an equally forthcoming separate commentary.

Well, it did not happen.

Mr. President, the Supreme Court is the court for all the people of America; not just for one race, not just for one gender, not just for one religious belief. It is for all the people.

My colleagues and I serve in this body as representatives for all the people. We are here because of the consent of the governed.

Mr. President, I respectfully submit that it is simply not acceptable for a nominee to the Supreme Court to refuse to disclose his views on equal protection against gender discrimination and not to elaborate in any detail the implicit right to privacy.

I truly believe we are all created equal and that each of us is endowed with inalienable rights to life, liberty, and the pursuit of happiness. And I humbly stand before this body, the first Democratic woman elected to the Senate in my own right, as testament to the struggle for equality for women and all Americans.

Mr. President, in 200 years of American history only 16 women have ever been U.S. Senators. I say that not as a statistic but to show how hard it is to gain equality. It is only within this century that women gained the right to vote. Certainly, as we go forward to the 21st century we, the women of America, should believe that the Supreme Court would at least believe and be willing to posit the Declaration of Independence and the Bill of Rights in our behalf.

We have come too far, sacrificed too much, and worked too hard in the

cause of freedom, liberty, and equality to turn a blind eye to this nominee's deliberate failure to tell the people of America whether the Constitution protects their privacy and guarantees to all men and all women equality under law. We, you, the American people, deserve better. We deserve the best.

TRIBUTE TO ASA T. SPAULDING, SR.

Mr. SANFORD. Mr. President, with the passing of Asa T. Spaulding, Sr., on the morning of September 5, 1990, the Nation and the State of North Carolina lost one of America's significant citizens of the 20th century. I lost a true friend of many years. Asa Spaulding was one of North Carolina's most distinguished and remarkable sons. He was an individual whose great achievements in life were great achievements for others, a truly unique trait.

A former president of North Carolina Mutual Life Insurance Co., the largest minority-owned financial institution in the world, Asa Spaulding gained an outstanding reputation for his financial skill and business acumen. Elected as Durham County's first African-American commissioner, he established a standard of public service for all races. By example and encouragement, he helped to calm and shepherd the community through the emergent times of improving but strained race relations in the 1960's.

Asa Spaulding's commitment to education, especially those neglected or excluded, led him to serve on numerous boards of colleges and universities. Most notably, he served as the chairman of the board of trustees at Howard University in Washington, DC. Many colleges and universities awarded him honorary degrees. In 1969 Duke University honored him as "one of the State's great citizens, a master in [his] own profession, and the constant servant of other men in their need."

Presidents Eisenhower, Ford, and Carter all took note of the accomplishments of Asa Spaulding and called on him for public contributions. President Eisenhower named him vice chairman of the UNESCO delegation to India. Presidents Ford and Carter called upon Asa to serve in special delegations to Africa and Central America. His influence extended greatly beyond his community of Durham, which he cared about so deeply. As a statesman, he continued to think deeply about the future of our society and to transmit the traditions of peace and justice that he advocated and practiced throughout his life.

To his wife Elna, his daughter Patricia, his sons Asa Jr., Aaron, Kenneth, and his other family members, I extend my condolences. I mourn the loss while rejoicing in the fulfillment of life of such a good and faithful servant of the Lord. I offer this statement as a testament to and celebration of his life.

Asa T. Spaulding, Sr., 1902-90.

THE NOMINATION OF JUDGE DAVID H. SOUTER

Mr. SANFORD. Mr. President, along with most of my colleagues, I have had to resolve in my own mind what the role of the Senate should be in exercising its constitutional responsibility to advise and consent to Presidential nominations to the Supreme Court. Whereas a candidate for a major elective office is expected to reflect the majority will, the Supreme Court Justice has a different function in the balance of our governmental system, that of protecting the dissident and minority views in our pluralistic society.

The office of Supreme Court Justice is a unique position in American Government. We provide our Justices lifetime tenure and entrust them with vast potential to rule our lives and ways. Consequently, the questions about Supreme Court Justices should not be related to what his or her decisions will be, but rather to how these decisions will be reached. Certainly those who vote on the confirmation of a Justice might well examine prior decisions and writings, and may quite justifiably vote pro or con based on this evidence. It is appropriate, in my judgment, to inquire about a candidate's impartiality of mind, but not to seek his or her commitment to vote a certain way on a specific issue, although such a commitment is legitimately sought from a congressional candidate.

As Senators, we have had to define for ourselves the criteria each would personally apply to these nominees. After much thinking, reading, and listening, I determined that for me the fundamental criterion was scholarship defined by integrity. I would like to find also the qualities of compassion, practicality, extraordinary intellect, broad education, and an optimistic faith in America. But true scholarship is the best guarantee we have of a Justice's future performance. All other attributes pale in comparison.

Scholarship is definable and recognizable. Intellectual integrity is its essence. Scholarship is not just the accumulation of knowledge, and certainly not the accumulation of academic degrees. True scholarship is the relentless, uncompromising search for truth. Like a laser beam reaching for the unknown in the fine structure of atoms, the scholar reaches sharply through the maze of facts, fiction, propositions, and prejudice, always probing for the ultimate truth, eschewing half-truths, and false conclusions.

The intellectual honesty of true scholarship and the concomitant intellectual capacity that will measure up to the challenge are the indispensable attributes that we should consistently demand, with no compromise, of a Supreme Court Justice. Three years ago, I based my decision on a candidate for the Supreme Court on the scholarly approach to decisions, not on the nominee's political ideology or on pressure from groups either pleased or displeased by his nomination. This test will be the one on which I also have based my decision on Judge Souter.

I have had the opportunity to meet personally with Judge Souter, to talk with him, to listen carefully to his confirmation hearings before the Judiciary Committee, to review his writings, and to consult with some of my trusted friends in his home State. I came away with one overriding impression that Judge Souter is a person of tremendous intellectual integrity. That he respects the Constitution, not only that which is explicit, but also the individual rights and freedoms which are implicit. I believe that he loves the law and that he will listen with an open mind, always cognizant of the fact that, to quote him, "at the end of our task some human is going to be affected, some human life is going to be changed." That he is, in the truest sense of the word, a scholar.

I apply no litmus test to Judge Souter's views. I have applied no litmus test in past confirmations. Unless fate intervenes, David Souter will serve for a generation. What litmus test will inform us as to how he might decide a crucial national issue in the year 2020? Rather, I believe he will faithfully examine the law, and I trust him to reach his conclusions by the path of scholarship illuminated by his intellectual capacity and personal integrity. I see in David Souter signs of the qualities of such former Justices as Oliver Wendell Holmes and Hugo Black. He just may be our next truly outstanding Justice. I will vote, with considerable confidence, to confirm him.

REMOVAL OF INJUNCTION OF SECRECY

Mr. SANFORD. Mr. President, as in executive session,

I ask unanimous consent that the injunction of secrecy be removed from the Treaty on the Final Settlement with Respect to Germany and a Related Agreed Minute, Treaty Document No. 101-20, transmitted to the Senate today by the President; and I ask unanimous consent that the treaty be considered as having been read the first time; that it be referred, with accompanying papers, to the Committee on Foreign Relations and ordered to

FAMILY PLANNING AMENDMENTS OF 1989

The Senate continued with the consideration of the bill.

Mr. KENNEDY. Will the Senator yield for a unanimous-consent request from the Senator from Utah without losing is right to the floor?

Mr. LIEBERMAN. I would, indeed, under those circumstances.

Mr. HATCH. Mr. President, I ask unanimous consent that immediately upon the conclusion of the remarks of the distinguished Senator from Connecticut the distinguished Senator from Arkansas be given 4 minutes——

Mr. PRYOR. Mr. President, I think 4 minutes is sufficient.

Mr. HATCH. To make his comments. Then the right to the floor to call up an amendment, be given to the distinguished Senator from New Hampshire.

Mr. LOTT. Mr. President, reserving the right to object.

Mr. KENNEDY. Mr. President, reserving the right to object, as I understand, the Senator from Connecticut is going to introduce a resolution and have disposal of the resolution. I have no objection then to going to the Senator from Arkansas, and then going to the Senator from New Hampshire.

I would also include in that after the introduction of the amendment of the Senator from New Hampshire, the Senator from Connecticut be recognized to introduce a second-degree amendment.

Mr. ARMSTRONG. I object.

Mr. HUMPHREY. Mr. President, reserving the right to object.

The PRESIDING OFFICER. Is there objection?

Mr. ARMSTRONG. Yes, Mr. President, there is an objection to the final part of the unanimous-consent request.

Mr. HATCH. Mr. President, could I——

The PRESIDING OFFICER. Objection is heard.

Mr. HATCH. Mr. President, could I ask——

The PRESIDING OFFICER. The Senate will be in order.

Mr. HATCH. Mr. President, may I be recognized here? Could I ask the distinguished Senator from Connecticut—one of our problems on this bill, and there has become a lot, is that they only have until the cloture vote to bring up amendments.

I wonder if it is possible for you to have this resolution, unrelated as I understand it to this bill, brought up following the clotuure vote, or whenever we get unanimous consent for you? I do not want any more time taken up by nonrelated matters because we have a lot of people who have amendments. That was the whole reason for the fight last night.

Mr. KENNEDY. If the Senator will yield further.

As I understand, the Senator from Connecticut would like to get a vote. He was glad to do it within a 10-minute time frame. I understand what the Senator is requesting, but as I understand, he would do it within a 10-minute timeframe.

Mr. HATCH. Let me say this: We have a number of amendments on our side—people waiting for days. They know that once cloture is invoked, they will not be able to bring up their amendments. I am inclined to do this if he will limit the time to 10 minutes. And then we will go to the distinguished Senator from Arkansas who just has a 4-minute statement, with no amendments to make. And I would ask unanimous consent that we go next to him. Then at least the distinguished Senator from New Hampshire can call up his amendment. Then whatever happens, happens under the rules.

The PRESIDING OFFICER. Is there objection?

Mr. LOTT. Reserving the right to object.

First, I would like to inquire, do we have a copy of that resolution so that the Members would have a chance to review that resolution? I would be inclined to object until I have a chance to at least see what is in the resolution.

Mr. HATCH. Could I get this other unanimous-consent request through which is then related to your request?

I am asking unanimous consent to go to the distinguished Senator from Arkansas as soon as this matter is disposed of, one way or the other, and then to the distinguished Senator from New Hampshire, to call up an amendment, and then let the rules take over.

Mr. LOTT. Reserving the right to object, you are saying you are now agreeing to let the resolution——

Mr. HATCH. No. I am saying as soon as it is disposed of when it is disposed of. I would ask that he give you a copy of the resolution.

Mr. LOTT. I am sorry.

Mr. HATCH. I am not agreeing he can dispose of this resolution. I am just saying immediately upon disposal of that resolution, we go to the distinguished Senator from Arkansas, and then to the distinguished Senator from New Hampshire.

Mr. LOTT. Mr. President, I am trying to clarify exactly, is this motion going to lead to the immediate consideration of the resolution? That is why I am reserving at this point to object.

Mr. HATCH. Should I restate?

The PRESIDING OFFICER. Let the Senator from Utah restate his request.

Mr. HATCH. I ask unanimous consent that as soon as the distinguished Senator from Connecticut's resolution is disposed of, whenever it is disposed of——

Mr. LOTT. Mr. President.

Mr. HATCH. That we yield 4 minutes to the distinguished Senator from Arkansas to make a short statement.

In fact, if I could, would the Senator from Connecticut be willing to yield 4 minutes to the distinguished Senator from Arkansas right now with the understanding that we will come back to him, he will not lose the right to the floor, and then as soon as his matter is disposed of, we will go to the distinguished Senator from New Hampshire?

Mr. ARMSTRONG. As soon as the resolution is disposed of.

Mr. NICKLES. Would the Senator yield for a comment?

I just glanced at Senator LIEBERMAN's resolution. It basically urges—correct me if I am wrong—urges that we begin releasing oil from the strategic petroleum reserve?

I see Senator FORD and others on the Energy Committee. We have had one hearing on this. I think we would need to discuss it at length before we pass this resolution. I am not sure that is a good resolution.

Mr. HATCH. Nothing in my unanimous consent would prevent you from doing that.

Mr. HUMPHREY addressed the Chair.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. HUMPHREY. Is there a unanimous consent pending?

The PRESIDING OFFICER. There is a unanimous-consent request pending. I think if it is not objected to, we are going to move on. Is there objection?

Mr. HUMPHREY. Mr. President, if the Chair will not entertain a reservation, I will be forced to object.

I would first like to defer to express a thought.

Mr. President, I want to be sure that this unanimous-consent request in no way negates the rule of the Senate; that the matters only are germane, that the remarks germane to the legislation be in order 3 hours after convening of the Senate. Let me be sure that rule is not in any way negated by this request.

The PRESIDING OFFICER. The unanimous-consent agreement does not in any way relate to that.

Mr. HUMPHREY. I withdraw my reservation.

The PRESIDING OFFICER. Is there objection?

No objection is heard. The unanimous-consent request is agreed to.

NOMINATION OF JUDGE DAVID SOUTER

Mr. PRYOR. Mr. President, I not only thank the Chair, I thank seven or eight of my colleagues who have made it possible for me to address the

Senate for not to exceed 4 minutes on the nomination of Judge David Souter.

First, over the past 2 months, we have come to learn more and more about Judge David Souter, the President's nominee for the Supreme Court. Judge Souter came to us as a mystery. As the confirmation process proceeded—and he was questioned by members of the Judiciary Committee—many looked for clues to unravel the mystery of this man. I am not certain there is a mystery to be solved: Judge Souter is an intelligent, highly qualified nominee who brings an open mind, an even temperament, and a respect for basic constitutional principle to the bench.

Second, Judge David Souter comes across as an extremely intelligent man who has a distinguished educational background. He is a magna cum laude graduate of Harvard University, a Rhodes scholar, and a Harvard Law School graduate. His professional career is no less extraordinary: He served in the New Hampshire attorney general's office for 10 years—including 2 years as the attorney general of that State, sat as a trial court judge for 5 years, served on the New Hampshire Supreme Court for 7 years, and was recently appointed to the 1st Circuit Court of Appeals.

Third, during his confirmation hearings, Judge David Souter appears to have shown a judicial philosophy grounded in the fundamental principles of our constitutional system, including separation of powers and protection of individual rights. He espouses a judicial philosophy that treats the Constitution as a living document which recognizes changing circumstances.

Fourth, it is not the Senate's duty to determine how the nominee would vote on specific cases. Rather, it is the Senate's duty to assess the nominee's general philosophy and his approach to resolving the critical issues which come before the Supreme Court of the United States.

Fifth, Judge David Souter has shown himself to be a thoughtful jurist, possessing a sharp legal mind, who does not bring a personal agenda to his work on the court. Rather, his appearances and statements indicate he would bring to the Court an open mind, an eagerness to listen, and a willingness to understand both sides of an issue.

Sixth, some people have raised questions about Judge Souter's New Hampshire parochialism. Mr. President, for this Senator I am comfortable with a Supreme Court justice who lives in the same unpainted farmhouse that he grew up in, who visits his mother regularly, and who serves on the board of directors of the Concord Hospital.

Mr. President, finally, as far as this Senator can state, I have faith in this nominee. If his confirmation hearings and his statements before the Judiciary Committee are any indication of his future service to the Highest Court of the land I think that that faith will have been misplaced.

I am very proud, Mr. President, this morning to endorse the nomination of Judge David Souter to the Supreme Court of the United States.

FAMILY PLANNING AMENDMENTS OF 1989

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. Under the agreement, the Senator from Connecticut is recognized.

AMENDMENT NO. 2887

(Purpose: Calling upon the President to initiate a modest use of the strategic petroleum reserve to stabilize the crude oil market)

Mr. LIEBERMAN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Connecticut [Mr. LIEBERMAN] proposes an amendment numbered 2887.

Mr. LIEBERMAN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

At the appropriate place in the amendment add the following:

Since Americans are deeply concerned about the impact of the Iraqi invasion of Kuwait on the world supply and price of crude oil and on the price of refined products—like gasoline and heating oil—that the American consumer will have to pay and the American economy will have to absorb;

Since the Department of Energy now estimates that most of the crude oil production lost because of the Iraqi invasion of Kuwait will be offset by increased production around the world;

Since crude oil markets remain unstable and volatile, causing the price of crude this week to exceed forty dollars per barrel and leading some experts to conclude that it may reach sixty dollars per barrel;

Since the latest economic indicators show that even before Iraqi's invasion of Kuwait the American economy was slowing such that the recent increases in the price of oil and oil products now threaten seriously to disrupt our economy and begin a recession;

Since the substantial increase in oil and oil product prices will severely affect those who can least afford it, including rural and urban poor, home heating fuel users, and small communities relying on oil-fired electric power generation;

Mr. LIEBERMAN addressed the Chair.

The PRESIDING OFFICER. Who seeks recognition?

Mr. HATCH. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Several Senators addressed Chair.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. ARMSTRONG. Mr. President, I send an amendment to the desk.

Mr. KENNEDY. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senate will be in order. Under the previous order that will not be in order.

Several Senators addressed the Chair.

Mr. KENNEDY. Mr. President, I suggest the absence of a quorum.

Mr. ARMSTRONG. Mr. President, that is not in order until the clerk has stated the amendment. The amendment is at the desk.

Regular order, Mr. President.

The PRESIDING OFFICER. The question now is whether or not Mr. ARMSTRONG can be recognized. The Chair rules that he can be recognized for a second-degree amendment. So the Senator from Colorado will be recognized.

AMENDMENT NO. 2888 TO AMENDMENT NO. 2887

(Purpose: To protect the health and well-being of young people and the integrity of their families)

The clerk will report the amendment.

The bill clerk read as follows:

The Senator from Colorado [Mr. ARMSTRONG] proposes an amendment numbered 2888 to amendment No. 2887.

Mr. ARMSTRONG. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

Mr. KENNEDY. Objection.

The PRESIDING OFFICER. The Chair hears objection.

The bill clerk resumed reading the amendment as follows:

At the end of the pending question add the following:

At the appropriate place, add the following new section:

SEC. . NOTIFICATION OF PARENT PRIOR TO ABORTION ON A MINOR.

(a) NOTIFICATION REQUIREMENT.—Section 1001 of the Public Health Service Act (42 USC 300) is amended by adding at the appropriate place the following new subsection:

"( )(1) No entity which receives a grant or enters into a contract under this section shall provide an abortion for an unemancipated female under the age of 18 until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified under paragraph (2), except when the attending physician certifies in the minor's medical record that the abortion was performed due to a medical emergency requiring immediate action.

"(2) Such notice shall—

"(A) Be addressed to the minor's parent or legal guardian at the usual place of abode of such parent or legal guardian and delivered personally to such parent or legal guardian by the physician performing the abortion or an agent of the entity; or

SENATE—*Thursday, September 27, 1990*

(Legislative day of Monday, September 10, 1990)

The Senate met at 11 a.m., on the expiration of the recess, and was called to order by the Honorable DANIEL K. AKAKA, a Senator from the State of Hawaii.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

But he that is greatest among you shall be your servant. And whosoever shall exalt himself shall be abased; and he that shall humble himself shall be exalted.—Matthew 23:11, 12.

Gracious Father in Heaven, our prayer this morning is for those who labor so faithfully and tirelessly to make it possible for the Senate to do its work. Many must be in this Chamber before the Senate opens, and their work is not finished until long after the Senate recesses. We praise and thank Thee for dedicated ones who work in the Chamber and around it; for those responsible for maintenance, food service, security; the hard-working pages; committee staffs and directors; committed office staffs. Let Thy blessing rest upon these hard-working, faithful men and women who serve so effectively and without whom the Senate could not function.

Dear Father, we commend to Thy loving care all in this large family who are hurting. For those who grieve, who are ill, incapacitated, frustrated. Especially, Father, we pray for Mary Sybeldon, mother of Senator KASTEN's personal secretary, and for Sean Hart. We join Paul Hill, who serves in the dining room, as he grieves for the loss of his dear wife last week. May all experience the comfort of the God of all comfort. We pray in the name of the great Physician. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. BYRD].

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, September 27, 1990.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable DANIEL K. AKAKA, a Senator from the State of Hawaii, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. AKAKA thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Senator from Washington [Mr. ADAMS] is recognized.

RESERVATION OF LEADER TIME

Mr. ADAMS. Mr. President, I ask unanimous consent that the time set aside for the two leaders be reserved until later in the day.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. The Senator from Washington is recognized in morning business for not to exceed 5 minutes.

OPPOSING THE SOUTER NOMINATION

Mr. ADAMS. Mr. President, over the last several days, I have had the privilege of working with the chairman of the Labor and Human Resources Committee, Senator KENNEDY, in managing S. 110, legislation extending the authorizations for the Federal family planning program authorized under title X of the Public Health Services Act. This is a very important piece of legislation, particularly for the nearly 5 million low-income women who receive family planning information and services each year under title X.

It is, of course, inevitable that a discussion of the subject of family planning, human sexuality and pregnancy brings us back again to the topic of abortion. So during the course of that we always face a series of amendments and listen again to Senator after Senator expressing their opinions on the subject of abortion, the circumstances under which abortions might be performed, the propriety of Federal funding of abortion, whether information about abortion should be made available to women, whether parental consent should be approved, the list goes on and on. Incidentally, I hear many of the same arguments and deal with many of the same amendments every time I try to bring the District of Columbia appropriations bill to the floor for a vote.

The greatest irony I find in this institution's never-ending discussion on the reproductive rights of women is that 98 percent of the Senators involved in this most serious subject have never, and will never, experience the implications of the policies we set. In the long history of this overwhelmingly male institution, I wonder how many of my colleagues have asked themselves, "What right have I to define the limits of the reproductive rights of women?" And yet we continue to blunder onward, denying the District of Columbia the right to spend its own money to allow some of the poorest women in this country the right to make their own decisions about whether or not to bear a child. And on the title X reauthorization, we spend hour after hour setting limits on the type of services available, the amount of information that can be received, whose permission must be sought. Ninety-eight men telling the women of this Nation what will be available to them in making decisions about their own lives, and their own bodies.

Mr. President, I am grateful that here in what was up to very recent years described as "the world's most exclusive men's club," we are about to take up the nomination of David Souter to serve on the Supreme Court of the United States, an institution that only recently seated our Nation's first woman justice. Very little was known about David Souter's views on the basic principles of constitutional jurisprudence before he was nominated by President George Bush. The President has, however, expressed his own view that the most important issue affecting the rights of women in our society, the right to privacy in making personal decisions in the matter of their own reproductive rights, should be overturned by our Supreme Court.

For the 98 men in this institution who must exercise the constitutional advise and consent authority under the Constitution on this nomination, and the 7 other male members of the Supreme Court that Judge Souter would hope to join, and the male occupant of the White House who hopes to see Roe versus Wade overturned, the issue of women's reproductive rights, their right to privacy, is too often ours to debate, discuss, and decide. In every instance, the impact of those decisions

rests solely with women. Is there any wonder why so many women oppose this nomination, and resent our continued meddling in a topic that is really none of our business? An exceellent commentary on this aspect of the Souter nomination recently appeared in the Washington Post, written by Judy Mann, appropriately entitled "Outdated Patriarchy Supports Souter." I ask unanimous consent that the article appear in the RECORD at this point.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Sept. 21, 1990]

OUTDATED PATRIARCHY SUPPORTS SOUTER

(By Judy Mann)

Molly Yard, president of the National Organization for Women, gave one of the most compelling testimonies of her long career before the Senate Judiciary Committee Tuesday afternoon. She was pleading—you might say begging—for the men on that committee to understand the impact of abortion rights on women's lives.

What she got in return for her eloquence was a patronizing lecture from Sen. Alan Simpson (R-Wyo.), who was more concerned with senatorial courtesy than the fact that women will die if abortion—until 1973 the leading cause of maternal death—is made illegal again.

The confirmation hearings for David H. Souter were a striking display of how outdated the make-up of both the Senate and the Supreme Court have become. Despite the enormous implications this court nomination has for women's health, women have had no say in the matter on the Judiciary Committee or in the White House.

Nowhere in the entire power structure that influenced the selection of the nominee were there any women or blacks, the two groups struggling to become full partners in this society and whose progress has been most severely set back by the Supreme Court in the last three years. What we are witnessing here is a patriarchal power structure protecting itself—but perhaps for the last time.

Political savants are reading the results of the primaries as the beginnings of a nationwide rebellion against entrenched power structures. They cite Sharon Pratt Dixon's upset victory in the Democratic mayoral primary in the District. Her clean-house theme was successfully echoed in Massachusetts by Boston University President John Silber, who won the Democratic gubernatorial race. In Oklahoma, voters approved a constitutional amendment to limit the service of state legislatures to 12 years. Similar measures have been proposed in more than a dozen other states and both conservative and women's organizations have shown keen interest in efforts to limit terms of members of Congress, who enjoy a 98 percent reelection rate.

Signs of extreme voter unrest are all around us. And no one should overlook the fact that more than half of all voters are women, and women are running and holding office now more than any time since they won the right to vote 70 years ago. "I think there's a sense that it's been in the hands of men now for so long, and it's sort of a mess," is the way Dixon has put it. "Give women a chance."

It is no coincidence that opposition to Souter stems from uncertainty over his beliefs about the rights to individual privacy and about civil rights. For these are the two areas of law that have done so much to emancipate women and blacks, both of whom are threatening the power structure as never before. Reproductive rights, particularly, go to the very core of a woman's ability to control her own destiny. In his testimony, Souter made it clear that he believes that *Roe v. Wade*, the 1973 decision that legalized abortion across the country, is open for reconsideration.

"When abortion became legal in our country in 1973," said Yard, testifying against his nomination, "women in the United States became free because they could now control their reproductive lives. If one cannot decide for herself when or whether to have children, she surely has no freedom—no freedom to control her life, to plan her life, to decide what to do with her life. Any goal she sets can be completely disrupted by an unplanned pregnancy, and if she cannot end it, then her life is being controlled, not by herself but by some law enacted by men which forces her to carry the pregnancy to term, and then be responsible for the child borne, whether or not she has the emotional or financial resources to bear that burden.

"For 17 years women have had this freedom, but by your consideration of David Souter for appointment to the Supreme Court, you are really considering ending freedom for women in this country. We believe from Judge Souter's record that he will be the fifth vote to overturn *Roe v. Wade*." Further, she said, NOW was troubled by his testimony about cases that legalized birth control.

The American Association of University Women, the Fund for the Feminist Majority, and the National Abortion Rights Action League have all opposed the Souter nomination on similar grounds.

All the polls are showing that the American people consider birth control and abortion as matters of right, prompting antiabortion politicians across the land to scurry for a middle ground. The country is far, far ahead of the politicians on civil rights and on women's rights. And the country is showing all the signs of being ready to rock the establishment, instead of pleading with it.

Mr. ADAMS. Presumably, President Bush hopes that a Justice Souter would deliver the crucial vote in favor of turning back the clock on the basic right of privacy that has allowed American women to make deeply personal decisions without risking their lives to the back-alley abortionists who thrived in the years preceding the Roe versus Wade decision. The U.S. Senate, in reviewing this nomination, must give a particularly high degree of scrutiny to this issue. Should we not have a right to know?

Quite frankly, several of Judge Souter's previous efforts as Attorney General of New Hampshire troubled me, particularly his work to require literacy tests for citizens who want to vote. In confirmation hearings before the Senate Judiciary Committee, Judge Souter expressed his opinion on a wide range of constitutional issues. For example, we know where he stands on the constitutionality of the dealth penalty. I do not know why more than 2,000 criminals under sentence of death in this country should be allowed to know Judge Souter's views on the constitutionality of the dealth penalty, and the millions of law-abiding women of America should be told "wait and see" on an issue that will come before the court, and might result in terminating the constitutional protection they have enjoyed for these last 17 years.

Although the majority of his professional career has been in the State court system of New Hampshire, it is clear that Judge Souter possesses the personal integrity and intellectual skills to serve as a judge in our Federal system. His recent confirmation to a seat on the First Circuit Court of Appeals demonstrates our confidence in his abilities as a Federal jurist. However, a seat on the U.S. Supreme Court requires different tests, which include close scrutiny of a nominee's views on basic constitutional values.

Mr. President, I will oppose the confirmation of David Souter for the U.S. Supreme Court because he has failed, indeed he has refused, to allow the citizens of this Nation, and their elected representatives in the U.S. Senate to learn his views on the fundamental constitutional right of privacy under which women's reproductive rights are protected from the intrusion of government.

If David Souter is confirmed by the Senate, and proves to be sensitive to the constitutional protection that women enjoy under Roe versus Wade, I will be most pleasantly surprised and relieved, and I will return to the Senate floor and express my personal gratitude that my concerns were misplaced.

But if I were to vote to confirm Judge Souter, and if he voted as President Bush hopes he will vote on the topic of the constitutionally protected privacy rights now enjoyed by women in our society, I know I would not be able to answer the question that would surely come from my two daughters, "Dad, what did you see in his background or in his testimony that led you to believe he really understood how important the right to privacy is to us?"

Because I can find no basic commitment to preserving the right to privacy, and the right of women to make their own decisions in the area of reproductive rights, I find myself unable to vote to confirm him. Judge Souter is an intellectually brilliant individual, a student of history, and a man whose life has been dedicated to the law. However the future course of constitutionally protected individual rights to privacy set forth in existing should be constitutional law as defined by the court in the 1970's entrusted to a nominee with a clearly stated and unequivocal commitment to the preserva-

tion of these very base rights. Regrettably, we cannot say today, on the basis of the record before us, that David Souter is that person.

Mr. ROTH addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Delaware is recognized.

THE ROTH ALTERNATIVE

Mr. ROTH. Mr. President, with less than 1 week before the beginning of the fiscal year, the time has come to meet our responsibility to the American people. Across our Nation we are seeing a legitimate concern over Government efficiency, even the effectiveness of this body to administer its most rudimentary responsibility: that of balancing the Federal budget. The summit between Congress and the administration raised hopes only months ago, but this, too, has evaporated into cynical suspicion that is being manifiest in opinion polls and the voting booths. Few people care which party is at fault. For Americans, concerned about their economy and global competitiveness, the issue of good government has gone beyond politics.

After the longest peacetime economic expansion in our history, the recent news regarding the GNP should be warning enough that the time has come for responsible action. The second quarter's 0.4 percent increase in real GNP growth is one of the slowest increases since the economic recovery began in 1982. Warning signs point to a recession, and confidence in the economy is waning. Frankly, I am not surprised. The budget summit has been meeting for 4 months. We are within a week of the fiscal year, and Americans still have no idea where the summit is headed.

For this reason, I believe it is time to set politics aside and cut the finger pointing. It is time for us to initiate real reform that will address the needs our Nation has today. It is time for Congress to promote policies for growth. And, Mr. President, I cannot overemphasize how important growth is—especially as we move more and more into the emerging global economic community. Countries that compete abroad—countries that provide opportunities for their citizens at home—will be the countries that promote policies that encourage growth. Strong national economies will be those that reward hardwork, risktaking and thrift—it is the law of the harvest. And it represents the objectives we should focus on as we initiate legislation on this floor.

I have a program that will allow us to meet these growth objectives. It is a program that will enable us to meet our financial responsibilities with policies beneficial to our economy. My program is an alternative to the stalmated budget summit. It is straight forward and easy to understand. The summit, to it is credit, has drawn together both the administration and the Congress. It is has established the issues where there is relative agreement, and I believe we should immediately build upon this foundation. On those issues where there is no agreement—let us save them for another day.

And that is what this Roth alternative proposes:

First, I abandon the budget negotiations' proposed tax increases. Warning signs point toward a recession, and a tax increase would throw the Nation into it headfirst.

Second, I lay aside the proposed cut in the capital gains.

Third, I cut the Federal deficit by $400 billion over 5 years, a significant cut, but one that will not have damaging effects in an already weakened U.S. economy. This would be accomplished by:

Reducing defense spending by $6 billion in the first year and $176 billion over the next 5 years;

Reducing entitlement spending $6 billion in the first year and $56 billion over 5 years; and,

Reducing nondefense discretionary spending by $12 billion in the first year and $70 billion over 5 years.

The fourth step includes pro-growth policies, many of which will contribute to the $400 billion deficit reduction. These include expanding individual retirement accounts to enhance savings incentives as well as raising $11.5 billion in new user fees—modeled after proposals in both Republican and Democratic budget packages. In addition, the R&D credit is made permanent and education incentives are broadened to keep our industries competitive and our employment base strong. Combined, these would raise additional revenues of $29 billion—the most significant part of which would be provided by the IRA rollover.

This alternative will work, Mr. President. It will allow Congress and the administration to break the budget gridlock. And it is a productive response to meeting fiscal necessities given the current economic climate. It will not require the furloughing of Federal employees who provide needed services, and it will not require tax increases on Americans.

Now, when the economy is slowing down, is no time to raise taxes. It is no time to shut down the Government. But it is time for us to take a good long look at spending practices and to ask the simple question: Is Congress spending too much, or are Americans being taxed too little?

Frankly, I do not think anyone would be surprised by how the voter would answer. The American people have had enough. They are tired of excuses. They are tired of tax increases. They are tired of excessive Federal spending. Revenues from taxes are higher today than ever before in our Nation's history. Still, Congress has been unable to balance the budget, and to add insult to injury, some of our colleagues persist in using this fiscal irresponsibility as an excuse to raise more taxes.

This has to stop; it has to stop now! Failed policies of tax and spend have to be replaced by policies for growth—policies that spark the economy, create incentives for the taxpayers, and force Congress to balance the budget and government to confront the reality of finite resources.

Like I said, Mr. President, this plan is simple. It's workable. And it will be an important first step in getting our deficit under control, and meeting our commitment to Americans. Frankly, these last few years have been exciting for America. Within a relatively short period of history, we witnessed the longest peacetime economic expansion America has ever known; we witnessed the end of the cold war, and even an alliance between former adversaries; and we have watched our free market principles and democratic ideals being embraced by nations throughout the world that are stepping from beneath the shadow of totalitarian regimes.

We have every reason to share in the celebration of these successes. But in the end, leaders lead, and our responsibility is to keep the momentum alive. We need to advance internal reforms that strengthen our economy here at home, expand our markets abroad, and enable us to meet our responsibilities in the emerging global community. And, Mr. President, should we be unable to implement even these simple measures to correct the budget debacle, let me be the first to say: Do not furlough the people; furlough the Congress.

Mr. President, I ask unanimous consent to print two tables in the RECORD.

There being no objection, the tables were ordered to be printed in the RECORD, as follows:

SENATOR WILLIAM V. ROTH, JR., SEPT. 26, 1990, OUTLINE

Item	Fiscal year—					
	1991	1992	1993	1994	1995	1991–95
Revenue items:						
IRA (w/rollover)	$1.50	$3.40	$3.30	$3.30	$3.30	$14.80
Extension of current law tax provisions	1.85	3 04	2.97	2.90	2 81	13.57
Retiree health benefits rollover	20	.40	.20			.80
Subtotal of increases	3 55	6 84	6 47	6 20	6 11	29 17
Spending cuts:						
Defense	6.00	17.00	34.00	50.00	69 00	176.00
Nondefense d scretionary ($12,000,000,000 off final appropriation)	12 00	13.00	14.00	15.00	16 00	70.00
Entitlement changes	6 30	9 11	10 54	13 43	16 89	56.27
User fees	5.49	1 45	1 55	1 36	1 65	11.50
Net interest	1 60	5 60	10.50	16.00	23 40	57.10

hard decisions about national energy supply.

It directs the president to recommend to Congress a specific plan of action to reduce imports below the 50% mark, and to choose among the available actions on a priority basis. On the advise of his Secretary of Energy, the President under this legislation submits to Congress his plan of action for conservation, development of alternative energy sources, and development of new domestic oil and gas reserves.

Then Congress gets the opportunity to review and revise the President's action plan. In the wisdom of this body, members can change the President's plan if we deem it necessary—just as long as we achieve the same results of lessening dependence on foreign oil to a level below 50%.

This "Dear Colleague" letter issued by Senator Graham of Florida and cosigned by a number of other senators is an outright falsification of the purpose and intent of the national security act. I urge my colleagues to brief themselves about this—to talk to me directly about it. I'm confident that it is the right idea for the right time.

We have asked thousands of our military personnel to make tremendous sacrifices for their country in order to help a foreign national defend itself against a foreign aggressor in order to protect a foreign supply of oil for a good portion of the world.

The least we can do in this time of crisis, is to get our own energy house in order. The national energy security act is the way to do it, and I ask the Senate for its support.

Mr. MURKOWSKI. Mr. President, as I indicated earlier, there is a Dear Colleague letter that is floating among my colleagues relative to the issue of the National Defense Authorization Act and an amendment which I offered entitled the National Energy Security Act of 1990 which was adopted by unanimous consent in this body shortly before our recess.

Mr. President, the Dear Colleague letter suggests that the amendment would compel the President to consider leasing offshore and onshore Federal lands that are currently off limits to oil and gas leasing in order of their potential for oil and gas discovery without regard for why those lands were placed off limits.

Further, Mr. President, the letter suggests that the amendment will allow oil and gas leasing in wilderness and other environmentally sensitive areas now provided exempt from intrusion, and it specifically states the Arctic National Wildlife Refuge, the Florida Keys, the National Marine Sanctuaries off California, and the suggestion is that this means that, notwithstanding the regulations of important environmental protection statutes such as the National Environmental Policy Act and the Coastal Zone Management Act, these lands somehow would be jeopardized.

Mr. President, whoever prepared the letter for my colleagues about the Murkowski National Security Act amendment to the Defense Authorization Act did a very poor and inadequate job of comprehending the legislation. One could conclude that they simply did not read it. The mischaracterization of the purpose of the legislation apparently has prompted some of my colleagues to lend their name to this communication to the chairman and ranking member of the Armed Services Committee.

Mr. President, for the record, the purpose of the National Energy Security Act, cosponsored, by the way, by 16 other Members of the Senate from both sides of the aisle, is to put a ceiling on the level of imported oil into the United States. The purpose of the legislation is to give teeth—teeth, Mr. President—to a national energy policy that we have been frustrated at the lack thereof.

Mr. President, to force the President and the Congress to make the hard decisions about national energy supply is certainly appropriate in light of our troops in the Mideast.

The amendment directs the President to recommend to Congress a specific plan of action to reduce imports below the 50-percent mark and to choose among the available actions on a priority basis.

On the advice of his Secretary of Energy, the President under this legislation submits to Congress his own plan of action for conservation, development of alternative energy sources, and development of new domestic oil, and gas reserves.

The Congress then gets the opportunity to review and revise the President's action plan. In the wisdom of this body, Members can change the President's plan if we deem it necessary just as long as we achieve the same results of lessening dependence on foreign oil to a level below 50 percent.

Mr. President, this Dear Colleague letter issued by my friend, Senator GRAHAM, of the State of Florida and cosigned by a number of Senators, is an outright falsification of the purpose and intent of the National Security Act.

I urge my colleagues to have their staffs brief them about this. I would be pleased to talk to any of my colleagues directly about it. I am confident it is the right idea at the right time and it is the only vehicle that has come forth during this crisis.

Mr. President, in conclusion, we have asked thousands of our military personnel to make tremendous sacrifices for their country in order to help a foreign nation defend itself against a foreign aggressor in order to protect foreign supplies of oil for a good portion of the Western World. The least we can do in this time of crisis is to get our own energy house in order. The National Energy Security Act is the way to do it. I ask the Senate for its support.

I thank the Chair.

CONFIRMATION OF JUDGE DAVID SOUTER

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

Mr. President, by now I think we are all familiar with the background and credentials of Judge Souter. Nobody questions his intellect, character, or qualifications. Judge Souter has graduated Phi Beta Kappa from Harvard University, was a Rhodes scholar at Oxford, and a graduate of Harvard Law School. Following this distinguished academic career, Judge Souter has spent the last 22 years of his life dedicated to the practice of law and service to the public. During this time, he has served as attorney general of the State of New Hampshire, associate justice of the Supreme Court of the State of New Hampshire, and, most recently, as a judge on the U.S. Court of Appeals.

Mr. President, I do not happen to be a lawyer and do not serve on the Judiciary Committee, but it is hard to imagine that this body has ever been asked to confirm a candidate perhaps more qualified than David Souter to sit on the U.S. Supreme Court. Judge Souter's entire life evidences a rare combination of intellectual capability and the human characteristics of thoughtfulness and compassion.

Mr. President, as public servants ourselves, we know the demands that can be made on our time. No matter how hard we try there are always more good causes that deserve our attention than time to devote to them. I think we all agree in an age where quick fixes perhaps from time to time are more prevalent than thoughtful solutions, and hasty decisions have become the norm, Judge Souter lives a life that is dedicated to an introspective thought, well-reasoned solutions, and personal humility, which I think was evident to those of us who watched his confirmation. Perhaps we would all do better if more people like David Souter were willing to devote themselves to public service.

There is some opposition, and one might ask why special interest would oppose that nomination. Mr. President, it is the feeling of the Senator from Alaska that with these kinds of qualifications, one wants to know why these special interest groups are speaking out in opposition to Judge Souter's confirmation. What ax do they have to grind with this well-respected jurist from New Hampshire?

Mr. President, in the opinion of the Senator from Alaska, this is simple: David Souter did not pass the special interest litmus test. It seems that for some in this town, and regrettably for some in this body, qualifications and experience and compassion simply do not matter. All that matters is how a

candidate will vote on one special interest issue. If you disagree with the folks on this one issue, or, worse yet, you tell them that your decision will depend on the facts—the facts, can my colleagues imagine that; a Justice on the Supreme Court will depend his decision on the facts of a particular case—then you are unworthy of support. I do not buy that argument, Mr. President. I do not think a majority of my colleagues will.

This is not a practical, realistic, or certainly a fair approach. The type of approach that these groups advocate with respect to our advice and consent responsibility is degrading to the U.S. Senate and should be rejected by each and every one of my colleagues.

Mr. President, after listening to the complaints of certain special interest groups, it is hard not to call on a general terminology that there might be some degree of hypocritical atmosphere or certainly attitude in this regard. On the one hand, the caution of any nominee that is subject to the administration litmus test must be rejected out of hand, while at the same time they insist that a nominee pass a litmus test of their own. That is a little bit of a hit and miss, Mr. President. Political posturing and litmus tests only serve to cloud the real issue, and that is competence; that is dedication. Judge Souter has repeatedly proven he has the confidence and dedication necessary to serve with distinction on the U.S. Supreme Court. Because of these qualifications, this Senator will not take part in the hypocrisy of a single-issue litmus test.

Mr. President, we are all subjected to that, and we all respond in the same way, except when it is convenient to do otherwise, and that is what some are doing in this case.

As this body wraps up the confirmation process with respect to Judge Souter, I ask my colleagues to reflect briefly on the type of precedent that certain special interest groups are asking us to establish. By asking us to apply a single-issue litmus test to a candidate to sit on the U.S. Supreme Court, these groups are asking us to undermine one of the cornerstones of our constitutional system, the presence of an independent judiciary.

Only voting to confirm a candidate that happens to share similar views on a particular issue of the day is, in effect, saying that we should expand the Supreme Court, maybe, from, what, 9 to 109 Members. Mr. President, I think we have plenty to do while we are here without moving over there. I think this is a dangerous precedent, and I ask my colleagues not to endorse it.

Mr. President, the question each Member of this body needs to ask himself or herself when casting this vote on confirmation is whether Judge David Souter is qualified to serve on the U.S. Supreme Court. An examination of Judge Souter's record, along with his thoughtful answers to the questions of our colleagues during the committee hearings, I think indicates that there is only one reasonable answer to this question. Of course, David Souter is qualified. For this reason, I ask my colleagues to join me in voting in favor of his confirmation.

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.

NOMINATION OF DAVID SOUTER

Mr. BOND. Mr. President, it is my pleasure today to rise to announce my support for Judge David Souter for appointment to the position of Associate Justice of the Supreme Court.

Throughout his legal career, Judge Souter has shown himself to be an outstanding jurist. In last week's hearings before the Senate Judiciary Committee, he made it clear that he intends to uphold the Constitution, not to expand it to fit his political philosophy.

Throughout his career as a State attorney general, a justice of the State supreme court, and a Federal appeals judge, David Souter has demonstrated that he has the keen intellect, the willingness to put in long hours, and the understanding of the concept of judicial restraint that a member of the Supreme Court should have. His strength of character and his devotion to his friends, family, and community are, unfortunately, too seldom seen these days.

Some of my colleagues have criticized Judge Souter and announced opposition to his nomination because of his refusal to be tied down to a specified position on issues that may come before the Court, particularly the very difficult issue of abortion. I believe, however, that Judge Souter should be commended for maintaining his independence and for not knuckling under to those who would have him lay out in detail, to prejudge, to predecide the cases before him on the basis of political or personal views.

As Justice Stevens has stated, for Senators to pin down a nominee in advance on specific issues on future votes would discourage openmindedness on the part of the judge, give an appearance of impropriety, and threaten an independent judiciary. It is not our business to tell judges how they will decide cases. The Supreme Court has the Constitution and precedents before it, and I believe Judge Souter will do an able job of interpreting that Constitution in the light of those precedents.

On Monday, the Supreme Court will open its next session. There are many important issues to be decided by the Court this year, many of them scheduled for argument in the early days of the session. There is no reason this body cannot act on Judge Souter's nomination in time for him to join his colleagues in the first session of oral arguments next week.

The President acted in an extremely timely manner to send the Senate a nominee who is well qualified. The Judiciary Committee moved quickly to hold hearings.

I urge the majority leader to schedule a vote this week and allow Senators to send this very qualified nominee to the Supreme Court.

VOTER REGISTRATION

Mr. FORD. Mr. President, last evening, this body in its wisdom voted not to allow us to go forward in our effort to attempt to register more Americans. The distinguished Presiding Officer was one of those who was very interested in seeing that every American had access to the polls.

Mr. President, I am not going to get into all of the objections that we heard. Most of them could have been worked out. But we want to give every American, almost without exception, the opportunity to be registered and to vote. The problems could have, I think, been worked out. Whatever the objections to the bill, and they were minor, I think could have been negotiated.

I want to just draw one conclusion here. A political race is an event. It is an event that people begin to want to watch. Take for example—how many Members of the U.S. Senate watch a baseball game, professional baseball game every night? They may look at the paper in the morning, scan down, and see who won the night before, or who lost. But wait until you get close to the World Series. The viewing public increases. The interest reaches a crescendo in the World Series. But, Mr. President, when you want to go to the World Series to see the game, you cannot find a ticket. That is similar in my opinion to the political process.

People are not real interested. They are not listening to everything that goes on, read every article, every accusation, every claim, every issue until closer to election time. If you are not registered to vote, you do not have a ticket to go to the voting booth.

How many people watch professional football games every time one is on television? Not many. All of us will watch a ball game on occasion if you are home on Sunday afternoon or Monday night. You watch a ball game. But you become very, very interested as it nears Super Bowl time. You get down to the cream of the crop. Then you want to go to the Super Bowl, and

we are going to get our deficit under control. It is absolutely critical that we make these reductions on a selected basis and have a clear understanding of what we do in each and every instance.

I thank the Chair. I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

NOMINATION OF JUDGE DAVID SOUTER

Mr. DANFORTH. Mr. President, I rise today to endorse wholeheartedly the nomination of Judge David Souter to the Supreme Court. When I head of Justice Brennan's retirement, I was genuinely worried about the nominations process that would follow. I was worried about what we had created in the demeaning process employed to mischaracterize Judge Robert Bork. I was worried about what methods would be used to misrepresent the next nominee. How would prior writings be misused, be taken out of context, be employed for a purpose never intended? How would a person's personality and character be twisted and turned? How would the Senate and the interest groups comport themselves this time around?

Well, Mr. President, I still regret the treatment of my former professor, Judge Bork. I feel for him each time I read about events at the Supreme Court. He should be there. He deserved it. But I am slightly heartened. The unfair attacks on Judge Robert Bork have not given rise to my worst fears. They have not led to the nomination of a mediocre candidate. They have not led to the nomination of a candidate without significant experience. Most importantly, they may not have permanently infected the process of choosing our Supreme Court Justices.

I believe that President Bush has nominated a stellar candidate to the Highest Court in the land. In all of the areas appropriate for examination by the Senate: integrity, intelligence, legal scholarship, and judicial temperament, Judge Souter has proved beyond a reasonable doubt that he deserves a unanimous vote of approval by this body.

The man has a résumé about which most people can only dream. He attended Harvard College, graduating magna cum laude. He received a Rhodes scholarship and then went on to Harvard Law School. He worked in private practice for 2 years and then began his long and distinguished career in public service. In 1968, he became an assistant attorney general for the State of New Hampshire. He then was appointed deputy attorney general under our colleague, WARREN RUDMAN, and 5 years later, he succeeded his former boss and became the highest law enforcement officer in the State of New Hampshire. He was appointed to the State bench in 1978 where he served as a trial judge for 5 years. Judge Souter was promoted to the State Supreme Court of New Hampshire in 1983. He was recently appointed to the Court of Appeals for the First Circuit.

As for legal qualifications, Judge Souter has distinguished himself at the bar and on the bench. Senator HATCH properly dismissed his supposed lack of a paper trail as nonsense. David Souter wrote 221 opinions as a justice of New Hampshire Supreme Court. This does not include his memorandum decisions as a trial judge, and all of the oral decisions he made from the bench. I am told that these decisions are reasoned, clear, and well written. According to John Broderick, the New Hampshire Bar Association president:

> [Souter has] the finest legal mind I have ever encountered. He gets to the bottom line faster than anybody I've ever seen." "He's a judge's judge, extraordinarily talented and impeccably fair. * * * He will not cast his lot with conservatives on the court merely because they're conservatives. He's fiercely independent in his legal reasoning. * * *

There can be no doubt. Judge Souter has the legal acumen and ability to be a great Supreme Court Justice.

More than these qualifications, as outstanding as they are, Judge Souter has demonstrated throughout this process that he has the requisite judicial temperament. As Senator RUDMAN stated:

> On the New Hampshire Supreme Court, Judge Souter demonstrated that he is a classic conservative. Judge Souter respects precedent, applies the law to the facts before him, without predefined conclusions. He is committed to the application of the traditional rules of statutory construction and constitutional interpretation, and recognizes the proper role of judges in upholding the democratic choices of the people through their elected representatives.

I believe that this description speaks volumes about Judge Souter's judicial temperament. He understands the limits on his office. Judges are selected to decide cases and controversies brought before them. They should do only that. They need not reach out for other issues not properly raised. They need not read their own views into precedents or legislative history in deciding a case. Everything that I have heard about Judge Souter and everything that he said at his confirmation hearings convinces me that he respects the institutional limits on the judiciary.

There is one last issue that has been raised in the meticulous and exhaustive examination of the life of this judge from New Hampshire. It's his humanity or experience or sensitivity. Well, Mr. President, I never doubted him on this issue, but I must say that what I have learned since his appointment has given rise to a sincere affection for this person who I have only met a couple of times in my life. I have no doubt that he has seen the full range of human endeavors. As the attorney general of New Hampshire, he probably saw more suffering and tragedy than any of us wish to see. I know from experience as a State attorney general that one gets all the life experiences one wishes as the attorney general for a State.

With respect to his humanity or sensitivity, Judge Souter showed us all that we need to know in his confirmation hearings. His experience as a proctor on the board of freshman advisers at Harvard reveals his sympathy and empathy for those in need of support. He spoke to a young woman in great pain for 2 hours about a decision that would effect her life forever. He understands the pain of those who would be impacted by his decisions. This revelation showed us a side of Judge Souter that only his close friends, like Senator RUDMAN, knew before. Now he has let all of us see this side of him. His response on civil rights, when being pressed about positions he took as the Governor's lawyer, show his sensitivity in that arena. Judge Souter said the following:

> I hope one thing will be clear, and this is maybe the time to make it clear, and that is that with respect to the societal problems of the United States today there is none which, in my judgment, is more tragic or more 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. * * *

In his opening statement, Judge Souter talked about his beginnings in a small New Hampshire town, about the people he knew there from every class and every ethnic origin. He spoke of his pro bono work at his law firm, about a case in which he represented a poor woman who had lost custody of her children. He told us of two lessons learned from being a judge. The first was that his decisions impact the lives of real people. The second is that this impact on humanity forced him to do everything he can to get the decisions right. The last indication of his humanity which gave me a great insight into this man is the comments of the parents of his godchild. They described how Judge Souter took his responsibilities toward his godchild seriously. This concern for those in his charge impresses me. For all of these reasons, I will give my endorsement to this nominee.

Certain Senators have stated their intention to vote against the nomination of Judge David Souter. None that I have heard has based that vote on the criteria that I have used in may analysis. All of these Senators have found him professionally competent and of the highest integrity. Instead, these opponents to the nomination have based their opposition on the judge's refusal to answer hypotheticals regarding the extension or restriction of Roe versus Wade. They claim that he was not consistent in his examination of different issues. He gave short shrift to the right to privacy while going into detail on other issues. I disagree.

Judge Souter did not stonewall the committee. He answered questions about his views on the underlying principles of decision in every area of interest to the committee. With respect to the right to privacy, Judge Souter stated the following: "I believe that the due process clause of the 14th amendment does recognize and does protect an unenumerated right to privacy." He said that as an interpretivist, he was confident that the ninth amendment issured the recognition of privacy rights which were already recognized by the State prior to the signing of the Constitution. It is true that as a sitting judge, Judge Souter refused to answer the specific question of whether this right extended to abortion or to the right of an unmarried couple's use of contraception. Mr. President, these are questions about specific cases that may very well come before the Court. An attempt to overrule Roe versus Wade will almost certainly come before the court in the next few terms. Yet, even on this sensitive issue, Judge Souter stated that he recognized the principle that must be applied one way or the other in a case regarding abortion: the right to privacy. He simply would not say whether the woman's right to privacy outweight the interest in life of the unborn child. He would not apply the relevant principle to the facts of a specific case.

Judge Souter used this methodology in every area of interest to the committee. He discussed the principles that would generally guide his decisions, but he would not apply those principles to specific cases. He discussed the merits of the tests used in specific areas, but he would not apply these tests to facts or cases that might come before him. With respect to the first amendment, he was willing to talk about the principles that would generally guide his examination of the establishment clause and the free exercise clause but stated specifically that he could not talk about their application in specific cases. With the respect to the death penalty, he stated that the Constitution expressly contemplates it, but he would not discuss whether it should apply in certain cases.

Judge Souter dealt fairly with the Judiciary Committee. It is true that he did not state his position on specific cases, but he is constrained by judicial ethics and common sense not to do so. What he said about these issues was that he had not prejudged any case and would listen carefully to the arguments presented. That, Mr. President, is all that we can ask.

Mr. President, this nominee comes with the highest recommendation from a man that all of us deeply respect: our colleague from New Hampshire, Senator RUDMAN. That recommendation means a lot to me. I believe that Judge David Souter has the integrity, intelligence, legal scholarship, judicial temperament and, most importantly, the heart, to be a great Supreme Court Justice. I will support him.

Mr. AKAKA addressed the Chair.

The PRESIDING OFFICER. The Senator from Hawaii is recognized.

Mr. AKAKA. Mr. President, I ask unanimous consent to proceed as in morning business for 5 minutes.

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

The Senator from Hawaii is recognized.

Mr. AKAKA. I thank the Chair.

(The remarks of Mr. AKAKA pertaining to the introduction of S. 3119 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. AKAKA. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BRYAN). The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

ORDER OF PROCEDURE

Mr. DODD. Mr. President, I am about to ask the Chair to consider passage of a piece of legislation that has emerged from the Securities Subcommittee of the Banking Commiittee. It has been cleared on both sides. Senator HEINZ, my colleague and ranking minority member of the subcommittee, will be here shortly to be representing his views on the legislation.

SECURITIES ENFORCEMENT AND PENNY STOCK REFORM ACT

Mr. DODD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 647.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 647) entitled "An Act to amend the Federal securities laws in order to provide additional enforcement remedies for violations of those laws", do pass with the following amendments:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS; EFFECTIVE DATE.

(a) SHORT TITLE.—This Act may be cited as the "Securities Enforcement and Penny Stock Reform Act of 1990".

(b) TABLE OF CONTENTS.—

(c) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2) and title V of this Act, the amendments made by this Act shall be effective upon enactment.

(2) CIVIL PENALTIES.—No civil penalty may be imposed pursuant to the amendments made by this Act on the basis of conduct occurring before the date of enactment of this Act.

(3) ACCOUNTING AND DISGORGEMENT.—Paragraph (2) shall not operate to preclude the Securities and Exchange Commission from ordering an accounting or disgorgement pursuant to the amendments made by this Act.

that will be fair to tenants and fair to owners. We cannot ignore the just concerns of either tenants or owners.

Failure to pass the extender would give the owners everything they want but would be a disaster for the tenants, giving them nothing that they want. Both bills contain preservation provisions, both of the housing bills that have passed, one in the Senate, one the House, that have been developed over the course of the past 3 years through an open and enormously extensive legislative process. Independent task forces, numerous studies, extensive hearings have been part of that process. To allow owners a window to prepay at this late date in this process would serve no discernible purpose, at least no discernible public purpose. It would send a surge of rancor throughout the Nation that would undermine the conferees' ability to adopt a prudent approach in the days immediately before us when it is their intention to do exactly that.

The House bill was received on September 2, more than 2 weeks ago. Since that time, the subcommittee has spent each day consulting and working with others to get this measure enacted and to send to the President a measure for his immediate signature. Yet, day after day, that was not to be. What should have been a routine measure has been delayed by the Senator from Colorado, for reasons which have only become apparent in the past few days. I refer to Senator ARMSTRONG of Colorado.

The time for delay is over, Mr. President. The Sunday deadline is right upon us, like the even more significant budget deadline. I urge my colleagues to vote for the House extender. That will protect the thousands of low-income tenants who are at risk, and it will allow the housing conferees to reach a final, responsible decision on the prepayment issue.

Mr. President, we await the arrival on the Senate floor of Senator ARMSTRONG of Colorado. Pending his arrival, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. LAUTENBERG). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SIMON. 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. SIMON. Mr. President, I rise in support of the pending legislation. I think it is extremely important that we move ahead. This is simply calling for a 30-day moratorium so that the conference that our distinguished colleague from California, Mr. CRANSTON, and others are involved in can work this thing out.

My understanding is that the conference is working this out so that we are not going to deprive owners of income. It is being worked out in an equitable way, but worked out in a way so we do not force people into the streets. This is not a substitute for moving ahead and having more public housing, getting interest rates down, getting more private housing. In the city of Chicago alone, 2,063 units will be eligible as of Monday, should the extension not go through. My guess is that means 4,000, 5,000, 6,000 people who could be put out on the streets if we do not get this worked out.

My hope is that we will move quickly and get this passed for another 30 days—a 30-day moratorium, no more, while the conference committee works its will. I think it makes eminent good sense.

NOMINATION OF JUDGE SOUTER

Mr. SIMPSON. Mr. President, I wish to comment on the Souter proceedings. We had a very productive hearing in Judiciary this morning, with all of the members, of course, present and presenting their reasons for support of this remarkable candidate—nominee. This is a political year. I must get the nomenclature correct—the nominee, and he passed the Judiciary Committee by vote of 13 to 1.

The American people are well aware of Judge Souter through the hearing process. I commend the chairman, Senator JOE BIDEN, who did a superb job. He was very steady, very patient, very sensitive to the sometimes spirited debate that went on, very accommodating to the witnesses, and he deserves the commendation certainly not just of the members of the Judiciary Committee but the entire Senate. It took a tremendous amount of staff work. His very capable chief of staff, Diana Huffman did a marvelous job. It was well done.

Of course, I supported Judge Souter. My remarks are entered in the record of the committee and I will not belabor that.

I thought that we saw a procedure which really presented to us one of the most extraordinary men to be presented to sit upon the Supreme Court that I have seen in my 12 years in the Senate. There was a brief attempt to set things on a referendum of where he would be on the issue of Roe versus Wade. There was an attempt, which did not prevail, to turn those hearings into a referendum on that single issue. I am very pleased that my colleagues were able to inquire into that issue without requiring a specific answer on how Judge Souter would vote when presented with that issue. I thought he handled it beautifully.

We have moved very swiftly on this nomination. The President moved very swiftly to nominate a successor to William Brennan, who is irreplaceable. I have come to know the man and I have already made my remarks about that splendid gentleman. But Chairman BIDEN was equally expeditious, and now the committee has done its work. Our job, of course, was made easier by the quality of the nominee. But I think we need speedy action now.

It is up to the Senate to give similar consideration to the need for very swift action because the eight Judges, the eight sitting members of the Supreme Court undertook the job of acting upon 1,000 petitions of certiorari which had accumulated during the summer.

It was unfortunate, but unavoidable that Judge Souter did not participate in that process. There is nothing that could have been done to stimulate that. However, the Supreme Court begins its oral arguments on Monday, October 1, 1990. Unless a Justice participates in the oral argument of a case, he is precluded by Court tradition from participating in a decision on that case. The oral argument is one of the most important aspects of the appeals process.

The Supreme Court traditionally hears oral argument on four cases per day. So if we do not take action upon the nominee until the middle of next week, there would be as many as a dozen cases in which this new Justice could not participate. I do not think that needs to happen because we can, with a waiver of certain rules regarding committee reports, take floor action on the nomination tomorrow or Sunday, if we do happen to be in session, or Monday, at the very latest, in the morning, in time for the nominee to participate in the oral arguments on that day.

In many cases it might not be wise to waive the 3-day rule on filing reports, but in this case the hearings were so widely broadcast in newspapers, magazines, on televison, I do not think we need to have the usual need of a committee report to bring us up to speed on what transpired in the hearing. With the vote of 13 to 1 in the hearing this morning, I think that is ever more evident.

Several Members have taken to the floor and made statements on their position on the Souter nomination. I suggest simply, in conclusion, that it is time, with our image, if you will, of a great deliberative body, we could bring credit by moving expeditiously to assist the third branch of Government by placing this splendid man on the Court Monday of next week, because there is no reason why we should doom certain cases to the prospect of a 4-4 tie vote and thus no decision on issues that have been demanding resolution for years. Litigants in the Supreme Court cases which are going to be argued beginning Monday, as well

as the American public, will be grateful, if we can take action now for the new Justice to sit with the rest of the Court on Monday, October 1, 1990.

I encourage the Senate to act on Judge Souter before Monday.

EXTENSION OF CERTAIN HOUSING AND COMMUNITY DEVELOPMENT PROGRAMS

The Senate continued with the consideration of the bill.

Mr. ARMSTRONG. Mr. President, what is the pending business before the Senate?

The PRESIDING OFFICER. The pending business is H.R. 5558.

Mr. ARMSTRONG. Mr. President, I understand that a few minutes ago the Senator from California [Mr. CRANSTON] called up a bill, and I am not clear of the extent of the opening statement he made. It may be that he may which to make a statement in explanation of the bill before I say any more. I understand he did say that I would be holding up the bill. I will comment on that in due course. I would be glad to let him proceed.

Mr. CRANSTON. If the Senator will yield, I already made an opening statement to get the ball rolling. I would just as soon wait now.

Mr. ARMSTRONG. Mr. President, let me start by clarifying the record of whether or not I have been holding this bill up. Let me tell my friend from California if I were trying to hold up this bill we would not be debating it right now. I do not know what we would be doing. Probably if I were trying to hold this bill up, I would likely now or at some previous occasion would have said the seven magic words. "I suggest the absence of a quorum."

Mr. President, if I were trying to hold up this bill, which I believe the Senator told the Senate and which I believe the Senator told the press on yesterday, I would not have agreed to the unanimous-consent request on the motion to proceed to this bill.

Mr. CRANSTON. Mr. President, if the Senator will yield, I am delighted that he is willing to let us proceed with the bill now. He is not now holding up the bill. I have been trying to get it up for some days. The Senator was concerned about the bill and I am simply concerned about time running out on a very important matter. We have a deadline that must be met very soon.

Mr. ARMSTRONG. Mr. President, I do not want to be argumentative, I do not want to be touchy. I do not know how many days he has been trying to get it up, but as far as I know this bill was received officially by the Senate on September 26. That was yesterday. I gather the bill was floating around here for a while before then. It had sort of drifted over on a strong west wind from the House of Representatives and sort of wafted into the Chamber. But it was never officially received until yesterday.

On yesterday the Senator from California asked, Was I willing to take up the bill? What did I want? Did I have amendments? What was my desire? I said all I want is a chance to explain what I think of this bill and maybe offer a few carefully thought out amendments.

But I just wanted to tell my friend from California that, because it hurts my feelings a little to have someone think that I was trying to prevent the consideration of this bill or delay the consideration of this bill and then have it come up so easily. If I wanted to delay or prevent the consideration of this bill, there would be a lot more aggravation and ruckus than we have had or than, in fact, I expected to have. I have no particular interest in delaying action on this bill. I have absolutely no interest whatsoever in inconveniencing my friend from California.

So with that in mind, I wish somebody could just explain to me what the big hurry is about this bill. Here is what I understand this legislation to be all about, and I will confess that there is just about everything that I do not know about housing. There was a time when I was somewhat knowledgeable on housing legislation. In fact, there was a time a few years ago, when I was a member of a committee of the Senate that had jurisdiction over housing legislation, but when I left the committee I sort of pulled the plug. Like water running out of a bathtub, everything I then knew about it sort of drained out of my brain leaving like a ring around the bathtub, just sort of a residue of sort of odd bits and facts.

There used to be a great political leader, still is a great political leader from the State of California, who used to have facts that he carried around on 3 by 5 cards. That is what I am doing on this. I have sort of collected facts, some of which may or may not be accurate. So if I stray off on to something not entirely accurate in the knowledge of the Senator from California who is an authority on this matter, I hope he will straighten me out.

Some of the details I am a little hazy on, I will be frank to say. I hope other Senators will come to the floor and enlighten us all. But I am pretty clear on two issues that I think ought to be considered by the Senate before we rush to pass this bill. The first is a wholesome all-American notion that a deal is a deal, that honorable people do not welsh on deals. Even if they subsequently decide they made a bad deal once they make it, by gosh, they stick to it.

What I understand to be at stake here is this: Somewhere along about 22 years ago the U.S. Government entered into some deals with some people to build subsidized housing. The details I do not know. I am willing to be corrected if I am in error on these facts. I am here to learn. I am a seeker after truth here today.

But it is my understanding that in the contracts which were entered into between the providers of this subsidized housing and the Federal Government were provisions which gave to the provider an option after 20 years to prepay the mortgage, a prepayment clause. After having done so, the providers of the housing, that is the home builder, the home provider, would be entitled to use that property in the ordinary and normal way that any citizen who owns real estate can use it, but that prior to that time, the owner of the property would be required to use the property only for the purpose of the subsidized housing program. Or to put it more simply, as long as this mortgage existed on housing they had to make it available for low-income tenants to rent.

I would like to just pause here because if I am mistaken in the basic facts, I would like somebody to stralghten me out before I go completely off the track.

May I ask the Senator from California if I have accurately stated the essence of those contracts? Twenty years firm, right to prepay the mortgage, when you prepay the mortgage, you recapture the right to use the property? Is that pretty much the case? I would have looked this up in the committee report but as far as I know there is not one.

Mr. CRANSTON. Mr. President, there was language in the contract to allow for the prepayment. It was not a bargain for term. Owners did not pay consideration to get that in the contract. In fact, no reference was made to prepayment in the statute. It was an administrative decision.

But plainly we have to take into account equity for the owners. We also have to take into account equity for the tenants when there is a major public purpose, making sure that we do not have more homeless people, making sure that the people who cannot afford to pay these rents not face eviction and/or the problem of having even more of this slender income required for housing leaving less for food and clothing and other needs. This is a public purpose we have to take into account. Our endeavor is to work that out in a fair and equitable way. There is one Senate version. There is one House version. It is my belief that given time we will get when this measure passes, we can work it out. We are willing to negotiate very intimately and closely with

a tiny handful of communities is the cable company subject to real competition.

Consumers who are dissatified with either the price of their cable system or the quality of the service which it provides have few, if any, real alternatives under current law. Good public policy should now allow unregulated monopolies to go unchallenged.

It is ironic, Mr. President, that even the present Cable Deregulation Act of 1984 gives lip service to competition and authorizes some form of rate regulation where that competition does not exists, but competition under the 1984 act by law and by regulation is defined as having been met by having a handful of over-the-air television stations available to the viewer. It is not a realistic definition of competition in the present world where the vast majority of the channels which a person on cable can receive cannot be received over the air or by any alternative and readily available technology.

During the course of 1989 and 1990, the Commerce Committee held 10 days of hearing on cable issues. Many of us worked with the distinguished ranking Republican member of the committee, Senator DANFORTH, in his judicious attempt to write the bill which we had hoped would be before the Senate today, a truly consensus cable measure.

It certainly does not include every provision I would have liked to have had included, but it does significantly mobilize our efforts both to protect the consumers and to lay the foundation to encourage new competitors of cable to enter the marketplace.

Many constituents, literally hundreds of constituents who have written or called or spoken to me pesonally during the course of the past few years, would welcome new rate regulation. Some form of regulation is included in this bill. Again, it is regulation which can exist only where there is no effective competition but effective competition is defined much more realistically.

As a consequence, the bill would provide some protection from run away price hikes in the future. While most consumers do not concentrate on the other half of this formula, it is at least equally important to encourage new video programming alternatives. The Commerce Committee's findings suggest that because the cable industry is both horizontally and vertically integrated, it is able to exert undue control and power over potential competitors. To address concerns with horizontal integration. the bill requires the Federal Communications Commission [FCC] to conduct a rulemaking to prescribe reasonable limitations on the number of subscribers a cable operator can reach nationwide and on the number of channels that can be occupied on a cable system by programmers affiliated with a cable operator.

As you know, Mr. President, those programmers are frequently given beneficial channel selection by an affiliated cable provider.

Because of verticle integration, cable operators have both the ability and the incentive to favor their affiliated programming service. In the worst cases, a cable operator simply refuses to carry nonaffiliated programmers. In less extreme and more common cases, the operator simply gives his affiliate a more desirable channel position. The bill addresses these concerns by barring cable operators from discriminating against unaffiliated programmers in terms of carriage, price or conditions. These provisions will help alternative providers, such as satellite or wireless technologies, gain fair access to programming, and it is that fair access to programming which is the key to true competition in this field.

As I have already said, the bill does not contain every provision which I supported during the course of the committee's consideration. The bill does not include, at this point at least, any portion of S. 2800, the proposal of the distinguished junior Senator from Montana [Mr. BURNS] which I cosponsored. S. 2800 would have allowed certain independent telephone companies to even the cable business. The bill included extensive safeguards to guard against fears of cross-subsidies. Nevertheless, that proposal was highly controversial, was divorced from the bill, and then was modified and approved by the Commerce Committee a month or so ago. The modified bill will allow telephone companies simply to act as common carriers and not the originators of programming. At the same time, it would require the Federal Communications Commission to study the present cable telephone cross ownership limitations and report back to Congress on its recommendations within a year.

I regret that we have not been able to debate this bill here today. I also regret that the administration has sent a list of objections to the bill which include at least indirect threat that should it pass and and should it be compromised with the bill which the House of Representatives has already passed then it would be likely to be the subject of a veto. The administration lays out five or six specific objections to the bill but then summarizes by stating that it, the administration: "* * * continues to believe that competition, rather than regulation, creates both the most substantial benefits for consumers and the greatest opportunities for American industry."

That statement on the part of the administration is entirely correct. Unfortunately, the position that it takes encourages the maintenance of monopoly and the absence of competition in cable television.

I believe that it is vitally important that Members of Congress consider carefully consumers' objections and protests about the present system. I am convinced that competition is the greatest and the best cure and thus with truly competitive offerings to people who are now restricted to the use of a single cable entrance in their community almost all of the objections to the present system on the part of consumers would disappear. Competition has been the touchstone to the success of the American economy. Monopoly is something which we abhor and attempt to avoid. When we are faced with the existence and the necessity of a monopoly, however, we do call for governmental rate regulations. This bill is modest and narrow in that respect, and the ability for rate regulation disappears precisely with the advent of true competition.

It is a procompetition bill, Mr. President; it is an important matter for consideration while we wait for a solution to the budget controversy. It is most unfortunate that we have not been permitted to debate it today. I hope that its opponents will reconsider and allow such a debate to take place before the Congress adjourns.

Mr. President, seeing no one seeking recognition, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEVIN. 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 NOMINATION OF DAVID H. SOUTER

Mr. LEVIN. Mr. President, I rise today relative to the nomination of Judge David Souter. The most significant part of Judge Souter's testimony, to me, was his approach to the law as reflective of life and experience and not just a wooden, logical exercise. His description of his approach to judicial interpretation is significantly different from the rigid ideological agenda which would move us backward in the area of constitutional rights. Some disguise that agenda by claiming that they seek only to divine the original intent of the founders of the Constitution. But Judge Souter's description of his own approach is very different from that.

For instance, Judge Souter said:

When you are speaking of original intent, as I understand it and as I understand what you have just said, you are referring to the original intent in the sense of the specific intent of the drafters to deal with specific problems and, conversely, their provable

intent not to deal with other specific problems by the application of that particular provision of the 14th amendment.

He went on to say:

* * * I do not believe that kind of specific intentionalism is a valid interpretive canon. I believe that is why, as I have said, that is why I have used the terms original meaning and understanding to get away from that sense of specific intentionalism.

In response to Senator KOHL's question, Judge Souter said:

* * * If I am confirmed in this office I want to try the best that I can to exercise that responsibility to give the Constitution a good life in the time that its interpretation will be entrusted to me, to preserve that life and to preserve it for the generations that will be sitting perhaps in this room after you and I are long gone from it.

Judge Souter also spoke with feeling and eloquence about the man whose position he will take, a Justice whose vision has helped spur the growth of rights of American citizens. Judge Souter said the following about Justice Brennan:

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. No one following Justice Brennan, absolutely no one, could possibly say a word to put himself in the league with Justice Brennan.

I asked Judge Souter the following question for the record:

It's my understanding that you are an admirer of Justice Holmes. Would you give your comments on the aphorism from Holmes' book, "Common Law" "the life of the law has not been logic; it has been experience"?

His response was reassuring about his openmindedness and his view of the law as a growing human institution rather than as a catalog of dry precedent irrelevant to current needs. He said in response to my question:

Holmes's aphorism speaks to a central truth about our law: it is not a closed system of neatly consistent rules, but a set of principles derived from human experience, with claims to legitimacy that may come into conflict with each other. What a theorist might criticize as an objectionable untidiness is in fact the law's reflection of the divergent human needs and aspirations that call it into being.

I also asked him for the record some questions concerning his views of the Constitution's protection of the right to privacy. I had hoped he would be more forthcoming on this issue, both before the Judiciary Committee and in response to my questions.

On the other hand, Judge Souter, while not as forthcoming as I would have liked, seems to be of judicious temperament and open to argument.

Mr. President, we have just survived a decade in which ideological rigidity too often marked nominees who were forwarded to the Senate for confirmation.

Judge Souter's testimony allows us to retain the hope that his quest for a living Constitution that fits a changing society will lead to humane and just decisions that will keep us a nation that searches for a greater degree of justice, a more sensitive protection of privacy, and a higher level of opportunity for our citizens.

I will vote to confirm Judge Souter in the knowledge that none of us, as conscientious as we try to be, can predict the direction in which an intelligent and senstive person will move while sitting on our Highest Court, and with the hope that Judge Souter's qualities of intellect and his good nature will lead him to be a wise and just Associate Member of our Highest Court.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. PRYOR). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

Mr. CRANSTON. Mr. President, I ask unanimous consent that there be a period for morning business with Senators permitted to speak therein.

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

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. CRANSTON. Mr. President, I ask unanimous consent that the Senate proceed to executive session to consider the following nominations: Calendar No. 999, Calendar No. 1000, and Calendar Nos. 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1012, and 1013.

I further ask unanimous consent that the nominees be confirmed en bloc; that any statements appear in the RECORD as if read; that the motions to reconsider be laid upon the table en bloc; that the President be immediately notified of the Senate's action; and that the Senate return to legislative session.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The nominees, considered and confirmed en bloc are as follows:

SECURITIES AND EXCHANGE COMMISSION

Richard Y. Roberts, of Virginia, to be a member of the Securities and Exchange Commission for the term expiring June 5, 1995.

THE JUDICIARY

Joel F. Dubina, of Alabama, to be U.S. circuit judge for the Eleventh Circuit.

Charles W. Pickering, Sr., of Mississippi, to be U.S. district judge for the Southern District of Mississippi.

William B. Shubb, of California, to be U.S. district judge for the Eastern District of California.

Gary L. Taylor, of California, to be U.S. district judge for the Central District of California.

James Ware, of California, to be U.S. district judge for the Northern District of California.

Jean C. Hamilton, of Missouri, to be U.S. district judge for the Eastern District of Missouri.

David F. Levi, of California, to be U.S. district judge for the Eastern District of California.

Samuel B. Kent, of Texas, to be U.S. district judge for the Southern District of Texas.

DEPARTMENT OF JUSTICE

Linda A. Akers, of Arizona, to be U.S. attorney for the District of Arizona for the term of 4 years.

Kenneth W. Sukhia, of Florida, to be U.S. attorney for the Northern District of Florida for the term of 4 years.

STATEMENT ON THE NOMINATION OF LINDA AKERS

Mr. McCAIN. Mr. President, I am pleased to recommend to you and the Senate Ms. Linda Akers for the position of U.S. attorney for the district of Arizona. Linda Akers has all of the qualities to be an outstanding U.S. attorney. She is experienced with the federal system, serving as assistant U.S. attorney in the Phoenix office. As a top assistant U.S. attorney, she has developed a firsthand understanding of a broad range of difficult issues. Her extensive experience in the areas of drug enforcement, environmental crime, and the issues affecting native Americans are critical elements for an effective U.S. attorney for Arizona. In addition of this, Linda has been active in the development of cooperative law enforcement relations with Mexico which will enhance her ability to forcefully carry out our war on drugs.

Prior to her service as an assistant U.S. attorney, Linda Akers served 5 years as an assistant State attorney general in Arizona. In that capacity, she directed the crime and racketeering division, which involved the organization of Arizona State grand jury investigations and the prosecution of criminal cases involving tax and fraud, and violations of State criminal law involving arson and archaeological resource protection. Through her experience as assistant attorney general, Ms. Akers has a full understanding of the State system, and she will be able to coordinate effectively the State and local law enforcement offices.

In short, Linda Akers is an outstanding person for the job. Her professional record shows her to be an attorney of the highest caliber, and her experience in the State demonstrates a clear understanding of the issues which affect Arizona. I have complete confidence in her abilities to serve as assist-

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this volume discount language and move on.

There is no reason why we cannot arrive at decent legislation that satisfies and meets the legitimate consumer interest, but does not do deep damage to one single industry at the expense of a variety of others who are circling around trying to limit the cable industry's market share, the cable industry's ability to grow and meet its enormous promise.

In summary, Mr. President, on Friday, I objected to the motion to proceed to S. 1880, the Cable Television Consumer Protection Act of 1990. I would like to reiterate that, as I said on Friday, I am not opposed to passing cable regulatory legislation that addresses rates and customer service, the consumer protection issues that we all agree need our attention.

On the contrary, I want to see legislation enacted that addresses these issues. Nevertheless, I have a number of concerns about several specific elements of the Senate bill. These include provisions related to program exclusivity, the authority of the FCC to address vertical and horizontal integration within the cable industry and ownership restrictions on direct broadcast satellites [DBS].

I would like to repeat my request to the sponsors of the legislation. Let us sit down and work these issues out. I think we can reach a compromise. We owe it to cable viewers to reach a compromise. We can and should pass an effective consumer protection bill. I would like to see such a bill and renew my offer to resolve the issues I have raised and pass legislation we all can support.

Some have said that, since the administration is opposed to any reregulation of the industry at this time, we should not spend time trying to reach an agreement that will only be vetoed when we send it to the President. I hope this is not the case. I encourage my colleagues on the other side of the aisle who want a bill to weigh in with the administration in support of the legislation. I have done so and I hope that we can produce a package that the President will sign. We have spent a great deal of time on legislation such as campaign finance reform, child care, and others despite a threatened veto. We should not use a possible veto as an excuse to abandon the cable bill.

If possible, one option that we should consider is to take the House bill from the desk, pass an amended version of that legislation and go to conference. The House bill addresses many of the same issues as the Senate in a more moderate manner. Although I do have concerns about some elements of the House bill as well, I would be willing to take up that proposal if we can obtain an agreement on the legislation and on the amendments that would be in order.

To sum up, I want to see legislation. I think we have an opportunity to pass needed legislation in this area. We should not squander this opportunity. Again, I would be pleased to sit down and discuss my concerrns with the sponsors of the proposal and try to reach an agreement.

I appreciate the forbearance of the President and the distinguished Senator from Minnesota.

I yield the floor.

EXHIBIT 1

COMPETITION IN THE VIDEO MARKETPLACE

Competition in the distribution of video programming generally occurs between media within a discrete geographic market. There can be little disagreement that CNN and Headline News compete directly with the broadcast networks' news operations; that Arts and Entertainment and the Discovery Channel compete against programming typically found on PBS; or that ESPN competes against sports programming carried by broadcasters. Furthermore, the cable industry has found it highly effective to compete against broadcasters by serving market segments ignored by television stations. Black Entertainment Television, Nickelodeon, children's programming networks, and Spanish-language networks allow cable operators to compete against local broadcasters by serving interests in the community which the latter have largely ignored or abandoned.

EXCLUSIVITY AND FEDERAL LAW

Product differentiation is the key to successful competition in the distribution of video programming. Exclusivity over product is usually the best means to protect diversity, which is why programmers want to determine how and by whom their products are to be exhibited. Federal law has long recognized that by protecting exclusivity rights to intellectual property, one enhances competition and provides for increased diversity of information and entertainment. Indeed, federal policy recognizes that disruption of these exclusive rights works against, not toward, competition.

For example, federal law does not mandate that a local movie theater or even a national chain of theaters is entitled to show any particular movie. It does not mandate that all television stations are entitled to network affiliation agreements, nor does it forbid a network-owned broadcast station from being programmed with the same network's "feed." It is recognized, for example, that NBC may license its wholly-owned and operated broadcast station in Washington, D.C. (WRC-TV) as the only distributor of NBC programming in the Washington area, to the exclusion of other aspiring NBC affiliates. Moreover, federal law does not permit a cable system to use its compulsory license to import network programming over the objection of a local affiliate of that network.

The federal government recently took steps to strengthen broadcasters' exclusive rights to programming. With the reinstatement of syndicated exclusivity for broadcasters earlier this year, federal law forbids cable from using its compulsory license to import programming from distant stations if a local station has the exclusive rights to a market for such programming. At the same time, the FCC broadened the network non-duplication rules by expanding the situations where local broadcast network affiliates can prevent carriage of distant broadcast network affiliates.

In the last Congress, the need to protect program exclusivity was recognized in the Satellite Home Viewer Act of 1988. That law extends a compulsory license to satellite carriers to make broadcast signals available to home satellite dish owners. Congress restricted that license, however, so that home dish owners may not receive network programming via satellite if they have access to a terrestrial broadcast affiliate of that network.

The PRESIDING OFFICER. The Senator from Minnesota [Mr. BOSCHWITZ].

Mr. BOSCHWITZ. Mr. President, I ask unanimous consent that I be allowed to proceed as in morning business for a period not to exceed 8 minutes.

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

JUDGE SOUTER

Mr. BOSCHWITZ. Mr. President, I rise to state that I will vote for Judge David Souter as the Associate Justice of the Supreme Court. The Senate Judiciary Committee almost unanimously approved Judge Souter's nomination, and I commend them for that.

Judge Souter's intellectual qualities are unquestionable. He is a magna cum laude graduate from Harvard College, a Rhodes scholar, and a graduate of Harvard Law School. His professional qualifications are equally impressive. He succeeded our colleague, Senator RUDMAN, as New Hampshire attorney general. That certainly is an intellectual challenge, to succeed Senator RUDMAN.

While his tenure on the First Circuit Court of Appeals has not been a long one, he did serve for 7 years on the New Hampshire Supreme Court.

So I look forward to voting for him. I believe his confirmation should go through this body speedily, and I am pleased to announce my support for Judge Souter at this time.

GLOBAL TRADE NEGOTIATIONS

Mr. BOSCHWITZ. Mr. President, I would like to point out that the global trade negotiations are running into tough days. I see an article in the Wall Street Journal from the 25th of September saying that Carla Hills, our Trade Representative, suggests that they may, indeed, collapse. That would certainly be an unfortunate occurrence.

I agree with Ms. Hills that we should, indeed, move forward and that the Europeans need to, in some way, moderate what they are doing on the world market.

In another article on the 26th of September, it is noted in the Wall Street Journal that the EC, the European Community, the subsidies and penalties that they impose upon their

tess, who showed the two women to a table. Meko promptly went to sleep at Ellen's feet.

"There," Carole said "The worst is over."

"No, it isn't," Ellen blurted. "Look. Everyone's talking about us." Only later did she begin to relax.

That evening, after Carole returned to her motel, Ellen took Meko for a walk. She felt confused, uncertain. Did she really want Meko? No, she wanted a dog that didn't need to have daily exercise and that didn't make a fool of her in public. Then she remembered Carole's advice: "Give yourself a chance, Ellen." Yourself, Not Meko.

Ellen looked around. She hadn't walked this far in years. The fresh air felt good, and she was in less paln. This little mutt, she decided, had already accomplished something. Or rather, Ellen realized, she had done it, with Meko's help.

Hearing-ear dogs, Ellen discovered, were new to Montana. One day while she was walking in the park, an official ran up to her.

"Don't you see the signs?" he sputtered. "No dogs permitted!"

Trembling, Ellen stood her ground. "This is a hearing-ear dog, and state law allows us to be together in public parks." She showed the man her card and the cleanup bag she carried.

"Look," the official said grudgingly, "you can walk around the park, but not inside."

Ellen was even more determined now, "Meko and I are going to enjoy the birds and flowers," she said, surprised by her even tone. "Here's our address. If your superior wants to talk about this, we'll be glad to go in and see him."

The man stalked away in a huff, and Ellen and Meko continued on their way.

A few months later, Meko suddenly vanished. Ellen searched the house, then walked to the park and back, hoping Meko might have slipped away to take their daily walk alone. Finally, she went out to her car to drive to the city pound. That's when she realized she hadn't looked in the garage.

As she swung open the door, a small blur of fur shot out and slammed against her knees, bowling her over in the gravel. Ellen saw where paint had been gouged from the door, as the dog fought vainly to answer her calls. She pulled the warm bundle close, "I love you, Meko," she whispered softly. "What would we do without each other?"

Over the three years they've been together, Meko has learned her job well. One winter night, Ellen was doing laundry when Meko raced up to her frantically. Ellen hurried after the dog—into a billowing pall of smoke. A portable heater had set a bed on fire, and the smoke alarm hadn't gone off yet.

Today Ellen Raines is totally deaf. But with Meko at her side, she works as a volunteer computer operator, and after losing 50 pounds exercising with Meko, she has resumed social dancing. "My friends say I actually dance better than I ever did," she says. "I don't try to lead anymore. I follow my partner." She strokes the small, sleeping figure at her feet, "Meko taught me that. And a lot of other things, as well."

NOMINATION OF JUDGE DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF U.S. SUPREME COURT

Mr. DODD. Mr. President, I rise to speak on the confirmation of Judge David H. Souter to be an Associate Justice of the U.S. Supreme Court.

The appointment of any nominee to the U.S. Supreme Court celebrates the particular genuis of our Constitution. Two branches of Government, the executive and the legislative, share in the power to determine the membership of the third branch, the judiciary, which then explicates the authority of the other two, the relationship between the National Government and the States, and the rights and liberties of all Americans.

To fulfill the appointment function, both the President and the Senate must respect each other's constitutional role in the process while remaining true to their own. In selecting a nominee, the President should consider the prevaling views of the Senate and the American people while upholding the sole authority to choose a nominee for the Supreme Court. The Senate should refrain from dictating a particular choice to the President while asserting its right to weigh the nominee's intellect, integrity, and character, as well as constitutional and judicial philosophy in its exercise of advice and consent.

Like all of my colleagues, I approach the question of the confirmation of Judge David Souter with enormous seriousness and solemnity. The constitutional responsibility to "advise and consent" on the President's nominee to the Supreme Court is one of the most important responsibilities charged to a U.S. Senator. A Supreme Court Justice has an unparalleled opportunity to influence the most critical issues facing this and future and generations of Americans. Moreover, I believe that the Court now may be at a pivotal point—a time when the future direction of our law is at stake and when the Court is most shaped by the outlook and philosophy of the nine individuals who serve as Justices.

While the framers unquestionably intended that the Senate take an active role in the confirmation process, the Constitution nowhere dilineates those factors by which each Senator should judge the fitness of a judicial nominee. Thus, each Senator must determine for himself or herself the acceptable criteria in judging a Supreme Court nominee.

In my view, each Senator must begin and end his examination of the nominee in the best interest of the United States?

Answering this question in the affirmative first requires that each Senator satisfy himself or herself that the nominee possesses the excellent technical and legal skills which we must demand of all Federal judges. Our next task is to ensure that the nominee is of the highest character and free from any conflicts of interest. Finally, we must vigorously examine the nominee to see whether he or she is capable of and committed to upholding the Constitution of the United States, and protecting the individual rights and liberties guaranteed therein.

We must ask whether the nominee has the commitment and judicial temperament to give life and real world meaning to our Constitution's guarantees. We may disagree about the meaning of the various provisions in the Constitution, but the nominee's views must be within an appropriate and acceptable range, and his or her approach must reflect a deep commitment to our Nation's constitutional ideals.

In that regard, it is up to each Senator to decide for himself or herself at what point a nominee's views become so contrary to what the Senator believes is in the best interest of the Nation to warrant opposition to the nominee.

Clearly, Judge Souter possesses the requisite technical and legal skills for a position on the Supreme Court. He is an individual of outstanding intellectual ability, integrity, and character. He has an excellent academic background—magna cum laude and Phi Beta Kappa at Harvard College, Harvard Law School, and a Rhodes scholar at Oxford University. He has impressive professional experience—extensive practice as a lawyer, attorney general of the State of New Hampshire, trial judge, and associate justice of the supreme court of the State of New Hampshire. The American Bar Association unanimously endorsed Judge Souter, giving him its highest rating.

Mr. President, I believe that Judge Souter's considerable intellectual strengths and professional experience are coupled with a commitment to fundamental constitutional values and principles. Judge Souter's testimony offered this Senator sufficient assurance of his place within the mainstream of Supreme Court jurisprudence—by endorsing an active role for the Court in protecting individual rights, by showing himself to be at ease with modern developments in the law and in the country, and by asserting that he would bring no "personal agenda" to the Court.

The picture of Judge Souter that emerged from the hearings is that of a jurist who is openminded, intellectually flexible, and fair, a judge who understands, as he stated that, "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."

Judge Souter also appears to be a man of thoughtfulness, humility and compassion. During the hearings, he

spoke of being a listener, of being committed to preserving the Constitution for present and future generations of people "whose lives will be affected by (his) stewardship."

It also became quite evident that Judge Souter is a proponent of judicial restraint who respects and defers to precedent, but who treats the Constitution as a living document which recognizes changing circumstances and conditions.

Mr. President, during the hearings, Judge Souter did provide, in general, a reassuring discussion of his judicial philosophy. I must point out, however, that I found some of his testimony troubling, as I am sure every Member did at one point or another.

Clearly, there are constitutional issues that all of us are deeply concerned about. These include the constitutional right of a woman to make decisions about reproduction, gender-based discrimination, separation between church and state, and freedom of speech. During the hearings, Judge Souter touched on many of these subjects.

Frankly, I wish he would have been more forthcoming and definitive in his views in these areas. Unfortunately, with respect to one particular area of constitutional law—the area involving the right to privacy in matters relating to reproduction—Judge Souter has determined that the Members of the U.S. Senate and the American people are not entitled to know his views.

He steadfastly and persistently refused to answer any questions relating to this complex area, although he was forthcoming in many other areas of constitutional law which may come before the Supreme Court during this or upcoming terms.

During the course of his testimony, Judge Souter conceded that he did have a view regarding Roe versus Wade at the time the decision was rendered in 1973, but he would not reveal to the members of the Judiciary Committee what that view had been.

He declined to tell the committee what his personal views on the issue of abortion were on the grounds that many people would not believe that his personal views would have no impact on how he might rule in a future case concerning abortion. I would note that other Supreme Court nominees have been more forthcoming and have distinguished personal views from judicial views when appearing before the committee.

I also would note, Mr. President, that Judge Souter did feel free to disclose his views on numerous other issues that will be coming before the Supreme Court in the years ahead. He spoke freely about legal cases and principles regarding such controversial subjects as capital punishment and separation of church and state.

Thus, I am troubled by Judge Souter's refusal to speak not only to a broad right of privacy, but even to the line of cases involving the right of privacy leading up to the Roe versus Wade decision.

However, while Judge Souter's unwillingness to disclose his position on abortion troubles me, I recognize that the law on this issue remains unsettled. It is significant to me that during the hearings, Judge Souter agreed that there is an "unenumerated right of privacy" in the Constitution. Moreover, in many of his statements, he appeared committed to embracing an expansive reading of the nature of constitutional liberties. He specifically committed himself to keeping an open-mind when the Court reconsiders Roe versus Wade.

Mr. President, we never have an absolute assurance as to how any nominee or sitting Supreme Court Justice will vote on a particular issue. Requiring a commitment in advance would discourage openmindedness and threaten an independent judiciary. All we as Senators should ask is that the nominee possess intellectual excellence, integrity, judicial temperament, experience, fairness, and a willingness to listen.

Mr. President, I am convinced that Judge Souter is such a nominee. I believe that David Souter is a fair and open-minded jurist. My strong feeling is that he would serve with distinction and would work to preserve and protect our fundamental constitutional values, if confirmed as a Justice of the Supreme Court. There is no indication that his approach to the Constitution, or to the Court's role in interpreting it, would unravel the settled fabric of constitutional law.

During the hearings, Judge Souter described the Justice he hopes to replace on the Supreme Court, Justice William J. Brennan, as "one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have." Judge Souter's admiration for the man he would succeed, of course begs the question of how like or unlike Justice Brennan he would be. While I do not expect Judge Souter to take Justice Brennan's place on the Court's ideological spectrum, I am confident that he will not stay in the Court's conservative shadow.

My hope is that, if confirmed, he will grow in his capacity as a Supreme Court Justice and may well become an outstanding justice.

Therefore, I will vote to confirm Judge David Souter to be an Associate Justice of the Supreme Court of the United States.

TERRY ANDERSON

Mr. MOYNIHAN. Mr. President, I rise to inform my colleagues that today marks the 2,025th day that Terry Anderson has been held captive in Beirut.

I ask unanimous consent that an Associated Press article featuring the families of the men held hostage in Lebanon be submitted to the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

FAMILIES OF AMERICANS HELD IN LEBANON ARE HOSTAGES IN THEIR OWN WAY

(By George Esper)

Thomas Cicippio is never in bed before midnight. Each night, he anxiously watches the 11 o'clock news for any word of the six American hostages held in Lebanon, including his brother, Joseph.

Then, as the clock nears the start of yet another day of waiting, he walks to the plywood billboard on the lawn of his Norristown, Pa., home listing the names of each hostage and the total days they have been held. Silently, he advances the numbers.

He and other family members of the six men sympathize with the relatives of the new hostages being held in Kuwait and Iraq, but they don't want their husbands, fathers, brothers and sons forgotten.

"I feel very badly for them," Cicippio said of the latest hostage families. "I know what they're going through. The only difference is that we really don't know what conditions they're being held under. We do know our hostages are in chains. They're blindfolded. They don't see daylight."

On Sept. 12, the fourth anniversary of his brother's captivity, Cicippio advanced the days to 1,462.

A week earlier, he had posted the 2,000th day for Terry Anderson, chief Middle East correspondent for The Associated Press and the longest held of the hostages. Time enough for the 42-year-old Anderson to spend five birthdays in captivity and face a sixth, Oct. 27.

"I feel as though I'm doing something for the hostage families," said Cicippio. At 6 am., he's up again, watching the morning news, hoping he'll hear something on the hostages' release.

In a sense, the families of the Lebanon captives are hostages themselves.

In trying to save the lives of their relatives, they have given up much of their own lives. For years, they have felt the uncertainty, the loneliness and the fears now gripping the families of the hundreds of hostages being held by Iraq.

Estelle Ronneburg, the 69-year-old mother of hostage Jesse Turner, pointedly kept her job as a bank accountant in Boise, Idaho, to keep her mind occupied with figures instead of her son's deprivation. "That way, I don't get quite as upset," she said.

Turner's wife, Bader, a Lebanese native, and their 3-year-old daughter, Joanne, left Beirut a little more than a year ago to visit Mrs. Turner's brother in the United Arab Emirates. They never returned because of the fighting.

They recently arrived in Boise to spend a few months with Mrs. Ronneburg, who never had seen her granddaughter.

"It's rough," said Mrs. Turner. "They kidnapped him six months after we got married. It was a very hard time for me. He wasn't around when Joanne was born, and the war was tough. I'm lost without him. Every time I see Joanne, I feel pity that he is missing her childhood."

tition, but in the absence of competition, let us at least allow local authorities to regulate. And, to make competition possible, let us give prospective competitors access to programming. There is never going to be meaningful competition if somebody interested in getting into the business is shut out from competing because he cannot get the programming.

That is what we did in the legislation, and the legislation received careful attention in the Senate Commerce Committee. We had 10 days of hearings on cable and related issues, and then we marked up the bill. We reported the bill out of the Commerce Committee by a vote of 18 to 1. I do not know what the vote would be on the floor of the Senate. But, there is no doubt in my mind, Mr. President, that if we had sufficient time, and we do not in this Congress, we could pass the bill by an overwhelming majority—I might say, by a veto-proof majority. That is not to be.

The strong support in the Congress for legislation to deal with the abuses in the cable television industry, is mirrored throughout the rest of the country. The Consumer Federation of America has described this as the most important consumer legislation before Congress this year. Interestingly, even people who answer polls sponsored by the cable industry itself have weighed in very heavily in favor of legislation. On August 24, CNN conducted a poll of its viewers, all of whom were cable subscribers. The question asked was: "Should cable TV be regulated?" Ninety-two percent of those who answered, answered yes, cable should be regulated; 8 percent answered no.

Recognition of the abuses within the cable industry is spreading through this country. The American people know that an unregulated monopoly is taking advantage of them, both in prices and in services. And the American people are speaking out; 92 to 8 in this poll. Their voices are being heard in the Congress.

Yes, there were some differences between the Commerce Committee bill and the House bill. But more important than the differences was the fact that both the Commerce Committee and the House of Representatives were serious about passing cable legislation. We could have come to an agreement with the House. I know that from speaking with Congressman MARKEY, he was very anxious to pass legislation this year. But, unfortunately, we are in a position where a small number of Senators could block the legislation. And they did it, Mr. President.

Mr. President, I congratulate the cable industry on winning the battle. They made a tremendous effort. As Senator HOLLINGS pointed out on the floor, the cable industry is a formidable foe, represented in Washington by some of the ablest advisors in this city. I do not minimize the skill of their legislative endeavors, but I also believe that to win the battle is not the same as winning the war. This is a war that will be fought next year.

It will be fought because legislation is not going to be introduced a month or 6 months or a year into the next Congress. Legislation is going to be introduced as soon as Congress begins. Having spoken with the chairman of our committee, Senator HOLLINGS, and the chairman of the subcommittee, Senator INOUYE, and knowing my own position, if our party is able to win control of the Senate, this is a matter that is going to receive hearings and will receive a markup very early in the next Congress. I believe we are going to pass legislation which will provide for rate regulation. I believe that we will pass legislation that will bar cable programmers from unreasonably refusing to deal with competitors. I believe that the legislation that will be enacted next year will be at least as strong as what we were considering this year. To the cable interests who were able to prevent this bill from passing this year, I extend my congratulations. I am not a sore loser. I would just as soon not lose but I am not a sore loser. I look forward to revisiting this in the Commerce Committee and on the floor of the Senate at an early date in 1991.

The PRESIDING OFFICER. Who seeks recognition?

Mr. AKAKA addressed the Chair.

The PRESIDING OFFICER. The Senator from Hawaii [Mr. AKAKA].

NOMINATION OF JUDGE SOUTER

Mr. AKAKA. Mr. President, after much deliberation, I rise to oppose the nomination of Judge Souter to the Supreme Court. After carefully reviewing his legal background and the Judiciary Committee's hearing record, I have reluctantly come to the conclusion that I cannot support Judge Souter for our Highest Court.

Judge Souter is by all accounts an engaging, thoughtful, and highly intelligent individual. No one questions that his academic and legal qualifications are of the highest standard. However, his record on matters relating to the Constitution is unusually sparse. And what little can be found on his beliefs on a number of fundamental constitutional issues, such as civil rights and the right to privacy, concern me very much.

I am troubled by his defense of New Hampshire's voter literacy test.

I am troubled by the opinion he authored which undermined New Hampshire's rape shield law, an important statute protecting women who have been sexually assaulted. I am troubled by his criticism of the so-called heightened scrutiny test in gender discrimination cases, a standard that has been highly effective in battling discrimination against women. I am also troubled by his defense of New Hampshire's refusal to abide by an Equal Employment Opportunity Commission regulation requiring a racial breakdown of State employees.

And I am especially disturbed by his refusal to acknowledge a fundamental right of privacy beyond that accorded married couples.

Judge Souter's limited view of the right to privacy raises grave questions about his outlook on matters such as reproductive choice. His silence on this issue places a cloud of uncertainty over well-settled legal precedents governing the rights of individuals to make fundamental choices involving themselves, their families, and their relationships with other members of society.

He has also refused to state a view on whether the right to privacy includes the right to use contraception. A retreat in these areas could deny millions of men and women privacy rights which the Constitution guarantees and which previous Supreme Courts have affirmed.

The Constitution invests the Senate with the responsibility to advise and consent on Supreme Court nominations. The Founding Fathers granted us a responsibility equal to that of the President in determining the fitness of an individual for the High Court.

This week, I will cast my first vote as a Senator on a nomination to the Supreme Court. I feel compelled to exercise an abundance of caution in carrying out this responsibility. Because we are deciding on a nominee to our highest court, and because so much is at stake in filling this seat, I would much rather err on the side of caution than to give a nominee merely the benefit of the doubt.

Despite 3 days of Judiciary Committee hearings, Judge Souter's view on major constitutional questions such as abortion and civil rights remain largely a mystery to the American public and the Senate. The American people should not be playing a guessing game with a nominee to the Highest Court of the land.

The concerns I have raised do not relate to a narrow, single issue, but involve an entire field of constitutional law. For these reasons, I will oppose Judge Souter's nomination when it reaches the Senate floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum having been suggested, the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. METZENBAUM. Mr. President, I ask unanimous consent that the

order for the quorum call be rescinded.

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

FORMER PRESIDENT JIMMY CARTER ON THE MIDDLE EAST

Mr. METZENBAUM. Mr. President, a recent Washington Post carries a column by former U.S. Ambassador to the United Nations Jeane Kirkpatrick entitled, "Jimmy Carter's Mideast Fictions."

Ambassador Kirkpatrick comments on a September 16 interview that President Carter gave to CNN regarding the current situation in the Middle East. In the interview, the former President asserted that Israel is guilty of ignoring U.S. resolutions regarding withdrawal from the West Bank. He claimed that "there have been six or eight unanimous (resolutions) by the United Nations Security Council calling for Israel to withdraw from the occupied territories. * * * These have the same legal status as the resolutions demanding that Iraq withdraw from Kuwait."

Mr. President, I join Ambassador Kirkpatrick in inquiring as to exactly which resolutions the former President refers. There certainly are U.N. resolutions calling for Israel to withdraw from occupied territory, but this is conditioned upon Arab recognition of Israel's right to exist. Ambassador Kirkpatrick is correct when she suggests that former President Carter was more creative than accurate when totaling up the U.N. resolutions.

It would appear that the former President's goal was to tighten the vise on Israel while supposedly objectively analyzing the current Persian Gulf crisis. His comparison of Israel in the West Bank to Iraq in Kuwait employs some of the most inventive logic we have seen in Middle East analysis. With respect, I would point out to the former President that inventive is not synonymous with accurate. With sadness, I would point out to the former President that his characterization is not only inaccurate, but counterproductive and damaging to long-term efforts for Middle East peace. The former President is confused regarding the difference between a war of self-defense, and a shameless grab for land and resources. Maybe the staff of his fine library can clarify the issue for the former President, as I read Ambassador Kirkpatrick's column, I must confess I had a feeling of foreign policy deja vu. This was not the first time I had heard of former President Carter's unique approach to Middle East analysis. Nearly 6 months ago, March 27, 1990, he briefed Members of the Senate on a trip to the Middle East from which he had recently returned, during that trip, he publicly criticized Israel on its policies in the West Bank and Gaza. Israel was only one stop on Carter's itinerary, however. He also went to Syria. What did he have to say about human rights in Syria? Human rights in Syria where 20,000 people had been totally eliminated, the whole community had been plowed under by Assad and his troops? What did he have to say about that? Not one word.

During the March 27 briefing, I pressed him on this apparent double standard in his public statements on human rights. Former President Carter's response was that Syria did not need public criticism because the Syrian public has no say in decisionmaking. In other words, the ex-President of the world's most free society felt at liberty to penalize Israel for being an open vibrant society, and did not see fit to say one word about that repressive society that exists in Syria where 20,000—or better people—had admittedly been plowed under, lost, their lives, and the total community lost.

I told the former President that democracies like Israel could take the heat of public criticism. I also told him that fear of offending a dictatorship like Syria ultimately leads to stronger dictatorships. Unfortunately we are now learning this lesson the hard way in the Persian Gulf.

Mr. President, a fringe minority of Middle East analysts have recently linked a permanent resolution of the Iraq-Kuwait crisis to a resolution of the Arab-Israel crisis. I regret that the former President seems to have bought into this self-serving approach.

I applaud former Ambassador Kirkpatrick's effort to maintain a higher standard of intellectual integrity regarding the Middle East, and I ask unanimous consent that a copy of her column appear in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Sept. 24, 1990]

JIMMY CARTER'S MIDEAST FICTIONS

(By Jeane Kirkpatrick)

Saddam Hussein was only half-serious when he linked Iraq's conquest of Kuwait to Israel's occupation of the West Bank and Gaza. Former president Jimmy Carter was wholly serious—and wholly mistaken—when he tried to make the case that the two matters "have the same legal status."

In an interview with CNN's Bernard Shaw on Sept. 16, Carter made the weirdly mistaken assertion that, "There have been six or eight unanimous [resolutions] by the United Nations Security Council calling for Israel to withdraw from the occupied territories, to restore the rights of the Palestinians, to come to an international conference—these have the same legal status as the resolutions demanding that Iraq withdraw from Kuwait." But, Carter added, "The world has not marshalled its efforts to make sure that these United Nations resolutions have been fulfilled."

Carter's comments are important because the unanimous Security Council resolutions to which they refer do not exist. This fiction is dangerous to Israel and dangerous to an understanding of realities in the Middle East.

As of Sept. 19, seven Security Council resolutions had been passed concerning Iraq's invasion of Kuwait. The first condemned Iraq's invasion and called for an unconditional withdrawal of Iraqi troops from Kuwait. The remaining six resolutions built on this.

There is *no* parallel resolution concerning Israel's presence in the West Bank and Gaza. There is a resolution that calls for Israel's withdrawal from territories occupied in the 1967 war and *also* calls for Arab governments to end "all states of belligerency" against Israel and accept that "every state in the area," including Israel, has "a right to live in peace within secure and recognized boundaries free from threats and acts of force."

This, of course, is Security Council Resolution 242, passed at the end of the 1967 war, in which Israel successfully fended off an attack by all her Arab neighbors. Resolution 242 is the basis of the famous "land for peace" formula, which was reaffirmed in Resolution 338 passed after the next Arab war against Israel in 1973 and supplemented by a call for direct negotiations between the parties.

These resolutions were the basis of the 1978 Camp David Accords negotiated by Israel's Menachem Begin and Egypt's Anwar Sadat with the help of then-President Carter. Those accords were a remarkable achievement because they were the only instance in which an Arab state (Egypt) was willing to negotiate with Israel or to make peace with the Jewish state. For the crime of making peace with Israel, Egypt was expelled from the Arab League and Anwar Sadat was murdered.

All other Arab states have ever since refused negotiation, peace or normal relations with Israel. Most have continued to call for the destruction of Israel, support terrorist attacks against Israel, and have ever since refused to reaffirm Resolutions 242 and 338. (The exception was Lebanon in the brief period of Bashir Gemayel's presidency—also terminated by assassination.)

How could Carter have imagined that there were "six or eight unanimous Security Council resolutions"? Or—a more basic question—how could he have seen the cases of Kuwait and the West Bank as parallel when Iraq invaded and occupied Kuwait, a sovereign state, and Israel was itself invaded three times?

The answer, I think, is that a false version of the Arab-Israeli conflict has been so often repeated that many people—including some very high officials—have come to feel that Israel is somehow guilty of aggression. It was, in fact, the victim of repeated wars of aggression. They have also come to feel that Israel's occupation of the West Bank is as clearly "illegal" as Iraq's conquest of Kuwait, when Israel acted in self-defense against neighbors (including Jordan) who not only attacked but have been unwilling to make peace.

These mistakes have serious implications. They lead Carter and others who have come to believe them to feel that Israel is a lawbreaker and that the U.S. failure to "pressure" Israel is evidence of an American double standard.

This mythical version of the Arab-Israeli conflict ignores the reality of the hostility that has surrounded the state of Israel from its founding until today, and makes the Is-