it clearly violated the constitutional requirement of separation of church and state.

In a commencement speech, Judge Souter, stated that affirmative action programs are affirmative discrimination and suggested that the Government should not be involved in promoting such programs.

It is true that all but the last of these positions were taken by Judge Souter while serving in the New Hampshire Attorney General's Office in the course of defending actions taken by the State government, and the views that he expressed as the State's lawyer are not necessarily his own.

But these positions are troubling. There is little in his record that demonstrates real solicitude for the rights of those who are weakest and most powerless in our society, and who have historically had the most difficulty in obtaining these rights from the majorities that rule the legislatures in our democracy.

It is the responsibility of this committee to find out whether Judge Souter is committed to these rights and to the other basic values enshrined in the Constitution. It is these values that make America America and that determine the kind of country that we will be in the years ahead.

That is why these hearings on Judge Souter's nomination are so important and I look forward to his testimony.

The CHAIRMAN. Thank you, Senator.

The Senator from Utah, Senator Hatch.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Mr. Chairman.

I would like to welcome you, Judge Souter, to our committee and I hope that your hearing goes well. Having met you, and having chatted with you and having looked at you for better than 3 years now, or about 2½ years, I want to tell you that I am very impressed with your impeccable educational and legal background, and also with your experience in both the executive and judicial branches of government, at least State government at that time.

We have already heard, and of course we are going to hear some more today about your distinguished legal career.

Judge Souter, incidentally, is the first Supreme Court Justice or nominee from New Hampshire in 145 years. This is rather surprising given New Hampshire's prominent role every 4 years in the first step in the judicial selection process—namely the selection of the President.

I might add that people across the political spectrum in New Hampshire have told me of their high regard for you as both a man and as a jurist. 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 that we enact in Congress, among other things, as their meaning was originally intended by those who framed those laws. That does not necessarily mean that they cannot adjust to the needs of a modern society.

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 other way around this conclusion. This other approach is judicial activism, plain and simple and it can come from the political left and it can come from the political right.

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 the power of governance that the Constitution commits to the people and their elected representatives. These judicial activists are limited only by their own will—which of course is no limit at all.

I would also note parenthetically that Judge Souter must be evaluated on his own merits, not on how four other Justices might vote. Judge Souter is going to cast one vote on the Supreme Court, if confirmed, and not five or not four others. So we might say that that is an important consideration.

Now, we have all read and we have all heard of the anxiety of many private interest groups which prefer an activist Supreme Court to impose certain political outcomes on the American people. They are disappointed that they have been unable to ascertain exactly where Judge Souter stands or how he might vote on many issues of concern to them. Having been unable to do so, but fearing that Judge Souter will actually be faithful to the Constitution rather than to their own particular policy preferences, when the latter cannot be justified by the former, some of these groups seem to be hoping that there will be something uncovered to derail Judge Souter.

In the words of William F. Buckley, Jr., in National Review Magazine, he said, "If only he had smoked marijuana or streaked at an American Bar Association banquet, no such luck."

I want to respond to one of the misguided observations we have heard about this nominee. That is that Judge Souter does not have a record on which to evaluate him and that he lacks a paper trail—that is nonsense. Judge Souter has authored over 200 opinions during 7 years as a justice on the New Hampshire Supreme Court and additional opinions as a New Hampshire Superior Court judge.

He has joined in the decisions in hundreds of other appeals. Scarcely a dozen Justices in the 200-year history of the Supreme Court have been nominated with a more extensive judicial background. His legal reasoning is on record in those opinions and I note that those cases indicate that Judge Souter is a solid law and order jurist—tough but fair with criminal defendants.

This balance is of the greatest importance to the citizens of Utah and of other States. We Utahns welcome visitors from everywhere and we try to provide a safe environment for them and our own people. By the same token we like to travel around the country and to do so in safety. That safety greatly depends on our criminal justice system. We need sufficient numbers of police, prosecutors, tough trial judges, and prisons. But at the top of our criminal justice system sits the Supreme Court. When the Supreme Court con-

cocts ingenious theories and rules to help criminal defendants and criminal convicts as it began to do in one case after another under the Warren Court, the cumulative effect of these pro-criminal-rights decisions is felt in our Nation's streets and in our subways. I think Judge Souter's experience as a State trial judge, having seen and sentenced criminals with a first-hand knowledge of the harm they caused will provide a useful perspective to the High Court.

Let me note that a nominee's legal brief filed on behalf of a client are available as a review as examples of a nominee's writing ability and ability as an advocate. Probing a nominee about such briefs, however, would in my view be a very disturbing development. The role of advocate in our legal system is a cherished one. A client is entitled to a zealous representation regardless of the advocate's personal views.

At the Bork hearings, a majority of this committee, and then of the Senate, sent a clear message to the legal profession—be careful about what you say in academic writings. No matter how speculative and even if you change your mind about what you write, your academic writings will be used against you.

Will we now witness the misuse of an advocate's legal briefs? Will this committee send this further message to prospective nominees: Be careful about which people, which institutions, and which causes you represent, especially unpopular ones, and be careful about which arguments you make as an advocate.

Now, Judge Souter is not running for a political office, nor has the President nominated him to a policymaking position in the executive branch. He has been nominated for the High Court in a co-equal branch of the Federal Government.

In my view, the Constitution clearly gives the President principal responsibility for judicial selection. As such, 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 a particular issue, or on particular issues.

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

As Alexander Hamilton wrote in Federalist 76 about the Senate's advice and consent function in general, the Senate's:

> Concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon the 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.

In my view, senators are free to ask a nominee any question they wish, no matter how misleading, abusive, unfair, or foolish. A Supreme Court nominee, however, 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 may come before him in order to be nominated or confirmed.

Judge Souter, I hope you will stand your ground when you sincerely believe you are being asked for answers which you clearly cannot provide and have the good faith to be able to act as a Supreme Court Justice later.

The Senate should not probe into the particular views of the nominee on particular issues or public policies, let alone impose direct or indirect litmus tests on specific issues or cases. If it does, 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. This course is an inappropriate as it would be for the President to seek such influence, himself. The judiciary is one branch which should be above politics.

Judge Souter, we are happy to have you here and we look forward to hearing your testimony. We look forward to getting to know you better and we look forward to seeing you sit on the Supreme Court.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge, as you can already see, there is unanimity on the committee.

Senator from Ohio, Senator Metzenbaum.

Senator METZENBAUM. I did not like the fact that you said that just before you introduced me. [Laughter.]

The CHAIRMAN. Well, we all follow you, Howard, and that is why I mentioned you.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Judge Souter, there is something reassuring about this hearing. Reassuring in the fact that probably no other nation in the world has this concept that a President makes an appointment, nomination, and then the U.S. Senate has the right, as the peoples' representative to vote up or down on your confirmation.

Our Founding Fathers, how they were able to come up with this structure, I do not know; but I do not know of any other nation that has that same structure—to their credit. They could not have known at that time that there is another factor that is in place now and that is that it is possible for us, as we meet here today, to open the vista of the American people so that the American people can hear you respond, hear us inquire of you, so that the American people can be a part of the process, itself.

I must say to you that there are many comments and criticism about how the committee does this or does that, but there is something wonderful about this entire concept that the President nominates and the Senate either confirms or refuses to confirm. I feel privileged to be a part of that process.

The fact is that you cannot become a member of the Supreme Court in this country simply because the President and those around him are comfortable with a nominee's views on the law. We have an obligation, it is a constitutional responsibility, to make an independent examination of your constitutional views, your judicial philosophy, and your approach to law.