

**NOMINATION OF DAVID H. SOUTER  
TO BE ASSOCIATE JUSTICE OF THE  
SUPREME COURT OF THE UNITED STATES**

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**HEARINGS**

BEFORE THE

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**ONE HUNDRED FIRST CONGRESS**

**SECOND SESSION**

ON

**THE NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF  
THE SUPREME COURT OF THE UNITED STATES**

—————  
**SEPTEMBER 13, 14, 17, 18, AND 19, 1990**  
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# NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

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THURSDAY, SEPTEMBER 13, 1990

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:05 a.m., in room 215, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

## OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The CHAIRMAN. The hearing will come to order.

Welcome, Judge Souter. The committee is delighted to have you here this morning. Let me, before I make my opening statement, just go through very, very briefly the procedure we hope to follow this morning.

As is the custom of the committee, Judge, each member of the Judiciary Committee, on such a solemn and important occasion as this, makes an opening statement. We will limit our opening statements to 10 minutes apiece. But with the number we have here, you can see that is going to take a while, at which time we would then proceed, Judge, to having your colleagues from New Hampshire, Senator Humphrey and Senator Rudman, introduce you. After that point, we will then ask you to stand to be sworn and then to deliver your opening statement.

Now, I expect, in light of the clock and the time and the number of statements, that we will probably break for lunch before you make your opening statement. So I expect the first item of business after we break for lunch will be your opening statement, at which time we will then begin questioning. In order to have some prospect of a genuine exchange on matters of consequence, it has been my practice and my predecessors before me, Chairman Kennedy and Chairman Thurmond, to have that first round of questioning be a half-hour—that each Senator have one-half hour to question you.

I do not anticipate going late tonight or any night during this process, and I do not anticipate that we are going to have to bring a knapsack for any of these proceedings. Today, our lunch break will occur whatever the convenient moment is after Senators have

made their opening statements. If there is still time, we will ask Senators Humphrey and Rudman to make their statements and you be sworn. If not, that will be put over until the afternoon.

I again, Judge Souter, welcome you to this committee.

Seven weeks ago, President Bush discharged one of his most important constitutional responsibilities, one of the most important responsibilities assigned to the Chief Executive of this Nation, by selecting you to be his nominee for Associate Justice to the Supreme Court of the United States.

Today, we, the members of the Judiciary Committee and the Senate as a whole, embark on a solemn task that article II of the Constitution commits to this body: The Senate's responsibility to offer its "advice and consent" to the President's nomination.

As these hearings begin, I believe this committee's role in that process is threefold:

First, and foremost, in my view, we must conduct a fair and thorough hearing that will provide you with a full opportunity to present your constitutional philosophy to the Senate and, I might add, to the Nation;

Second, we must explore those views with you, to try to identify the meaning you would give to our Constitution, if you become "Justice Souter"; and

Third, we must decide—each Senator, bound by his own conscience—whether that constitutional vision is the one that this Nation should have.

These have been our obligations for many years now, obligations that the Constitution makes it our duty to complete. And to fulfill our constitutional duties, Judge Souter, we will need your help.

You come before us without an extensive record that details your views on important constitutional questions of our time. And I say that not critically. I say that as an observation. You are an extremely bright man with an extremely admirable record. But the past responsibilities you have had have not required you to enunciate your views in any detail on major constitutional issues and questions. As a result, we need your help for us to be able to understand your constitutional philosophy, the philosophy that you would bring to the Nation's highest court. We need you to join us in a meaningful and important dialog about the Constitution.

And let me be clear on one point, Judge. As chairman of this committee, I am not asking you for any commitments as to how you would vote on any specific case, nor am I trying to pry nor am I attempting to pry into your personal views on publicly debated issues.

Rather, we want to know what principles you would apply, what philosophies you would employ as you exercise the awesome—and I emphasize awesome—the awesome power you will hold if you are confirmed as an Associate Justice of the Supreme Court of the United States.

The Supreme Court holds far-reaching power over the constitutional rights and daily lives of every American. Throughout the course of our history, its impact—upon what we can do, what we can say, and how we can live—has equaled that of any President or any Congress.

The fact of the matter is that we hold many of the freedoms we enjoy today because of the wisdom and the courage—and I emphasize the courage—and foresight of the 104 Justices who have sat on the Supreme Court.

But there have been moments in our history when the Court, like other institutions in this Nation, has come to a crossroads, moments when the Court's future has confronted its past, moments when its long-term direction is at stake, or at least in question.

It is at these moments in particular when the Court is most shaped by the outlook and philosophy of individuals who serve as Justices. In my view, Judge Souter, we are witnessing just such a moment in our history.

Today, our Nation, our Constitution as interpreted by the Court, is at a crossroads. There are some very fundamental choices to be made:

Will the first amendment's guarantee of freedom of religion continue to protect the rights of all Americans—Protestant and Catholic, Jewish and Moslem—to practice their faith and practice it in a way of their choosing? Or will we begin to change the standard by which we judge whether a religious practice can be impacted upon by a governmental body?

Will the fourth, fifth, and sixth amendments protecting our civil liberties—of a fair trial, of freedom from unreasonable searches—remain intact as it is today? Will it be scaled back, giving government more power, or changed, giving individuals more impact and control?

It is a question, as they say in the vernacular, that is up for grabs today.

Will the power of the 14th amendment's equal protection clause—used to root our discrimination against racial minorities and women in our society—be diminished? Again, will government be given more control?

And will the majestic sweep of the 14th amendment's due process clause, which protects the right of privacy of all Americans, be curtailed, changed, or in any way affected?

Judge Souter, because of the close division on the Court on the meaning of these constitutional guarantees, many of which are divided 5 to 4 or, in essence, now will be 4 to 4, you, Judge Souter, are the single man in this room who can affect in the near term the outcome of all these issues. With this close division, will you have and how will you exercise and determine which way you will vote, deciding which direction the Court will go on a dozen issues we could probably both name? You will have the power to determine which direction the Nation will take, which path we will follow, as we reach this critical crossroads.

Let there be no mistake about it, Judge Souter. If confirmed, the fate of our private lives and our public responsibilities will be placed in your hands in a very significant way.

Judge, I sincerely hope—and expect, quite frankly—that you will join me in a dialog on the Constitution, a dialog in which you respond with specific answers to specific questions, specific questions about the due process clause and its protection of our right to private and individual liberty; the equal protection clause and its guarantees of racial equality and equal rights for women; the first

amendment and its protection of freedom of speech and freedom of religion; and other important constitutional issues of our day.

At this fateful moment in our history, Judge, we have a right to know, a duty to discover, precisely what you, Judge David Hackett Souter, think about the great constitutional issues of our time.

I believe we can engage in a real discussion on these issues while respecting your judicial independence. We value impartiality in our judicial officers, and it is not a function of these hearings to trespass upon any boundaries that are set by or need to be maintained to guarantee that independence.

Yet the office of a Supreme Court Justice inures to no one by birth, no one by right, and no one as a consequence of a nomination by the President of the United States. To attain that post, a nominee has the obligation to persuade the Senate that he or she is the person in whose hands we should agree to vest this awesome power and responsibility.

No one is entitled to be a Supreme Court Justice any more than a member of this committee is entitled to be a U.S. Senator.

Judge, put bluntly, the burden of proof is on you—Judge Souter, the nominee—as it is on us when we stand for election. If a majority of the electorate deems us to be the right person for the job, given the particular time and circumstances facing this country, then we will be. And a Supreme Court Justice can assume his post only if the Senate is persuaded that the nominee is the right person for that position at that particular juncture of American history.

Judge, as I said, the power is awesome, the duty is profound, the obligation is yours, and the responsibility is ours.

No one knows, Judge Souter, what questions the Supreme Court will have to resolve in the year 2024, the year until which you will serve on the Court, God willing, should you be confirmed and serve as long as your predecessor—2024.

Of one thing, though, we can be sure.

If the history of this great Nation is any guide, tomorrow's issues—whatever form they take—will pit governmental power against individual liberty; majority tyranny against personal rights; the danger of discrimination against the dream of equality for all Americans.

For 200 years, the Supreme Court of the United States has served as the court of last resort in such struggles—the final guardian of our fundamental rights.

So it was for our parents and our grandparents, and so I hope it will be for our children and our grandchildren in the 21st century.

If confirmed, you, Judge Souter—more than any other person in this room—will decide what the Constitution means for the next generation. We will long be gone from this bench while you are still sitting on the Supreme Court of the United States, helping decide the fate of this great Nation. To consent to your nomination, we must have considerable guidance as to what kind of Supreme Court, what vision of the Constitution you will provide for our grandchildren.

For the next few days, Judge Souter, open for us a window into your mind, and give us a little bit of a glimpse into your heart.

[The prepared statement of Chairman Biden follows:]

OPENING STATEMENT

SENATOR JOSEPH R. BIDEN, JR.

HEARINGS ON THE NOMINATION OF JUDGE DAVID SOUTER  
TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT  
THURSDAY, SEPTEMBER 13, 1990

JUDGE SOUTER, I WOULD LIKE TO WELCOME YOU TO THE SENATE  
JUDICIARY COMMITTEE.

SEVEN WEEKS AGO, PRESIDENT BUSH DISCHARGED ONE OF THE MOST  
IMPORTANT CONSTITUTIONAL RESPONSIBILITIES ASSIGNED TO THE CHIEF  
EXECUTIVE, BY SELECTING YOU TO BE HIS NOMINEE FOR THE UNITED STATES  
SUPREME COURT.

TODAY, WE EMBARK ON A SOLEMN TASK THAT ARTICLE II OF THE  
CONSTITUTION COMMITS TO THIS BODY -- THE SENATE'S RESPONSIBILITY  
TO OFFER ITS "ADVICE AND CONSENT" TO THE PRESIDENT'S NOMINATION.

AS THESE HEARINGS BEGIN, I BELIEVE THIS COMMITTEE'S ROLE IN  
THE PROCESS IS THREE-FOLD:

\* FIRST -- AND FOREMOST -- WE MUST CONDUCT FAIR AND  
THOROUGH HEARINGS THAT PROVIDE YOU WITH A FULL  
OPPORTUNITY TO PRESENT YOUR CONSTITUTIONAL PHILOSOPHY TO  
THE SENATE AND TO THE NATION;

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- \* SECOND, WE MUST EXPLORE THOSE VIEWS WITH YOU, TO TRY TO IDENTIFY THE MEANING YOU WOULD GIVE TO OUR CONSTITUTION, IF YOU BECAME "JUSTICE DAVID SOUTER;" AND
  
- \* THIRD, WE MUST DECIDE -- EACH SENATOR, BOUND BY HIS OWN CONSCIENCE -- WHETHER THAT CONSTITUTIONAL VISION IS ONE THAT THE NATION SHOULD EMBRACE.

THESE HAVE BEEN OUR OBLIGATIONS FOR MANY YEARS NOW -- OBLIGATIONS THAT THE CONSTITUTION MAKES IT OUR DUTY TO COMPLETE.

TO FULFILL OUR CONSTITUTIONAL DUTIES, JUDGE SOUTER, WE WILL NEED YOUR HELP.

YOU COME BEFORE US WITHOUT AN EXTENSIVE WRITTEN RECORD THAT DETAILS YOUR VIEWS ON THE IMPORTANT CONSTITUTIONAL QUESTIONS OF OUR TIME. AS A RESULT, WE NEED YOU TO HELP US IN UNDERSTANDING THE CONSTITUTIONAL PHILOSOPHY YOU WOULD BRING TO THE NATION'S HIGHEST COURT. WE NEED YOU TO JOIN US IN A MEANINGFUL AND IMPORTANT DIALOGUE ABOUT OUR CONSTITUTION.

AND LET ME BE CLEAR ON ONE POINT, JUDGE: WE ARE NOT ASKING FOR ANY COMMITMENTS AS TO HOW YOU WOULD RULE ON ANY SPECIFIC CASE -- NOR ARE WE TRYING TO PRY INTO YOUR PERSONAL VIEWS ON PUBLICLY-DEBATED ISSUES.

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RATHER, WE WANT TO KNOW WHAT PRINCIPLES YOU WOULD APPLY -- WHAT PHILOSOPHIES YOU WOULD EMPLOY -- AS YOU EXERCISE THE AWESOME POWER YOU WILL HOLD IF YOU ARE CONFIRMED AS A JUSTICE OF THE UNITED STATES SUPREME COURT.

THE SUPREME COURT HOLDS FAR-REACHING POWER OVER THE CONSTITUTIONAL RIGHTS AND THE DAILY LIVES OF EVERY AMERICAN CITIZEN. THROUGHOUT THE COURSE OF OUR HISTORY, ITS IMPACT -- UPON WHAT WE CAN DO, WHAT WE CAN SAY, AND HOW WE CAN LIVE -- HAS EXCEEDED THAT OF ANY PRESIDENT OR ANY CONGRESS.

THE FACT OF THE MATTER IS THAT WE HOLD MANY OF THE FREEDOMS WE ENJOY BECAUSE OF THE WISDOM, COURAGE AND FORESIGHT OF THE 104 JUSTICES WHO HAVE SAT ON THE SUPREME COURT.

BUT THERE HAVE BEEN MOMENTS IN HISTORY WHEN THE COURT -- LIKE OTHER INSTITUTIONS IN THIS NATION -- HAS COME TO A CROSSROADS; MOMENTS WHEN THE COURT'S FUTURE HAS CONFRONTED ITS PAST -- MOMENTS WHEN ITS LONG-TERM DIRECTION HAS BEEN AT STAKE.

IT IS AT THESE MOMENTS WHEN THE COURT IS MOST SHAPED BY THE OUTLOOK AND PHILOSOPHY OF THE INDIVIDUALS WHO SERVE AS JUSTICES. IN MY VIEW, WE ARE WITNESSING SUCH A MOMENT TODAY.

TODAY, OUR NATION -- OUR CONSTITUTION AS INTERPRETED BY THE COURT -- IS AT A CROSSROADS. THERE ARE SOME FUNDAMENTAL CHOICES

## TO BE MADE:

- \* WILL THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF RELIGION CONTINUE TO PROTECT THE RIGHTS OF ALL AMERICANS -- PROTESTANT AND CATHOLIC; JEWISH AND MUSLIM -- TO PRACTICE THE FAITH OF THEIR CHOOSING?
  
- \* WILL THE FOURTH, FIFTH, AND SIXTH AMENDMENT'S PROTECTION OF CIVIL LIBERTIES -- OF A FAIR TRIAL AND FREEDOM FROM UNREASONABLE SEARCHES -- REMAIN STRONG?
  
- \* WILL THE POWER OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE -- USED TO ROOT OUT DISCRIMINATION AGAINST RACIAL MINORITIES AND WOMEN IN OUR SOCIETY -- BE DIMINISHED?
  
- \* AND WILL THE MAJESTIC SWEEP OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE -- WHICH PROTECTS THE RIGHT OF PRIVACY OF ALL AMERICANS -- BE CURTAILED?

JUDGE SOUTER, BECAUSE OF THE CLOSE DIVISION ON THE COURT ON THE MEANING OF THESE CONSTITUTIONAL GUARANTEES, IF YOU ARE CONFIRMED, YOU WILL HAVE THE POWER TO DETERMINE WHICH DIRECTION THIS NATION WILL TAKE -- WHICH PATH WE WILL FOLLOW AS WE REACH THIS CRITICAL CONSTITUTIONAL CROSSROAD.

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LET THERE BE NO MISTAKE ABOUT IT, JUDGE SOUTER. IF CONFIRMED, THE FATE OF OUR PRIVATE LIVES AND OUR PUBLIC RESPONSIBILITIES WILL BE PLACED IN YOUR HANDS.

I SINCERELY HOPE, JUDGE, THAT YOU WILL JOIN ME IN A DIALOGUE ON THE CONSTITUTION -- A DIALOGUE IN WHICH YOU RESPOND WITH SPECIFIC ANSWERS TO MY SPECIFIC QUESTIONS ABOUT:

- \* THE DUE PROCESS CLAUSE AND ITS PROTECTION OF OUR RIGHT TO PRIVACY AND INDIVIDUAL LIBERTY;
- \* THE EQUAL PROTECTION CLAUSE AND ITS GUARANTEES OF RACIAL EQUALITY AND EQUAL RIGHTS FOR WOMEN;
- \* THE FIRST AMENDMENT AND ITS PROTECTION OF FREEDOM OF SPEECH AND RELIGION;
- \* AND OTHER IMPORTANT CONSTITUTIONAL ISSUES OF OUR DAY.

AT THIS FATEFUL MOMENT IN OUR HISTORY, WE HAVE A RIGHT TO KNOW -- AND A DUTY TO DISCOVERY -- PRECISELY WHAT YOU, JUDGE DAVID HACKETT SOUTER, THINK ABOUT THE GREAT CONSTITUTIONAL QUESTIONS OF OUR TIME.

I BELIEVE WE CAN ENGAGE IN A REAL DISCUSSION OF THESE ISSUES WHILE RESPECTING YOUR JUDICIAL INDEPENDENCE. WE VALUE IMPARTIALITY

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IN OUR JUDICIAL OFFICERS, AND IT IS NOT A FUNCTION OF THESE HEARINGS TO TRESPASS UPON ANY BOUNDARIES THAT ARE SET BY THE NEED TO MAINTAIN THAT INDEPENDENCE.

YET THE OFFICE OF SUPREME COURT JUSTICE INURES TO NO ONE BY BIRTH OR BY RIGHT -- OR BY VIRTUE OF A PRESIDENTIAL NOMINATION ALONE. TO ATTAIN THAT POST, A NOMINEE MUST PERSUADE THE SENATE THAT HE OR SHE IS THE PERSON IN WHOSE HANDS WE SHOULD AGREE TO VEST AWESOME POWER AND RESPONSIBILITY.

NO ONE IS ENTITLED TO BE A SUPREME COURT JUSTICE, ANY MORE THAN ANY MEMBER OF THIS COMMITTEE IS "ENTITLED" TO BE A SENATOR.

THE BURDEN OF PROOF IS ON YOU, JUDGE SOUTER, THE NOMINEE -- AS IT IS ON US, WHEN WE SEEK ELECTION AS SENATORS. WE HOLD OUR POSTS ONLY IF A MAJORITY OF THE ELECTORATE DEEMS US THE RIGHT PERSONS FOR THE JOB, GIVEN THE PARTICULAR TIME AND CIRCUMSTANCES FACING THE COUNTRY. AND A SUPREME COURT JUSTICE CAN ASSUME HIS POST ONLY IF THE SENATE IS PERSUADED THAT THE NOMINEE IS THE RIGHT PERSON FOR THAT POSITION, AT THAT PARTICULAR JUNCTION IN HISTORY.

THE POWER IS AWESOME, THE DUTY IS PROFOUND, THE OBLIGATION IS YOURS, THE RESPONSIBILITY IS OURS.

NO ONE KNOWS, JUDGE SOUTER, WHAT QUESTIONS THE SUPREME COURT

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WILL HAVE TO RESOLVE IN THE YEAR 2024 -- THE YEAR UNTIL WHICH YOU WILL SERVE ON THE COURT SHOULD YOU BE CONFIRMED AND SERVE AS LONG AS YOUR PREDECESSOR DID.

OF ONE THING, THOUGH, WE CAN BE SURE.

IF HISTORY IS ANY GUIDE, TOMORROW'S ISSUES -- WHATEVER FORM THEY TAKE -- WILL PIT GOVERNMENTAL POWER AGAINST INDIVIDUAL LIBERTY; MAJORITY TYRANNY AGAINST PERSONAL RIGHTS; THE DANGER OF DISCRIMINATION AGAINST THE DREAM OF EQUALITY FOR ALL AMERICANS.

FOR 200 YEARS, THE SUPREME COURT HAS SERVED AS THE COURT OF LAST RESORT IN SUCH STRUGGLES -- THE FINAL GUARDIAN OF OUR FUNDAMENTAL RIGHTS.

SO IT WAS FOR OUR PARENTS AND GRANDPARENTS; AND SO I HOPE IT WILL BE FOR OUR CHILDREN AND GRANDCHILDREN IN THE 21ST CENTURY.

IF CONFIRMED, YOU, JUDGE SOUTER -- MORE THAN ANY OTHER PERSON IN THIS ROOM -- WILL DECIDE WHAT THE CONSTITUTION MEANS FOR OUR NEXT GENERATION. TO CONSENT TO YOUR NOMINATION, WE MUST HAVE CONSIDERABLE GUIDANCE AS TO WHAT KIND OF SUPREME COURT -- WHAT VISION OF THE CONSTITUTION -- YOU WILL PROVIDE FOR THEM.

FOR THE NEXT FEW DAYS, JUDGE SOUTER, OPEN FOR US A WINDOW INTO YOUR MIND.

-C-

The CHAIRMAN. Senator Thurmond.

#### OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, today the committee begins hearings to consider the nomination of Judge David H. Souter to be an Associate Justice of the Supreme Court of the United States. This marks the 6th nominee to the Supreme Court that this committee has considered in the past 9 years and, once confirmed, would be the 105th person to serve as a Justice. As well, I might say, it is the 23d Supreme Court nomination that I have had the opportunity to review during my 36 years in the Senate.

As we begin the hearing process, we must remain keenly aware that it is a solemn responsibility. Those chosen for appointment to this Nation's highest court occupy a position of great power and authority, as this appointment is one of life tenure granted without accountability by popular election. With this position of great status comes a greater responsibility to the people of this Nation—to the concept of justice, and to the Constitution.

Mr. Chairman, I have always believed that the Constitution is the greatest document ever penned by the hand of man. The Constitution creates the basic institutions of our National Government and spells out the power of these institutions, the requirements for holding office, and the rights of our citizens. Our Constitution is the fundamental law of the land. It is the basis for laws written by Federal, State, and local governing bodies, and it defines the separation of power between the individual States and our National Government. The fact that our Constitution has survived since its adoption in 1787 is a true testament to its enduring nature.

Our magnificent Constitution confers tremendous responsibility on both the House and the Senate to declare war, maintain the Armed Forces, borrow money, regulate commerce, mint currency, and make all laws necessary for the operation of Government. However, the Senate alone holds exclusive to "advise and consent" on all judicial nominations, without a doubt one of the most important responsibilities undertaken by the Senate. It is a responsibility that takes on greater significance when a nomination is made to the highest court in the land. The Senate has assigned the task of holding hearings and reviewing judicial nominees to the Judiciary Committee. It is our duty to make the recommendation to the full Senate. This critical role in the judicial process must be equitable, thorough, and diligent. It is this committee that will be called upon to cast the first vote which will in all likelihood determine the fact of this nomination. I am not aware of any nominee to the Supreme Court in this country who has failed to attain a majority of the votes of the members of this committee and then been confirmed by the full Senate. This track record clearly underscores the importance of our responsibility.

The role of the Supreme Court in America's development has been vital because the Court has faced many difficult issues, using its collective intellectual capacity, precedent, and constitutional interpretation to address such issues as criminal law, privacy rights, church-state relations, freedom of speech and press, the death pen-

alty, civil rights, and much, much more. Throughout the course of this Nation's history, the Court has been thrust into the center of many difficult controversies. As Justice Holmes stated: "We are quiet here, but it is the quiet of a storm center."

Due to the broad range of difficult, controversial, and important issues which must be resolved by the Court and the impact of its decisions, great responsibility is placed upon each Justice. An Associate Justice must be an individual who possesses outstanding qualifications. In the past, I have reflected upon the judicial qualifications. The attributes I believe a nominee to the Court should possess are:

First, unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair and just.

Second, courage. The courage to decide tough cases according to the law and the Constitution.

Third, compassion. While a nominee must be firm in his decisions, he should show mercy when appropriate.

Fourth, professional competence. The ability to master the complexity of the law.

Fifth, proper judicial temperament. The self-discipline to base decisions on logic, not emotion, and to have respect for lawyers, litigants, and court officials.

Sixth, an understanding of the majesty of our system of government. The understanding that Congress makes the laws, that the Constitution is changed by amendment, and that powers not delegated to the Federal Government are reserved to the States.

An individual who possesses these attributes cannot fail the cause of justice.

My review of the background of this nominee convinces me, as we start these hearings, that he possesses the necessary qualifications to be an outstanding member of the Supreme Court. His intellectual credentials are impeccable: Phi Beta Kappa, Rhodes scholar, undergraduate and law degrees from Harvard, and graduate study at Oxford University. His experience is extraordinary: Currently serving as a member of the U.S. Court of Appeals for the First Judicial Circuit, formerly an associate justice of the New Hampshire Supreme Court for 7 years, previously served as a judge on the New Hampshire Superior Court for 5 years, served as the attorney general for the State of New Hampshire, held positions as deputy attorney general, assistant attorney general, and practiced law in the private sector.

Recently, Judge Souter's professional experience and qualifications were scrutinized by the American Bar Association in connection with his appointment to the first circuit and his nomination to the Supreme Court. For both positions, the ABA gave Judge Souter the highest possible rating based on his professional competence, integrity, and judicial temperament. Without question, Judge Souter has the professional credentials to serve on this Nation's highest court. He has long been known as a man of keen intellect and devotion to the law—a perception certainly warranted by his distinguished professional record.

Mr. Chairman, our critical role in the selection process of a Supreme Court Justice requires us to carefully examine and review the intellectual capacity, moral character, and background of a

nominee. However, it does not convey the right to question a nominee about how he or she would decide a particular case. It is inappropriate to ask a nominee how he would rule for several reasons. A nominee cannot, and should not be expected to, indicate how he would rule until there has been an opportunity to fully examine precedent and relevant law, to study briefs, and to listen to oral argument. Only after a complete review of all the facts and relevant law, and after sufficient time for calm, rational deliberation, should an individual be called upon to render a decision. Direct questioning about sensitive issues that may come before the Court could impinge on the concept of an impartial, independent judiciary. We must take all precautions to ensure that the judiciary is shielded from the political pressures that are imposed on the legislative and executive branches. For these reasons, I urge all members of this committee to be diligent, thorough, and thought-provoking in questioning this nominee, but not to exceed the appropriateness to the purpose for which these questions are intended.

Mr. Chairman, a member of the Supreme Court must consider hundreds, even thousands of issues during his or her tenure. No one issue should be the sole criteria by which a nominee is judged fit to serve. While any one issue may now be more prominent than others, as times change so will the issues before the Court. A Supreme Court member is confirmed for life, not put in place to make short-term decisions to satisfy any political constituency. A member of the Supreme Court makes decisions in a vast array of areas which affect all the people of this Nation and not just one individual or a particular group. To expect otherwise would diminish this august institution.

Mr. Chairman, I believe a nominee selected by the President of the United States for the Supreme Court comes to the Senate with a presumption in his favor. As well, a man who has been recently considered by the Senate and unanimously confirmed comes with an even greater presumption in his favor.

The Framers of the Constitution established the judicial branch as a coequal branch of government, along with the legislative and executive branches. In 1803, Chief Justice John Marshall stated that "it is the duty of the judicial department to say what the law is." Because the Supreme Court is the final arbiter of legal disputes, its authority is immense. With that view in mind and a keen awareness of the great responsibility facing each of us, I look forward to a fair, thorough review of Judge Souter's intellectual capacity, background, and his sense of justice.

Judge Souter, we welcome you to the committee and look forward to your testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Just before I yield to Senator Kennedy, let me explain, Judge. I noticed you heard that buzzer. The way this place works is the Senate is in session as we conduct this hearing; that is, over on the Senate floor. I failed to mention that for you and for some in the audience. Those buzzers indicate whether or not there are votes, and we may at some point during this hearing today have to—some will get up and go vote and come back while we are trying to keep this thing going. So that is what that buzzer was about, and I

apologize. They do tend to break one's concentration. But if we don't show up when those buzzers ring, it tends to break our longevity in the Senate.

The Senator from Massachusetts, Senator Kennedy.

#### OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Good morning, Judge Souter. I don't know how you are enjoying it up until now, but it will get better later on. [Laughter.]

Today, the Senate begins one of the most important tasks entrusted to it under the Constitution: consideration of a nomination to the Supreme Court. In this remarkable time when democracy is spreading through Eastern Europe and Latin America, the Constitution stands more than ever as a timeless ideal for peoples throughout the world, a charter that protects the fundamental rights and liberties that are essential to human dignity. And it is more important than ever that we uphold these values in our own country.

The Constitution itself is silent on what standard the Senate should apply in weighing a Supreme Court nomination. The very notion of Senate confirmation of judicial nominees selected by the President was a last minute compromise reached by the Framers. Those who drafted the Constitution had originally proposed that the Senate alone select judicial nominees. The final compromise, which assigns shared responsibility to the President and the Senate, was adopted as one of the key checks and balances to assure that neither the President nor the Senate would have excessive influence over the Supreme Court and other Federal courts.

The true genius of the modern Constitution and Bill of Rights is also apparent in the establishment of an independent Federal judiciary, sworn to protect the fundamental rights and liberties of individuals against the excesses of government. The Supreme Court has the last word on the meaning of the Constitution, and its decisions have a profound impact on all our lives.

In the past half century, the Supreme Court has played a central role in the effort to make America a better and fairer land. The Court outlawed segregation in the schools, removed barriers to the right to vote, strengthened the basic rights of minorities, and took major steps to end the second-class status of women in our society.

In considering a Supreme Court nomination, the Senate must make two inquiries. The first is a threshold issue: Does the nominee have the intelligence, integrity, and temperament to meet the responsibilities of a Supreme Court Justice?

But that is not the only inquiry. The Senate must also determine whether the nominee possesses a clear commitment to the fundamental values at the core of our constitutional democracy.

In this second inquiry, the burden of proof rests with those who support a nomination. Our constitutional freedoms are the historic legacy of every American. They are too important, and the sacrifices made to protect those freedoms have been too great, to be entrusted to judges who lack this clear commitment. If a Senator is left with substantial doubts about a nominee's dedication to these

core values, our own constitutional responsibility requires us to oppose the nomination.

This is not to suggest any single-issue litmus test. Nominees should be judged on their overall approach to the Constitution. I have frequently supported nominees whose views on particular constitutional issues are very different from my own. But the Senate should not confirm a Supreme Court nomination unless we are persuaded that the nominee is committed to upholding the essential values at the heart of our constitutional tradition.

Recent developments at the Supreme Court have increased the importance of this inquiry by the Senate. Over the past few years, the Court has retreated from its historic role in protecting civil rights and civil liberties. In case after case, the Court has adopted narrow and restrictive interpretations of important civil rights laws. The Senate is entitled to ensure that nominees to the Nation's highest court share Congress' view that these laws must be interpreted generously, to provide effective remedies to eliminate unfair discrimination in all of its forms.

Judge Souter has a distinguished intellectual background, and he has spent the great majority of his legal career in public service. But aspects of his record on the bench and while serving in the New Hampshire attorney general's office raise troubling questions about the depth of his commitment to the indispensable role of the Supreme Court in protecting individual rights and liberties.

While on the New Hampshire Supreme Court, Judge Souter wrote a dissenting opinion arguing that the meaning of the State constitution should be confined to the specific intent of those who drafted it in the 18th century. Applied to the U.S. Constitution that view would have prevented the Supreme Court from outlawing school segregation in 1954. It would effectively stop the Court today from applying the Constitution to protect our fundamental rights from government intrusions not anticipated by the Framers two centuries ago. In this day and age our constitutional freedoms are too important to entrust to Justices who would turn back the clock on these basic issues.

While Judge Souter was serving in the New Hampshire Attorney General's office, he took a number of very troubling positions.

He argued that Congress does not have the constitutional authority to ban State literacy tests for voting, even though such tests place needless barriers on the exercise of the most important right in a democracy—the right to vote.

He argued that Congress did not have the constitutional authority to require employers to file reports with the Federal Equal Employment Opportunity Commission showing the overall racial composition of their work force—reports that are vitally important in investigating claims of discrimination.

He questioned the standard adopted by the Supreme Court to ban most forms of sex discrimination.

He referred to abortion as the "killing of unborn children" and opposed the repeal of an unconstitutional State abortion statute.

He defended the constitutionality of an order by the Governor of New Hampshire that flags on State buildings must be lowered to half-mast on Good Friday—an order enjoined by the courts because

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-

cocks 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 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.

We also have a further responsibility and that is to try to determine, as best we can, what kind of person is Judge David Souter? This is a different type of nomination from others that we have had in the past, because it is a fact—although some have challenged the statement—but it is a fact that when you look at the record you find little that you have written on many of the critical constitutional issues which face the Court. Therefore, it makes it all the more important that we inquire fully into your views on these subjects.

But there is probably another, maybe equally as important a reason, for us to undertake a full and complete inquiry. When the President nominated you he stated that he did not solicit your views on any of the controversial issues facing the Court. But just a day later, John Sununu, his Chief of Staff, went out of his way to reassure political advocacy groups on the right that Judge Souter could be counted on to vote with them. Sununu reportedly stated, that the far right should consider the Souter nomination "a home run that is just about to leave earth orbit."

I say to you, frankly, does John Sununu know something which we, on the committee, do not know and I think we are entitled to try to learn?

Much has been said about the impact of your nomination on the right to privacy and the right of a woman to choose to have an abortion. I am concerned about that subject, and I will, with appropriate questions ask you about these matters. Less has been said about you in the civil rights issues facing the country. On that subject, frankly, the nominee's record is practically blank. I believe it is necessary to ask whether Judge Souter can understand and empathize with the aspirations, the concerns, and the frustrations of blacks, hispanics, women, minorities. I want to know would you, as the nominee, have a feel for the conflicts and problems which arise from our diverse and heterogeneous population?

Since this nomination, I have had the opportunity to meet with you, Judge, on two separate occasions; once for over an hour and to speak with you over the telephone as well. I am frank to say that I enjoyed those meetings much. I found you to be a thoughtful, caring, and personable man. I respect your deep feelings for and commitment to the community in which you were raised.

Like most of the people who have met you in the last few weeks, I have no doubt about your legal intelligence nor your legal acumen. It is clear that you possess a keen legal mind. But I think most Americans want to know more about the kind of person you are. Justice Oliver Wendell Holmes, who was the subject of a thesis written by you once wrote that "The life of the law has not been logic; it has been experience."

Legal acumen is, indeed, important. But I think many Americans would not be comfortable with a Judge whose logic and reason were not tempered by experience and compassion. Judges must understand and have a feel for the human situations which underlay the disputes which come before the court. The dilemma faced by an unwed pregnant teenager; the sting felt by women and minorities victimized by discrimination; the temptation of the majority to ignore the consciousness of the religious minorities; or censor on popular expression.

These are not simply abstract, technical matters; they are real-world controversies whose resolution directly affects the degree of liberty, fairness, and diversity which Americans enjoy.

The quality of justice rendered by judges depends upon their capacity to grasp both the human and legal elements which underlay the case before them. Do you have that capacity? You are obviously a community-spirited man and you are obviously a caring human being. We know that you have devoted considerable time—in some respects it might be said an unbelievable amount of time—and energy to the Concord Hospital.

As you know, I asked you for a list of your charitable contributions, though I made it clear that I was not interested knowing the amount of those contributions. I thought that it would give this Senator some insight into the kind of human being you are. You were kind enough to share that list with me and I will make that list available to the Chair and to the public.

I found that you have given to an impressive variety of groups. I have a copy of the letter which you sent to me in connection with that, and unless the Chair has some objection, I would like to place it in the record.

The CHAIRMAN. Without objection.

[The letter of Judge David Souter follows:]

*David H. Souter*  
*Washington, D.C.*

September 5, 1990

Dear Ms. Sweitzer:

When I met with Senator Metzenbaum last month, he asked me to provide information, by letter to you, about the organizations to which I have made charitable gifts in the recent past and about the policy and practice of a particular organization, the Mayhew Program, in admitting and serving members of racial minorities. I would be grateful if you would bring the responses that follow to Senator Metzenbaum's attention.

During the calendar year 1989 and so far in 1990, I made contributions to the following organizations:

Capitol Region Food Program  
 United Way of Concord, New Hampshire  
 Presiding Bishops' Fund for World Relief  
 The Mayhew Program  
 Contoocook Valley Counseling Service  
 Operation Santa Claus  
 St. Andrew's Hurricane Relief Fund  
 Shrine Circus Fund  
 National Foundation for Cancer Research  
 WGBH TV  
 The New Hampshire Historical Society  
 The Currier Gallery, Manchester, New Hampshire  
 Shaker Village  
 Museum of Fine Arts  
 Harvard College Fund  
 Harvard Law School Fund  
 Harvard-Radcliff Club of New Hampshire Scholarship Fund  
 Phi Beta Kappa  
 St. Andrew's Church  
 New Hampshire Bar Foundation  
 Association of American Rhode Scholars  
 Appalachian Mountain Club  
 Piscataquog Watershed Association  
 The Trust for New Hampshire Lands

The subject of the Senator's second request is the Mayhew Program which operates a camp on Mayhew Island in Newfound Lake, New Hampshire for boys at risk of

trouble. Mayhew's statement of its nondiscrimination policy was adopted in 1974 and provides that:

"Mayhew admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at Mayhew. Mayhew does not discriminate on the basis of race, color, national and ethnic origin in the administration of its educational admissions, policies, scholarship and loan programs, and athletic and other school administered programs."

The Executive Director of Mayhew has informed me that in addition to this stated policy, the Mayhew staff handbook provides that "any form of racism, whether directed toward a boy, a fellow staff member, or a group in general, has absolutely no place on Mayhew Island."

The Director has also advised me that according to the 1980 census, New Hampshire is 98.9% "white, non-hispanic." Despite the state-wide percentage of minorities of 1.1%, such minorities were represented by 6% of the enrollment at Mayhew this summer, and the Director advises me that this figure is consistent with the average for the past five years or so. In effect, then, the minority representation at Mayhew is more than five times that for the state population from which Mayhew's campers are selected.

Yours sincerely,



David H. Souter

Ms. Sheri Sweitzer  
Office of the Honorable Howard M. Metzenbaum  
U. S. Senate  
Washington, D.C. 20510

Senator METZENBAUM. On the other hand, in some of your opinions, I am frank to say that you seem to have sprinkled an extra dose of logic in places where a dash of common sense or compassion would have been, in this Senator's opinion, more appropriate.

Moreover, having combed through your record as a judge and attorney general, I am frank to say that I am hard-pressed to find many instances in which you broke new ground, provided additional legal protection for the poor, the elderly, minorities, and women. These are people whose progress in integration in the mainstream of American life has been aided immeasurably by judges who grasp the special role which the Supreme Court plays in ensuring fairness and equal dignity for all Americans.

Frankly, Judge Souter, I do not expect your views on the law and the Constitution to accord precisely with mine. If they did, President Bush would not have nominated you.

But the diversity and strength of this Nation depends upon the Court's willingness to continue to fulfill its role as the guarantor of individual liberty, equal justice, and fundamental fairness. The American people need to be sure that you understand that role and that you are committed to preserving it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

The Senator from Wyoming, Senator Simpson.

#### OPENING STATEMENT OF SENATOR ALAN K. SIMPSON

Senator SIMPSON. Welcome, Judge Souter. Relax now, they have not rolled out the cannons to the crest of the hill yet. The grape-shot and the ball have not yet been fired. It will occur. It may come. You will be ready for that.

Remember, the best shield to use when that comes, the best shield to raise before it will be patience, ultimate, blessed patience, because it will likely get very ponderous, very prolix, very arcane. Because while we poor souls have been off home in the hustings, the staff has been burrowing and scratching, and the advisers and the consultants and the lawyers and the professors on the payroll are near exhaustion, and all for you, a conservative, an apparent adherent to constructionism.

We are here today to learn more about you, in order that the committee may make a recommendation to our colleagues on your nomination. What we really need to know here is whether you have a good legal education and a broad knowledge of the law. We need to assure ourselves that you are of good moral character and have a proper judicial temperament.

We want to know, and quite properly so, whether you as a Justice will make decisions based upon the law, rather than upon your own personal, moral, and political views.

We are certainly not here to determine whether you will decide the various issues that come before the Supreme Court, as the various zealous interest groups may think they should be decided. That is not the function of this.

My personal believe, I think a deep belief of most thoughtful Americans, is that a Justice should be a person of integrity, recti-

tude, intelligence, superior legal scholarship, and proper temperament for the Supreme Court bench.

It is also my personal belief, I think shared by many, that a Justice should have a judicial philosophy of respect for the laws and the Constitution, a Justice should interpret the laws and uphold the Constitution, but he or she should not legislate from the bench.

This is the painful part of this operation for the special interest groups. They have had free rein in that area for so many years, and this is a very difficult thing and we must wean them away from it very carefully, else they be in shock.

We are hired on in this tripartite form of government to do just that, to legislate. That is our job. We do that rather imperfectly, but with good intent, expressed through a pretty able group of Democrats and Republicans alike. We try.

From my time with you and from all that I have read and heard, you surely appear to possess all of these important traits, and I feel that you will make a very fine addition to the Supreme Court.

However, many on the committee, including our able and energetic chairman, have expressed their interest in having your views on key constitutional issues. I do certainly believe that judicial nominees should respond to appropriate questions, but overly explicit questions are not only unwise, but I think even impermissible from a legal ethics perspective, because you, sir, are a sitting Federal judge and you are, as a judge, then bound by the Code of Judicial Conduct, and I believe it is vital and critical for all to know and keep in mind, as we do these proceedings, that canon 3(a)(6) of that code provides that, "A judge should abstain from public comment about a pending or impending procedure in any court." You are a judge. This would apply to you.

We all well know how politicized the abortion issue has become and we know how hard the purists among the special interest groups are pushing and pounding and howling to get you to reveal your views on this topic. But we are also all very well aware that there will be abortion cases argued before the Supreme Court in the coming term.

I happen to be personally prochoice. I deeply believe that women should have this right, this freedom, this right of privacy, even, if you will, even though it was stretched like a drum head in *Roe v. Wade*, with the use of the words like "penumbra."

But extremists on both sides are now controlling that debate, extremists, and I would humbly suggest that legislators, especially male legislators, should not even be involved in the decision. But be sure to read all I have said on that intimate personal issue before you write. [Laughter.]

I would also point out to my colleagues that abortion is most clearly a pending or impending issue before the courts, and I personally believe that Judge Souter, you, sir, are prohibited from public comment about that issue, not as a nominee, but as an invested sitting Federal district judge. That is my personal view.

We heard from our chairman on Tuesday that "questioning directed particularly at issues on which the Court is closely divided has long been our practice." But let me remind you that in 1981 we were all admonished by our chairman that "a nominee can speak in general terms about the law, but should not be forced to state

opinions on controversies likely to come before her." That was the chairman's statement at Sandra Day O'Connor's nomination hearing.

We were also advised on Tuesday by the chairman that Judge Souter must answer questions on particular issues, because if he wants the job, the burden of proof is on the nominee, as it is on us when we seek election as Senators.

But in 1981, we were once again admonished by the chairman on the same Senate floor that the nomination process is "unlike the situation with respect to Senators, in which the electorate can demand of us what our philosophic background is or what we think about a particular issue."

Let us be very refreshingly candid and honest with each other. Really, the only thing that has ever long been our practice with regard to judicial nominations in this arena in these recent years is politics, pure politics.

We have a certain and perfect right to inquire about your judicial philosophy, but we do not have the right to know a nominee's position on specific issues, and certainly not with a sitting judge.

So, which is it? We cannot have it both ways. Was it true in September 1981, or is it true now in September 1990? Some of the panting and hand-wringing special interest groups are very disturbed about your quiet lifestyle, the fact that, according to media reports, you spend much of your time with the law, music, books, and nature. Good heavens.

Some even seem to be concerned that you are a bachelor, and it is even clumsily and desperately suggested that you are somehow "out of touch" and not in "the mainstream of humanity." It is thus expressed that a doctor, then, I guess, or a priest or a judge or one who has not been married and who seeks solitude and contemplation, rather than the excitement and the bright lights is unfit to counsel, advise, or judge his fellow humans.

Are we saying that a priest who took the vows of celibacy was not able to counsel the estranged and anguished wife or husband, or comfort the tormented child, because he or she had none? That logic surely diminishes and denigrates the doctrine and process and practice of several of the world's significant religious orders.

Well, I would suspect that most thoughtful Americans would like to take more time to engage in just those pursuits—music, books, and nature—if they had the ability, in their hurried existence. So, let us, if nothing else, let us be fair. Let us follow our constitutional responsibility, as the chairman may see it, as I may see it, determine whether Judge David Souter has the—this is what the chairman asked—whether you have the "intellectual capacity, background and training, character, and judicial temperament to serve on the Supreme Court."

Those are also the words of our chairman. I do know him well. I know him as a very fair man—I really do—vigorous, energetic, full of spirit—you are going to get it all—but he is fair.

You are going to be alright here. In the West we would say, "sit deep in the saddle," and you will ride it out well.

The CHAIRMAN. I might say to my colleague from Wyoming, while those who he said were ensconced here, staff scurrying through statements, obviously yours was on vacation, because they

did not give you the whole quote. The remainder of the quote was, "I believe nominees should be required to answer all questions, except for those questions that would necessitate an opinion as it applies to a specific set of facts that is likely to come before the Court for decision." I will be happy to give your staff the rest of the quote, when we go on.

Senator SIMPSON. We will put it in the record.

The CHAIRMAN. I now yield to my colleague from Arizona.

#### OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeCONCINI. Thank you, Mr. Chairman.

Judge Souter, another welcome. You will have many and, I suspect, after several days you may wonder what kind of a welcome the Senate might give you. You are going to have some difficult days in the sense of being asked a lot of questions.

A lot of information about your life has already come out, I am sure some of which you would rather not come out, not that there is anything embarrassing that I have seen, but we all have our private lives, those of us that choose some public service, as you have, realize that it is part of the price we pay.

I do not like it all the time and I have had accusations and things written about me I would rather not have been written, but I realize that it is part of the process and I suspect that you do, too. The process demands that we go through exactly what we are doing today and exactly what the Senator from Wyoming said has been happening over the last 5 to 6 weeks.

Yes, people are scratching, people are interested in knowing about you, because President Bush has nominated you to the position of extraordinary importance in our country. Whether one believes the framers intended it or not, no one can deny the immense power that Supreme Court Justices wield through their opinions. Decisions by the Supreme Court affect the lives of each and every one of us every day.

Whether you label them conservatives or liberals or tag them as activists or constructionists, Supreme Court Justices are unquestionably active participants in the national policymaking. Once the President appoints and the Senate confirms, a Supreme Court nominee never has to look back. There are no strings attached, if you are confirmed here. He or she has been set free to interpret that great document our Founding Fathers signed over 200 years ago. Each Justice defines the great ideas of freedom, liberty, and equality embodied in that Constitution.

For these reasons, the constitutional responsibility of advice and consent conferred on the Senate is crucial to our system of government and laws. I am sure that no one on this committee or in this body takes his or her role in this process lightly.

In nominating Judge Souter to the Supreme Court, I believe President Bush has chosen an individual with a keen intellect and solid judicial background. His colleagues speak of his dedication. Lawyers who appeared before him praise his hard work. The American Bar Association has found that Judge Souter meets their highest standards of professional competence, judicial temperament, and professional integrity, as well.

You have two sponsors, and one of them, Senator Humphrey, sits on this committee. Senator Humphrey has been an active and well-respected member of this committee since 1987. Senator Rudman, his colleague and your close friend, is well respected and liked by members of this committee and the entire Senate. That goes a long way, I believe, because it is important as to who put you forward, as well as the President in the White House.

I was left with some very positive impressions, Judge Souter, after our office visit over a month ago. I found you to be thoughtful and a sensitive person. Since that time, I have had a chance to read a number of your court opinions. These opinions lead me to believe that you have an open mind and that you will be an open-minded jurist.

Judge Souter's opinions, in my judgment, are thoughtful and well written. Though I did not agree with every one, that is not why I was reading them. His unique approach to an issue, in certain cases, reflects great thought on the case before he wrote out his particular opinion, at least that is my observation. I saw no evidence of any tendency toward carrying out a personal agenda.

But as important as these attributes are to your confirmation, we still know very little about you. From all indications, it appears that President Bush did not apply a litmus test in choosing you for the Supreme Court. This Senator never has and never intends to apply such a test. I will not keep a scorecard on the number of areas upon which I may agree or disagree.

Instead, I hope to find through these hearings that Judge Souter is indeed an advocate of judicial restraint and not a judicial activist. I hope to find a jurist who is respectful of precedent, rather than a jurist who is on a mission to impose his personal beliefs or hidden agenda on the country through the broad, sweeping opinions that he may write.

In the past, some Supreme Court nominees who have come before this committee have been evasive in answering valid and what I believed necessary questions posed to them by myself and my colleagues. I find that practice to be disturbing. Neither this Senator, nor do I believe any other Senator on this panel, is looking for a nominee to pledge how he or she will vote on specific cases that may come before the Court.

We all understand and agree with the need to protect the interests of future litigants who will appear before you. However, it is essential that the committee ask and that you, Judge Souter, provide some answers to questions regarding your judicial philosophy, your views on constitutional interpretation. To settle for less would be a great disservice to this body and to this country.

As I do with all judicial nominees, I presume the President's nominees should be confirmed and that they are qualified and competent. In my 14 years in the Senate, I have only voted against three judicial appointments. I have in the past voted for conservative judges, as well as liberal judges, including recommending William Canby and Mary Schroeder for the ninth circuit, who did not agree with me on some particularly sensitive issues. But I knew them and I knew their competence and capabilities.

Unfortunately, in a practice that is becoming all too common, interest groups are attempting to turn a Supreme Court nomination

hearing into a referendum on *Roe v. Wade*. Those who view these procedures as just a question of how a nominee will vote on one case, in my judgment make a mockery of this process.

If confirmed, Judge Souter, you will serve on the Court long into the future, as it has been pointed out. Like any other Justice, you will face countless opportunities to cast a deciding vote on issues that can shape our society for decades. It is a nominee's ability to interpret the Constitution for these as yet unforeseen issues that we must evaluate in this process starting today. Thus, Judge Souter, your opinion on a particular case is not as important as your approach to judging and your understanding of the Constitution.

Will you be able to separate your personal beliefs from your judicial duties and your constitutional oath? Will you respect the traditions of precedents of the Court? Will you wield your judicial power with restraint and respect for the two other branches of government? Will you acknowledge that the Constitution should not only protect the haves, but also the have-nots?

I hope to be satisfied with the answers to these questions as we conclude these hearings. I am most favorably impressed with what I know about you and have read about you. I hope and, quite frankly, expect, Judge Souter, that you will be forthcoming and candid in answering my questions and those of my colleagues. I also hope that after a thorough examination, the committee and the Senate and this Senator will be able to vote for you. It certainly appears today that that is where we are headed, and I am pleased that that is how the process is moving.

In closing, I join my colleagues once again in extending a warm welcome to you. From what I know of you, it appears that you are qualified, that you have the education, that there is no question of your intellectual capacity. And the American people now will have an opportunity through this democratic process, second to none, equaled no place that I know of, to get a glimpse at perhaps the new Justice of the Supreme Court. I hope, Judge Souter, whatever the questions are, as uncomfortable as they might be, that they are taken in the spirit of this committee and certainly this Senator as trying to understand you and fulfill our constitutional responsibility.

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

The CHAIRMAN. Thank you, Senator.

The Senator from Iowa, Senator Grassley.

#### OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

More than 200 years ago, Alexander Hamilton, the architect of much of what became the judiciary article of the U.S. Constitution, wrote, and I quote, "the complete independence of the Courts of justice is \* \* \* essential" in a Republic governed by a "limited Constitution."

Hamilton reasoned that the courts, the weakest of the three branches, must declare the "sense" of the law made by the other two branches, but if they should be disposed to exercise "will" instead of "judgment," the consequence would be the substitution of

their pleasure for that of the democratic bodies and, hence, the people.

Unfortunately, over the past 30 years or so, the Federal courts have exercised more power over a broader range of social and economic issues than the framers of the Constitution ever imagined. Therein, I believe, lies the reason why the confirmation process in recent years has come dangerously close to looking like the electoral process. Unelected and unaccountable judges have come to play the preeminent role in virtually every aspect of American life—in many cases supplanting the politically accountable branches of government. This erosion of the principle of the consent of the governed has, at the same time, undermined public confidence in the judiciary.

I have served in the politically accountable branches of government—Federal and State—for 32 years. I am looking for a judge who understands his or her role in a democratic society, to interpret the laws made by others, rather than to second-guess them based on personalized notions of enlightened social policy. To be sure, judges have an obligation to enforce the rights guaranteed by the Constitution. When a law clearly conflicts with that Constitution, a judge is right to nullify the will of the people. But let us never forget that perhaps the most fundamental of those rights in the Constitution is the right of our people to democratic self-government.

As the second Justice Harlan explained, “the vitality of our political system is weakened by reliance on the judiciary for political reform.” The fact is that not every major social ill can find its cure in a Supreme Court promoting reform when democratic government is slow to act—that is, not unless we are to abandon the more than 200-year-old axiom that the Constitution is an instrument of government founded on the idea that only in a diffusion of governmental authority lies the greatest promise of the most liberty.

Therefore, I do not prefer politicians disguised in robes on the Federal bench, nor ones who are compelled to make campaign promises to be confirmed. Judges ought not to be “pro-this” and “anti-that.” They should, rather, be judges of cases, not causes.

As expected, we have heard a great deal about the nature of the Senate’s “advice and consent” role. It is often said—in fact, we have already heard it this morning—that our role in scrutinizing and voting on Supreme Court nominees is the most important function that we have as Senators. This has become some sort of confirmation catechism.

But why is this? Is this process more important than, for example, voting to declare war? Is it more important than voting to solve the budget deficit so that future generations won’t be condemned to a lower standard of living? Only those who desire the courts to be more powerful than the coequal branches, or the States, could answer “yes” to that question.

Now, true, the framers of the Constitution granted judges lifetime tenure; we are told that this makes all the difference. But that was to insulate judges from the passing political pressures of the day, not to make them more susceptible to that pressure.

It is also asserted that the Senate and this committee in particular have an equal role in this process, and thus we must scrutinize

the nominee as if we were the President of the United States. In fact, this nominee has for the past few weeks been studied in great detail. No stone in his life has been left unturned.

Until very recently, of course, the historical practice was quite to the contrary. With only a couple of exceptions, it was not until the 1950's that nominees regularly appeared before this committee. As recently as 1922, the President nominated and the Senate confirmed a Supreme Court nominee on the very same day, a mere 1 day after the vacancy occurred. Of course, only five nominees have been denied confirmation during the entire 20th century. Now, I point this out not to advocate a return to the past, but rather to provide some historical context to our proceedings.

Similarly, our clear practice has been to refrain from seeking commitments on specific questions likely to come before the Court. I think that we would find it quite a paradox on the one hand to shield judges from political pressures through lifetime tenure, while on the other hand subject them to the same pressure through litmus-test questions as a condition for confirmation.

President Abraham Lincoln put it another way, at the time of his nomination of Chief Justice Chase: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it." To be candid, I did not always share this view of the Senate's role. But as with Supreme Court Justices who are faced with an old precedent, I do not believe that Senators ought to be forever bound by past practice, particularly when the force of better reasoning suggests a better way.

So, Judge Souter, the ultimate question for me is whether—  
[Audience disturbance.]

The CHAIRMAN. Will the police officers please clear the folks—the committee will suspend. The committee will stand in recess until the police can restore order.

[Recess.]

The CHAIRMAN. The committee will come back to order and out of recess. Welcome to Washington, Judge. [Laughter.]

You think this is bad, you ought to run for President or run for the Senate.

I thank my colleague.

Senator GRASSLEY. Mr. Chairman, I apologize to everybody for what I said. [Laughter.]

The CHAIRMAN. There is no need to, Senator. I, on that score, completely concur with you.

Senator GRASSLEY. I am just about done, Mr. Chairman.

The CHAIRMAN. Keep going, Senator.

Senator GRASSLEY. So, Judge Souter, the ultimate question for me is whether you are the kind of judge who will be truly faithful to our written Constitution and the system of government that it supports. This quality, together with an open mind—or what Justice Frankfurter called "the capacity for disinterested judgment"—is what I hope to find by the time we have completed our questioning of you.

I congratulate you on your nomination, Judge Souter, and I look forward to hearing from you.

The CHAIRMAN. I thank the Senator. The best part, the most interesting part is, Judge, I don't know why they were for or against.

Senator Leahy.

#### OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Welcome, Judge Souter. Being from New England, I will try not to say anything as inflammatory as Senator Grassley did. [Laughter.]

Chuck has a way of stirring us up around here.

Judge, we do welcome you here, and though there may be a moment of levity here and there, you know—as we do—the seriousness and the importance of this hearing. I think that you as well as the Senate welcome it, and that you have enough of a dedication to the Constitution to know its importance for all of us.

Your nomination comes at a historic time. The individual who takes a seat on the Supreme Court today is going to have a dramatic impact on that institution, on our Nation well into the next century, long after the President and the Members of the Senate are gone. The 105th Justice to this country's High Court is going to affect the lives of individual Americans on issues ranging from personal privacy to equal protection to the free exercise of their religion. That power is not bestowed on an individual unless and until the U.S. Senate is confident that he or she will exercise it fairly.

The Senate's duty to advise and consent to nominations to the Supreme Court is, in my opinion, one of our most profound and meaningful responsibilities. It brings together the three distinct branches of our Government. It proves the wisdom of our system of checks and balances. The constitutional separation of powers is envied and emulated by emerging democracies around the world. In fact, the genius of our Nation's Founders denied the possibility of tyranny here in the United States, and it did that by devising our system of checks and balances.

Now we, the members of this committee, and the rest of the Members of the U.S. Senate, have to demonstrate our own wisdom and fairness in undertaking a thorough review of Judge David Souter's record. The Constitution mandates it. The times demand it.

Now, the President has said that this nomination was not subject to a litmus test and I applaud President Bush for that. He did not apply a litmus test and I do not apply a litmus test. I do not think any Senators will do so.

Look at where we are. Justice Brennan, whose departure precipitated the nomination, viewed the Constitution as a "sparkling vision \* \* \* of the human dignity of every individual." He never sacrificed the liberties of the individual—no matter how unpopular—for the sake of appeasing the majority. Justice Brennan resisted the anti-individual direction the Court has taken over the last decade. He never lost sight of that institution as the Nation's legal tribunal of last resort. Justice Brennan's intellect, leadership, and compassion represented the best of a public servant. His seat on the Court is immensely difficult to fill.

Today we consider whether the President should receive the consent of the Senate in the nomination of Judge David Souter. Judge Souter, you are an articulate and intelligent man with an engaging

sense of humor. In fact, I passed on last night to my son your comments about the motorcycle. He got a laugh out of it, too.

You also have a strong streak of Yankee individualism. By most accounts, you are a scholar and have dedicated your life to the law. Now, those qualities are admirable, but we are all agreed that they are not enough by themselves to entitle a person to a seat on the Supreme Court.

We must be persuaded that Judge Souter has the commitment and the capacity to preserve the freedoms the American people have fought for two centuries to protect. Will Judge Souter serve as a trustworthy guardian of our fundamental rights? I want to be sure that the next Supreme Court Justice understands the extraordinary nature of the position he or she assumes. That Justice must never forget, in the words of our great Chief Justice Marshall in 1809, that "it is a Constitution we are expounding"—a Constitution in a living, breathing, changing society on the threshold of the 21st century, a Constitution that can fit in this little book, but that has meant so much for the last 200 years in this country.

Any nominee to the Supreme Court must recognize that discrimination is not a high-minded issue about standards of review, but a daily struggle for minorities and women in this country; that rights for the disabled are not academic fodder in the debate over federalism, but the opportunity for an individual with a disability to lead a rich, full life; and that privacy is not an abstraction but a critical issue for a woman struggling with the dilemma of an unwanted pregnancy.

These are not esoteric hypotheticals. They are vitally important issues that affect the basic principles and fundamental values of the American people.

We 100 Members of the Senate, representing 260 million Americans, are sworn to uphold the Constitution. That Constitution requires us to offer our advice and consent to the President's nomination. We are in this body to represent the American people. This hearing process is how we must satisfy their concerns about a potential nominee. These proceedings are the public's sole opportunity to assess the qualifications of an individual who could greatly influence their daily lives. We owe it to the American people to proceed carefully, thoughtfully, and fairly.

We will hear from interest groups on both the right and the left, and that is as it should be. They are exercising their first amendment rights, and very properly so. But my decision will not be influenced by any group on the left or the right. My decision is going to be determined really, Judge, based on what I hear from you, in the answers to my questions and the answers to the questions of the other members of this committee.

I have a number of questions—ranging from the first amendment to the right to privacy to Judge Souter's views on criminal law. In addition, Judge, I will explore fully your involvement in the Seabrook incident, an issue I have already discussed with you. In fact, I first raised it with you when I sent you a telegram in 1977, and we have since talked about it.

Judge Souter, it is incumbent upon you to be forthcoming in your responses so that we have an adequate basis on which to make our recommendation to the full Senate and the American

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

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

#### OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

The distinguished Senator from Alabama, Senator Heflin.

#### OPENING STATEMENT OF SENATOR HOWELL HEFLIN

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

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

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

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

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

is a constitutional mandate, and for good reason. Federal judges, once confirmed, are not subordinate to the President nor the U.S. Congress. They are members of a coequal branch of our Federal Government and hold their jobs for life, not subject to the political processes as we in the executive and legislative branches are.

Therefore, I also believe that the Senate, as an independent body, in exercising its constitutional mandate to advise and consent, must peel beneath the veneer of a nominee to try and better ascertain what role that person intends to play as an Associate Justice on the highest court in this great Nation.

Judge Souter, this committee will do a lot of peeling beneath your veneer, for you are, indeed, a stealth nominee. It is thought by many that little is known about your reasoning process, thinking, and predictability of how you would decide certain issues that are expected to come before the U.S. Supreme Court. While you left a paper trail in the 219 opinions you wrote as a member of the New Hampshire Supreme Court, there are few blips on the radar screen on the major issues that will face the Supreme Court of the United States in the upcoming crossroad years. So peel we must. But we must do this in a fair and impartial manner, and certainly not cause you to prejudge an issue or a case without benefit of briefs, arguments, and research on the issue of the case in point.

It is our constitutional role to probe, cautiously but firmly and fairly, any s nominee on his or her past actions as a public official; his or her general views on political, economic, or social issues facing our Nation; his or her views on how, as a judge, he or she might expect to approach the analysis of a case in general; and, finally, his or her judicial philosophy. To do less would be a dereliction of our responsibility to the American public and to the constitutional process by which the President is "advised."

I believe the majority of the American public supports the concept of judicial restraint—that is, judges who will interpret the U.S. Constitution, respect prior decisions, and give presumptions to the validity of laws passed by the Congress and State legislatures, so long as they do not violate the U.S. Constitution.

I believe the people of our Nation do not want to see a Justice appointed who will try to legislate from the bench. Nor does the public wish to see a judicial extremist of either the right or the left who would proceed to force his or her peculiar political ideology through opinions rendered by the highest court in the Nation. Extremism is a dangerous commodity, and we on this committee have a duty to the American people to guard against this in any such potential nominee.

Given these facts and acknowledging the critical nature of the task before us, Judge Souter, I welcome your appearance before our committee today and look forward to your comments through a dialog with the members of this committee.

Thank you.

The CHAIRMAN. Thank you, Senator.

We would ordinarily go to Senator Humphrey next, but he has indicated that he is going to waive his opening statement because he will be joining Judge Souter when we conclude our statements to introduce Judge Souter, along with his senior colleague, Senator Rudman.

Now I yield to Senator Simon from Illinois.

#### OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. The good news, Judge Souter, is we are getting near the end of this part of the process.

As my colleagues would tell you, I do not ordinarily prepare a written statement. In fact, in 6 years on this committee, I don't believe I have ever done that. But last night, late last night, I sat down at my old manual typewriter and pounded out my reflections on where we are right now.

No task is more awesome than the one we now confront—approving or disapproving a nominee for the U.S. Supreme Court. Seven months ago, I became a grandfather for the first time. Perhaps no vote I cast this term in the Senate will have a greater impact on my granddaughter's future, Judge Souter, than whether I decide for or against your nomination.

After reading your opinions and various writings, even including your senior honors thesis, I come away with some uneasiness. Candidly, I am not sure how to vote.

In your senior honors thesis, you wrote about a struggle in the philosophy of law, and I quote: "I cannot offer a solution to the controversy. I have tried, rather, to describe the alternatives which are open in settling what I believe to be the most important point at issue." In the only article you wrote over the next quarter century, you paid tribute to Justice Laurence Duncan in the New Hampshire Bar Journal for his sense of what is appropriate on the bench; for his keen sense of words; for his attention to the small things—but hardly a hint about any judicial philosophy that motivated him. And then at the end of the article, you say, and I quote: "He was my kind of judge. He was an intellectual hero of mine, and he always will be." But after reading your article, I have no idea what his philosophical moorings were, nor what yours are.

Because David Souter may have such an influential voice in the destiny of this Nation, we must know a little better who the real David Souter is. I hope these hearings will assist in that, and I hope you will make every effort to help us.

What am I looking for? The two essentials I mentioned to you in your visit to my office: I want a champion of basic civil liberties, because the Supreme Court must be the bastion of liberty; and I want someone who will champion the cause of the less fortunate, the role assigned to the Court in our system.

I also want someone to whom every American can look and say, "There is a champion of my liberty." That should be true of men and women, for the able and the disabled, for people of every religion and color and national background and station in life. That is an extremely high standard, but it is an extremely high court to which you aspire.

During these hearings I also want to get some sense of whether David Souter has an ability to grow. The great Justices were not suddenly great Justices, any more than great Senators are suddenly great Senators. Great Justices and great Senators emerge gradually.

There are those who are concerned because you come from a small New Hampshire community of 2,000. Coming from an Illinois community of 402, that does not bother me. But if your intellectual and emotional horizons are bounded by that community that would bother me. Checking your background I talked to an African-American classmate of yours, now practicing law in this city. His comments about you were positive. He allayed some of my fears. But I also want to know if you empathize with a woman on the west side of Chicago who did not go to Harvard, who barely made it through the fourth grade. You will be her voice for justice. Is there some understanding of her plight? Will there be an attempt on your part to grow and understand our society with all its richness and diversity and with all its joy, often within sound of its cries of anguish and hopelessness?

In a new book, Justice Richard A. Posner of the Seventh Circuit Court of Appeals has written, "Our legal certitudes are pragmatically rather than analytically grounded." He was speaking of *Brown v. Board of Education* when he wrote that. From case to case his statement may not be applicable, but in the broad sweep of history it is. When the Supreme Court has lacked vision or compassion or practicality or passion for liberty, as in the *Dred Scott* case, the Nation has paid a terrible price for the Court's shortcomings.

Above the entrance to the Supreme Court, just a few steps from where we meet today, are the words etched in stone "Equal Justice Under Law." I want those words to live. And I want a Supreme Court Justice who will make them live.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Senator.

Senator HUMPHREY did wish to make a brief statement?

Senator HUMPHREY. Thank you, Mr. Chairman.

Welcome, Judge Souter.

Are you having fun, yet? I hope so. You might as well enjoy it.

Mr. Chairman, I have the honor and privilege of formally introducing the nominee to the committee in just a few moments, so I will, for my part, at this juncture pass on an opening statement.

The CHAIRMAN. Thank you, Senator.

I misspoke. I made Senator Rudman the senior Senator and he is not. He is the junior Senator. Senator Humphrey is the senior Senator.

Senator HUMPHREY. He is senior in age.

The CHAIRMAN. As Senator Baker used to say, I do not have any dog in that fight. I understand.

So, Senator Kohl, from Wisconsin.

#### OPENING STATEMENT OF SENATOR HERBERT KOHL

Senator KOHL. Thank you, Mr. Chairman.

I am a person who has not sat through any Supreme Court nominations before and I think Judge Souter, you would agree with me that these opening statements—although we are probably all happy they are coming to a conclusion—have been most outstanding and say something unusual about our American system and the way in which we go about selecting Supreme Court Justices.

Judge Souter, the President of the United States has asked you to serve on the Supreme Court. And if confirmed, you will be making decisions which will shape the fabric of American society for the rest of your life. You will be interpreting the Constitution in which, we as the people, place our faith and on which our freedoms as a nation rest.

During your tenure on the Court you will be free of all political constraints, unaccountable to the people, and unrecalable by the Congress—absent some severe dereliction of duty. Before we place that power in your hands, we need to know what is in your heart and in your mind.

While the issues the Court must address are well known, your views are not. Indeed, some cynics have even suggested that you were nominated precisely because you have not spoken to those issues in any detail. They even implied the President believed that a nominee would be more easily confirmed if his views were largely unknown. Those cynics do not understand, as I am sure the President does understand, the role of the Senate in this process.

The Constitution requires us to give our advice and consent to this nomination. The oath of office we took obligates us to examine your fitness to serve on the Supreme Court. We must conclude that the quality of your thinking deserves our respect, that you will relate the law to the basic values we have embraced as a nation, and that you are interested in doing justice as well as giving logic to the law.

In this process, a number of groups have told us to use this hearing to determine your views on one single issue or another, and they have told us that our decision to confirm you ought to depend on whether you pass their litmus test.

Well, let me add my own personal single-issue litmus test to the mix; and that is judicial excellence. Judicial excellence, it seems to me, involves at least four elements. First, a nominee must possess the competence, character, and temperament to serve on the bench. He or she must have a keen understanding of the law, and the ability to explain it in ways that the American people will understand. Based on the record developed thus far, Judge Souter, certainly you appear to have those qualifications.

Second, judicial excellence means that a Supreme Court Justice must have a sense of the values which form the core of our political and economic system. No one, including the President, has the right to require ideological purity from a member of the Supreme Court. But we do have a right to require the nominee to understand and respect our constitutional values. We do not elect Justices. They do not have the representational role that Members of Congress have.

The Framers of the Constitution gave the Supreme Court Justices lifetime tenure for a reason—they wanted the Court to be insulated from the momentary pull and tug of our daily politics. We do not want Justices who will change their legal opinions as the tide of public opinion turns. Indeed, we charge the Court with the task of defending the rights established in the Constitution even if those rights are, for the moment, reviled.

In my opinion, that means that a Supreme Court Justice must, at a minimum, be: Dedicated to equality for all Americans, deter-

mined to preserve the right of privacy and the right to be left alone by the Government, committed to civil rights and civil liberties, devoted to ensuring the separation of church and state; willing to defend the Bill of Rights and its applications to the States against all efforts to weaken it, and able to read the Constitution as a living, breathing document.

Third, judicial excellence requires a sense of compassion. The law is more than an intellectual game, and more than a mental exercise. As Justice Black said, "The Courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."

Indeed, the courts are our refuge, our sanctuary, and our safe haven. The courts are where people seek justice, not just the application of law. A Supreme Court Justice must understand that. He or she must recognize that real people, with real problems are affected by the decisions rendered by the Court. They must have a connection with and an understanding of the problems that people struggle with on a daily basis. Justice, after all, may be blind, but it should not be deaf.

And finally, judicial excellence requires candor before confirmation. We are being asked to give you enormous power. We want to know, in general, how you will exercise it. We want to know what you think about certain issues—abortion and privacy, civil and individual rights, the balance of power and separation of church and state. We do not want to know in advance how you will rule on cases that will come before you, but we do want—and we need and we deserve—to know what you think about these basic issues.

Judge Souter, let me be presumptuous enough to give you just a bit of advice. Do not hedge. Do not give us prepared answers. Do not hide behind the argument that you cannot talk about this or that. We are not trying to trap you and we are not trying to obtain a commitment from you about how you will vote. But, Judge, I believe you have thought about the great issues of the day and I believe you have some views on them, and I do not believe that those views will require you to vote in any specific way. I trust your ability to remain openminded about the specifics that may come before you. But I believe the country is entitled to know, before you take a seat on the Court and tell us *ex-cathedra*, how you view basic constitutional doctrine.

On behalf of the American people, we will be having a conversation with you over the next few days. If you are confirmed it is the last conversation we can have about basic constitutional issues. So, in these next few days, we must make an extra effort to get to know you and you must make an extra effort to help us do that.

The burden of proof rests on you, and only you can discharge it. Let me conclude on this note. Much of this hearing will focus on facts, but behind all of this is a sense of mystery. The Supreme Court is one of the most majestic institutions in American life. By its nature, the Court makes decisions which people oppose, but so far it has had the moral standing to compel compliance with those decisions, no matter how unpopular they are.

We have made a covenant with the Court; we have given it the power to make ultimate decisions and in return, asked the Court to

exercise that power responsibly. As Justice Stone once observed, and I quote, "The only check upon our own exercise of power is our own sense of self-restraint."

This hearing will help us to determine, as a Congress and as a country, how Judge Souter intends to exercise that power and that restraint.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Senator.

Now, Judge, what I propose to do before we break is to have our two distinguished colleagues, both of whom strongly favor your nomination, join you at the table. I will ask the senior Senator, Senator Humphrey, to speak first, and then Senator Rudman. At which time, after that is done, Judge, with your permission, unless you would prefer to do it another way, I would suggest that we break; we will come back; I will swear you in and we will hear your opening statement and then begin the questioning.

Is that all right with you?

Judge SOUTER. Yes, sir.

The CHAIRMAN. Senator Humphrey.

#### STATEMENT OF SENATOR GORDON J. HUMPHREY

Senator HUMPHREY. Thank you, Mr. Chairman.

With my colleague, Senator Rudman, I take pride in introducing to the Judiciary Committee, Judge David Souter, of Weare, NH.

I have to, because we are so very proud of our State, I have to correct my dear friend from Utah, it has not been 145 years since someone from our State sat on the Supreme Court. In fact, Chief Justice Harlan Fiske Stone was born in New Hampshire in the town of Chesterfield and he served, of course, until his death in 1946.

The uninformed suggest that David Souter is from a small town. Well, Mr. Chairman, I think perhaps you are better informed on this point than others, because you visited our State extensively drawn by its natural beauty and conservative politics. [Laughter.]

The CHAIRMAN. I wish I had been able to stay longer. [Laughter.]

Senator HUMPHREY. So do we. Drawn as you are by its natural beauty and conservative politics, but the uninformed, Mr. Chairman, think that David Souter is from a small town. Nothing, in fact, could be further from the truth, because where is a town so very large in area that it has no less than five separate metropolitan centers? There is the village of Weare, itself; there is East Weare, from which the Judge hails; there is South Weare; by now you might have guessed there is a West Weare; and, in fact, in the north, Mr. Chairman, is the village, which is sometimes abbreviated on signs as No. Weare, and sometimes pronounced by tourists as Nowhere.

But we do not mind tourists laughing at our signs, or even laughing at us, as long as they spend all of their money before they go home because that helps to keep down our taxes.

Mr. Chairman, the elegant pundits here, inside the beltway, think that David Souter may not be quite up to the big city or the big time because he drives a clunky old car, because he believes in conserving energy by not mowing his lawn until the grass begins to

block his view from the window. They think maybe a small-town fellow is not good enough for the big city of Washington, DC.

Well, my dear colleagues, I believe that you will find David Souter to be as smart as anyone in this city. I believe you will find him to be as sophisticated as anyone living up in Georgetown. I think you will find that he has a wonderful sense of humor. That he does not take himself too seriously.

On that point, I want to quote from a letter sent to the New York Times, and published in the New York Times by William Bardell who 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 especially with his imitations of New England accents." He added, "I am pretty sure also that he climbed in a few windows with me after midnight when they locked the college gates."

Mr. Chairman, I believe that our colleagues will find that David Souter enjoys the company of others every bit as much as he enjoys the company of his famous collection of books on history, philosophy, and the law.

Here is a man who works hard, yes, very hard, in a very disciplined way. But he is a man who also, for example, enjoys stopping by to visit older folks on his way home from weekly worship. He is an admirable human being.

On the professional side, for 22 years, David Souter has faithfully gone about the business of enforcing the law, and dispensing sound justice. He has enforced the law as our State's attorney general. He has presided over jury trials as a superior court judge, and he has served with distinction on our State's highest court, the supreme court.

Judge Souter's selfless commitment to public service surely tells us something about the qualities, the human qualities that he would bring to the Supreme Court. With his sterling credentials, as a graduate of Harvard Law School and as a Rhodes scholar at Oxford's Magdalen College. Every one of us knows that he could have been earning millions these past years as a partner in a prestigious firm in Boston or New York, but instead, he has devoted himself to positions of very high responsibility, but rather modest financial compensation. Shunning personal aggrandizement and self-promotion, he has found his compensation, instead, in pursuing the interest of justice in the public good.

But the best measure, surely the best measure is the opinion of those who know him best. In a close-knit State like ours, anyone who has been in public service as long as David Souter is well-known by people across the State. So it is especially revealing that folks of all political persuasions, Republicans and Independents, Conservatives and Democrats, women, men have offered high praise for Judge Souter's fairness, for his fairness, for his diligence, and his grasp of the law.

Support and respect for Judge Souter among members of the legal profession in our State has been virtually unanimous and let me read a few brief quotes. The New Hampshire Bar Association president, John Broderick—who is, by the way, a Democrat—says this: "He is the finest legal mind I have ever encountered. He gets

to the bottom line faster than anybody I have ever seen." He adds, "He is a judge's judge, extraordinarily talented and impeccably fair. He will not cast his lot with the conservatives on the Court merely because they are conservatives. He is fiercely independent in his legal reasoning."

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

"I am a Liberal," Green concluded, "but I have tremendous respect for Judge Souter. I think he will honor the Constitution."

Paul McKechn, a well-known political activist, candidate for Governor, a Democrat, past president of the New Hampshire Bar Association says this: "My impression is that he is a first-rate scholar. He is going to be confirmed and deservedly so."

Finally, a resolution passed by the New Hampshire Bar Association unanimously adopted and I will just read the resolve clause:

Be it resolved that the New Hampshire Bar Association on behalf of its 3,400 members, acting through its Board of Governors, unanimously and enthusiastically supports and endorses the nomination of David Souter and proudly commends its respected member for confirmation to the Federal Bench by the United States Senate.

Mr. Chairman, David Souter is well seasoned. This is interesting: No current member of the Supreme Court had the breadth of judicial experience at the time of nomination as Judge Souter has, as both a trial and appellate judge. Two of the Justices now on the Court had no judicial experience at all when nominated. Five of them had varying amounts of experience as appellate judges, but none as a trial judge, and only Justice O'Connor had both trial and appellate experience when she joined the High Court, but then not nearly as much as Judge Souter.

By any measure, then, Judge Souter is ideally prepared to serve on the Supreme Court. He has been actively engaged in the trenches, rather than offering commentary and criticism from the sidelines. Judge Souter's 12-year judicial record is there for all to see, and it provides the strongest possible proof of his judicial excellence.

This point was expressed well by Prof. Joseph Grano, a distinguished professor of law at Wayne State University Law School, who in a detailed report he prepared on Judge Souter's opinions in the criminal law area, said this:

From the cases I reviewed, I can find no legitimate basis for either side of the political spectrum opposing this intelligent jurist. Of course, those who want politics, rather than law from the Supreme Court, those few, Justice Souter is not the right person. For those who know better, it should be evident that President Bush has made an excellent selection.

Mr. Chairman, it is a credit to Judge Souter's spotless record that the critics have resorted now to the game of "trivial pursuit" in their efforts to find something negative to write about. Frustrated in their search for a smoking gun, some pundits have lamely suggested that a scholarly bachelor somehow lacks the perspective to be a good Supreme Court Justice.

Such critics need to be reminded that one of the Nation's most eminent and humane Justices, the great Benjamin Cardozo, was a scholarly bachelor. As always, my colleagues, we need persons marked by fairness, wisdom, and self-restraint sitting on the bench. Judge Souter fits that description in every way.

President Bush has made an excellent nomination. I am honored, therefore, to introduce him to my colleagues on the Judiciary Committee and confident that he will leave them impressed in every way.

Thank you.

The CHAIRMAN. Thank you, Senator, for a thorough and entertaining and informative opening statement.

Senator Rudman.

**STATEMENT OF HON. WARREN B. RUDMAN, A U.S. SENATOR  
FROM THE STATE OF NEW HAMPSHIRE**

Senator RUDMAN. Mr. Chairman, Senator Thurmond, and my colleagues on the committee, it is a very rare event in a public career that one has the opportunity to recommend a close and dear personal friend, as well as a former colleague for the highest position the legal profession offers, that of Associate Justice of the U.S. Supreme Court.

Therefore, this is a very special privilege for me personally, because more than 20 years ago, when I was attorney general of New Hampshire, I first met a young lawyer named David Souter and, like many, I recognized that this was a rare man, of great talent and extraordinary capacity for legal analysis, and quiet strength.

We worked together for 6 years, but more importantly, we have been friends for 20. So, I do feel qualified, not only to introduce this nominee to the committee with my colleague Senator Humphrey, but also to discuss his enormous capability, his accomplishments, and his humanity.

David Souter, throughout his distinguished career, has demonstrated that he possesses the intellectual judicial temperament, the personal qualities that will make him an outstanding addition to the Court.

His scholastic credentials we have already heard, Harvard, the Rhodes scholarship, Harvard Law School, and the positions in public life. But his personal credentials are equally impeccable—fairminded, considerate, eventempered, warm, and compassionate. It speaks volumes that the consensus in New Hampshire, from lawyers, judges, Democrats, Republicans, liberals and conservatives, is that David Souter is eminently qualified for the U.S. Supreme Court.

As a member of the superior court, the trial court of general jurisdiction of the State of New Hampshire, David Souter witnessed the panorama of life. As a trial court judge, he dealt with the gritty and oftentimes unappealing cases which, unfortunately, packed the docket and comprise a part of American life today.

He presided over cases involving the full range of people who comprise our society, from the poorest to the most affluent. As a trial court judge, he confronted cases of violent crimes, the scourge

of drugs, economic disputes, family conflicts, and crimes of passion. In short, Mr. Chairman, David Souter has seen it all.

When you speak to those who appeared before David Souter in his capacity as a trial judge, his fairness and even-handedness in the administration of justice is cited by all.

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.

As recently as April 13, 1990, Judge Souter wrote, as a member of that court, "The basic scheme of the Constitution is a limitation of powers. Government is limited and courts and legislatures can only do what they are authorized to do."

Judge Souter's opinion are admired for their crispness, their strength of reason, for their clarity, and for the intellectual attainment they demonstrate. His record makes clear his commitment to the rule of law, his full understanding of judicial restraint and precedent. I believe that his judicial philosophy reflects the thinking of the great Justice Oliver Wendell Holmes, as expressed in *Missouri, Kansas and Texas Railway v. May*. That quote says,

Great constitutional provisions must be administered with caution. Some play must be allowed for the joint of the machine, and it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

I know how carefully the members of this committee and your staff have worked to assess this nomination. I know that your exchange with David Souter will be enlightening and comprehensive, as it should be. I think you will find a first-rate legal mind, a writer of great precision and force, a jurist of uncommon quality, who brings no agenda, no ideology to the bench, only a single-minded commitment to serve justice in the greatest traditions of American jurisprudence.

Mr. Chairman, Senator Thurmond, and members of this committee, I cannot let this moment pass without sharing with you my own observations of a man I have known and worked closely with for 20 years. Having sat for 10 years now in your positions at confirmation hearings, I know it is customary for a home State Senator to praise a native nominee. Indeed, I have done that, as we all have.

I want to make it clear today that my association with this man is far beyond that norm. David Souter is my friend. I trust him, I respect him, and I like him. He has made me think, he has made me reflect, and he has made me laugh.

When I became attorney general, our office was small. I recognized its potential to make a difference for the citizens of our State. To realize this potential, I needed to invigorate the office with new talent and new energy. David joined me in that task and succeeded me as Attorney general of our State.

He oversaw the expansion of the attorney general's office during my tenure and his own. He did so by recruiting a staff of young,

able, dedicated lawyers and then reared them to maturity. He hired on the basis of talent alone, no political, no philosophical tests. We soon boasted a staff that was the envy of law firms in that State. Today, those lawyers have led distinguished careers in their own right. A number are familiar to the members of this committee. They are judges, public servants, partners in major firms in our State and beyond.

To a person, they cite their relationship with the attorney general's office and David Souter, in particular, as the outstanding experience of their lives. That is because David did not just hire good lawyers, he hired good people. Once hired, he showed these people how a lawyer can and must balance all of the elements of a demanding professional career and a personal life. He stressed service to State and Nation, but also to your community and to your family. He brought the office together, not as a cheerleader, but as an understanding and concerned friend.

Much has been made of David's New Englandness—I think that is a word. I am not sure what it means. You do not have to spend much time in our State or our region at this time to appreciate its special qualities. I know, Mr. Chairman, that several members of this committee have had firsthand experiences in New Hampshire. You know that it is indeed a very special and a very unique place. But New England and New Hampshire are not just states of mind. They are real places, where real things happen to real people.

There is no demographic profile of the perfect judge. The people who we seek to discharge these responsibilities must have certain human qualities, not fixed life résumés. I know that David Souter, shaped by his experiences, knows that judges must understand that their decisions are not mere academic or scholarly exercises, but, rather, the best hope of resolving human dilemma.

Judges must realize that real people are impacted by what they do, that the essence of judging is its humanity. I am confident that my friend David Souter knows that.

Finally, Mr. Chairman, I must say that it is remarkable that there are some here in Washington who view a man who has a single-minded dedication to his chosen profession, the law, and possesses great qualities of humility, graciousness, frugality, charity, reverence to his faith and to his family is somehow regarded as an anomaly and somehow out of touch with life. I believe that most Americans see these as endearing and desirable qualities, all too often sacrificed in the frenetic pace of modern life.

In closing, Mr. Chairman and Senator Thurmond, allow me to suggest that we in New Hampshire are enormously proud to sit here today and have David Souter appear before this distinguished committee on the occasion of his confirmation hearings to our Nation's highest court.

His life has been rooted in our rocky soil and nurtured by a lifelong commitment to public service. I present to you a good person, one who will bring honor to the Supreme Court and to our constitutional system, with enthusiasm and with deep personal conviction. I urge your favorable consideration of a dear friend and a deserving nominee.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Judge Souter, you are a lucky man to have a friend like that, two friends, and we take their recommendations seriously and to heart.

Now, what we will do, Judge, if it meets with your approval, is we will recess until 2 p.m., at which time we will come back, swear you in, and begin the hearing.

We will recess until 2 p.m.

[Whereupon, at 12:29 p.m., the committee was in recess, to reconvene at 2 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Judge, would you please stand to be sworn? Do you swear that the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Judge SOUTER. I do.

The CHAIRMAN. We are going to wait a moment while the photographers have an opportunity to leave and get their lunch or whatever they would like to do. They are very angry with me.

[Pause.]

The CHAIRMAN. Welcome back to the hearing, Judge Souter. As I indicated before we left, we would welcome any opening statement you have to make for as short or as long as you wish to make it. Then we will begin with questions.

#### TESTIMONY OF HON. DAVID H. SOUTER, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOUTER. Thank you, Mr. Chairman. I probably should begin by asking you if you can hear me as well as I can hear you.

The CHAIRMAN. Yes, we can, Judge.

Judge SOUTER. Mr. Chairman, Senator Thurmond, and other members of the committee, as you know, I did not ask to make a formal and preprepared statement, but I would like to accept your invitation to say a few words before our dialog together does begin.

I would like to start maybe in a very obvious way simply by saying thanks for some things, to begin with, to thank every member of this committee who, in the waning and the very hectic days that you went through prior to the summer recess, nonetheless found some time to see me when I came by to meet you, in most cases for the first time. I was grateful for the reception and the courtesy that every one of you gave to me.

Equally obviously, I would like simply to say here what I have already said privately this morning, or at least quietly this morning, in thanking both Senator Humphrey and Senator Rudman for their generosity to me in their introduction and their sponsorship of me before you. And I will have to continue, as I have been trying to do for the past 7 or 8 weeks now, to say some adequate thanks to the President of the United States for the confidence that he showed in me in making that nomination. I have not succeeded in doing that adequately yet, but I will keep trying.

In fact, I came to the notice of probably most of you on this committee when I stood next to the President and tried—again, with great difficulty—that afternoon in late July to express some sense

of the honor that I felt, despite the surprise and even shock of the event to me. It is equally incumbent on me to try to express some sense of the honor that I feel today in appearing before you, as you represent the Senate of the United States in discharging your own responsibility to review the President's nomination. I could only adopt what Senator Metzenbaum said earlier this morning about the grandeur of this process of which we are a part.

I mentioned to you the great surprise that I had on July 23 in finding myself where I was. I certainly found very quickly that I had no reason to be surprised at the interest which the United States and, actually, a good deal of the world suddenly took in me as an individual. And despite the reams of paper and I suppose the forests that have fallen to produce that paper in the time between July 23, I would like to take a minute before we begin our dialog together to say something to you about how I feel about the beginnings that I have come from and about the experiences that I have had that bear on the kind of judge that I am and the kind of judge that I can be expected to be.

I think you know that I spent most of my boyhood in a small town in New Hampshire—Weare, NH. It was a town large in geography, small in population. The physical space, the open space between people, however, was not matched by the interspace between them because, as everybody knows who has lived in a small town, there is a closeness of people in a small town which is unattainable anywhere else. There was in that town no section or place or neighborhood that was determined by anybody's occupation or by anybody's bank balance. Everybody knew everybody else's business, or at least thought they did. And we were, in a very true sense, intimately aware of other lives. We were aware of lives that were easy, and we were aware of lives that were very hard.

Another thing that we were aware of in that place was the responsibility of people to govern themselves. It was a responsibility that they owed to themselves, and it was a responsibility that they owed and owe to their neighbors. I first learned about that or I first learned the practicalities of that when I used to go over to the town hall in Weare, NH, on town meeting day. I would sit in the benches in the back of the town hall after school, and that is where I began my lessons in practical government.

As I think you know, I went to high school in Concord, NH, which is a bigger place, and I went on from there to college and to study law in Cambridge, ME, and Oxford, England, which are bigger places still. And after I had finished law school, I came back to New Hampshire, and I began the practice of law. And I think probably it is fair to say that I resumed the study of practical government.

I went to work for a law firm in Concord, NH, and I practiced there for several years. I then became, as I think you know, an assistant attorney general in the criminal division of that office. I was then lucky to be deputy attorney general to Warren Rudman, and I succeeded him as attorney general in 1976.

The experience of government, though, did not wait until the day came that I entered public as opposed to private law practice; because although in those years of private practice I served the private clients of the firm, I also did something in those days which

was very common then. Perhaps it is less common today—I know it is—but it was an accepted part of private practice in those days to take on a fair share of representation of clients who did not have the money to pay.

I remember very well the first day that I ever spent by myself in a courtroom. I spent in a courtroom representing a woman whose personal life had become such a shambles that she had lost the custody of her children, and she was trying to get them back. She was not the last of such clients. I represented clients with domestic relations problems who lived sometimes, it seemed to me, in appalling circumstances. I can remember representing a client who was trying to pull her life together after being evicted because she couldn't pay the rent.

Although cases like that were not the cases upon which the firm paid the rent, those were not remarkable cases for lawyers in private practice in those days before governmentally funded legal services. And they were the cases that we took at that time because taking them was the only way to make good on the supposedly open door of our courts to the people who needed to get inside and to get what courts had to offer through the justice system.

I think it is fair to say—I am glad it is fair to say—that even today, with so much governmentally funded legal service, there are lawyers in private practice in our profession who are doing the same thing.

As you know, I did go on to public legal service, and in the course of doing that, I met not only legislators and the administrators that one finds in the government, but I began to become familiar with the criminal justice system in my State and in our Nation. I met victims and sometimes I met the survivors of victims. I met defendants. I met that train of witnesses from the clergy to con artists who passed through our system and find themselves, either willingly or unwillingly, part of a search for truth and part of a search for those results that we try to sum up with the words of justice.

As you also know, after those years I became a trial judge, and my experience with the working of government and the judicial system broadened there because I was a trial judge of general jurisdiction, and I saw every sort and condition of the people of my State that a trial court of general jurisdiction is exposed to. I saw litigants in international commercial litigation for millions, and I saw children who were the unwitting victims of domestic disputes and custody fights which somehow seemed to defy any reasonable solution, however hard we worked at it.

I saw, once again, the denizens of the criminal justice system, and I saw domestic litigants. I saw appellants from the juvenile justice system who were appealing their findings of delinquency. And, in fact, I had maybe one of the great experiences of my entire life in seeing week in and week out the members of the trial juries of our States who are rightly called the consciences of our communities. And I worked with them, and I learned from them, and I will never forget my days with them.

When those days on the trial court were over, there were two experiences that I took away with me or two lessons that I had learned, and the lessons remain with me today. The first lesson,

simple as it is, is that whatever court we are in, whatever we are doing, whether we are on a trial court or an appellate court, at the end of our task some human being is going to be affected. Some human life is going to be changed in some way by what we do, whether we do it as trial judges or whether we do it as appellate judges, as far removed from the trial arena as it is possible to be.

The second lesson that I learned in that time is that if, indeed, we are going to be trial judges, whose rulings will affect the lives of other people and who are going to change their lives by what we do, we had better use every power of our minds and our hearts and our beings to get those rulings right.

I am conscious of those two lessons, as I have been for all of the years that I was on an appellate course. I am conscious of them as I sit here today, suddenly finding myself the nominee of the President of the United States to undertake the greatest responsibility that any judge in our Republic can undertake: The responsibility to join with eight other people, to make the promises of the Constitution a reality for our time, and to preserve that Constitution for the generations that will follow us after we are gone from here.

I am mindful of those two lessons when I tell you this: That if you believe and the Senate of the United States believes that it is right to confirm my nomination, then I will accept those responsibilities as obligations to all of the people in the United States whose lives will be affected by my stewardship of the Constitution.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Judge, for a statement that gives us all more insight into you. When I ended my opening statement, I said "maybe a little glimpse into your heart," I think you have given us a little glimpse into your heart as well as how you view the responsibility you hope to undertake.

Judge, before I begin my questioning, I want to make it clear to you that under precedence—we can debate and argue, which we will up here, about how long they have existed—but under precedence dating back, as one of my colleagues said, at least to the 1950's, and arguably much earlier, each member of the committee can decide whatever questions he deems proper to ask you. We have never imposed a gag rule on any committee member.

But, Judge, while we may ask any questions we deem proper, you are free to refuse to answer any questions you deem to be improper. No one is going to try to force you to answer any question you think in good conscience you cannot appropriately address. So, Judge Souter, I trust you are fully capable of deciding for yourself which questions you can and cannot speak to. And we or an individual Senator may not agree with your decision, but that decision is yours and will be protected.

Everyone involved in the process, both the members of this committee and you, I think have to be guided by the most considered interpretation of our respective constitutional responsibilities. And I know from my first discussion with you weeks ago that that was a judgment, as I think you have said, to paraphrase you, when the photographs had left my office, and I said "How are you? What are you looking forward to?" And you said something to the effect: Going home to New Hampshire to think about how you can appro-

privately reveal to us and the Nation your constitutional philosophy within the limitations you think you are bound by.

So to clear it up, to state it again, any member can ask anything. You don't have to answer if you think it is inconsistent with what your responsibilities are.

Judge SOUTER. I appreciate that. Thank you.

The CHAIRMAN. Now, Judge, let me begin. You said in your statement, you used the phrase "the promises of our Constitution." That is the phrase you used, and that is really what I want to discuss with you—the promises of our Constitution. What does it promise? Because there are very, very different views held by very bright women and men, all experts in the law, many incredibly well informed, who have very different visions of what the promises of our Constitution are.

Judge, it comes as no surprise to you, as I discussed with you a little bit yesterday, there is nothing intended that I am about to ask you that is designed as a surprise, so much to the extent that I think you were probably surprised yesterday when I told you what I was going to ask you.

Judge SOUTER. I was a little bit.

The CHAIRMAN. And it will not surprise any of the press I see out there because it is something I care deeply about, and they are probably tired of hearing me talk about it, but I am going to continue to talk about it. And as, Judge Souter, a close friend of yours, and I consider him, quite frankly, a close friend of mine, my colleague Warren Rudman, has said—he has said many things, but he has said that Supreme Court—

Judge SOUTER. You should have been staying with him for the last 10 days. [Laughter.]

The CHAIRMAN. No, we each have our own jobs. That is your job, not my job.

Judge SOUTER. I realize that.

Senator HATCH. We live with him every day, let me tell you. [Laughter.]

The CHAIRMAN. But he has indicated that one of the Supreme Court Justices you most admire was the second Justice Harlan, who served on the Supreme Court between 1955 and 1971, and who was widely regarded, is widely regarded as one of the great conservative Justices ever to serve on the Court.

Now, Justice Harlan concurred in the Court's landmark decision of *Griswold*. That is the Connecticut case that said that the State of Connecticut, the legislature and the Governor couldn't pass a law that—constitutionally—said that married couples could not use birth control devices to determine whether or not they wished to procreate.

Justice Harlan indicated that that Connecticut law violated the due process clause of the 14th amendment which says that no State can deprive any person of life, liberty, or property without process of law.

Now, my question is this, Judge: Do you agree with Justice Harlan's opinion in *Griswold* that the due process clause of the 14th amendment protects a right of a married couple to use birth control to decide whether or not to have a child?

Judge SOUTER. I believe that the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy. The—

The CHAIRMAN. And that—please continue. I didn't mean to interrupt. I like what you are saying.

Judge SOUTER. The only reservation I have is a purely formal reservation in response to your question, and that simply is: No two judges, I am sure, will ever write an opinion the same way, even if they share the same principles. And I would not go so far as to say every word in Justice Harlan's opinion is something that I would adopt. And I think for reasons that we all appreciate, I would not think that it was appropriate to express a specific opinion on the exact result in *Griswold*, for the simple reason that as clearly as I will try to describe my views on the right of privacy, we know that the reasoning of the Court in *Griswold*, including opinions beyond those of Justice Harlan, are taken as obviously a predicate toward the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination—*Roe v. Wade*, upon which the wisdom or the appropriate future of which it would be inappropriate for me to comment.

But I understand from your question, and I think it is unmistakable, that what you were concerned about is the principal basis for deriving a right of privacy, and specifically the kind of reasoning that I would go through to do so. And in response to that question, yes, I would group myself in Justice Harlan's category.

The CHAIRMAN. Well, Judge, let me make it clear, I am not asking you about how you would decide or what you even think about *Roe v. Wade*.

Judge SOUTER. I understand that.

The CHAIRMAN. Now, in the *Griswold* case, I am curious what proposition you think it stands for. Do you believe it is a case in a long line of cases, establishing an unenumerated right to privacy, a right the Constitution protects, even though it is not specifically mentioned in the document?

Judge SOUTER. I think probably it would be fairest to say that it is a case in a confused line of cases and it is a case which, again referring to the approach that Justice Harlan took, it is a case which to me represents at least the beginnings of the modern effort to try to articulate an enforceable doctrine.

My own personal approach to that derivation begins with, I suppose, the most elementary propositions about constitutional government, but I do not know of any other way to begin. I am mindful not only of the national Constitution of 1787, but of the history of State constitution-making in that same decade.

If there is one generalization that we can clearly make, it is the generalization about the intended limitation on the scope of governmental power. When we think of the example of the national Constitution, I think truly we are at the point in our history when every schoolchild does know that the reason there was no Bill of Rights attached to the draft submitted to the States in the first instance after the convention recessed, was the view that the limitations on the power to be given to the National Government was so clearly circumscribed, that no one really needed to worry about the possible power of the National Government to invade what we

today group under the canon of civil liberties, and we know the history of that response.

We know that there were States like my own which were willing to ratify, but were willing to ratify only on the basis of requesting that the first order of business of the new Congress would be to propose a Bill of Rights in New Hampshire, like other States, who was not bashful about saying would not be in it.

The CHAIRMAN. Did you wish to continue?

Judge SOUTER. If I may. This attitude did not sort of spring up without some antecedent in 1787. I am not an expert on the constitutions of all of the original States, but I do know something about my own.

One of the remarkable things about the New Hampshire Constitution, which began its life at the beginning of that same decade, is the fact that it began with an extraordinarily jealous regard for civil rights, for human rights. The New Hampshire Constitution did not simply jump in and establish a form of government. They did not get to the form of government until they had gotten to the Bill of Rights first.

They couched that Bill of Rights with an extraordinary breadth and a breadth which, for people concerned with principles of interpretation, requires great care in the reading. But the New Hampshire constitutionalists of 1780 and 1784 were equally concerned to protect a concept of liberty, so-called, which they did not more precisely define.

So, it seems to me that the starting point for anyone who reads the Constitution seriously is that there is a concept of limited governmental power which is not simply to be identified with the enumeration of those specific rights or specifically defined rights that were later embodied in the bill.

If there were any further evidence needed for this, of course, we can start with the ninth amendment. I realize how the ninth amendment has bedeviled scholars, and I wish I had something novel to contribute to the jurisprudence on it this afternoon, which I do not.

The CHAIRMAN. It is novel that you acknowledge it, based on our past hearings in this committee. [Laughter.]

One of the last nominees said it was nothing but a waterblot on the Constitution, which I found fascinating. At any rate, go ahead.

Judge SOUTER. Well, I think it is two things—maybe it is more. I have no reason to question the scholarship which has interpreted one intent of the ninth amendment as simply being the protection or the preservation of the State bills of rights which preceded it.

Neither, quite frankly, do I find a basis for doubting that, with respect to the national bill of rights, it was something other than what it purported to be, and that was an acknowledgment that the enumeration was not intended to be in some sense exhaustive and in derogation of other rights retained.

The CHAIRMAN. Is that the school to which you would count yourself a graduate?

Judge SOUTER. I have to count myself a member of that school, because, in any interpretive enterprise, I have to start with the text and I do not have a basis for doubting that somewhat obvious and straightforward meaning of the text.

The CHAIRMAN. Let me ask you another question here, and I realize this is somewhat pedantic, but it is important for me to understand the foundation from which you build here.

You have made several references appropriately to the Bill of Rights and the Federal Government. Do you have any disagreement with the incorporation doctrine that was adopted some 70 years ago applying the Bill of Rights to the States? Do you have any argument with that proposition?

Judge SOUTER. No; my argument with the incorporation doctrine would be with the proposition that that was meant to exhaust the meaning of enforceable liberty. That, in point of fact, as you know, I mean that was Justice Harlan's concern.

The next really—I mean that brings to the fore sort of the next chapter in American constitutional history that bears on what we are talking about, because one cannot talk about the privacy doctrine today, without talking about the 14th amendment.

The CHAIRMAN. Judge, I am truly interested in us going back through in an orderly fashion the evolution of constitutional doctrine, but as my colleague sitting behind you will tell you, I only have a half hour to talk to you and I want to ask you a few more specific questions, if I may.

The 14th amendment, as you know, was designed explicitly to apply to the States. Speaking to the liberty clause of the 14th amendment, Justice Harlan said:

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution,

Which is totally consistent with what you have been saying thus far.

Judge SOUTER. Yes.

The CHAIRMAN. Now, do you agree with Justice Harlan that the reference to liberty in the 5th and 14th amendments provide a basis for certain—not all, but certain—unenumerated rights, rights that the Constitution protects, even though they are not specifically enumerated within the Constitution?

Judge SOUTER. I think the concept of liberty as enforceable under the due process clause is, in fact, the means by which we enforce those rights. It is sterile, I think, to go into this particular chapter of constitutional history now, but you will recall that Justice Black was a champion at one point of the view that the real point of the fourth amendment, which was intended to apply unenumerated substantive rights, was the privileges of immunities clause, and not due process. Well, as a practical matter, that was read out of the possibility of American constitutionalism, at least for its time, and it has remained so by the slaughterhouse cases.

What is left, for those who were concerned to enforce the unenumerated concepts of liberty was the liberty clause and due process, and by a parity of reasoning by the search for coherence in constitutional doctrine, we would look to the same place and the same analysis in the fifth amendment when we are talking about the National Government.

The CHAIRMAN. Now, let us follow on. We recognize, you recognize, you have stated that *Griswold* and the various means of rea-

soning to arrive at the conclusion that there was a constitutionally protected right of a married couple to determine whether or not to procreate, to use birth control or not, is a constitutionally sound decision.

Now, shortly thereafter there was a similar case in Massachusetts, although in this case it did not apply to married couples, there was a Massachusetts statute, in the *Eisenstadt* case, that said unmarried couples, and the rationale was that there is reason to not be out there allowing unmarried couples to buy birth control, because it would encourage sexual promiscuity, and the Supreme Court struck that down, as well, saying that it violated a right to privacy, having found once again, most Justices ruled that way, in the 14th amendment.

Now, do you agree that that decision was rightly decided?

Judge SOUTER. Well, my recollection—and I did not reread *Eisenstadt* before coming in here, so I hope my recollection is not faulty, but my recollection is that *Eisenstadt* represented a different approach, because the reliance on the Court there was on equal protection. I know that my recollection is—

The CHAIRMAN. Yes, the—

Judge SOUTER. I am sorry.

The CHAIRMAN. Go ahead. I am sorry.

Judge SOUTER. My recollection is that the criticism of *Eisenstadt* at the time was whether the Supreme Court was, in fact, reaching rather far to make the equal protection argument. But I think there is one point that is undeniable, without specifically affirming or denying the wisdom of *Eisenstadt*, and that is there is going to be an equal protection implication from whatever bedrock start privacy is derived under the concept of due process, and I think that then leads us back to the essentially difficult point of interpretation, and that is how do you go through the interpretive process to find that content which is legitimate as a concept of due process.

The CHAIRMAN. Also, to what extent you find it legitimate. Is it a fundamental right, or is it an ordinary right? In the case of *Griswold*, in the *Griswold* case, it was discerned and decided that there was a fundamental right to privacy relating to the right of married couples to use contraceptive devices. Do you believe they were correct in that judgment, that there is a fundamental right?

Judge SOUTER. I think the way, again, I would express it without getting myself into the position of endorsing the specifics of the cases, is that I believe on reliable interpretive principles there is certainly, to begin with, a core of privacy which is identified as marital privacy, and I believe it can and should be regarded as fundamental.

I think what we also have to recognize is that the notion of protected privacy, which may be enforceable under the 14th amendment, has a great potential breadth and not every aspect of it may rise to a fundamental level.

The CHAIRMAN. I agree. That is why I am asking you the question, because as you know as well as I do, if the Court concludes that there is a fundamental right, then for a State to take action that would extinguish that right, they must have, as we lawyers call, it is required they look at it through the prism of strict scrutiny. Another way of saying it, for laymen, is that they must have a

pretty darn good reason. If it is not a fundamental right and it is an ordinary right, they can use a much lower standard to determine whether the State had a good enough reason to preempt that right.

So, as we talk about this line of cases, in *Griswold* and in *Eisenstadt*—let me skip, in *Moore v. East Cleveland*, where the Court ruled, extending this principle of privacy from the question of procreation, contraception and procreation, to the definition of a family. As you know, East Cleveland had an ordinance defining a family that did not include a grandmother and grandson, and so East Cleveland, under that ordinance, said that a grandmother and her two grandchildren could be evicted from a particular area in which they lived, because they were not a family, as defined by the local municipality in zoning ordinance.

Now, the Court came along there and it made a very basic judgment. It said—if I can find my note, which I cannot find right now, and I think it is important to get the exact language, if I can find it—I just found it. [Laughter.]

Justice Powell said, “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th amendment.”

Now, my question, Judge, is do you believe that that assertion by Justice Powell is accurate?

Judge SOUTER. I think that assertion by Justice Powell represents a legitimate judgment in these kinds of problems with respect to *Moore* just as in the discussion with *Griswold*. I am going to ask you to excuse me from specifically endorsing the particular result, because I recognize the implications from any challenge that may come from the other privacy case that is on everyone’s mind.

But the one thing that I want to make very clear is that my concept of an enforceable marital right of privacy would give it fundamental importance. What the courts are doing in all of these cases is saying—although we speak of tiers of scrutiny—what the courts are saying, it seems to me in a basically straightforward way—is that there is no way to escape a valuation of the significance of the particular manifestation to privacy that we are concerned with, and having given it a value we, indeed, have to hold the State to an equally appropriate or commensurate reason before it interferes with that value.

The CHAIRMAN. That is exactly what I am trying to find out in your answering. So the valuation applied to a definition of family, is fundamental. The valuation applied to whether a married couple can use contraception is fundamental. The valuation applied to whether or not an unmarried couple can use contraception is fundamental.

Now, I would like to ask you, as I move along here, as you look at this line of cases we have mentioned—and I will not bother to go through a couple of others that I have anticipated—is my time up? I saw the light go off and I thought my time was about up and the one thing these fellows are not likely to forgive me for—they will forgive me for a lot of things but not for going over my time.

That when it comes to personal freedom of choice, as Justice Powell put it, in family and in marriage, one basic aspect of that freedom is the right to procreate. Now, early in the 1940’s, in the

*Skinner* case, the Supreme Court said that criminals could not be sterilized. The Court made it very clear and it said, "Marriage and procreation are fundamental" and that sterilization affected "one of the basic civil rights of man."

I assume that some of the civil rights that you are referring to that those who wrote the New Hampshire Constitution referred to.

Do you agree that procreation is a fundamental right?

Judge SOUTER. I would assume that if we are going to have any core concept of marital privacy, that would certainly have to rank at its fundamental heart.

The CHAIRMAN. Now, the reason I am pursuing this is not merely for the reason you think, I suspect. It is because you have been categorized as—I believe you have described yourself as an interpretivist.

Judge SOUTER. I did and I have, yes.

The CHAIRMAN. You have begun—and I thank you for it—you have begun to flesh out for me on which part of the spectrum of the interpretivists you find yourself.

Let me, in the interest of time, move on here. I am trying to skip by here.

Let me ask you this, Judge. The value that the Court places on certain alleged, by many, privacy rights will dictate, as we said earlier, the burden placed upon a State in the circumstance when they wish to extinguish that right, or impact on that right.

Judge SOUTER. Yes, sir.

The CHAIRMAN. Now, you have just told us that the right to use birth control, to decide whether or not to become pregnant is one of those fundamental rights—the value placed on it is fundamental.

Now, let us say that a woman and/or her mate uses such a birth control device and it fails. Does she still have a constitutional right to choose not to become pregnant?

Judge SOUTER. Senator, that is the point at which I will have to exercise the prerogative which you were good to speak of explicitly. I think for me to start answering that question, in effect, is for me to start discussing the concept of *Roe v. Wade*. I would be glad—I do not think I have to do so for you—but I would be glad to explain in some detail my reasons for believing that I cannot do so, but of course, they focus on the fact that ultimately the question which you are posing is a question which is implicated by any possibility of the examination of *Roe v. Wade*. That, as we all know, is not only a possibility, but a likelihood that the Court may be asked to do it.

The CHAIRMAN. Judge, let me respectfully suggest the following to you: That to ask you what principles you would employ does not, in any way, tell me how you would rule on a specific fact situation.

For example, all eight Justices, whom you will be joining, all eight of them have found there to be a liberty interest that a woman retains after being pregnant. That goes all the way from Justice Brennan—who is no longer on the Court—who reached one conclusion from having found that liberty interest, to Justice Scalia who finds a liberty interest and yet, nonetheless says, explicitly he would like to see *Roe v. Wade*, he thinks *Roe v. Wade* should be overruled.

So the mere fact that you answer the question whether or not a woman's liberty interest, a woman's right to terminate pregnancy exists or does not exist, in no way tells me or anyone else within our earshot how you would possibly rule on *Roe v. Wade*.

Judge SOUTER. I think to explain my position, I think it is important to bear in mind there are really two things that judges may or may not be meaning when they say there is a liberty interest to do thus and so, whatever it may be. They may mean simply that in the whole range of human interests and activities the particular action that you are referring to is one which falls within a broad concept of liberty. If liberty means what it is, we can do if we want to do it. Then obviously in that sense of your question, the answer is, yes.

The CHAIRMAN. It is more precise, Judge, than that. I mean liberty interest has a constitutional connotation that most lawyers and all justices have ascribed to it in varying degrees. For example, Justices Blackmun, Brennan, Marshall, and Stevens, they have said a woman has a strong liberty interest, although Justice Stevens has phrased it slightly differently. Justice O'Connor has made it clear that she believes a woman has some liberty interest. Even Justices Rehnquist, White, Kennedy, and Scalia, all of whom criticized the Court's rulings in this area have said that a woman has at least some liberty interest in choosing not to remain pregnant.

Now, each of these Court members has acknowledged what we lawyers call a liberty interest after conception. So my question to you is, is there a liberty interest retained by a woman after conception?

Judge SOUTER. I think, Senator, again, we have got to be careful about the sense of the liberty interest. There is the very broad sense of the term which I referred to before and then there is the sense of an enforceable liberty interest. That is to say, one which is enforceable against the State, based upon a valuation that it is fundamental. It seems to me that that is the question which is part of the analysis, of course, upon which *Roe v. Wade* rests.

The CHAIRMAN. Well, all liberty interests have following all liberty interest is a right. The question is, how deeply held and rooted that right is; and what action the State must take and how serious that action must be—the rationale for that action—to overcome that interest?

But once we acknowledge there is a liberty interest, there is a right.

Judge SOUTER. But what—I am sorry.

The CHAIRMAN. So I am not asking you to tell me—I am just told my time is up—I am not asking you to tell me what burden of proof the State must show in order to overcome that. I am asking you is there a liberty interest and your answer is what, yes, or no?

Judge SOUTER. My answer is that the most that I can legitimately say is that in the spectrum of possible protection that would rank as an interest to be asserted under liberty, but how that interest should be evaluated, and the weight that should be given to it in determining whether there is in any or all circumstances a sufficiently countervailing governmental interest is a question with respect, I cannot answer.

The CHAIRMAN. With all due respect, I have not asked it.

But I will come back to that. My time is up. I yield to my colleague from South Carolina.

I thank you, Judge.

Judge SOUTER. Thank you, sir.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Souter, the Constitution of the United States is now over 200 years old. Many Americans have expressed their views about the amazing endurance of this great document. Would you please share with the committee your opinion as to the success of our Constitution and its distinction as the oldest existing constitution in the world today.

Judge SOUTER. Well, Senator, it is difficult to make a pronouncement which is commensurate with the magnificence of the document. If I have to explain it in a few words I would do it by reference to a very limited number of concepts.

The first reason for the Constitution's success is its insistence and its recognition on the source of power. The source of governmental power is the people.

The second concept which has guaranteed its endurance is that that power is no more granted to government than the people grant to government. The very concept of the National Government is one of limited power, was one of its motivating, one of its very forces of life from the moment that it was presented to the people.

Third, I would look to the concept implicit in that document and as a basis of the bedrock of the structural sense of American constitutionalism that power is divided and that that division of power even granted, is a division of power which must be protected if the entire Government is to remain in the place that it was intended to have.

That structural sense of the division of power encompasses not only what we speak of as the separation of powers doctrine within the National Government, itself, but the concept of the distribution of power in a federal system.

I think the reasons then for the remarkable and blessed endurance of the American Constitution are extraordinarily pragmatic reasons. It rests upon a recognition of where its power comes from and it is structured with a recognition that power will be abused unless it is limited and divided and restrained.

Senator THURMOND. Judge Souter, the 10th amendment to the Constitution provides that powers not delegated to the Federal Government are reserved to the States or the people.

Would you describe your general view about the proper relationship between Federal and State Governments, as well as how would you characterize the States' power to legislate in areas not specifically enumerated to the Congress.

Judge SOUTER. Well, Senator, as we know—certainly you know better than I, having sat in this Congress as you have—there is a great overlap of subject matter in which we know the Congress under article I has authority, and which is equally covered by the States. We are familiar with the doctrines of preemption which have developed over the years and we are familiar, of course, with the provision of the Constitution that in cases of conflict in legislation within both the constitutional competence of the States and

the National Government, the National Government is, of course, going to prevail.

One of the things that I think we have to recognize in dealing with problems of federalism today is a basic political problem which in those areas of overlap the Constitution, itself, cannot solve for us. That is a political problem that arises from the willingness or the unwillingness of the States to exercise the constitutional powers that they have to address the problems that are really before them.

One of the things that I was reminded of in my preparation, my sort of autobiographical inquiry—which has preceded my coming here today and has been going on for the last 7 or 8 weeks—is a speech which I gave years ago in Newport, NH, in which I was talking about—which to most people and to me seemed—an erosion of power all in the direction of the National Government from the States.

But the explanation for that erosion began with the fact that there were problems to be solved which the States simply would not address and the people wanted them addressed and therefore, the people looked to Washington. They looked to Washington, of course, because Washington had the means or exerted the means of raising the money to solve them.

So one of the problems that has to be recognized, as underlying so much of the tension which sometimes gets expressed by focus on the 10th amendment, is, in fact, a political problem and ultimately a fiscal problem.

We know that the concept of the 10th amendment today is something that we cannot look at with the eyes of the people who wrote it. At the very least, two developments in our constitutional history have necessarily changed the significance of the 10th amendment for us.

The first, of course, is the concept of the commerce power which I think—whatever everyone's predilections may be—has grown to a, and has been recognized as having a plenary degree which would probably have astonished the Founders.

The second development which has got to be borne in mind in coming to any approach to the 10th amendment is simply, the 14th. There was, very expressly, authority given to the National Government through the 14th amendment, which again, was inconceivable to the Framers of the 10th.

It is those two developments that have led to the difficulty reflected in a number of cases in recent years, in trying to determine, whether in fact, there is a substantive basis, an objective basis, perhaps I should say, for identifying and protecting State power under the 10th amendment; or whether conversely, the 10th amendment, in effect, has been relegated to the expression of kind of a political truism.

When I was in public practice, the case known as *National League of Cities v. Usury* was the law, which recognized a basis for enforcing limitation on national power in name of the 10th amendment under the wage and hour law. Subsequently *National League* was overruled by *Garcia v. San Antonio*, which has left the law, at the present time far closer to, in effect, a reflection of the politics of the Congress of the United States.

I do not know what the next step in that chapter may be, but I do know that any approach to the 10th amendment today is an approach which has got to take into consideration constitutional developments outside of the 10th amendment which we cannot ignore, and, as I have said, would have astonished the Framers.

Senator THURMOND. Judge Souter, the famous decision of *Marbury v. Madison* is viewed as a basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Would you give the committee your views on this authority?

Judge SOUTER. Well, I suppose for anyone in the year 1990 to speak admiringly of *Marbury v. Madison* is a fairly conservative act, so I don't have any trouble in sort of going out on the limb in support of *Marbury v. Madison*.

I recognize that the difficulty which may be facing us in assessing the significance of *Marbury v. Madison* today is a difficulty in defining the appropriate role of Congress with respect to the appellate jurisdiction of the Supreme Court of the United States. We might all hope that that kind of a contest would not come before us, but we cannot rule it out.

The question, of course, is not whether *Marbury* can be overruled as such, but whether the force of *Marbury* can, in fact, be eroded by limitations upon the appellate jurisdiction of the Supreme Court of the United States. As I am sure you know as well as I, the existing precedent on that is not of very great help to us.

We know that in the one case expressly addressing the Supreme Court's appellate jurisdiction, a post-Civil War case, *McCardle*, the Court seemed to say that there could be such an erosion through the exercise of congressional power, although there are times when I find *McCardle* a somewhat more ambiguous case than some have found it.

On the other hand, we know in the *Klein* case that followed not long after that, which dealt with the jurisdiction of the lower Federal courts not the appellate jurisdiction of the Supreme Court, that the Supreme Court clearly put limits upon what the Congress could do in trying, in effect, to limit jurisdiction for the sake of bringing about particular results or avoiding particular results which were thought to be undesirable.

But those are all post-Civil War cases. They seem to speak with conflicting and certainly not with consistent voices. And they are going to be the preface to any question about the ultimate vitality of *Marbury* in our time. But it is at least comforting to be able to end my response to you as I began it; that subject to that issue which has yet definitively to come before the courts, I trust everyone like me will accept *Marbury* as constitutionally essential to government as we know it.

Senator THURMOND. Judge Souter, the opinion of *Miranda v. Arizona* defined the parameters of police conduct for interrogating suspects in custody. Since the decision, the Supreme Court has limited the scope of *Miranda* in certain cases. Do you feel that the efforts and comments of top law enforcement officers throughout the country have had any effect on the Court's views?

Judge SOUTER. Well, of course, Senator, I cannot speak expressly for the Court, but I think those comments must have had some

kind of effect. The legitimacy of that effect, the appropriateness of the Court's listening, I think has got to be assessed from two different standpoints. It is very important that courts not be swayed in any case merely by the politics of the moment. And there is, I think, a laudable tendency—I hope it will always be regarded as laudable—for the Court to keep itself above the momentary furor.

It would be a mistake, however, from that, for a court to be unwilling ever to reexamine the wisdom of something that it had done. This is certainly true when we are dealing with decisions like *Miranda*, which are very pragmatic decisions. Whether one initially agreed or did not agree with *Miranda*, the point of *Miranda* was to produce a practical means to avoid what seemed to be unduly time consuming and sometimes intractable problems encountered in the Federal courts in dealing with claims that confessions were inadmissible on grounds of their involuntariness.

But *Miranda* was a practical case on how to deal with it. The assumption of the Court was that if *Miranda*, in fact, was complied with, a lot of the very difficult voluntariness problems were just going to take care of themselves. When we are dealing with a rule like *Miranda*, which had a very practical objective which, as was said at the time, extended the fifth amendment to the police station for the sake of trying to avoid other more serious problems, of course it is appropriate to consider the practical effect that those decisions have. And I have no doubt that both in the briefs that have been filed before the courts and in the arguments of the specific parties, the satisfaction or the dissatisfaction of law enforcement with the practical effects of that decision have had an influence, and rightly so, on the courts.

By the same token, I think it is important to note that when we look back on a decision which has been on the books as long as *Miranda* has now, we are faced with a similarly, I think, practical obligation, if one wants it modified or expanded or contracted, to ask very practical questions about how it actually works. That is a judicial obligation. If the judiciary is going to be imposing pragmatic rules.

Senator THURMOND. Judge Souter, there are hundreds of inmates under death sentence across the country. Many have been on death row for several years as a result of the endless appeals process. Recently, the Senate passed legislation which would reduce the number of unnecessary appeals. Generally, would you give the committee your views on the validity of placing some reasonable limitations on the number of posttrial appeals that allow inmates under death sentences to avoid execution for years after the commission of their crimes?

Judge SOUTER. Well, Senator Thurmond, I am not familiar with the bill which the Senate has passed, but I am assuming that it was probably in response to the report of the committee headed by Justice Powell a couple of years ago, retired Justice Powell, who was—the committee, rather, was addressing the problem of what you describe rightly as the seemingly endless appellate process and frequently of the confusion in haste which tended to characterize it at the Federal level.

I think there was great wisdom in the recommendation of the Powell committee, because what the Powell committee centered on

was not in the first instance a strict rule of limitation, but on the problem which, in fact, was leading to the resort, frequently at the last moment, to the Federal courts in death penalty cases.

What the Powell committee identified as one of those reasons was the fact that, although counsel is guaranteed to a criminal defendant through the direct appellate process, in most States counsel was, in any event, in the process of collateral review by habeas corpus after the direct appeal process had been exhausted, there was not a mandate under the national Constitution to the States to provide counsel at that level, and most States were not doing so.

The practical result was that in the attempt at collateral review at the State level, death row inmates were, in fact, trying to raise constitutional issues without counsel competent to do so—they were issues of sufficient subtlety that a pro se litigant simply could not handle them—and that time was being consumed in what was really unproductive, almost helpless, litigation in State court collateral review. And it was only when that was exhausted and only when, in fact, an execution date was set that the prisoners would then find it appropriate to try to go into the Federal courts for collateral review.

What the Powell Commission recommended was that if we are going to place reasonable limits on Federal collateral review, we have got to accept the reality that there has got to be some kind of genuinely significant representation by counsel at the very point collateral review can begin, so that it can be worth something both at the State level and at the moment the petitioners enter the Federal scheme. And if that can be provided, if counsel can properly be provided at the initial stages, then it is fair and appropriate to place limitations upon the time in which collateral review can be sought.

I can only say that I think that is an eminently fair approach to the problem.

Senator THURMOND. Judge Souter, you are currently serving as a member of the U.S. Court of Appeals for the First Judicial Circuit. Previously, you served on the New Hampshire Supreme Court for 7 years and the New Hampshire Superior Court for 5 years. How beneficial, in your opinion, will this prior judicial experience be to you if confirmed to sit on the Supreme Court?

Judge SOUTER. Well, Senator Thurmond, for someone who has never sat on the Supreme Court, there is great difficulty in answering that question, because the one thing that I think we all hear about the Supreme Court and its workload is that the combination of the task, the volume of the task, and the responsibility of the task is something for which no one really feels prepared at the beginning of service on that Court. And probably it would be impossible that anyone could be.

There are at least some bits of background which I hope would fit me to work into the responsibilities of the Court as fast as possible if I am confirmed. Although the supreme court on which I sat, without question, did not have the demands on me that the Supreme Court of the United States would have, it shares the problem of all appellate courts in the United States today of having a series of requests for review which, as a practical matter, tend to

exceed the capacity of the court to deal with the depth that the court would like.

In New Hampshire, before I ever went on the New Hampshire Supreme Court, we had gone necessarily to a system of discretionary review because it was impossible to review every request for an appeal on the merits. So I am familiar, in fact, with the business of the Court and the need to set some kind of limits to make any worthwhile adjudication possible.

More than that, though, I think the important thing is what I alluded to in the remarks that I made before the questioning began today. There is one overriding responsibility that any judge on an appellate court has. It will not guarantee that he will get the right result, but it will guarantee that he will try as best he can to get the right results. And that is a recognition that however far removed from the bench of that court, the decision that the court renders, the ruling that the court makes is going to affect a life.

I have learned that lesson, and it is a lesson which, if I am confirmed, I hope will stand me in good stead.

Senator THURMOND. Judge Souter, I believe that judges should impose tough sentences in criminal cases, especially when the crime committed is one of violence. Society demands tough punishment for violent offenders. In the past, victims of those who committed violent crimes have often played a diminished role in the criminal justice system. However, recently, the number of victims who participate in the prosecution of criminal cases has increased.

In your opinion, should victims play a major role in the criminal justice system? If so, to what extent should a victim participate?

Judge SOUTER. Well, Senator, there are certainly two respects in which victims should be recognized in the system, and there is a further interest of victims which the government as a whole should recognize. The most obvious role of the victim, of course, is the role which any victim must play in establishing the fact of the crime. Your central witness, theoretically, in a criminal case is the victim. The victim also, it seems to me, has a claim to the attention of the court in a criminal case if there is, in fact, a conviction.

We try to avoid disparity in sentencing, but one of the subjects which is appropriate to bear in mind is exactly the one that you raised a moment ago, and that was: What was, in fact, the conduct of the defendant? What degree of either mild or outrageous behavior can we assign to the conduct of the defendant in relation to the victim in causing harm? The heinousness of a crime is an appropriate subject in any sentencing decision.

I think going beyond that, one of the happy developments of the law in the last few years is the recognition by the government that after the criminal case is tried, whatever may be the result, the victim is still left, in many cases, in a mess not of the victim's own choosing; and that, in fact, there is a need to provide some help. The victim assistance acts which the States have been passing, it seems to me, is a step in the right direction.

Senator THURMOND. Judge Souter, the doctrine of stare decisis is a concept well entrenched in our legal system and the concept that virtually all judges have in mind when making decisions, especially in difficult cases. I am sure that the issue of prior authority has

been a factor which you have considered many times in your years on the bench.

Could you please briefly state your general view of stare decisis and under what circumstances you would consider it appropriate to overrule prior precedent?

Judge SOUTER. Well, Senator, as you know, the doctrine of stare decisis which we speak of in that shorthanded kind of way is a series of considerations which courts bear in mind in deciding whether a prior precedent should be followed or should not be. Some such doctrine or some such rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-to-case basis.

The problem that the doctrine of stare decisis addresses is the problem of trying to give a proper value to a given precedent when someone asks a court to overrule it and to go another way. And I suppose the complexity of the doctrine is such that, contrary to the terms of your question, I suppose I could talk about it for a very long time. And there may be other members of the committee—

Senator THURMOND. You need not do that.

Judge SOUTER. I was going to say, I think you have made it very clear that that is not what you had in mind, and I don't know whether any other members of the committee may be greater bears for punishment to go into it further than you have or not. Let me, though, in compliance with your terms, just state in a very kind of outline way what I think we should look to, without meaning to be exhaustive.

The first thing, kind of the threshold question that, of course, you start with on any issue or precedent, is the question of whether the prior case was wrong. We don't raise precedential issues unless we are starting with the assumption that there is something inappropriate about the prior decision. Now, that decision may have been right at the time and there now be a claim that, in fact, it is wrong to be applied now. But the first question that we have to ask is: If we were deciding the case today, if we were living in a kind of Garden of Eden and we didn't have the precedent and this was the first case, would we decide it the same way?

If the answer is no, we would not do so, then we look to a series of factors to try to decide how much value we ought to put on that precedent even though it is not one that we particularly like or would think appropriate in the first instance.

One of the factors which is very important I will throw together under the term of reliance. Who has relied upon that precedent, and what does that reliance count for today? Have people—

The CHAIRMAN. Excuse me, Judge. Did you say if the answer is no or if the answer is yes? You said when we look back—

Judge SOUTER. My problem, Mr. Chairman, is I forget what the question was.

The CHAIRMAN. I am sorry. You indicated that one of the things you looked at is whether the prior case was wrongly decided, isn't that correct?

Judge SOUTER. Then the answer should have been yes. I said no?

The CHAIRMAN. Yes. OK. I got it.

Judge SOUTER. Thank you for amending that.

The CHAIRMAN. I was getting confused.

Judge SOUTER. If you are going to ask me for a statutory interpretation, I would be as liberal as that, then you may have me in a corner. But assuming we start with a precedent which is wrong for this time, considered by itself, one of the things we are going to start by looking at is the degree and the kind of reliance that has been placed upon it.

We ask in some context whether private citizens in their lives have relied upon it in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now.

We look to whether legislatures have relied upon it, in legislation which assumes the correctness of that precedent. We look to whether the court in question or other courts have relied upon it, in developing a body of doctrine. If a precedent, in fact, is consistent with a line of development which extends from its date to the present time, then the cost of overruling that precedent is, of course, going to be enormously greater and enormously different from what will be the case in instances in which the prior case either has not been followed or the prior case has simply been eroded, chipped away at, as we say, by later determinations.

Beyond that, we look to such factors as the possibility of other means of overruling the precedent. There is some difference, although we may have trouble in weighting it, there is some difference between constitutional and statutory interpretation precedent, which Congress or a legislature can overrule, so we look to other possibilities.

In all of these instances, we are trying to give a fair weight to the claim of that precedent to be followed today, even though in some respect we find it deficient on the merits.

Senator THURMOND. Judge Souter, former Associate Justice Lewis F. Powell once stated:

Those of us who work quietly in our marble palace find it difficult to understand the apparent fascination with how we go about our business. However, as our decisions concern the liberty, property and even the lives of litigants, there can be no thought of tomorrow's headlines.

Judge Souter, would you share with the committee your thoughts regarding Justice Powell's statement, especially his comment that "there can be no thought of tomorrow's headlines"?

Judge SOUTER. Senator, I hope there is no judge in the Republic who would not agree with that statement of Justice Powell. If there is one thing that—

Senator THURMOND. That is sufficient. [Laughter.]

Judge SOUTER. You are going to turn me into a laconic Yankee, if you keep doing that, Senator. [Laughter.]

Senator THURMOND. I have just been told that my time is up, Judge Souter. Thank you. I was trying to get in another question, but it is too late.

Judge SOUTER. Thank you, sir.

Senator THURMOND. Thank you.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like to direct the judge's attention to the issue of civil rights. I am sure you understand, as all Americans understand, that the issue of slavery, when it was discussed at the Constitution-

al Convention almost ruptured that whole process and compromises were made during the consideration of the Constitutional Convention.

As a consequence of accepting slavery, we saw a vicious Civil War that took place in the 1860's on that issue. We saw this country go through enormous convulsion in the late 1950's and early 1960's, with loss of life, as we were trying to move toward a fairer, more equitable society, to breath real life into the Constitution when it talks about equal protection of the laws.

I am interested in your own views about the majesty of the Constitution and about providing guarantees for the citizens of this Nation, whether black or white, man or woman, of whatever religious, in assuring that the words "equal protection of the laws" really mean equal protection of the laws. I am most interested at this point in having your view about the authority and the legitimacy of the Congress in implementing the 14th amendment, through the 5th section.

So, I would like to direct your attention to a couple of these areas, firstly that you took positions on as attorney general and assistant attorney general of New Hampshire. Both of these areas relate to the questions of pursuing equal rights and liberties. First of all, I want to talk about eliminating discrimination in the workplace and guaranteeing equal opportunity in employment.

I am sure you are aware of the case which I am directing your attention to, decided in 1973, when the Equal Employment Opportunity Commission regulations required State and local communities and private firms with over 100 employees to file annual reports, listing racial composition of the employers' work force, to assist the Commission in its mission.

In many circumstances, we see Evan Kemp, President Bush's head of EEOC, talking about how necessary such statistics are today and recognize the importance of the accumulation of that type of material.

Now, unlike every other State, New Hampshire rejected the regulation and it refused to supply the data for 1973, 1974, and 1975. When the U.S. Government sued to enforce the requirement, you defended the refusal, as New Hampshire Attorney General, and when New Hampshire lost in the Federal district court, you appealed to the circuit court of appeals, which unanimously rejected your position, and then you tried to take the issue to the Supreme Court, which refused even to hear your case, let alone accept your argument.

Your office took the position in all three courts that it was unconstitutional to require employers to compile reports of those statistics. A reading of the brief would indicate that you did not believe that Congress had the power to implement and develop that legislation of their work force.

As far as I can determine, no other employer, public or private, pressed such an excessive claim, so hostile to civil rights. Your brief even went so far as to make the extraordinary argument that it violated a worker's constitutional right to privacy, for employers to report the overall racial composition of their work force.

My question is this: Did you agree with the position of the State of New Hampshire that it is unconstitutional for Congress to re-

quire employers to provide statistics about racial composition of the work force?

Judge SOUTER. At the time that case was litigated, Senator, I did not know whether it was constitutional or not. That case, as I think you realize, was——

Senator KENNEDY. What I am directing your attention to is your view about the power of the Congress, under section 5 of the 14th amendment, that when it finds that there is discrimination, that we have the power to try and take steps to eliminate the discrimination as best we can. We are not going to argue that laws are going to resolve all of these problems. Clearly, they are not. But the issue and the question, the basic issue and question is whether you recognize the authority and the power of the Congress to develop legislation, in this case the EEO Act, which required the kind of information that I have mentioned, in order for the American people to be able to gain these rights.

Judge SOUTER. There is no question that, under the law as it is understood today and under the law as I understand it, that Congress has a preferred and unique role of power in enforcing the 14th amendment under section 5.

There is probably no question that there will be further years of litigation before the exact limits of that power are defined, but there are some things that are clear now. It is clear now under the law that the Congress certainly does not stand on the same footing as the State and county and local governments may do in devising remedies for a broader societal discrimination than may come to light in specific cases. We know that the Congress has a preferred position in that respect.

Senator KENNEDY. Well, you certainly had the opportunity to develop your own personal view at the time that you were developing the position, as the Governor's lawyer. Did you form any position on your own, as to whether that was the correct position? Did you do it reluctantly? What can you tell us? We know that the lawyer who assisted you in the case, Mr. Edward Haffer, was quoted in the press as saying that you were supportive of and involved in the effort to challenge the regulation. Governor Thompson has said that you did not discourage him from pursuing the case to the Supreme Court.

So, did you at the time formulate any personal view about the legitimacy of the Congress in attempting to root out discrimination in the workplace?

Judge SOUTER. I came to no comprehensive personal view of section 5 at that time. The views that I came to grips with at that time were these: The first, of course, is that I was representing a client. The issue before me, as a lawyer in that case, was whether the client, whose policy was being set by the executive branch, speaking through the Governor, had a legitimate position which could in good faith be pressed before the courts. It was my judgment at that time that the State did, in fact, have a case which could be pressed in defense of the Governor's position.

The most remarkable thing about it and the reason for coming to this conclusion which I drew as a lawyer, is indicated in an unusual way in our constitutional history. In a footnote in a later opinion by Justice Powell that came about years later—and I cannot cite it

from memory, but I can produce it, if you would like—Justice Powell referred to a survey of discrimination by State and local governments on racial grounds, and I do not recall now whether it was strictly State employment discrimination or discrimination in voting, but it illustrated the truth that lay behind the decision that New Hampshire could take that position and press it before the courts, for whatever disposition, and that determination was that there was no indication that there had ever been racial discrimination, what we would today broadly call title VII discrimination, by the State or local governments.

The issue that the Governor wished and the State wished to press forward was whether the power of section 5 of the 14th amendment, whether the congressional power could in fact be used to require the assembly of racial data by a governmental entity with respect to whom there was absolutely no historical indication of any discrimination.

As I think you know from the briefs which I know have been brought to your attention, one of the concerns raised is that if you have not been thinking in racial terms and you are suddenly forced to start classifying nor at least to classify statistically in racial terms, you are running the risk that race is, in fact, going to play a role and a wrong role, which it has never done.

The issue before me, as attorney general of New Hampshire, in carrying on with that litigation which had in fact begun before I became attorney general, was whether in fact there was an argument that could be made to that effect. I believed that there was an argument that could be made to that effect. The courts rejected it and it is, of course, not an argument that would be made today.

Senator KENNEDY. Of course, first of all, as attorney general, you take the oath of office in upholding the Constitution. Second, the New Hampshire statute says the attorney general will represent the public interest in the administration of the department of justice, be responsible to the Governor, the general court, and the public for such administration.

So, what we have to gather here, and when you give a response that you are just acting as the lawyer for the Governor, we have to give some weight to the fact that you are sworn to an oath of office, both in terms of the Constitution and the New Hampshire statute. Very clearly you are not only the lawyer for the Governor, but you also represent the public interest.

You have stated that you support that concept as a matter of personal belief now and, as I gather, you were uncertain at the time when you filed the brief, is that correct?

Judge SOUTER. The question that I thought could be legitimately raised at the time was whether, in fact, as against a governmental entity which had not practiced any discrimination, either specific or reflective of societal discrimination, that was an appropriate exercise of section 5 power. I think we now know very clearly that it is.

Senator KENNEDY. Well, the point that we are talking about is a national determination by the Congress that this kind of information is necessary in order to try to gather discrimination information that is necessary before any action can be taken, and also to try to measure some progress in this area.

Tell me, why did you file information with regard to gender in employment, and not with regard to race? I found that somewhat puzzling. You submitted the information to EEOC with regard to gender, but not with regard to race, and the 14th amendment clearly is about race and about gender—in terms of that—why did you file that?

Judge SOUTER. As you indicate, I think the 14th amendment is about both.

Senator KENNEDY. Right.

Judge SOUTER. I think, in fact, the answer to that is one which, with respect, I would almost have to direct to my client. If you were to ask me cold whether the State was filing gender information at that time, I could not have told you.

Senator KENNEDY. Let me go to a second area of civil rights, and this is with regard to the literacy tests. You are familiar that in 1965 the Congress took action to abolish literacy tests in the limited number of States that were included in the 1965 act, and then in the 1970 act we abolished literacy tests generally across the country?

Judge SOUTER. I think they were suspended, were they not, for 5 years by the 1970 amendments?

Senator KENNEDY. Exactly. The State of New Hampshire vigorously defended the State law, arguing that Congress did not have, again, the constitutional authority to ban literacy tests. Your name appears on the brief. Do you remember whether you drafted it or not?

Judge SOUTER. I was assistant attorney general at that time, and my recollection is that I filed a posttrial memorandum with the U.S. district court after that case was argued. I remember I was the assistant attorney general assigned to argue—

Senator KENNEDY. Well, your name is on the brief, the third one down.

Judge SOUTER. Pardon me?

Senator KENNEDY. Your name is on the brief.

Judge SOUTER. I was not trying to get you to read the names off, Senator.

Senator KENNEDY. We have got two of them.

Now, when this was brought up in the district court, the position was rejected 3 to 0, and then when it was brought up eventually in the Supreme Court, the position was rejected 9 to 0. Again, the question I think is how you view the Congress' power to try and provide remedies against discrimination against minorities and women.

Very little was given me when I heard you talk about the questions of limited power. You talk about the overlap of power that exists and the power of preemption by the National Government. You say that the National Government will prevail when there is conflict, and speak of the movement toward greater power to the National Government, primarily political and fiscal in recent times, but did not mention what has been the most, I consider the most important reason in the past several years, and that is to try and guarantee civil rights and liberties to minorities. This is something that we have to make a judgment on.

Another part of that brief that concerned me that I want you to speak to, is in the brief you said that if people who could not read were permitted to cast ballots, it would dilute the votes of literate citizens. You went on to say:

To this harm, must be added the impossibility of providing any means whereby illiterate voters could intelligently vote upon the constitutional proposals which are presented on the ballot in narrative form. The result of allowing illiterates to make a choice in such matters is tantamount to authorizing them to vote at random, utterly without comprehension.

Yet, in a letter to the President on the issue, when Congress was considering the Voting Rights Act of 1970, Father Hesburgh, who was Chairman of the Civil Rights Commission, said this:

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

What troubles me is that you said that the Congress did not have the power to collect data on race discrimination. Now, you say that Congress does not have the power to ban literacy tests for voting. Congress is attempting to deal with the profound historical, national problem that this country has ached at over its history and continues to do so today.

Yet, we have seen these fundamental areas—you seem to interpret the powers of Congress so narrowly that we cannot achieve our purpose—even fundamental areas such as race discrimination and the right to vote.

Judge SOUTER. Well, with respect, Senator, let me address a couple of points that you raise. Maybe the best place to start is with the fundamental one. That is about me today, as opposed to me as an advocate in a voting rights case 20 years ago.

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 and in the matters of invidious discrimination which we are unfortunately too familiar with.

That, I hope, when these hearings are over, will be taken as a given with respect to my set of values.

The second thing that I think must be said, with respect to that case of 20 years ago, is that I was not giving an interpretation 20 years ago. I was acting as an advocate, as a lawyer, in asserting a position on behalf of a client. Maybe it is unnecessary to add, but I know that you recognize that the identity of the Governor has nothing to do with the responsibility of the attorney general to bring a case.

This voting rights case, by the way, did not arise during the administration of the Governor that you have just been referring to. It arose during the Peterson administration which preceded his. The issue that was presented to the State was, in one respect, similar to one we have already discussed.

New Hampshire had a literacy test. The literacy test had never been used or, indeed, ever have been claimed to have been used for any discriminatory purposes whatsoever. There is some question as

to what its practical effect was in those days. But it had never been used for discrimination.

There was one thing that we did know very clearly about the law in those days, and that was that the use of a literacy test for a non-discriminatory purpose was constitutional under the 14th amendment. That had been litigated.

So that New Hampshire's practice was, in fact, a wholly constitutional practice. The issue which the Governor requested the attorney general to raise was: Is it within the power of Congress, under section 5, to suspend a literacy test in a State in which there is absolutely no history or evidence of any sort, at any time, of its discriminatory use, in such a way as to be unconstitutional under the 14th amendment?

That issue was not ultimately decided until about 4 or 5 months after our case began. That issue was decided in *Oregon v. Mitchell*, and as you indicated a moment ago, the Court under varying rationales—some under 14th and some under 15th amendment analyses—decided that it was, in fact, within the power of the Congress to deal with literacy and the discrimination frequently associated with it, as a national problem, and to suspend the test without regard to any particular history of discrimination in the States.

But that case had not been decided at the time that ours was brought. Therefore, the attorney general at the time was in the position, No. 1, of being requested by the Governor to defend a constitutional action under existing State law. I think that was within the appropriate role of an advocate, and it did not represent a personal opinion, either by the attorney general or anyone else involved in the litigation about the ultimate scope of Congress' power under section 5.

Senator KENNEDY. Well, Judge, I must say that you keep coming back to the role of the Governor's lawyer. It is very clear to me that the oath of office that you take, as attorney general in the statute requires, and a part of your responsibility as attorney general is, your responsibility to the public trust and to the people.

Judge SOUTER. That is correct.

Senator KENNEDY. So now we know where you are today. I think the question is, where were you then?

Judge SOUTER. Well, Senator, I think you have answered that question. Where we were then, where the attorney general was and where I was as an assistant attorney general in that case was in defending a State practice which the Supreme Court of the United States had ruled to be constitutional under the 14th amendment.

I think that cannot be reasonably regarded as a derogation of the duty of the State to its people. It may have turned out to be a legal position which the Supreme Court of the United States ultimately rejected, but I think it is a defensible one.

Senator KENNEDY. Well, you can see what the impact would have been if they had not rejected it, because then we would have had 50 different types of solutions which the Federal Government would have been attempting to deal with in a problem of major national concern.

Let me go to the issue of the equal protection clause of the 14th amendment. The Supreme Court struck down virtually all laws that discriminate on the basis of race. On the other hand, they

used a weak standard, on other classifications, and upheld many laws under the rational justification test.

Obviously they have drawn a distinction between trucks and automobiles and different laws for businesses of different sizes. Before the 1970's, the Supreme Court applied the weakest test to cases involving claims of sex discrimination. The Court accepted any rational basis for laws that discriminated against women. Under this approach women were routinely excluded from many occupations, including being lawyers, and many areas even serving as jurors.

Beginning in the 1970's, the Court began to apply a higher standard of review to laws that discriminated against women. But evidently you did not agree with that standard. In 1978, you urged the Court to reexamine and perhaps eliminate the new standard.

The issue here does not turn on the facts of the case. It involved the New Hampshire statutory rape law, and a man convicted under the statute claimed the law was unconstitutional because it did not apply to women, too. The Supreme Court refused to hear the New Hampshire case, but a few years later the Court, in another case, made clear that under even the higher standard of review, statutory rape laws were valid, even though they do not apply to women.

What I find very disturbing is that in your brief you urged the Supreme Court to eliminate the higher standard of review. It seems to me that if you are genuinely concerned about the rights of women the obvious argument to make is that even under a higher standard review the statutory rape laws are valid. But you did not take that course. You suggested the Court should go back to the old law, which had permitted sex discrimination to flourish.

In your brief, you call on the higher standard as amoebic, and you said it was in the "Twilight Zone" which are generally considered to be, I think, disparaging, perhaps even derogatory, ways of referring to a constitutional requirement that made an enormous difference in any discrimination against women in our society.

So do you think the Court should go back to uphold statutes that discriminate by sex if there is any plausible reason for the distinction?

Judge SOUTER. No. That is not my position. My position which was described in that, which was raised as an advocate in that brief, went to a problem which is a problem that is still with us. It is a problem which anyone who is concerned about sex discrimination and the appropriate standard of review, I think has got to face.

What we are dealing with when we are asking what is the appropriate standard of review in an equal protection case is what kind of pragmatic approach should we adopt in order to find whether there is or is not a defensible classification?

As you have pointed out, we have come up with, or the courts have come up with basically three tiers of review, so that the courts do not have to reinvent the wheel in every case.

Economic matters get the lowest scrutiny, and racial matters get the highest. The difficulty which has bedeviled the middle scrutiny test, under which classifications of sex and illegitimacy have been examined, is the looseness of the test.

The rational basis test is fairly easy to understand. The strict scrutiny test is fairly easy to understand but the middle scrutiny test requires the court to determine whether there is a substantial relationship to an important governmental objective in deciding whether or not a discrimination, a classification on the basis of sex is appropriate.

What is unfortunate about that standard of review is that it leaves an enormous amount of leeway to the discretion of the court that is doing the reviewing. The history of the middle-tier test illustrates this because we know there are examples, both State and Federal, in which the middle-tier test, in fact, has been treated as nothing more than the first-tier rational basis test—the lowest basis for scrutiny.

I think the question that has got to be faced is whether there can be devised a middle-tier test providing a higher level of scrutiny for these classifications on the basis of sex and illegitimacy that does not suffer from the capacity of a court, as a practical matter, to read it back down to the lowest level of scrutiny, if it is inclined to do so.

The trouble with the middle-tier test is that it is not a good, sound protection. It is too loose.

Senator KENNEDY. I—excuse me.

Judge SOUTER. No, I was just going to add, that has nothing to do with the question of whether sex discrimination should receive heightened scrutiny. I think that is to compare sex discriminations with common economic determinations seems to me totally inappropriate.

The question is, what is a workable and dependable middle-tier standard for scrutiny.

Senator KENNEDY. In your brief, you talk about even eliminating that test.

Judge SOUTER. Well, I also talked about making the test more clear and eliminating this kind of protean quantity to it.

Senator KENNEDY. And we will include the brief in the record.

Judge SOUTER. Surely.

[The brief of Judge Souter follows:]

IN THE  
SUPREME COURT OF THE UNITED STATES  
JANUARY TERM, 1978

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NO. \_\_\_\_\_

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RAYMOND A. HELGEMOE, WARDEN,  
NEW HAMPSHIRE STATE PRISON, ET AL.,  
Petitioners

V.

THOMAS E. MELOON,  
Respondent

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

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IN THE  
SUPREME COURT OF THE UNITED STATES  
JANUARY TERM, 1978

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NO. \_\_\_\_\_

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RAYMOND A. HELGEMOE, WARDEN,  
NEW HAMPSHIRE STATE PRISON, ET AL.,  
Petitioners

V.

THOMAS E. MELOON,  
Respondent

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

The Petitioners, Raymond A. Helgemoe,  
Warden, New Hampshire State Prison, et al.,  
respectfully pray that a writ of certiorari  
issue to review the judgment and opinion of  
the United States Court of Appeals for the  
First Circuit entered in this proceeding

on<sup>1</sup> October 31, 1977.

### OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 564 F.2d 602 (1st Cir. 1977) and a copy of that Opinion is appended hereto as Appendix A. The Opinion of the District Court, which granted Respondent's Petition for Writ of Habeas Corpus and was affirmed by the First Circuit, is not reported; a copy of that Opinion is appended hereto as Appendix B. The Opinion of the New Hampshire Supreme Court which upheld Respondent's conviction is reported as State v. Meloon, 116 N.H. 669, 366 A.2d 1176 (1976). A copy of the Opinion is appended hereto as Appendix C.

**JURISDICTION**

The judgment of the United States Court of Appeals for the First Circuit was entered on October 31, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

## QUESTION PRESENTED

- I. WHETHER NEW HAMPSHIRE REVISED STATUTES ANNOTATED 632:1, I-c, WHICH MAKES IT UNLAWFUL FOR A MALE TO HAVE SEXUAL INTERCOURSE WITH A FEMALE NOT HIS WIFE WHO IS LESS THAN FIFTEEN YEARS OLD, OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATUTORY PROVISION INVOLVED

New Hampshire RSA 632:1 states in  
pertinent part:

"632:1 Rape.

I. A male who has sexual  
intercourse with a female not  
his wife is guilty of a class  
A felony if . . .

(c) the female is  
unconscious or  
less than fifteen  
years old . . . ."

## STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the First Circuit's affirmance of an Opinion by the United States District Court for the District of New Hampshire granting Respondent's petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. The Opinions of both the Circuit Court and the District Court held that New Hampshire's statutory rape law (RSA 632:1, I-c), under which Respondent was convicted, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Respondent, Thomas E. Meloon, and the prosecutrix, Susan D. Souriolle, first met in Portsmouth, New Hampshire during late August or early September of 1973. At the time of this meeting, the prosecutrix

was thirteen years of age; the Respondent was twenty-four. On three separate occasions thereafter, the Respondent and the prosecu-  
trix engaged in consensual sexual intercourse. Respondent was then arrested, charged,  
indicted, and on May 21, 1974, convicted of statutory rape pursuant to New Hampshire RSA 632:1, I-c. (This statute was repealed and replaced on August 6, 1975, with RSA 632-A, a gender neutral law.)

Respondent's conviction was upheld on direct appeal to the New Hampshire Supreme Court, which considered and explicitly rejected Respondent's equal protection claims. See Appendix C. However, the United States District Court for the District of New Hampshire subsequently granted Respondent a writ of habeas corpus on the ground that New Hampshire's statutory rape

law, RSA 632:1, I-c, violated the Equal Protection Clause of the Fourteenth Amendment. See Appendix B.

The judgment of the District Court was affirmed by the United States Court of Appeals for the First Circuit on October 31, 1977. See Appendix A.

## REASONS FOR GRANTING THE WRIT

- I. IN HOLDING THAT NEW HAMPSHIRE'S STATUTORY RAPE LAW, RSA 632:1, I-c, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The law under which the Respondent was convicted, RSA 632:1, I-c, made it unlawful for any male to have sexual intercourse with a female not his wife who was less than fifteen years old. The District Court, in striking down this statute, became the first court in the nation to hold any statutory rape law unconstitutional on equal protection grounds. The Court of Appeals then affirmed. Petitioners respectfully submit that the decisions of the District Court and the Court of Appeals are erroneous.

These decisions present this Court with the unique opportunity not only to address the first impression issue of the constitutionality of a gender based statutory rape law vis-a-vis the Equal Protection Clause, but also to reanalyze and clarify the unsettled question of what is the correct equal protection test to apply to statutory classifications based on sex.

Few areas of the law have troubled this Court as much in recent years as has the problem of testing statutory classifications based on sex against the Equal Protection Clause of the Fourteenth Amendment. There are, of course, two traditional tests to which constitutionally challenged statutes under the Equal Protection Clause have been subjected -- rational basis and strict scrutiny. Under the rational basis

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standard a state is entitled to make reasonable classifications among persons upon whom benefits are conferred or burdens imposed, and the equal protection safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. See, e.g., Dandridge v. Williams, 397 U.S. 471, 484-485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); and Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955).

The strict scrutiny test is imposed if the statutory distinction is based upon a "suspect classification" such as race, alienage, or nationality, (Loving v. Virginia, 388 U.S. 1 (1967); Graham v. Richardson, 403 U.S. 365 (1971); and Oyama v. California, 332 U.S. 633 (1948)) or if the distinction infringes a "fundamental

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interest." Dunn v. Blumstein, 405 U.S. 330 (1972); and Skinner v. Oklahoma, 316 U.S. 535 (1942). To successfully withstand the strict scrutiny test, a state must demonstrate a "compelling state interest" in creating the challenged classifications. Skinner v. Oklahoma, supra.

Where the statutory classification under consideration has been based on sex, however, this Court has been unwilling to apply either of the traditional tests. Instead, the Court has resorted to an amorphous "substantial relation" test which requires more heightened scrutiny than would be applied under the rational basis standard, but less stringent scrutiny than is applied to suspect legislation.

The middle-tier approach began to evolve in Reed v. Reed, 404 U.S. 71

(1971). The Court, in striking down a probate statute which gave males a preferred position as executors, stated:

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Reed v. Reed, supra, at 76. (citation omitted)

The rationale of the Reed decision provided the underpinning for subsequent holdings which invalidated statutes employing gender as an inaccurate proxy for more germane bases of classification and which rejected administrative ease and convenience as sufficiently important objectives to justify gender-based distinctions. See, Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wisenfeld, 420 U.S.

636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); and Stanley v. Illinois, 405 U.S. 645 (1972). In other cases the Court, applying in some instances the traditional rational basis test and in others the substantial relation test of Reed, found that certain classifications challenged as sexually discriminatory were in fact based on functional or circumstantial differences between the sexes; therefore no violation of the Equal Protection Clause existed. See, General Electric Co. v. Gilbert, \_\_\_ U.S. \_\_\_, 97 S. Ct. 401 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); and Kahn v. Shevin, 416 U.S. 351 (1974).

In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices went so far as to conclude that sex should be regarded as

a suspect classification. Since Frontiero, however, the Court has not only declined to hold that sex is a suspect class, but it has significantly retreated from that position. See, Califano v. Goldfarb, \_\_\_\_ U.S. \_\_\_\_, '97 S. Ct. 1021 (1977); General Electric Co. v. Gilbert, supra; Craig v. Boren, 429 U.S. 190 (1976); and Mathews v. Lucas, 427 U.S. 495 (1976).

The most relevant precedent for the instant case is Craig v. Boren, supra, the only Supreme Court gender-based discrimination case concerning a criminal statute. In Craig, the Court examined and struck down an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. The majority applied the substantial relation test from Reed, but three Justices

expressed outward concern with this standard.

Justice Powell, in a concurring opinion, indicated that the rational basis test should take on a "sharper focus" when addressing a gender-based classification, but he balked at characterizing the new test as an independent "middle-tier" approach. Craig v. Boren, 429 U.S. 190, S. Ct. 451, 464 (1976). In separate dissenting opinions, both Chief Justice Burger and Justice Rehnquist expressed their position that gender based cases, like all cases where no suspect classification or fundamental interest is involved, should be tested by the traditional rational basis standard. Craig v. Boren, supra, at 466, 467, 469. Justice Rehnquist went on to express his concern that the substantial relation test is "so diaphanous and elastic

as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . ." Craig v. Boren, supra, at 467, 468.

In the instant case the Court of Appeals was troubled by the amoebic quality of the substantial relation test. Chief Judge Coffin comments that it is "hardly a precise standard," and he worries that "we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard." Meloon v. Helgemoe, supra, at 604.

Despite the First Circuit's misgivings over the imprecision of the Reed substantial relation test, the Court found that the New

Hampshire statute could not pass muster under that test. This decision is made even more suspect by the First Circuit's suggestion that the Court would not have struck down the statute under the "minimal rationality test." Meloon v. Helgemoe, supra, at 606.

In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale basis and strict scrutiny tests. This new standard lacks definition, shape, or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so "diaphanous and elastic" as to permit subjective judicial preferences and prejudices concerning particular

legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard. In all events, it presents the opportunity for the Court to correct a situation which invites subjective judicial judgments and possible abuses.

Finally, as noted above, the instant case is one of first impression. Never has this Court weighed a gender-based statutory rape law against an equal protection argument. The implications of the First Circuit's Decision for all gender-based criminal statutes and for equal protection analysis in general are devastating. The decision should not be left to the Court of Appeals. The issue is substantial and worthy of this Court's

consideration.

II. THE HOLDING OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE AND WITH THE DECISIONS OF ALL OTHER STATE COURTS WHICH HAVE CONSIDERED THE QUESTION.

During the course of Respondent's direct appeal to the New Hampshire Supreme Court, he first raised the issue of whether RSA 632:1,I-c was violative of the Equal Protection Clause. The Court considered Respondent's argument and in a unanimous decision explicitly rejected it. State v. Meloon, supra, at 670, 671.

The New Hampshire Supreme Court does not stand alone. On the contrary, equal protection attacks against statutory rape laws have been universally rejected by every state court considering the question.

See, e.g., People v. Mackey, 46 Cal. App. 455, 120 Cal. Rptr. 157 (1975); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973); In re W.E.P., 318 A.2d 286 (D.C. App. 1974); State v. Drake, 219 N.W. 2d 492 (Iowa 1974); In re Interest of J.D.G., 498 S.W.2d 786 (Mo. 1973); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976); and Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975).

The holding of the Court of Appeals runs directly counter to that of the New Hampshire Supreme Court. It is also in conflict with the decisions of all state courts which have considered the question. It is a significant issue, and a significant conflict. It is a question of law which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Counsel for Petitioners

January 25, 1978

Senator KENNEDY. But you talk about clarification but you also talk about eliminating it. My question is, do you not think that statutes that discriminate on the basis of sex should receive very close examination.

Judge SOUTER. I do not think there is any question about it.

Senator KENNEDY. I know my time is just rapidly going by. I mention these, Judge, because these are questions of fundamental equality and discrimination in all forms and shapes that have been, as I mentioned earlier, a matter of enormous concern and this country has experienced a lot of pain, a lot of tears, a lot of blood. I do not think the American people want to go back.

We have seen—and this is subject to many members understanding—we have seen recent judgments and decisions that have been made by the Supreme Court which many of us feel have been a significant retreat from protections for both women and minorities.

So it is important, at least for this Senator, to understand your recognition of the authority and the responsibility that we, in the Congress, have in terms of fulfilling our responsibility under the 14th amendment, clause 5, to make sure that when laws are necessary that we are going to pass them. And that we are going to have someone who is going to be sitting on the Court who is going to recognize the importance of interpreting them to deal with the problems of discrimination, and also who is going to give the adequate remedies for the enforcement of those laws.

That is why I am most interested in understanding your views about it, but I appreciate your response to these questions.

Thank you.

Judge SOUTER. I appreciate your concerns.

The CHAIRMAN. Before I yield to my colleague from Utah, I am a little confused, Judge.

Judge SOUTER. Yes, sir?

The CHAIRMAN. You say there should be a standard between strict scrutiny and rational basis.

Judge SOUTER. Well, I suppose there has got to be. It seems to me impossible to say that unless you are within those basically four categories that get the very strict scrutiny—race, alienage, national origin, fundamental rights—that there is no appropriate level of review except that bottom level of review which is reserved for basically the most garden-variety economic distinctions.

That kind of a position seems to me not to take into account the variety of the importance of the interests that fall between them.

The CHAIRMAN. So there should be a middle level to define it more clearly?

Judge SOUTER. There has got to be something other than just threshold level scrutiny.

The CHAIRMAN. Right.

Judge SOUTER. The tough thing is in writing—I have been saying and I will say it again—the tough thing is in finding—is in writing a test that does not have the undue flexibility in the middle.

The CHAIRMAN. I thank you.

I will yield to my colleague.

Senator HATCH. Thank you, Mr. Chairman.

I think you have more than adequately answered the concerns that Senator Kennedy has raised with regard to these issues, but I would like to just clarify them just a little bit, if we can.

Judge SOUTER. Yes, sir.

Senator HATCH. I would like to just make sure I correctly have the procedural history, say, of the EEOC case, the case regarding the racial data collection and the briefs you filed in that case.

As I understand it, Governor Thomson refused to supply the EEOC with the racial, ethnic data information on State employees about 1973.

Judge SOUTER. I believe that was the first year, 1972 or 1973, yes.

Senator HATCH. Who was the attorney general at that time?

Judge SOUTER. My esteemed former colleague, Senator Rudman. I would not want to suggest that Senator Rudman counseled any executive decision on that.

Senator HATCH. No. I am not trying to embarrass Senator Rudman here. But the point is that as I understand it Senator Rudman was then the attorney general when the Department of Justice sued the State of New Hampshire for this information in 1975?

Judge SOUTER. That is correct.

Senator HATCH. And as I understand, his name and Assistant Attorney General Edward A. Haffer, were on the answer to the Federal Government's lawsuit and they signed that particular answer, if you can recall.

Judge SOUTER. I believe that was correct.

Senator HATCH. Was your name on that answer?

Judge SOUTER. I do not remember. I do not specifically remember.

Senator HATCH. The answer is, no, I do not think you were.

Judge SOUTER. You are a better student of my history than I am.

Senator HATCH. The names of the same two persons, Senator Rudman and Assistant Attorney General Haffer appear on the State's memorandum in support of the cross motion for summary judgment which was filed, as I recall, December 9, 1975. I think you would agree with that.

Judge SOUTER. I recall that.

Senator HATCH. The Federal district court, later in December 1975, then granted summary judgment for the Federal Government. Now, who filed the State's notice of appeal to the Court of Appeals for the First Circuit?

Judge SOUTER. My best recollection is that the notice of appeal probably had been filed before I became attorney general, but I would have to check the dates.

Senator HATCH. Again, it was Senator Rudman and Mr. Haffer, I believe it was.

Now, I believe that the notice was filed on December 31, 1975, and your name was not on it?

Judge SOUTER. That is right. I was still deputy at that time.

Senator HATCH. On what date did you become attorney general of New Hampshire?

Judge SOUTER. I think it was January 20 of the next year, 1976.

Senator HATCH. So by the time that you became head of the office of attorney general of New Hampshire, the Governor had re-

fused to comply with Federal data requests and the Federal Government had sued the State to obtain the data and the State's answer and legal arguments had already been fully set forth in the Federal district court and the State had lost in that court.

And the State's attorney general, our current colleague, Senator Rudman, had already noticed an appeal and all of this occurred before you became attorney general.

Judge SOUTER. That is correct.

Senator HATCH. OK. Now, is it accurate to say that the State's appellate brief filed in the first circuit and the State's petition for certiorari, after the first circuit upheld the lower court, generally tracked the arguments made in the district court filing, while Senator Rudman was attorney general?

Judge SOUTER. That is my understanding.

Senator HATCH. That is true.

Now, I am pointing out who was attorney general at what stage of the proceedings. I am not trying to suggest that you should seek to disassociate yourself from the briefs. You clearly have not done that.

But I just want this episode and its perspective because I think that has to be said.

Then I would like to also add that you and then attorney general, my good friend Senator Rudman, you were both advocates and you have made that point here.

Judge SOUTER. That is correct.

Senator HATCH. It was your duty to do the best you could for your client who was, in this case, the Governor and the State of New Hampshire. And as such, it is not only appropriate but it is a part of your responsibility to advance the plausible arguments to try and win the case, is that a fair statement?

Judge SOUTER. Yes, sir.

Senator HATCH. I notice that these briefs asserted—I thought that this was fairly ingenious—that these briefs asserted the right to privacy for State employees not to reveal their racial identity and the briefs based it on *Griswold v. Connecticut*.

Judge SOUTER. That is correct.

Senator HATCH. Which, of course, was a 1965 decision and has been raised earlier by our distinguished chairman.

Judge SOUTER. That is correct.

Senator HATCH. Now, this argument, I might add for the benefit of my colleagues who are concerned that you might not be an advocate of the right of privacy, this argument extended far beyond *Roe v. Wade* with regard to the right of privacy, in those briefs cited, because the line of privacy cases cited grew out of the marriage relationship and the personal interest in procreation.

But as a critic of the *Roe v. Wade* decision, which I am—I am not the least bit troubled by its inclusion in your brief.

As an advocate, you have to make plausible arguments based on then current case law, and the principles you find there. I have to give my old friend, Senator Rudman, a lot of credit, and you as well, for having the ingenuity for making the arguments based upon *Griswold v. Connecticut*.

Judge SOUTER. We did the best we could, Senator.

Senator HATCH. You sure did.

Judge SOUTER. Thank you. [Laughter.]

Senator HATCH. You were wrong, but you made very, very good arguments. That is all I can say. I would be more concerned if as a judge you had accepted that inventive argument, you see.

Now, let me just ask one other question. When you did become attorney general, did your office comply and provide the racial and ethnic identification data in response to the EEOC surveys?

Judge SOUTER. Yes; I think by that time an order had been entered against the State.

Senator HATCH. So once you had taken a shot at it and tried to change the law and, as best you could, with innovative arguments in representing your client as an advocate and as one who inherited the case from prior ingenious advocates—and I say that with respect—you complied with the law once you lost.

Judge SOUTER. When the case was over, it was over.

Senator HATCH. It was over. Well, I think that makes the case pretty well that it is improper for us to try to use your position as an advocate to determine whether or not you have—or to determine your own beliefs as you exist here today as the nominee for the Supreme Court.

Judge SOUTER. Thank you, Senator.

Senator METZENBAUM. I think the Senator from Utah has convinced me we should not confirm Warren Rudman to the Supreme Court. [Laughter.]

Senator HATCH. Actually, I think—

Judge SOUTER. Senator, I would stipulate to that.

Senator HATCH. You will stipulate to that. [Laughter.]

Actually, I think he would make quite a great Supreme Court Justice. I would be worried every time a case came down, however.

Judge SOUTER. I was going to say I think he would be a great Justice, too. I thought it was a question of him against me, and under those circumstances. [Laughter.]

Senator HATCH. I wouldn't push that if I were you. I know Rudman too well.

With regard to the literacy case, the law of New Hampshire had basically, in your opinion, been upheld before you tried that case.

Judge SOUTER. Yes; it had. The use of a literacy test for a nondiscriminatory purpose had been affirmed by the Supreme Court.

Senator HATCH. As I understand it, the New Hampshire Constitution required all voters to be able to read and write and understand English.

Judge SOUTER. Yes. It was a requirement, and I don't think this was the point of any question so far. But needless to say, no one had authority to suspend the imposition of that literacy test except a court of competent jurisdiction.

Senator HATCH. Well, as I understand it also, that law required voters to be 21 years of age, and it restricted absentee voting to people who were actually outside of the State, at least as I understand it.

Judge SOUTER. I believe that is correct.

Senator HATCH. The Department of Justice took the position that the Voting Rights Act of 1965 outlawed all of these practices.

Judge SOUTER. That is correct.

Senator HATCH. So when you and Senator Rudman took that matter on, you had current law that seemed to support you.

Judge SOUTER. Yes, sir.

Senator HATCH. In addition, you were both, as advocates, as attorneys general, if you will, you were both required by your oath of office to uphold the New Hampshire Constitution and statutory law.

Judge SOUTER. Yes; we were.

Senator HATCH. In fact, it would have been unseemly if you had not tried to uphold the constitution that had been enacted by elected representatives in your State.

Judge SOUTER. The only case, Senator, in which our responsibility would have been different from the way we saw it would have been a case in which the national and State constitutions clearly conflicted. And in those circumstances, our oaths would have required us, if we so believed—and we believed that there was no reasonable argument that could have been made to defend the State position—our obligation would have been to state that to the court. We did not find ourselves to believe that we were in that position.

Senator HATCH. Is it fair to say constitutionally that at that time back in 1970, the constitutionality of the Voting Rights Act was being legitimately disputed at that particular time?

Judge SOUTER. Yes. That was being litigated, and it was a final determination on that, or at least on the issues that concerned us, came with *Oregon v. Mitchell*, which was decided, I think, about 4 months after our own State case.

Senator HATCH. It was disputed, basically, on the principles of federalism arguments.

Judge SOUTER. Yes; it was.

Senator HATCH. All right. Well, as I understand it, the district court itself expressed some doubt about the issue but said that the act was “probably” constitutional.

Judge SOUTER. Yes; they were at an injunction stage, and they made that judgment.

Senator HATCH. I also understand that you and Senator Rudman, then attorney general of the State of New Hampshire, complied with all aspects of the Justice Department suit as soon as the constitutionality of the act was settled by the Supreme Court.

Judge SOUTER. Yes. My recollection is that after *Oregon v. Mitchell* came down I believe there was a joint stipulation filed by the State and Federal counsel, which ended the case.

Senator HATCH. We can go through a lot of questions on the other point that Senator Kennedy raised with regard to the gender issue, but let me just say this: In its petition for writ of certiorari, your State in that particular case did refer to the Supreme Court’s case laws evincing a “middle-tier” approach and asked the Supreme Court to make it clearer and more precise and, in addition, to uphold your statutory rape law.

Judge SOUTER. That is correct.

Senator HATCH. Now, there is simply nothing here giving rise to any legitimate concern, as far as I am concerned, about you because the brief made reasonable arguments back in 1977 seeking to

construe precedent in a manner which would uphold your own State's statutory rape law.

Judge SOUTER. That is correct.

Senator HATCH. A May 5, 1987, opinion of the New Hampshire Supreme Court, which you joined in, made reference to the so-called middle-tier level of heightened scrutiny with respect to gender. And so, even on the bench, you acknowledged this middle-tier gender characterization.

Judge SOUTER. That is correct.

Senator HATCH. I think I have to say that I don't see any reason to criticize you on the basis of any of those matters. As a matter of fact, I see every reason to say that in the fight for principle, you may be wrong but you fight for it. You may be right but you fight for it. And you are an effective advocate and an ingenious representative of the people and, I might say, a clever and good writer of the law.

Judge SOUTER. Thank you, Senator.

Senator HATCH. But that once the decision is made, you immediately followed those decisions.

Judge SOUTER. We did.

Senator HATCH. I don't know what more we could ask for in somebody who is here sitting as a nominee for the Supreme Court of the United States of America.

Judge SOUTER. Thank you, Senator.

Senator HATCH. I want to compliment you for it because, you know, let's just be honest. If we are going to start criticizing advocates because they advocated for people who may have been wrong, we would hardly ever have an opportunity of putting a criminal lawyer on the Supreme Court, or any other bench, for that matter. Nor would we have an opportunity of putting people who actually go to bat for some pretty reprehensible people in our society and try and uphold their rights, which is time honored, one of the most important obligations of any attorney worth his or her salt. So, you know, I don't see any problems at all with you as an advocate. As a matter of fact, I would be surprised if you had not advocated the way you did at the time. It would have been nice if you had known how the Supreme Court was going to rule in advance.

Judge SOUTER. I could have been a very successful lawyer.

Senator HATCH. Well, you are also going to be in a position where I think you are going to know how it is going to rule in advance in the future. That will be great.

Judge SOUTER. Thank you, Senator.

Senator HATCH. Now, you have sat on a State trial court, a State supreme court. You have had tremendously broad experience. You have heard domestic relations cases, right?

Judge SOUTER. Yes, sir.

Senator HATCH. Child custody cases?

Judge SOUTER. Yes.

Senator HATCH. Criminal law cases?

Judge SOUTER. Yes.

Senator HATCH. Divorce cases?

Judge SOUTER. Yes.

Senator HATCH. In fact, you have heard cases of employment law.

Judge SOUTER. Yes.

Senator HATCH. You have heard cases involving almost every aspect of human endeavor.

Judge SOUTER. Anything that can come before a trial court of general jurisdiction.

Senator HATCH. Yes, and you have heard them in a more refined sense with arguments on both sides in the appellate courts that you have been on.

Judge SOUTER. Yes, I have.

Senator HATCH. All right. Well, having had that experience and now sitting on an intermediate Federal court, the highest court under the Supreme Court of the United States, could you describe for the committee the process by which you have reached your decisions in cases as they come before you? It is a generalized question, but I would like you to give us the benefit of how you go through deciding these cases.

Judge SOUTER. Well, do you want me to refer to the trial court experience as well as appellate court?

Senator HATCH. No, just the appellate experience I think would be fine at this point, since it is closely parallel to the Supreme Court experience I hope you will have.

Judge SOUTER. Well, the process is one which helps to discipline the mind as we go through it. I will leave aside the question of determining whether there should be discretionary review in a given case and start with the point at which the case is docketed before the court.

In the normal course, sometime in the month before the case is going to be argued, we get a set of briefs. My practice would be usually in the week or the weekend before the argument to read those briefs through, to make notes on the covers of the briefs of questions that I want to ask. And also, as a matter of curiosity, to try to settle a lawyer's argument, I engaged in a practice for the last couple of years of trying to get some sense in a way that I could measure of the effect of the oral argument on me, which would come after the briefs had been read.

What I would do after I had read the briefs and noted the questions that I knew that I wanted to ask counsel, I would make a notation on my docket list, which I kept in my own file, of what I thought was the strongest position at the time, a kind of first, even prestraw-poll indication of where I thought I might come out on the case.

Following the oral argument in the case, I would then compare my determination after oral argument with that first indication that I had put on the docket list. One of the things that I wish I had done before I came down here and I didn't think to do was to try to go down to my chambers and pull out my old docket lists and tabulate those points at which I had had some change of decision from the preliminary to the postargument decision. But I did change my mind in enough cases so that I remember there are enough little x's in the margin to indicate that the second look after argument suggested something that the first look before argument had not, to indicate to me that oral argument was a matter of substantial importance to me in deciding cases.

I would then, following that oral argument, of course, go through a preliminary discussion of the case and a preliminary vote with the other justices. We would decide how the case probably would come out, and the case in the New Hampshire Supreme Court would be assigned randomly. And if I got the case, I would then start working on the opinion.

The way I happen to work on opinions was to ask a law clerk whom I would assign to that particular case to draft an opinion which followed a rough outline that I would give the clerk of the points that I wanted to cover and the basic reasoning that I wanted to go through. What I wanted the clerk to do was not to write me an opinion which I was necessarily going to use—because, in fact, on the New Hampshire Supreme Court I never did use a clerk's draft ultimately. What I wanted the clerk to do was, in effect, to make the run-through, help me with the research, reduce down the amount of reading that I personally had to do of the most important authorities, and to give a further preliminary look at whether there was some flaw in our reasoning that I was not catching or that the other judges in the majority with me were not catching.

After I would get the clerk's draft back—we may or may not have argued about it in the meantime. But after the clerk's draft came back, I would then work my way through the briefs again. I would read the portions of the record sent up to us that were germane to the decision. I would then go through my own research process of rereading cases, even though I might think I was familiar with them, that the parties had relied on.

At that point, I would make a final assessment myself as to whether there was any reason to change my view from what it had been when the court voted. If there was, I would either go back to the court or I would draft an opinion indicating the change and circulate that and explain why I was doing it. If there was no change, I would then write my own opinion. I would revise it an unfortunate number of times. And then I would let the clerk have a go at it again, and the clerk would try to tear it to pieces. Usually, another clerk would review it then, and ultimately it would circulate to the rest of the court, at which point I might or might not be in trouble. But that was at least the process that I went through up to there.

Senator HATCH. Well, that is good. I have other questions I would like to ask. I have about 10 minutes left, but I think I will just reserve that time and we will move on from here. But thank you, Judge. It has been great to be able to ask a few of these questions.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. I think it may be appropriate now for us to take a short break. But before we do, let me ask my colleagues to think about it while we are on break. We have 2½ hours' worth of questioning left. I indicated we would stop around 6 o'clock, which is my preference this evening. But I would like my colleagues to think about that, and we will come in in the morning, and those who haven't had their first round would start off when we started in the morning. But I would just like to ask my colleagues to think about that while we take a break.

We will have a recess until 4:30, at which time we still start promptly at 4:30.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Judge, would you like a soda or some coffee or anything?

Judge SOUTER. No, I am fine. Thank you, sir. I was offered anything I needed out back.

The CHAIRMAN. We have done a little bit of a check here and I think this is consistent with my colleagues and the White House, I think we are all in agreement, which we usually always are. [Laughter.]

That is that this is how we will proceed. I checked with the ranking member, Senator Thurmond, because we do not do anything he does not agree to, and this is what we will do: We will go next to Senator Metzenbaum, then to Senator Simpson, and then to Senator DeConcini, and we will stop after Senator DeConcini, and by that time we will have a consensus.

Is there a preference when you wish to convene tomorrow morning, somewhere between 9 and 10? Before we close out, I will have that, because a lot of the press are asking. I do not—and we have discussed this—I do not intend to go late tomorrow afternoon. We will go into the middle of the afternoon, to the 5 o'clock area, but it will not be a late night tomorrow, and I expect, based on that, as we indicated before, have a reasonable prospect of finishing up early Monday and then begin with our witnesses, but we will see from there.

Again, I thank you. You obviously have one advantage that most witnesses do not have, Judge. You are accustomed to sitting for a long time, and you—

Judge SOUTER. That is the third lesson I learned as a judge. [Laughter.]

The CHAIRMAN. You do it with great aplomb, your physical constitution as well as your understanding of the Constitution are matched.

Judge SOUTER. Thank you, Mr. Chairman.

The CHAIRMAN. Now, let me turn to my colleague from Ohio Senator Metzenbaum, for his questioning.

Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Souter, I want to focus on your view of really what is at stake in the abortion debate. Now, we write the laws in Congress, the Court interprets the laws, but we all must be aware that the laws affect the personal lives and the hopes and the dreams of the people who must live with the laws we make.

I want to start to talk with you on a personal level, not as a constitutional scholar nor as a lawyer. This year, I held hearings on legislation that would codify the principles of *Roe v. Wade*. I heard stories from two women who had had illegal abortions prior to 1973. They were women about your age. They told horrifying stories.

One woman was the victim of a brutal rape and she could not bear raising a child from that rape along side her own two children. Another woman, who was poor and alone, self-aborted. It is a horrible story, just a horrible story, with knitting needles and a bucket.

I heard from a man whose mother died from an illegal abortion when he was 2 years old, after doctors told her that she was not physically strong enough to survive the pregnancy.

I will tell you, Judge Souter, that the emotion that those people still feel, after more than 20 years, is very real, sufficiently strong to have conveyed it to those of us who heard their testimony. Each woman risked her life to do what she felt she had to do. One of those women paid the price.

My real question to you is not how you would rule on *Roe v. Wade* or any other particular case coming before the Court. But what does a woman face, when she has an unwanted pregnancy, a pregnancy that may be the result of rape or incest or failed contraceptives or ignorance of basic health information, and I would just like to get your own view and your own thoughts of that woman's position under those circumstances.

Judge SOUTER. Senator, your question comes as a surprise to me. I was not expecting that kind of question, and you have made me think of something that I have not thought of for 24 years.

When I was in law school, I was on the board of freshmen advisers at Harvard College. I was a proctor in a dormitory at Harvard College. One afternoon, one of the freshmen who was assigned to me, I was his adviser, came to me and he was in pretty rough emotional shape and we shut the door and sat down, and he told me that his girlfriend was pregnant and he said she is about to try to have a self-abortion and she does not know how to do it. He said she is afraid to tell her parents what has happened and she is afraid to go to the health services, and he said will you talk to her, and I did.

I know you will respect the privacy of the people involved, and I will not try to say what I told her. But I spent 2 hours in a small dormitory bedroom that afternoon, in that room because that was the most private place we could get so that no one in the next suite of rooms could hear, listening to her and trying to counsel her to approach her problem in a way different from what she was doing, and your question has brought that back to me.

I think the only thing I can add to that is I know what you were trying to tell me, because I remember that afternoon.

Senator METZENBAUM. Well, I appreciate your response. I think it indicates that you have empathy for the problem. In your writings, as a matter of fact, you reveal real empathy for those who are morally opposed to abortion.

For instance, in 1986, as a State supreme court justice, you wrote a special concurrence in a wrongful birth case called *Smith v. Coat*, outlining, in your words, how a physician with conscientious scruples against abortion—this is a quote:

How a physician with conscientious scruples against abortion and the testing and counseling that may inform an abortion decision can discharge his professional obligation, without engaging in procedures that his religious or moral principles condemn.

As a matter of fact, that was sort of dictum. That was dictum in the case, it was not necessary.

As attorney general, you filed a brief in *Coe v. Hooker*, which emphasized that,

Thousands of New Hampshire citizens possess a very strongly held and deep-seeded moral belief that abortion is the killing of unborn children.

That brief went on to conclude,

It is not accurate to say that the moral feelings of other individuals and groups, both public and private, may not constitutionally interfere with a woman's otherwise unrestricted right to decide to have an abortion.

I start off saying it is not accurate to say that. Now, you obviously indicated a concern for the doctor with conscientious scruples against abortion, you indicated your concern about feelings of individuals and groups, both public and privately. My concern is do you have the same degree of empathy for the woman who must make a difficult decision when faced with an unwanted pregnancy. That is really the thrust of my concern, and I think the thrust of the concern, frankly, Judge Souter, of millions of American women, not really wanting to know how you will vote on a particular case, but wanting to know whether you can empathize with their problem.

Judge SOUTER. If they were to ask me whether I could, I would ask them to imagine what it was like to be in that room that fall afternoon that I described to you. That is an experience which has not been on my mind, because it has not had to be, but I learned that afternoon what was at stake.

I hope I have learned since that afternoon what is at stake on both sides of this controversy. You mentioned my opinion in the *Smith v. Cody* case. I do not know whether that was dictum or not. I did not think it was at the time.

What I thought I was addressing at the time was as moral dilemma which had been created not unnecessarily, but which had necessarily been raised by the majority opinion of my court.

If I were to generalize from that concurrence in *Smith v. Cody*, it would be that I believe I, indeed, can empathize with the moral force of the people whom I addressed, and I can with equal empathy appreciate the moral force of people on the other side of that controversy.

Senator METZENBAUM. My staff just points out to me that each year almost 3.5 million women face that problem of an unwanted pregnancy, much like the woman that you mentioned.

Everybody talks about *Roe v. Wade* as a case. I do not think of it as a case. I think of it as those witnesses who came before my committee. I think of it as women generally. I think of it as my own daughters, who are married, and I can imagine a situation where they might need to have or want to have an abortion. Other women less fortunate than they would not be able to go to a different State, if there were no law.

I think about what would happen if there were no constitutional protection, and I ask you not how you vote on the case, but what are your thoughts as to what would happen to those women in this country who might be able to go, if they had the money, to State x, but not get an abortion, not be able to stay in State y, because that State prohibits abortions.

My concern is what does Judge Souter think about this moral, and it goes beyond being a moral question, it becomes a really heart-wrenching decision that actually goes beyond morality, it goes to the very heart of living, the kind of living that people experience.

Judge SOUTER. I think I have to go back to something that I said to all of the members of the committee when I was speaking at the very beginning, before my testimony this afternoon.

If I have learned one thing, I have learned that whatever we do on any appellate court is not, just as you said it was not, just a case. It affects someone and it changes someone's life, no matter what we do.

One of the consequences undeniably of the situation that you describe would be an inconsistency of legal opportunity throughout this country. Some States would go one way, others would go another. Some would fund abortions, some would not fund abortions. There is no question that that is a consequence that has to be faced.

I do not think that, any more than any other given fact, as tragic as that fact may be, is sufficient to decide a case. We can never decide a case totally that way, and I know you are not suggesting otherwise.

But you remember what I said is the second lesson that I learned as a trial judge, that knowing that any decision we make is going to affect a life and perhaps many lives, we had better use every resource of our minds and our hearts and every strength that we have to get it right. It is the imperative for conscientious judging.

Senator METZENBAUM. Judge, I think you are a very sincere man and I think you are a very moral man. What is bothering me, maybe some others as well, is that you have already expressed concern for the conscientious scruples of physicians in connection with abortion, you have expressed concern for the moral feelings of others in connection with abortions.

The real concern is, would the conscientious scruples of a physician or the moral feelings of others override a woman's decision when and whether or not to have her child.

Judge SOUTER. There is no question that the decision about the future of *Roe v. Wade* does not rest upon an assessment of a physician's moral scruples. The issue of *Roe v. Wade* is one which, as you know, on the merits I cannot comment on.

But there is one thing that I can say, and I do not know how else to say it, is that whatever its proper resolution may be, it is an issue. It is not simply a label for one view, whether that view be in favor of continuing *Roe v. Wade* or in favor of overruling it.

You are asking me at this point have I demonstrated, can I point to something on the record that demonstrates as kind of equality of empathy on either side, and I think the only thing that I can, without self-serving rhetoric, say to you is I have talked and I have counseled with someone on the other side.

I have been the trustee of a hospital which has opened its facilities to people on the other side, people who did not agree with these conscientious doctors, and to the extent that I have a record that goes behind the legal issue in the case, I think you may properly look to that. And you may properly ask, and I hope you will ask yourself, as you and the other members of this committee listen to me over the course of the next few days, you may properly ask whether, on other issues generally, I am open enough to listen.

What you want to avoid is a judge who will not listen, and I will ask you when these hearings are over to make a judgment on me as to whether I will listen or not. I think I have a record as a judge which indicates that I will, and after you and the other members of

this committee have finished examining it, I will ask you to judge me on that basis.

Senator METZENBAUM. We will.

In *Griswold v. Connecticut*, Justice Douglas articulated the very important privacy concerns that were at stake if Connecticut fully enforced its anticontraceptive statute. He asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." This idea is obviously repugnant to everyone.

Surely, the Court has to concern itself with the problems of enforcing statutes regulating reproductive rights. The Court must be willing to reap what it sows, if it overturns *Roe* and permits States to once again criminalize abortion.

I do not have to tell you, until last November, what was occurring in Romania, the draconian regime, the manner in which they enforced their criminal abortion laws, each month police would enter factories to examine women to determine if they were pregnant. No question, that would not happen in this country.

Romanian women who had miscarried were interrogated to make sure they had not had an abortion. We know that will not happen. But if the Supreme Court were to overturn *Roe* and a State passed a statute criminalizing abortion, would it then be constitutional to put a woman in jail for obtaining an abortion?

Judge SOUTER. I think the only answer to that, Senator, is a reference back to the laws that preceded *Roe*. We know that in my own State there were misdemeanor statutes on the book for procuring an abortion. And it was exactly such statutes as that that *Roe* rendered unenforceable.

Senator METZENBAUM. Excuse me, I did not mean to be rude.

Judge SOUTER. I was going to say it was exactly such statutes as that that *Roe* rendered unenforceable.

Senator METZENBAUM. Now, according to news reports at the time you were attorney general, you opposed repealing New Hampshire's criminal abortion statutes which had been passed before *Roe v. Wade*.

The legislative archives of the bill that would have repealed the criminal statutes contain a memorandum from the attorney general's office outlining the effects of *Roe v. Wade*. Although it is unclear when the memo was written, it was likely written soon after *Roe* was decided in 1973, although I am not certain about that.

At that time, you were deputy attorney general. The memo concluded that "the effect of the Supreme Court decision is to invalidate RSA 585:12, 585:13, and to make RSA 585:14 a nullity."

Are you familiar with that memo?

Judge SOUTER. I do not recall the memo, no.

Senator METZENBAUM. Did you agree then, or do you believe now that the Supreme Court's decision in *Roe* rendered the New Hampshire criminal statutes unconstitutional?

Judge SOUTER. The fact is I cannot give you a categorical answer to that. To begin with, it is an issue that I have not even given thought to for, I guess, 17 years and I do not recall the extent to which I may have been aware of that memorandum at the time.

The further reason for the difficulty and a categorical answer is that you may recall that there are questions about the effect of *Roe*

or the *Roe*-type decisions depending on the form of the State statutes in question.

Now, I am going to say something from memory and it may be inaccurate, so I want you to take it with that disclaimer. But my recollection is that the Court's indication of the enforceability of the statute in *Roe v. Wade* was different from its indication of the enforceability that came out of *Doe v. Bolton*.

Quite frankly, Senator, without a reexamination of precisely what they were saying on whether the statute remained partially enforceable to the extent allowable under *Roe v. Wade* as opposed to becoming totally unenforceable, I would have to go back and reread those carefully and parse the New Hampshire statutes, which I have not done.

It is—in one sense I think we are inclined to say, well, that ought to be an easy question, and I do not think it is an easy question.

Senator METZENBAUM. I will change the subject.

The day after President Bush nominated you to the Supreme Court, White House Chief of Staff John Sununu called in an advocate for the right, conservative movement and said that you would—to assure him and the right, that those on the right would be very happy and that Bush selected you over better known conservatives. He called a man by the name of Pat McGuigan. Mr. McGuigan works for or is involved with something called the Coalitions for America; Paul Weirich, national chairman; Eric Licht is the president; library, court/social issues; Stanton, defense and foreign policy; Kingston, budget and economic policy; 721 Group, judicial and legal policy; Siena Group; Catholic Coalition; the Omega Alliance; Young Activist Coalition; Resistance Support Alliance; Freedom Fighter Policy; Jewish Conservative Alliance.

At that meeting, according to the memo that Mr. McGuigan then wrote to Paul Weirich and a number of others, it was stated that Sununu asked, how are you doing? I replied, well, John, you guys could have hit a home run if you had picked Edith Jones, a Texas judge. Instead, you hit a blooper single which has barely cleared the mitt of the first baseman who is backpedaling furiously and almost caught the ball.

Sununu smiled and replied, Pat, you are wrong. This is a home run and the ball is still ascending; in fact, it is just about to leave Earth orbit.

It was not too long after that the Coalition for America announced they were fully supporting your nomination. That original memo that I mentioned specifically provided that there were to be absolutely no leaks allowed.

Judge Souter, what does John Sununu know about you that we do not know? Can you tell us what conversations you have had with him or with others at the White House either before the nomination or since the nomination concerning any matter of issues, points of view, that make it possible for Mr. Sununu to say that it is a home run; the ball is still ascending?

Judge SOUTER. I have never discussed the issue in question with Governor Sununu. After Governor Sununu came to Washington, I did not see him until one day last December. I think it may have been around the 11th or the 12th. I was in Washington that day in

connection with the nomination or the possible nomination to the court of appeals.

The Governor invited me to lunch and I did have lunch with him. We did not discuss any substantive issue that his memorandum referred to. We largely, as I recall, talked politics in New Hampshire. I did not see the Governor again until the day before this nomination.

I did not have discussions with him on the issue that you referred to.

Senator METZENBAUM. How about on other issues? Did you discuss other issues with John Sununu, or others at the White House or connected with representing the White House?

Judge SOUTER. I was going to just try to establish how far back in time we want to go with Governor Sununu.

Senator METZENBAUM. I did not mean to interrupt you.

Judge SOUTER. No. I just wanted to know how far back you want to go in time? To the beginning?

Senator METZENBAUM. Well, anything that would give him sufficient knowledge to this kind of assurance and to call in the representatives of the far right and to assure them that you are going to be OK.

Judge SOUTER. I have not discussed that issue or given any assurance to Governor Sununu.

I presume that Governor Sununu was drawing a conclusion based on what he understood to be principles of judging. But I can assure you that I gave no assurance to him at any time on that matter. And I did not discuss that matter with him at any time.

Senator METZENBAUM. Did you have any discussions with him or any other persons at the White House concerning issues that may or may not come before the Supreme Court?

Judge SOUTER. The only discussion that I had with anyone at the White House in connection with this nomination or, for that matter the circuit nomination, was my conversation with the President which I think lasted about a half an hour on the afternoon that he announced his intent to nominate me. He asked for no assurance on any subject.

Senator METZENBAUM. And at the time you were appointed circuit court of appeals judge, did anybody in the White House inquire of you concerning any of your political views, or views concerning matters that might come before the Supreme Court?

Judge SOUTER. No, Senator. The only conversation I had or conversations, I should say, plural, with anyone at the White House at that time, was during the course of the lunch that I mentioned. Governor Sununu—the lunch was in Governor Sununu's office. He was there and his assistant was there; the Governor's legal counsel, Mr. Gray, and Lee Liverman, who is on his staff.

I was not asked for any statement of position or assurance on any issue in that conversation.

Senator METZENBAUM. Thank you.

Senator Biden, how much time do I have left?

The CHAIRMAN. I do not know. You have 1 minute. That is just about enough time to call Governor Sununu, who is doing a fundraiser in Delaware for my opponent. Maybe we can get a hold of him.

Senator METZENBAUM. Do I understand that we will be in several rounds?

The CHAIRMAN. Yes. What we will do is this. We will have those Senators who have additional questions ask them tomorrow afternoon and/or Monday morning, or whatever the appropriate time is. Yes, there will be an opportunity.

Senator METZENBAUM. I do, Judge Souter, wish to inquire of you concerning church-state issues, but time obviously does not permit it at this moment. Thank you very much for responding to my questions.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Thank you, Senator.

Senator SIMPSON.

Senator SIMPSON. Thank you, Mr. Chairman.

We lawyers often are out doing our business, like correcting the record. So I did want to—you will notice Senator Biden and I this morning, as I pungently gave a comment about his quote and he pungently spliced it back together. So I thought we would just put the whole thing in because we both said exactly that, and it is in the same paragraph. And we have already had that answered, I think, now.

But it is clear that what I said and what Senator Biden said are the exact quote with regard to the specific attitude of questions. So I just wanted to get that on record, because my staff was not on vacation. They were here laboring diligently. They were not at Rehoboth or anywhere.

The CHAIRMAN. Well, mine were not in a hole clawing to get this information, or however you mischaracterized it.

Senator SIMPSON. I was talking about those poor law professors. I think that was the part I should have clarified. Diana and the staff were doing their work, but the poor law professors and the academics, they were clawing and scratching. We have to realize that they have had an arduous summer and an arduous August, without question.

Judge SOUTER. If they were reading my opinions, they were.

Senator SIMPSON. Well, we all did a little of that. In any event, your remarks when you spoke with hardly or nary a note at 2 p.m. today was very impressive. I think to me, as a person who practiced law for 18 years in really what I thought of as the real world—and it was; you know, I have represented some real weird people, and did some real weird cases with some weird results, too, I can tell you that. [Laughter.]

So the thing that impressed me is to hear you able to describe yourself and then hear you describe answers and form answers to pretty piercing questions from Senator Biden, Ted, Howard, Orrin, Strom. All of those—your answers come back with the lucidity of very impressive degree.

I have always had the peculiar view that legislating should be done in a way—as I said earlier, in a way that is understandable to the governed. And certainly I always had a view of the law practice that if your clients could not understand what you had drafted for them, what was the purpose of practicing law?

I know that is a screwy view, but it was mine. In other words, if the client did not know and looked at a contract that you had

drafted and did not know what it said, what is the purpose of the law practice?

And I think as a judge, writing opinions, what greater purpose of a judge is to write an opinion that the public can understand or to answer a question in a way that the public can understand, not just from some intellectual level, but from the gut level, from the commonsense level?

And that is what has been most impressive to me—to hear you respond to these questions in a way that is extraordinarily understandable—

Judge SOUTER. Thank you, sir.

Senator SIMPSON [continuing]. And showing, in a hackneyed word in these times, sensitivity and empathy. I know my friend, Howard Metzenbaum and I know my friend, Ted Kennedy, and we get to know each other pretty well in 12 years, and Joe Biden and Orrin Hatch and all the men at this table, and our fine ranking member. And we do know each other pretty well after 12 years and going through these kinds of exercises. We have been through some grinders here.

The Bork thing was extraordinary in its, you know, intensity, in what occurred, and I do not see any portent of that at all here. Yet, my friend, Ted Kennedy, speaks with power as he gets into those issues of—he and I are chairman and ranking—and it was more fun when I was chairman and he was ranking, but we have done tough work together on immigration, refugees, things filled with, I often say, emotion, fear, guilt, and racism.

None of us on this panel are racists. I do not know any racists in the U.S. Senate. So it is always something that when you bang around the edges of it, you almost want to ask the question, David Souter, Are you a racist?

Judge SOUTER. The answer is, no.

Senator SIMPSON. A crazy question to ask, is it not?

Judge SOUTER. Well, far be it for me to say that a question from you, Senator, is crazy. [Laughter.]

Senator SIMPSON. No, do not. Just stop right there.

Senator HATCH. But we all agree.

Senator SIMPSON. Do not listen to them, just go ahead.

Judge SOUTER. In a way, I think that answer might have been impressive to some people if I had grown up in a place with racial problems, and some people have pointed out that I did not. The State of New Hampshire does not have racial problems.

So you can ask, well, what indication is there, really, as to whether you mean it or not. And you did not provoke this thinking on my part by your question immediately because I thought of it before I came in here. I can think of two things to say.

The first is something very personal and very specific to my family. In a way, it surprises me when I look back on the years when I was growing up that never once, ever in my house that I can remember did I ever hear my mother or my father refer to any human being in terms of racial or ethnic identity. I have heard all the slang terms and I never heard them in my house.

Now, as much as I esteem my family, I do not want to try to make them a race of saints, but the fact is, in that respect, they

were perfect. They were perfect in some other ways, too, but they were in that respect.

And if there is a kind of homely vision for America, in my mind, it is simply the vision of my home. And I have lived long enough and I have lived outside of my home long enough to know what the difference is. I am glad that I am conditioned by my beginnings and I am glad that I do not have to overcome them. I am glad that I can have an aspiration for America which is as good as the circumstances that I came from.

Another thing that occurred to me, and it is equally personal—and I think that I will not offend the two people involved by saying this—two of my closest friends in this world are sitting in the row behind me. You have already heard from Warren Rudman. I heard Warren Rudman talk about what it was like to be discriminated against when he was a kid because he was Jewish. Somewhere out there, there is somebody who is discriminating against a friend of mine who is close enough to me to be a brother.

And there is another friend of mine in that category in the row behind me; you haven't heard from him today. His name is Thomas Rath. I can remember Tom Rath telling me once years ago—I don't know why, I don't know how it came up. I remember him telling me about his grandparents, and his grandparents remembered the days when there were help-wanted signs up around the city of Boston that said "No Irish need apply." And that meant them.

So if you want to know whether I have got the vision, if you will, behind the answer to my question, I will be content to have you look to my friends.

Senator SIMPSON. Well, I come from Wyoming, and people think that I don't have the sensitivity about race. I remember I was at a baseball game with Coretta Scott King. It was the World Series in Kansas City several years ago, and she said, "I don't know much about baseball." I said, "Coretta, you will when I finish with you."

So when we finished the game, she said, "Now, I want to ask you what you know about racism in Wyoming. And how many blacks are there in Wyoming?" I said, "Well, probably less than 1 percent. I have a large Hispanic population of 11 to 12 percent or something of that nature, and a native American population." Funny how you can be from a small area and somehow be known as not sensitive enough. I don't know what that is, but it is not real. And on the immigration reform business, was I sensitive enough to Hispanics? I don't know. Three million of them have come forward under that bill, and they are now no longer living in some illegal subculture, and that just pleases me immensely—Hispanics and Germans and everybody else, all the way up and down the line. So it isn't just one.

This is a line of questioning that destroyed Robert Bork because all he had done was be a judge on a Federal district court, just like you, for 5½ years, and he did 106 opinions, and 6 of his dissents became majority opinions of the U.S. Supreme Court, and he was never overturned. And he was turned into a racist right here—in a different room—also a sexist, also a violator of the bedroom, also a sterilizer of women. That is what happened right here. I was here. You don't have to like him or not. You don't have to get into anything else. That happened.

So, you know, that is something we must be very careful about. That is not a good trait for any of us to say that somehow if someone does not agree with our views they are somehow, you know, racist or poll taxers or whatever or whatever. And that was uncomfortable. I didn't mean to drag that out, but it was all false. There was nothing in the background of the man that proved up one bit of it, and that is pretty tough stuff. That could happen to any of us.

We saw John Tower, you know, with ballerinas dancing on pianos and things that were all fake. We had to go look at the FBI report on our colleague and found that witness T-4 said this. I said, "Who is T-4? Some disgruntled former somebody?" And that could happen to each one of us.

That is what this committee, I think, should pride itself on, and we do pride ourselves in trying to assure that we do it right. I think we are going to do it right.

The issue of abortion, that was a powerful, powerful response to my friend from Ohio. Those were not only eloquent answers; the questions were eloquent by Howard Metzenbaum. And he and I don't always agree, but I do enjoy that ornery rascal. And he is as spirited as I am in his causes, and I have enjoyed him in many ways. And the thing that—I guess I could almost ask that same question just the way he did. I really would, because it comes from real life.

What we are dealing with here are real live people. I went through the abortion debate in 1975 when I was a State legislator. It was one of the most grueling, powerful, impressive debates of the State legislature that I had ever been involved in. From that and from my practice, I came to the determination that a woman should have the choice, and that I as a man and especially as a male legislator—a spouse would be different. That would be a whole new scenario God knows one would never want to go through. But as a male legislator, what was I even doing in the decision process, especially with, you know, a woman I remember—since we are speaking in some rather powerful little personal reminiscences of the woman who sat there and said, "I have five marvelous children, and now I know that if I am going to have the next one and I am pregnant, I am going to lose my mind. And I am here because you are a lawyer, and I am asking you what I should do."

You know, I sat for over 2½ hours with that lady, and she eventually made the decision to do that. And she also said that she, as I said, would destroy herself. She did not destroy herself. I had yet another situation that did destroy herself in that situation. So, really, it is so unfortunate that we get into this issue of extremism on both sides of this issue.

In any event, there are two or three things that I would say, and then I do have a question. But I think you have said several times in just this short day that all activities and decisions and the things you have done as a judge or a lawyer, you have realized that the most paramount feature of it is that it has some impact on another life, somebody's life, some other person.

Judge SOUTER. Yes, sir.

Senator SIMPSON. And that is your deep feeling. You have said that.

I would like to ask you a question. What else have you done in that little community where you grew up and where you practiced and what you did to tie you closer to the human condition? You have talked about a hospital board. You talked about these other things. What is it you are most proud of in the things you have done that would disclose the man I think that the American people are seeing here today? You have given us some. Who are you?

Judge SOUTER. If I had to pick one thing—you have already mentioned it—it would be that hospital board. It was like a second occupation for me. I went on it the way lots of people went on it. Somebody asked me to go on it. You say, well, why do you do it? Why do you do any of those things? You do it because you are paying your dues. You are in the group that is lucky. And the people in the group that are lucky have got an obligation to pay it back. And so we go on boards like that.

Then the activities start taking sort of lives of their own. I went on in an unassuming way. I was a quiet trustee for a couple of years. Sooner or later, it became obvious that we were outgrowing a building, and in kind of an innocuous way, a lawyer who was a mentor of mine said, "Well, why don't you go on the planning committee and just make sure we don't do something foolish?" And I said, "Well, yes, I will do that."

By increments, by short steps, I finally found myself back in the years when I first went on the superior court as the chairman or, as we called it, the president of the board. And I saw all sorts of conditions of people in doing that. We dealt with a regulatory bureaucracy because we could no longer just go out and build what we thought we needed. We dealt with a health care bureaucracy because whatever we built was going to affect the cost of health care throughout the State of New Hampshire. We dealt with the fact that there were people out there who did not have health insurance and who might or might not be eligible for governmental health benefits.

Once a year, we all trotted around to the town meetings. I remember standing up in the town meeting of my town telling how much money the hospital had given away in free care in that town every year because there was a neighborhood tradition around there that the towns would chip in to offset the costs that the hospital would otherwise have to drain out of an endowment or recoup by raising rates to the people who did pay. So we all knew exactly what it was costing. We knew what it was costing our neighbors. We knew what health care was costing the people who couldn't pay for it. We knew what it was going to do to the cost of health care throughout the State when we had to build a building. And we finished, ultimately we finished the job.

I am glad I did that. There are many other things, I suppose, that I might have done that would have given equal satisfaction. The reason it gave satisfaction I think is simply that in ways I never dreamed it would it was paying the dues. And I had a lot of dues to pay, and I got a chance to pay them.

Senator SIMPSON. And you paid those dues not only through that service but through pro bono activities, some of which you have described earlier today.

Judge SOUTER. I did some back in the time when I was in private practice. Of course, I couldn't do that as a public lawyer.

Senator SIMPSON. Well, I have just a few minutes left, and I had a great temptation to ask about an issue. But since I have been railing about that most of the day, I can't really do much of that, but I will. That is the issue—here is the kind of tough stuff I would love to get into, but I think that you can see that 1 year with one nominee we will want to ask a lot of specific questions, and 1 year with another nominee we won't want to ask any. And we have all done that. I could bring out the quotes, seeing my friend from Massachusetts. But how about gun control? See there, there is one.

There is a sign in Massachusetts on the border that says if you have a gun in your possession it is a \$100 fine. And in Wyoming you carry a gun in the gun rack of your pickup truck. Now, that is a pretty big difference in the United States, and that is the kind of thing that you are going to be dealing with. And we fiercely defend the right to keep and bear arms, and my friend from Massachusetts has an ever more intimate and personal reason why it is deeper than anything any of us have ever hit on that one. Talk about crazies with arms, versus the legitimate citizen with his arms. So there is one for you.

I guess I am not going to worry about you at all. I have read, and my President appointed you, and I think you are going to be a splendid, splendid judge. I can't wait to see you get on there with some of those others, get into some discussion. I wish we could record those. But the thing that is most critical and most important and the most exciting is that you are a listener. You are a listener, and that is the key. That is the very key.

I would have very great difficulty voting for a politician who was not a listener or a judge, if I had the opportunity—

The CHAIRMAN. I think you would have a great difficulty finding a politician who was a listener.

Senator SIMPSON. That is right. Finding one would be the tough part.

Judge SOUTER. That is why Senator Rudman and I have always gotten along so well. I listen. [Laughter.]

Senator SIMPSON. We do know the propensities of your former employer.

Senator HATCH. We do understand that, let me tell you.

Senator SIMPSON. Indeed we do. But that is so critical. And politicians need that and judges need that, and it is so important. That is impressive to me because there are people we deal with every day in this place, of either party, where you are talking to them and their eyes are just glazed over and you know they are not listening to one thing you are saying. You almost want to say, "Are you in there? Is anybody home back there? Are you just waiting to get out and get your suit boiled by the camera that is out in the hall? What are you doing?"

And so enough. But I thank you for sharing a bit of yourself and your philosophy and your sensitivity—that is certainly not an overworked word and certainly a most appropriate one—and yourself.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

The Senator from Arizona, Senator DeConcini.

Senator DeCONCINI. Judge Souter, I was not going to mention the previous nomination hearing, but my good friend—and, indeed, he is a distinguished scholar—from Wyoming brought the Bork hearing to mind. So far, I don't think anybody sees any comparison at all. For instance, with regard to the equal protection clause, Judge Bork made some very strong statements about the Supreme Court's decision banning literacy tests as a prerequisite to voting. He stated that this decision, and another which abolished poll taxes, were very bad, indeed pernicious, constitutional rulings. I haven't found any similar statements like those you have made. Judge Bork's statements were written, and he admitted that he said them. You don't have any such statements some place that we have missed over the past 5 or 6 weeks, do you?

Judge SOUTER. No, sir.

Senator DeCONCINI. I didn't think so. There is a great distinction here in these hearings as far as I see, and there was no racist approach toward Judge Bork at all—at least by this Senator, and I don't think there was by anybody on this committee. And I want that record at least explained from this Senator's point of view. There was a disagreement, a very strong disagreement, and that is what this process is all about.

Chairman Biden touched upon the interpretivist approach, you stated in a recent interview on its relation generally as to the Constitution, and you said in an interview that you are not looking for original application, but, instead, are looking for meaning.

Then, Senator Kennedy went on to the sex discrimination cases in that area, and I take it that it is fair to say, from your discussion with Senator Kennedy, that you have no qualms whatsoever about the existing three standards on discrimination cases vis-a-vis the equal protection clause that the Supreme Court has clearly laid out as the guidelines when they take up discrimination issues. Is that a fair assessment?

Judge SOUTER. That is a fair assessment. The only concern that I have expressed, and Senator Kennedy alluded to it in the course of his questioning, is whether any of us could do a better job in trying to articulate the middle-tier scrutiny.

As I said, what the courts are trying to get at, whether it be the Federal courts under the 14th amendment or the State courts under their own equal protection guarantees, is a way of approaching classifications which the law makes which is going to, in effect, weight the State's interests or channel the question of trying to weight the appropriate State interest to determine whether there is a real justification for the classification in question.

Trivial interests are not going to require tremendous overbalancing by the interests of the State. Fundamental interests do.

What the courts are doing by coming up with a three-tier test is in trying to give some structure to this enterprise, so that in each case the courts at least can begin, and particularly the trial courts, can begin by saying, all right, we know roughly what the State counterweight must be, once we know how the particular private interest is to be classified, and the concern, as I said a minute ago, with the middle-tier test—and, by the way, we use it in New Hampshire, so I have expressed this concern only in terms of the

State Constitution in my own judicial writing—is whether we can come up with some kind of a standard which is less subjective, because the experience has been that the middle-tier standard tends to shade down into the first-tier standard, and if that happens, somebody with a classification claim is going to get shortchanged.

Senator DECONCINI. Sure, and there is no reason why it cannot shake up to the highest scrutiny standard, either, is there—

Judge SOUTER. No, the—

Senator DECONCINI. Excuse me—particularly if the sex discrimination case is, as you say, fundamental?

Judge SOUTER. Well, the Supreme Court's approach to that has been—and it was described very concisely in the Court's opinion in the *Kleburn v. Living Center* case—is to indicate that there were two factors foremost in their mind in putting the sex discrimination classifications in the middle-tier category.

One was the likelihood that a classification might really have a legitimate reason behind it, a legitimate basis, and the case law, the experience with the cases coming up in the Court's view has simply been that there is greater chance that there may be a legitimate basis for some sex classification, in other words that it may not amount to invidious discrimination than would be the case in the racial area.

The second thing that the Court has pointed to and, as I recall, did in the *Kleburn* case, is the likelihood that individuals against whom there really has been a discrimination have some effective political process by which to counter it, as well. And the Court, if I understood or recall correctly, the Court's opinion, the indication was that, in the area of sex discrimination, there was more likely to be some political responsiveness than our history has shown in racial discrimination, so that is why they put it in the middle.

Senator DECONCINI. Judge, I know it is difficult to go back over all your cases—and I have read a number of your cases, a couple dozen of them during the recess—in one case *State v. Dionne*, you dissented from the majority, because you believe that the State constitution is required to be interpreted and understood strictly “in the sense in which it was used at the time of its adoption.” Do you remember that?

Judge SOUTER. I do remember that, yes, sir.

Senator DECONCINI. My concern there is with what I see as a very rigid use of original intent, at least in this dissenting opinion, and how you would apply this approach to the equal protection clause, in light of what I think is very encouraging—maybe because I agree with it—your explanation of the equal protection clause, particularly as it applies to race and sex and economics. How do you apply that particular dissenting opinion?

Judge SOUTER. Senator, I think the first thing that has to be understood about that dissenting opinion is that, whether it was written clearly or not, I referred to the test of—I believe I referred to the test of original meaning or original understanding of the terms.

I have tended to shy away from the use of the term “original intent” in describing any approach of mine. I have done so, because the phrase “original intent” has frequently been used to mean that the meaning or the application of a constitutional provision should be confined only to those specific examples that were intended to

be the objects of its application when it was, in fact, adopted. It is a kind of a—

Senator DECONCINI. Excuse me. Original intent, then, in what you are telling me is not applicable to your interpretation of the equal protection clause in the 14th amendment?

Judge SOUTER. That is exactly right. I do not believe that the appropriate criterion of constitutional meaning is this sense of specific intent, that you may never apply a provision to any subject except the subject specifically intended by the people who adopted it. I suppose the most spectacular example of the significance of this is the case of *Brown v. Board of Education*. That case, I am glad to say, we may safely say that that particular principle is never going to come before the Court in any foreseeable future in my lifetime and we can talk about it. The equal protection clause was appropriately applied in *Brown v. Board of Education*.

If you were to confine the equal protection clause only to those subjects which its Framers and its adopters intended it to apply to, it could not have been applied to school desegregation. I think it is historically accepted by people of all schools that it is a historical fact that those who proposed and those who adopted the 14th amendment never intended to require integrated schools. The *Brown* opinion itself alludes to that.

The reason *Brown* was correctly decided is not because they intended to apply the equal protection clause to school desegregation, but because they did not confine the equal protection clause to those specific or a specifically enumerated list of applications, the equal protection clause is, by its very terms, a clause of general application.

What we are looking for, then, when we look for its original meaning is the principle that was intended to be applied, and if that principle is broad enough to apply to school desegregation, as it clearly was, then that was an appropriate application for it and *Brown* was undoubtedly correctly decided.

Senator DECONCINI. I agree with you, Judge, and I think you highlight the difference between this hearing and the discussion that we have had with other nominees who have been here, some of whom have been approved and some that have not. You deal with the principle of the equal protection clause, and not its original background. As you pointed out, you cannot find a justification to apply the clause to segregated schools if you apply original intent.

Judge SOUTER. That is true.

Senator DECONCINI. Let me ask you this, Judge: Justice O'Connor in a case, *Mississippi University for Women v. Hogan*, stated that sex-based classification should be subject to the same standard of review, regardless of whether they harm women or men. Would you agree with that, in general, not with the *Mississippi* case, particularly, but—

Judge SOUTER. I can think of no reason to disagree with it.

Senator DECONCINI. Thank you. I read that case carefully and I was impressed with the logic and the writing of Justice O'Connor in analyzing that and coming to that conclusion, and I am pleased to hear your answer.

Justice Marshall, on the other hand, has his own distinctive approach to equal protection claims that you may be more familiar with than I am. Marshall believes that the Court does not apply a three-tier approach to equal protection claims, but, rather, "a spectrum of standing as to the review." Thus, the more important the constitutional and societal weight given to an interest, the greater the scrutiny that should be applied. How do you approach that Marshall thesis?

Judge SOUTER. Well, there is no question about the correctness of the proposition, that the more significant the interest, the greater societal counterweight would be required to justify an interference or an abridgement of that interest.

I think the question which this kind of a debate raises is whether it is useful to identify three places on the spectrum as a convenient basis for classification, and those who want to retain, as it were, the whole spectrum approach I think are saying to us in so many words, you are applying instruments that are too blunt when you try to identify just three points and say everything has to fit into one or the other of these three slots.

I will confess that I have not come to the point, even though I have worried sometimes about whether we were articulating the middle-tier test as well as could be done, and maybe we are, but even though I have worried about that sometimes, I have not gotten to the point of saying we ought to scrap the whole notion of three tiers and just take, in effect, every issue as an original balancing issue in the first instance.

Senator DECONCINI. But do you agree that the intermediate or middle test is not satisfactory for all of those cases that come before that seem to fall into that area, that you need to look at that middle tier more carefully and more on a case-by-case basis, to see whether or not that is really applying the equal protection clause in the manner of the history of that clause and its interpretation?

Judge SOUTER. Well, I am certainly satisfied that it would be too blunt a set of instruments, just to have one test at the bottom and one test, if you will, at the top.

Senator DECONCINI. I get a feeling from the little bit I have read of Justice Marshall that he has the same quandary you do about that intermediate or middle test, that he is concerned that it falls down, instead of falling up.

Let me turn to another subject, Judge. Over the last few terms of the Supreme Court, almost 50 percent of the Supreme Court cases have involved issues of statutory interpretation. Your judicial experience has been in a State court, so you have not had much exposure to cases of Federal statutory interpretation, and that is why I would like to ask a few questions.

I did notice in the committee's questionnaire, you stated,

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.

Based on that response to what extent do you believe the legislative history should be taken into consideration, if you were sitting

on the Supreme Court interpreting a statute passed by the Congress?

Judge SOUTER. Senator, I am very much aware, in answering or in approaching an answer to that question, about the great spectrum of evidence that gets grouped under the umbrella of legislative history. It seems to me that the one general rule—and it is a truism to state it, but the one general rule that I can state is, when we look to legislative history in cases where the text is unclear, we at least have got to look to reliable legislative history.

When we are looking to legislative history on an issue of statutory construction, what we are doing is gathering evidence, and the object of gathering evidence for statutory interpretation is ultimately not in any way different from the object of gathering evidence of extraneous fact in a courtroom.

We are trying to establish some kind of standard of reliability, in this case to know exactly what was intended. And what we want to know is, to the extent we can find it out, is whether, aside from the terms of the statute itself, there really is a reliable guide to an institutional intent, not just a spectrum of subjective intent. I suppose a vague statute can get voted on by five different Senators for five different reasons, so that if we are going to look to pure subjectivity, we are going to be in trouble.

What we are looking for is an intent which can be attributed to the institution itself, and, therefore, what we are looking for is some index of intended meaning, perhaps signaled by adoption or by, at the very least, an informed acquiescence that we can genuinely point to and say this represents not merely the statement of one committee member or committee staffer or one person on the floor, but in fact to an institution or to a sufficiently large enough number of the members of that institution, so that we can say they probably really do stand as surrogates for all those who voted for it.

Senator DECONCINI. So, in looking at legislative history, I take it from that, the amount, the intensity of it, those that are associated with the subject matter are of importance in a judge's interpretation?

Judge SOUTER. Yes, indeed.

Senator DECONCINI. More so than if it can be distinguished that someone merely put something in the record, because it appeared that it was the right place to put it in, but had no history in that legislation themselves.

Judge SOUTER. Yes, sir.

Senator DECONCINI. What other sources should a judge rely on in a statutory construction case outside the statutes and legislative history?

Judge SOUTER. Well, there is a kind of, I suppose, broad principle of coherence that we look to. The fact is we so frequently speak of interpreting sections of statutes. What we are really obligated to is to interpret whole statutes. We should not be interpreting a statutory section, without looking at the entire statute that we are interpreting.

One of the things that I have found—and I do not know particularly why I learned it, but I found one thing on the New Hampshire Supreme Court which has stood me in pretty good stead, and

that is when I get a statutory interpretation issue in front of me, I read the brief, I listen to the argument. But if I am going to write that opinion, I sit down, I tell my law clerks to sit down, but I do it myself before I am done, and I just sit there and I read the whole statute. Fortunately, I do not have to construe the Internal Revenue Code, in which case I would be in serious trouble with that methodology. But within reason, I try to read the whole statute, and I am amazed at the number of times when I do that, I will find a clear clue in some other section that nobody has bothered to cite to me in a brief.

We are trying to come up with statutory coherence, not with just a bunch of pinpoints in individual sections. So, the first thing to do, in a very practical way, is to read the whole statute.

It is beyond the intent of your question, of course, to get into constitutional issues, but we do know it is accepted statutory interpretation that if we have a choice between two possible meanings, one of which raises a serious constitutional issue and one of which does not, it is responsible to take the latter, and, of course, we looked at that.

Senator DECONCINI. Judge, the term, textualism, has been used to describe a judge who attempts to limit the statutory interpretation to the text and ignores the legislative history. You explained what you do, and such an approach really fails to take into consideration, I think, the necessity—although I have never been a judge, I have certainly had a lot of association and argued enough cases where I have felt at least the judges have listened to legislative history propounded on both sides of it, maybe not always coming to the same conclusion.

The fact that the matter is passed by a legislative body—often, those of us in those bodies are not clear ourselves as to the absolute interpretation or how it is going to be applied by the regulators or the bureaucracy that must implement our statutes.

I think it is very important that you have laid out a record here. I am curious about your views as a judge who might disregard dispositive legislative history and create his own definitions. If that is a judge's final decision, would you consider that judicial activism, to ignore this discussion that we have just had?

Judge SOUTER. Well, I was going to say activism is a term that we all employ to describe the activities of any judge when we do not approve of the activities. And so given that definition of activism—

Senator DECONCINI. Let me interrupt you a minute. I do not quite agree with that definition because—

Judge SOUTER. You are probably a more principled man than I am.

Senator DECONCINI [continuing]. Sometimes a judge will come to a conclusion that might very well be activism, and I can think of a few cases that I have argued before that I was very glad that he was an activist judge, even though I profess against that, but go ahead.

Judge SOUTER. I think probably a fair bedrock of activism is at least—or example of bedrock activism is ignoring any clear and positive source, objective source of law. I think what you are de-

scribing in your example is a refusal to accept an objective source of meaning.

Senator DECONCINI. Thank you, Judge, because I think that helps me a great deal as to how I feel you will approach the constitutional questions, and certainly the statutory questions.

I want to say, Judge, you have said many impressive things today; many of them have left a very favorable impression with me. Most important to me is that you are very convincing, that you are a listener; nothing is more important in communication than to listen. That, to me, leaves me with a very good feeling about the nominee that is before us today.

Senator Thurmond touched a little bit on the principle of respect for precedents, and although I do not think he said *stare decisis*, but along that line, how does a judge treat a 5-to-4 decision differently from a 9-to-0 decision when he is asked to perhaps consider not following *stare decisis*? Have you thought about that, having sat on the State supreme court?

Judge SOUTER. Senator, I think that is one of those questions that you cannot answer in the abstract like that. If we are talking about a 5-to-4 decision that is 50 years old and has spawned a body of consistent, supporting precedent which is basically the foundation of the law that we have, the fact that it was 5 to 4 originally is a matter of small or no consequence at all.

If, on the other hand, we are talking about a 5-to-4 decision which was rendered the year before and in between there are arguably inconsistent precedents with it, then, of course, you are not going to be able to give it that much weight. I suppose the real significance of its being 5 to 4 under those circumstances is that if it were unanimous it is virtually unlikely that there would be the arguably inconsistent precedents following it.

So I just think the numbers analysis standing by itself is a misleading analysis.

Senator DECONCINI. So you would not put any more weight in a 5-to-4 decision to a 9-to-0 decision, as far as the application? Each case has to stand on its own in the history of that case?

Judge SOUTER. I would be wary of any abstract numerical principle like that.

Senator DECONCINI. What about public opinion in a judicial decision? Does that play any role in a judge's objective decision?

Judge SOUTER. Well, Senator, it better not play any role in the application of principle. We all know of decisions—there could not be a better one than *Brown*.

Senator DECONCINI. I agree with that. How does a judge—how do you, Judge, attempt to avoid that influence from the real world that you live in, as we all do—public opinion on a subject matter; that is, the abortion issue or some other issue where the polls demonstrate popular support another way? How do you attempt to mentally prevent yourself from being influenced?

Judge SOUTER. By being conscious, Senator, of the fact that you could be influenced. It is a problem like any other problem; you solve it by facing it. You face the fact that you are human and that you are subject to being pushed unless you guard against it, and you face that as a possibility. You keep it in your consciousness. And by doing that, I think you can come as close as a human being

can possibly do to eliminating that from a role in the decision which you otherwise might not even be aware it was playing.

Senator DECONCINI. Judge, let me ask you one last question for today. I am gravely concerned about the so-called litigation explosion and its effect on the working of our judicial system. In the past 25 years, the volume of court cases has increased dramatically at all levels, State and Federal courts. There were 15,000 filings in the district courts of the U.S. Federal courts in 1915; 45,000 in 1950; 120,000 filings in 1975; today there are over 275,000 filings a year.

There are 575 district judges to handle 275,000 filings; 168 circuit judges handling 33,000 filings, and 9 Supreme Court Justices handling over 5,000 filings.

The number of pending product liability cases alone has increased 257 percent in 8 years. Part of the reason perhaps is that this country has 750,000 lawyers. I am concerned, Judge Souter, and maybe you can just give us your ideas of it. I realize you do not control the Judicial Conference. That is the Chief Justice's statutory area, but nevertheless, you have had a long experience. You have seen this growth. You witnessed it. I am sure you have been under the pressure of it. What role do you see, or how do you see any changes? Do you have any, quite frankly, observations about it?

Judge SOUTER. Senator, I have not—as you know, I have not been a part of the Federal judiciary long enough to have any qualification to give a judgment about the problems of the federal system. I have virtually just arrived as a circuit judge when I suddenly find myself here.

But I know that I have gotten used to thinking about that problem in the State context from which I came. I never wrote a definitive analysis of it, but I think I have some appreciation of the complexity of it.

We tend, it is true, as lawyers and judges to be willing to stab ourselves to a degree, at least when we are really being candid, with some responsibility for the problem. We say, well, there are all of those lawyers out there bringing the cases, and the judges may say, well, there are all of those judges recognizing new causes of action that did not exist 10 and 20 and 50 years ago.

I am wary of putting very much weight to those explanations. There are, of course, instances in which liability has been expanded. Products liability has obviously grown as a preferred cause of action.

But what we overlook are two other things that have happened in the last 25 or 50 years. The first is, at least in my own State, we have got an enormously larger population. The litigation explosion in New Hampshire is, to a very significant degree, in civil matters, of course, a function of population.

One thing the State of New Hampshire, I know, has not done or tried to do seriously until recently is to try to keep up with that population explosion. The fact is the population has grown far more exponentially than rights of action have grown during that period.

Senator DECONCINI. You do not think that we should be attempting to find new avenues to address the problem, or we should just

keep up with more courts, more prisons if it is the criminal matter, and more courts to handle the civil cases?

Judge SOUTER. Well, Senator, I think what you allude to with respect to civil litigation is what might be called the good news of the litigation explosion, and that is that it is forcing not just the judiciary, it is forcing society to ask seriously in a way that it did not do 20 years ago, whether there is now a new significant class of cases which belong not just in regulatory agencies to get them out of the courts, but belong outside the adversary process entirely.

I mean, the good news is that alternate dispute resolution has become a respectable subject of concern. It is a subject of experimentation in my own State, and I would assume in every State in the Union.

Senator DECONCINI. Do you subscribe to it?

Judge SOUTER. I certainly do.

Senator DECONCINI. Thank you, Mr. Chairman.

Thank you, Judge Souter, very much.

The CHAIRMAN. Judge, the second to the last question the Senator asked about impact of public opinion—and you said you said you had to guard against it—I would respectfully suggest that you guard more closely against it when it comes from Rudman and less closely when it comes from Rath, McAulliffe, and Broderick.

Judge SOUTER. I will take that under advisement, Senator.

The CHAIRMAN. I appreciate your patience today, Judge.

We will reconvene tomorrow at 9:30 a.m.

[Whereupon, at 6:08 p.m., the committee adjourned, to reconvene at 9:30 a.m., Friday, September 14, 1990.]



# NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

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FRIDAY, SEPTEMBER 14, 1990

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:33 a.m., in room 216, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. The hearing will come to order.

Good morning, Judge.

Judge SOUTER. Good morning, Mr. Chairman.

The CHAIRMAN. Welcome back.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. We are going to begin our second round of questioning today. Judge, as you have probably discerned by now, we are a lovable bunch of people up here. All those stories that Duberstein told you about us are not true.

Judge SOUTER. I will claim the privilege on that, Senator. [Laughter.]

The CHAIRMAN. Our first questioner today will be the Senator from Iowa, Senator Grassley.

Before he begins, let me just warn the witness and all my colleagues. There is an important cloture vote at 10:15. If that vote is, in fact, going to be on time—and we are going to check about 10 after to make sure it is about to be called—rather than have a Senator start his questioning, if we are at that point, we will recess at that point, be prepared to vote, go vote, and come back immediately. That is how we will proceed unless the time begins to slide on that 10:15 vote. We don't want to be in the middle of a dialog and have to be interrupted.

Now, Senator Grassley. Thank you for your indulgence, Senator.

Senator GRASSLEY. Thank you, Mr. Chairman. I want to tell you, first of all, that I reworked my questions through the evening so that I don't think they will provoke any demonstrations from the audience. [Laughter.]

Senator GRASSLEY. Good morning, Judge Souter.

Judge SOUTER. Good morning, Senator.

Senator GRASSLEY. The morning papers, of course, are trying to confirm how well you did yesterday.

Judge SOUTER. They make me very nervous.

Senator GRASSLEY. Well, if there is any one thing that a politician in this town respects, if not, in fact, envies, it is very good press. So you have passed a very important test.

I also congratulate you again on your nomination, and I also want to thank you for the time that on two different occasions you spent with me in my office, allowing me to get to know you better. Under our system of government, our face-to-face meeting these few days is likely to be the last time any of us will be able to ask you questions. And so I hope that we can continue our dialog; not to seek commitment from you on specific cases but, rather, to more fully understand your approach to deciding these cases. And at the same time, Judge Souter—and I say this hopefully—our conversation will not only tell us more about your judicial method but will also educate the public on the role of a judge in our democratic society. So let me start with some general questions on that role.

Judge Souter, some who have spoken highly of you—and most people have spoken very highly of you—term you “a lawyer’s lawyer,” someone entirely devoted to the law and to the profession. This phrase was often used to describe Justice Cardozo, who served, as you know, on the Supreme Court in the 1930’s, after a long tenure on New York’s highest court.

I would like to read to you a passage from one of Cardozo’s most famous lectures on the nature of the judicial process. And, I would like to get your reaction to that. I quote:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. Instead, he is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.

I think I understand what Judge Cardozo said in this lecture. So my question to you is: What do you think that he meant?

#### TESTIMONY OF HON. DAVID H. SOUTER, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOUTER. I think he was referring, although most obviously to the nature of the appellate process, I think he was referring to the constraints upon the legal process which applied to it in any level, whether it be trial or appellate.

What the judicial process gives in return for the respect and the acceptance that it deserves is an assurance of objectivity, to the extent that it is humanly possible. We confront that assurance the first moment we go into a trial court. We are immediately constrained. We immediately constrain ourselves in the search for facts to make that a search for truth. The reason we have rules of evidence in trial courts is to try to bring a discipline of objectivity to what we do and what we ask the other components of the judicial system to do in arriving at a result which can be called just.

When judges function at the appellate level, if they are following the ideals of Cardozo, they are also subjecting themselves to those

kinds of constraints. There is no area, certainly, in which that constraint is any more focused and any more difficult to keep in perspective than when we are dealing with what have been called the majestic generalities of the Constitution, when we are searching for meaning which is not spelled out in easy black-letter phrases, when we are trying to construe statutes and constitutions which are not written with the detail of the Internal Revenue Code.

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

Senator GRASSLEY. Judge Souter, a recent nominee to the Supreme Court once said—and I think what this nominee said is fully consistent with the Cardozo passage that I just quoted and you responded to—and I give you this quote: “In a constitutional democracy, the moral content of law must be that of a framer or legislator, never that of the morality of the judge.”

Do you share that philosophy of judging?

Judge SOUTER. Yes. I share the demand that we look outside ourselves, the demand that we guard against simply imposing our views of morality or public policy, however passionately we may hold them and however profound our principle may be. We have not been placed upon courts, in effect, to impose our will. We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all.

Senator GRASSLEY. So when it comes to the judge’s own values and beliefs, there is little or no room for those in his constitutional interpretation?

Judge SOUTER. He has got to guard constantly against substituting his values for the values which he is sworn to uphold.

Senator GRASSLEY. If I could, I would like to discuss with you the issue of rights created by the courts. We have had heard a great deal of discussion, not only yesterday but in the past, about unenumerated rights and how they manifest themselves, whether it be a right to unlimited abortion, undefined rights of privacy, or other rights not spelled out in the Constitution. And where these other rights lead to, of course, is anyone’s guess. This past January is an example. A Federal judge went so far as to find a constitutional right to panhandle in the New York City subway. Of course, from my point of view, thankfully the second circuit overruled him.

Let me ask you, do you have any concern about Federal judges—and Federal judges are fallible human beings like everyone—creating such new rights? And I don’t refer specifically to that right to panhandle. I don’t refer specifically to those other rights that I lim-

ited in this immediate statement, just generally creating such new rights out of whole cloth.

Judge SOUTER. Well, perhaps the only amendment I would like to make to the way you asked the question is I wouldn't single out the Federal judges. The Federal judges are confronted with a problem that confronts all judges. I have spent the last 7 years of my life as an appellate judge in the state system, so I know what I speak of from the State standpoint. That is going back to perhaps my earliest exchange yesterday with the chairman of this committee in which we began the discussion about one particular unenumerated right which is enforceable through the due process clause.

As I indicated to him, I think that a fair reading of the Constitution of the United States, like a fair reading of the constitution of my own State, compels the conclusion that there were values, in the case of our discussion a value of privacy, which were intended to be protected even though they were not spelled out in black-letter detail. And the difficulty that the judges have facing that fact—if, indeed, like me they accept it as a fact—is the difficulty of finding a discipline process for giving content to what we call the unenumerated—or the category of unenumerated rights.

This has been a source of great difficulty over the years. I think at one point yesterday in our discussion I mentioned my view that the incorporation doctrine is not the answer to the problem of how we keep from roving aimlessly in this quest. It seems clear to me that the concept of liberty is not limited by the specific subjects which the incorporation doctrine by bringing, as it were, the entire corpus of the stated Bill of Rights into the concept of the liberty clause. Liberty is not so limited.

Facing this problem, judges have tried formulations, at least to give labels, if nothing else, to the enterprise that they are engaged in when they are searching for meaning and trying to put reasonable limits upon their search. One of those formulations was that the content of the liberty clause certainly includes whatever would be comprehended by the concept of ordered liberty without which liberty and justice would be impossible.

I think perhaps I have preferred an approach which I indicated without a lot of discussion yesterday to the chairman, and that was the approach which is often identified—not exclusively but identified with Justice Harlan. Justice Harlan not only sometimes invoked the concept of ordered liberty, as, in fact, I think he did in *Griswold*. But he asked us to make a search somewhat further afield than that, but quite specifically to the subject of the American tradition, and search for evidence of that understanding of what might be called a bedrock concept of liberty, which is explained and indicated and illustrated by the history and traditions of the American people in dealing with the subject of liberty.

I think my best approach to the problem of how to keep from a totally undisciplined and totally nonobjective approach to the search for meaning is very much like what Justice Harlan described. But this is a difficulty which the judges simply cannot avoid. If they accept the view that I espouse that a search for meaning and for content of the notion of liberty is necessary, then they have got to face this problem. And if they face it in the way that I do, they have got to look for some kind of objective limita-

tions that will guarantee that they don't fall into merely personal expressions of preference.

Senator GRASSLEY. Judge Souter, in a sense, we as Americans have many more rights than ever, yet, by and large, the American people feel politically powerless. I sense a paradox when I read Supreme Court decisions like *Missouri v. Jenkins* from last year, where the Court permitted a Federal judge to order the Government to increase property taxes to pay the cost of a court order. I think it is fair to say that under our constitutional system, citizens simply can't understand that a court could assume for itself the taxing powers always thought to be reserved to elected representatives in their legislature.

This is, in my view, a profoundly antidemocratic decision decided by a bare 5-to-4 majority. Of course, I am not going to ask you to comment on whether you thought this case was correctly decided, but I would like to ask you if you understand my point that when we depend on unelected and unaccountable judges for our rights, we are relying on something fundamentally antidemocratic.

Judge SOUTER. I think there is no question that one of the animations in the judicial quest for self-restraint is exactly the consideration that you have described.

Senator GRASSLEY. Judge Souter, Abraham Lincoln warned about government by the judiciary in his first inaugural address. He said this, and I quote: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instance they are made in ordinary litigation the people will have ceased to be their own rulers."

Do you share President Lincoln's fear of government by the judiciary, that sort of irrevocably fixed decisions?

Judge SOUTER. I certainly share the spirit in which President Lincoln made that remark. I think that what we have to recognize in assessing the significance of Lincoln's statement for today is some of the history that has passed in the time between when the President made that address and the time when we are living now.

The most obvious and significant fact of history for our purposes is the adoption of the 14th amendment. The President was not contemplating the 14th amendment at the time that he made that statement, and he was not contemplating—he could not possibly have been contemplating the increase in national power in relation to the power of the States, which it was the object of the 14th amendment to effect. And that was in an increase in national power not only on the part of the judiciary but, of course, on the part of the Congress, too, as was indicated in some of our discussion yesterday about the significance of congressional enforcement power under section 5 of the 14th amendment. But it is undeniable that the very fact that standards for scrutinizing State action were enacted by the 14th amendment, and made subject to judicial over-view is undeniable; that the Federal judiciary and, in fact, the State judiciary acting pursuant to the 14th amendment, assumed a power which President Lincoln could not possibly have envisioned at that time.

We not only have to accept President Lincoln's admonition; we also have to accept the responsibilities that the 14th amendment have inevitably placed upon us.

Senator GRASSLEY. It seems to me whether it is 1861 or 1990, though, the principle laid down by the President that if there is bad Supreme Court precedent—and as he used the terms, irrevocably fixed—that under our principle you can't accept bad law as a permanent fixture.

Judge SOUTER. Well, as you know, Senator, without any lecture from me, the constitutional precedent is always, in theory, subject to reexamination. Our theory of precedent tries to give some indication of the force which a given precedent should have when reexamination is requested.

Senator GRASSLEY. Judge Souter, those who advocate a greater activist role for the Court say that the broad and spacious terms of the Constitution lend themselves to Court-made solutions when the political branches fail to act.

What is your sense of this perception that the courts, rather than the elected branches, should take the lead in creating a more just society?

Judge SOUTER. I think the proper way to approach that is that courts must accept their own responsibility for making a just society. One of the things that is almost a factor or a law of nature, as well as a law of constitutional growth, is that if there is, in fact, a profound social problem if the Constitution speaks to that, and if the other branches of the Government do not deal with it, ultimately, it does and must land before the bench of the judiciary.

One of the interesting developments—and I would suggest to you without trying to indicate to you in any way the direction that I think it should go—one of the hopeful developments or the developments that give me hope is the fact that we are living at a point of history right now where there is so much concern expressed in this committee yesterday and expressed in comment throughout the legal and political community in the legitimate extent of congressional power to act under the fifth section of the 14th amendment.

Because if, in fact, the Congress will face the responsibility that goes with its 14th amendment power, then by definition, there is, to that extent, not going to be a kind of vacuum of responsibility created, in which the courts are going to be forced to take on problems which sometimes, in the first instance, might better be addressed by the political branches of the Government.

I guess the law of nature I am referring to is simply the law of nature and political responsibility, constitutional responsibility, abhor a vacuum. I have spoken to this point before and I think I alluded to it yesterday.

Senator GRASSLEY. Are you saying the Supreme Court should act because there is a vacuum there, or because there is a cause within the Constitution for the courts to act; as opposed to because the political branches have not acted?

Judge SOUTER. The Supreme Court should only act and can only act when it has the judicial responsibility under the 14th amendment or any other section of the Constitution. But the Supreme Court is left to act alone when the political branches do not act beforehand.

We had *Brown v. Board of Education* as a decision of the Supreme Court, because we had no decision from any other branch of

the Government, at any other level of the Government, facing the undoubted constitutional problem that had to be solved.

It seems to me that one of the changes we are seeing in the complex of power in this country right now is a greater willingness of the Congress of the United States to look to its authority under the 14th amendment, and for that matter, under article I, so that the Court is not left in the position of seeming to be the only guarantor of some of the very liberties that we must most be concerned with.

Senator GRASSLEY. Judge Souter, yesterday, you mentioned the ninth amendment. I understand the historical context of the ninth amendment to view it as, I suppose, somewhat of a savings or reserve clause to foreclose application to the Bill of Rights the maxim that the affirmation of particular rights implies a negative of those not expressly defined.

But at this point, I have a problem. There is a kind of "rights' industry" out there that we read about and we deal with all the time in the Congress and maybe the courts deal with it more than we deal with it. We have various groups making their essentially political claims in terms of so-called fundamental rights—whether it is people claiming an unrestricted right to taxpayer's financed abortion or an artist claiming an unconditional right to taxpayer subsidized art, or the right to, as I said before, panhandle in the New York City subways.

You are an avid reader of Oliver Wendell Holmes. Is this situation I just described perhaps what he meant when he warned that "all rights tend to declare themselves absolute to their logical extreme?"

Judge SOUTER. I think what he was getting at there, yes, I think what he was getting at is if we simply focused on one interest and the desirability of that interest alone, there is a tendency to self-development that is simply unchecked. That is why, as I said a moment ago, it is important, in my view, to approach the problem much as Justice Harlan did.

But in any event, whether by the Harlan approach or by any other, it is essential for us—as judges, who have got to declare in some objective way the extent of the interest that can be recognized—it is essential for us to have some idea of the criterion that we are going to employ to find values which are not simply reflections of our own feelings at the moment and our own feelings about the desirability of the claims that may be pressed before us.

Senator GRASSLEY. Judge Souter, when unaccountable judges rather than legislators create these rights, I would like to ask you if you could imagine how that could lead to polarization, resentment, and even bitterness among the public?

Judge SOUTER. I think the key to the response to that, Senator, is in one of the terms that you used, when an unelected judiciary creates these rights. There is a sense in which the judiciary, I suppose, particularly at the State level and dealing with common law issues, do create rights. They are dealing in areas which, by definition, the legislature has left to the courts to develop.

But when we reach the level that I think you are talking, and I know that you are referring to this morning, it is essential to observe the distinctions between the creation of rights, which implies that the Court is simply sitting there and coming up with notions

of what it thinks may be desirable, and the recognition, on the other hand, of rights which are implicit in the text of the Constitution, itself, in which it is the responsibility of the judiciary to find and to state in ways that we can understand. The difference between the creation of rights and the recognition of rights is the difference between unbridled personal preference, that knight errancy that Cardozo was speaking of, and a disciplined approach to constitutional meaning, on the other hand.

I think when the people who are, like us, subject to the decisions that ultimately appellate courts must make, have a sense that the courts are conscientiously engaged in a search for meaning, that their task is to decide what should be recognized and not what is created, that that will make and can make all the difference in the acceptance which is given to the decisions when they come down, even if they are not the most popular.

Senator GRASSLEY. Let me suggest that over the years Congress has objected probably far too little over this encroachment, mostly out of our own self-interest. After all, if we or any legislature just sit back and consciously let the courts make the tough policy decisions, of course, we can tell our constituents, blame the courts, don't blame us.

But, in my opinion, we are paying a heavy price for this sort of silent conspiracy. Having given you my opinion, let me ask you—and this will probably be my last question, because we are out of time—in your personal opinion, is the tendency to increasingly turn every tough issue into an issue for the courts a healthy development of our constitutional democracy?

Judge SOUTER. Well, it is not a healthy development for a couple of reasons. The first is that some of the issues that seem most intractable may well yield to political solutions and the kind of political judgments which—and I use politics with kind of a large "P", I guess there—that after all, it is the genius of the democratic system to entrust to elected representatives.

In the longer run, there is an even more disturbing tendency, and that is to the extent that there tends to be a vacuum of response to problems that have to be solved and to the extent that, of necessity, those problems ultimately end up before the judiciary and without having had some solution proposed by the political branch of the Government, or branches of the Government, there is a tendency, I think, on the part of all of us, and on the part of the people of this republic who elect, who appoint and who watch what is going on, to assume that the only guardians of the Constitution are the judges.

The judges have a particular pivotal responsibility in guarding the Constitution, but it is absolutely essential to remember that the judges are not the only people in our governmental structure who are sworn to uphold the Constitution and to try to make it work.

The Executive, the President of the United States, takes such an oath. All of you take such an oath. And you are, just as all of you in the political branches, are just as much responsible for making good on the Constitution's guarantees as we are in the judiciary.

For the people of this Nation to forget that that is your responsibility, as well as the responsibility of people in my branch, is a very disturbing prospect to me.

Senator GRASSLEY. Well, I appreciate the time that you have spent with me on this round. I guess in closing, I would just simply say that I see litigation as a very poor way of—because it is so blunt and cumbersome process that it is, and so adversarial, and not a very good instrument for social change. The consensus and compromise that can come through the people's branch, the legislative bodies of our society, is the proper place for that to be done. I just do not see the courts as a very good place to do that, and I hope that judges see that as well, not avoiding their responsibilities, but seeing themselves in terms of a coequal branch and with a very limited role.

Judge SOUTER. Thank you, sir.

Senator GRASSLEY. Mr. Chairman, I am done.

The CHAIRMAN. Thank you.

Let me say to our witness and to the committee, in 4 minutes we have to vote on cloture. Our staff has checked and that is still scheduled for 10:15.

My recommendation would be, rather than start with Senator Leahy, and then be interrupted four or 5 minutes into the questioning, that we recess now. I will vote and ask Senator Leahy to vote immediately when we get over there and come right back so that with a little bit of luck, by between 20 and 25 after, Senator Leahy and I, at least, will be back to reconvene the hearing.

Until then, we will recess.

[Recess.]

The CHAIRMAN. The hearing will come to order.

We have 3 hours' worth of questioning on the first round if everyone takes a half hour. We will make a judgment after we get through four, whether we will break for lunch at that point or go on and finish the first round and then go to lunch.

We will not be going late this afternoon. I have spoken with the witness' people, they understand it, I do not think they disagree with that at all, and so I think this afternoon we will probably not be going much beyond 4 o'clock, the latest 5 o'clock, just so everyone can plan their schedules accordingly, unless for some reason it was possible to finish everything, and I do not see any realistic possibility of that today, Judge, but things are flowing along smoothly. I hope you think that, as well, and we will just keep moving on.

With that, let me yield to my colleague from Vermont, Senator Leahy, for his round of questioning.

Senator LEAHY. Thank you very much, Mr. Chairman. I appreciate your courtesy in recessing for the vote, so as not to interrupt these questions.

Judge, welcome back.

Judge SOUTER. Thank you, sir.

Senator LEAHY. We have gotten word now from the chairman that the New England people can get back home this weekend.

Judge, I was struck very much yesterday when you spoke of your close friendship with Senator Rudman and Mr. Rath. I did not know Mr. Rath before these hearings. I consider it one of my privileges in serving the Senate also to be a friend of Warren Rudman.

We have traveled back and forth to Vermont and New Hampshire, depending upon where the plane stopped first. With his clout, it usually stopped first in New Hampshire.

The CHAIRMAN. Since deregulation, does it stop in either State? Senator LEAHY. Yes. [Laughter.]

He, however, had to stamp my visa while I was there and applauded me for being one of the few U.S. Senators to land in New Hampshire and not declare immediately for the Presidency. [Laughter.]

Because of my friendship with Warren, I was struck by your reaction to his experience as a young man when he faced discrimination because of his Jewish background, and Mr. Rath's encounter with discrimination because of his Irish background. It was a touching comment.

If you and the committee would bear with me for a moment, I'll tell you why: My grandfather, who was also named Patrick Leahy, was a stonemason in Barre, VT, who died when my father was only 12 or 13 years old. My father was the only male in the family and, at 12 or 13 years old, he had to go out and start looking for work which he did and worked all his life.

When he was that age, the signs in Montpelier, VT, and Barre, VT, were either "No Irish Need Apply," if they were genteel about it or if they were more direct, "No Catholic Need Apply."

I also know in my mother's family—her Italian parents emigrated to this country—faced some of the same things. Now, I like to think that in Vermont, in New Hampshire, throughout New England, those vestiges are gone and long gone. I believe they are, and I think those of us who have heard the stories know how painful it would be for those days to return. I remember the pain in my own father's voice as he told me about these stories.

I have no question in my mind of your own feelings on this issue. I do not believe—from anything you have ever said here or in the past—that there is a discriminatory bone in your body, and I think you feel, as Senator Rudman does, as I do, and as everybody on this committee does, that discrimination based on religion or race or anything else is abhorrent. The scar of discrimination occurred in our country and still occurs in some places, but it is something any of us of conscience, especially in government, should do everything to eradicate.

I would like to explore with you one particular area where such discrimination has to be hedged against and where the Constitution explicitly tries to avoid it. That is in the first amendment, in the establishment clause.

In March 1978, back when you were attorney general of New Hampshire, then Governor Thomson issued a proclamation ordering that the flag over the State capitol and flags on other State buildings be flown at half-mast on Good Friday to commemorate the death of Jesus Christ. The proclamation said, among other things, if I could just read from it a little bit:

Whereas in lands where the Christian religion prevails, and among churches throughout our land Good Friday represents a day of solemn prayer. We appreciate the moral grandeur and strength of Christianity as the bulwark against the forces of destructive ideologies, and I hereby appeal to my fellow citizens to reverently observe Good Friday. Flags flown at half-mast on our buildings will memorialize the

death of Christ on the cross, and I urge our fellow citizens to fly their own flags at half-mast and their lapel flags in a position of distress on Good Friday.

Now, in my family, in my upbringing, we always observed Good Friday, and many others do, but I question whether that should be raised to this level of State action. So, let me go into your own views of the establishment clause.

The Supreme Court has addressed this issue many times. We had the *Abington School District v. Schemp* case back in 1963, an 8-to-1 decision, in which the Supreme Court struck down statutes that provided for reading of verses from the Bible or the Lord's Prayer to begin each school day, and the Court said the State must remain neutral among the various religions and between religion and non-religion. It spoke of the wholesome neutrality the State has to maintain toward religion. It said that government action neither advances nor inhibits religion, taking the words of the Supreme Court in that case.

My question is this: Do you agree that government has the obligation, under the first amendment, to remain neutral toward religion?

Judge SOUTER. I accept that as a personal principle. I recognize that it is a principle which is subject to much ferment at the moment, in trying to delimit its contours. I recognize that there is a school of thought which has received articulation within the present Supreme Court that the establishment clause was restricted to a more limited purpose, that it was restricted to the purpose of avoiding the literal establishment of a State religion, and was restricted to avoiding the expression of preference as between sects, which I guess in an historical context would, of course, be Christian sects or denominations.

Whether, in fact, that school of thought is going to be pressed, as it were, as a claim for adoption, for a rethinking of the theory of the establishment clause, I do not know. I think we can reasonably anticipate that it will, and I think that particular position is probably going to be pressed before the Court. And I think the only thing that I could say to you with respect to that or with respect to someone who is pressing that issue before the Court is that, if I am there on any issue, I will listen respectfully to it.

Senator LEAHY. Judge, I appreciate that and I would hope that all Justices would listen to the parties' arguments and consider them carefully. But you spoke of your accepting it as a personal principle in your answer. Do you accept it as a legal principle?

Judge SOUTER. I certainly accept it as the prevailing law of the United States, as it has been, for practical purposes, during my professional legal lifetime, and I do not have at this time either an agenda or a personal desire to bring about a reexamination of that position.

The great difficulty that has come, as you know, in establishment clause cases has come from the difficulty of applying the three-part *Lemon v. Kurtzman* test, and the concerns that have been raised about that, naturally, provoke a search not only perhaps for a different test of the standard which we think we are applying today, but a deeper reexamination about the very concept behind the establishment clause.

But if I were to go to the Court, I would not go to the Court with a personal agenda to foster that, and neither would I go in ignorance of the difficulty which has arisen in the administration of *Kurtzman*.

The only thing I was going to add is, in the oft-noted conclusion that we can find circumstances in which there seems to be an opposition between the theory of the establishment clause and the theory of the free exercise clause, and we have to recognize that as a problem for the Court to deal with.

Senator LEAHY. You mentioned *Kurtzman* a couple of times. *Kurtzman*, like *Abington*, said the controlling test for determining whether government action violated the separation of church and state was the secular purpose and effect test.

Judge SOUTER. Yes.

Senator LEAHY. *Kurtzman* was also the controlling law or controlling test at the time you were attorney general, is that correct?

Judge SOUTER. Yes.

Senator LEAHY. Now, the Governor issued the proclamation, you did not. I assume that you were not involved in the drafting of the proclamation, is that correct?

Judge SOUTER. I was not involved in the drafting of the proclamation that was litigated in that case. One of the facts which I think may not appear of record, I frankly do not remember whether it does or not, is that following the original proclamation which led to the action that you refer to, the Governor revised the proclamation and he revised it to give it, to articulate a much more secular purpose to what he was doing than the first proclamation could perhaps have been read to indicate.

When the litigation arose in that case, the position taken by the U.S. district court was that the second proclamation, what I will call the more secular proclamation of which I was aware, could not be considered in determining the validity of the Governor's action, without his making a formal withdrawal of the first proclamation by essentially the same formalities or with the same degree of publicity with which he had issued the first one. So, as a result, the second comparatively secular proclamation was never a pointed issue in the district court's order.

I go into this, only because—although I do not remember the specifics of anything that was in that second proclamation. I remember well enough that there was discussion with the Governor about the fact that he was going to issue one and I probably saw the language of it before he issued it, although I do not specifically remember that.

Senator LEAHY. Judge, let me ask you this: To the extent that there was a revision, it was because the district court ordered it, is that correct?

Judge SOUTER. My recollection is that the revision took place after the district court action had been brought, but before the district court order was issued, because, as I recall the district court order, it included a determination that the district court should not take the second proclamation into consideration, unless the first had been withdrawn with the same formalities with which it had been issued.

Senator LEAHY. Without having to spend time here trying to figure out which came first and which came second, it should be fairly easy to doublecheck, and I am not asking you to remember everything that happened. This dispute moved on a fairly fast basis, as I recall in reading it, over a matter of hours and days. But we can, and I am sure you do, remember very well the basic elements.

Now, to get your views today, I ask the question: The proclamation had references to the Christian religion, reverently observing Good Friday and flag lowering. How could those be considered secular, in light of *Abington* and *Kurtzman*?

Judge SOUTER. Let me, if I may, divide my answer to that question in two, Senator.

Senator LEAHY. Go ahead, but then I may end up repeating the question.

Judge SOUTER. I was going to say, you may revise it back, but let me start, if I may, with this: I think I have to respond to two different senses of that question. The first is how could I, as counsel for the State of New Hampshire, take a position in defense; second, how would I, if I were a judge with the identical issue before me today, tend to view it? And if I may, I would like to respond to you with those two distinctions in mind.

As to the first question, my responsibility as counsel there was my responsibility as counsel in any case in which I was representing the State, speaking through the Governor, and that is was there a position which could be advanced on behalf of the position that he had taken, consistently with the law as it existed or as it might reasonably be argued that it ought to be, which was not a frivolous or wholly unreasonable position.

I believe there was and took such a position. Essentially, the arguments which the lawyers in my office made were that although there were, of course, references to Jesus Christ as a religious figure. The tenor of the proclamation was to call into mind a set of moral principles which transcended the Christian religion.

The reasonableness or the ethical appropriateness of taking this position I think is indicated by the responses which the various courts made to the action. In fact, the U.S. district court, through Judge Skinner from Boston, held against the State on that issue.

The two extraordinary points which I think should be noted, in response to your question, is, first: The U.S. Court of Appeals for the First Circuit, to which the State took an immediate appeal, in fact, I forget the precise order, but it either reversed or stayed the district court's order, and the reason, as I recall, that it did so was that the first circuit thought the issue was such a serious issue, not a simple and clear-cut thing, that the plaintiffs, in fact, had come into court with dilatory hands, and that an issue of that importance should not be decided under the gun, because it was not an easy issue to decide.

And what most concerned the court of appeals, as I recall, was the fact that the Governor had done exactly the same thing on Good Friday a year before. There had been plenty of time to litigate the constitutionality of what the Governor had done, and the plaintiffs, who were aware of what had happened the year before and likely to happen again, had not done so.

So, I took and take today the position of the court of appeals as a vindication of the one point which is most significant for my role, and that is did I have a reasonable position to advocate in that case.

What is also interesting is that, although on what perhaps was the fastest appellate action I ever knew of in practice, although the U.S. Supreme Court later reversed the court of appeals, with the effect of reinstating the district court order, the U.S. Supreme Court did so on the basis of 5 to 4, so there was real division in the U.S. Supreme Court as to whether the court of appeals had acted properly on the basis of finding that there really was a serious issue here, and this was not some clear-cut constitutional violation.

Senator LEAHY. But it was eventually found that the proclamation and lowering the flag went beyond, or did not meet the secular purpose and effect test, is that correct?

Judge SOUTER. Well, that is what Judge Skinner had found, and at the point at which the Supreme Court reversed the court of appeals and reinstated Judge Skinner's order, it was really too late to do anything about issuing new proclamations, and the case just petered out at that point.

Senator LEAHY. Using this as an example, do you believe that the lowering of the flag met the secular purpose and effect test, do you believe so today, looking back at it?

Judge SOUTER. If I were sitting as a judge today, I would probably have ruled, given that proclamation, the same way that Judge Skinner ruled.

Senator LEAHY. The reason I ask and what draws me into this is that you made reference to the fact that, as counsel for the Governor, you were upholding his position. Now, I am sure Governor Thomson had all kinds of advisers on this, and I recollect the source of some of it and some of his ideas were interesting, to say the least.

Judge SOUTER. They certainly were to me at the time.

Senator LEAHY. Yes, well, I am sure he could keep a whole office going with some of them. But one of the reasons I bring this up, Judge, is that I was struck very much by your last answer to Senator Grassley.

All of us take an oath of office. Obviously, Senator Grassley and I and every other Senator is upholding the advice and consent role of the Constitution just in having this hearing.

When I was a prosecuting attorney, every time I brought a charge, I brought it on my oath of office. My oath of office was written on the information. You had an oath of office to uphold the Constitution as attorney general.

At what point does that oath make you say to the Governor "This is not a constitutional action"?

Judge SOUTER. The point at which it is clear that it is an unconstitutional action and that there is nothing that can be reasonably brought before the Court for adjudication.

There is a great difference between the kinds of judgments which an attorney general must make when he is asked for an opinion as to what, in his judgment, is the most appropriate and most likely constitutional action, on the one hand; and when he is asked to ful-

fill his role as State's counsel when the elected representatives of the people have taken a different position.

The Governor was, in fact, elected by the people of New Hampshire and he had a role in setting State policy which was undeniable. If his view of what was constitutional differed from mine, but was subject to a fair argument in its favor, whether I would have ultimately made the same decision or not, I believe that I had an obligation to represent that position.

I think what is most important to me about that is that it is an obligation not simply because as an attorney general I was hired on as a lawyer. Part of the attorney general's and part, indeed, of any lawyer's obligation to defend the Constitution is to engage in good faith and with the utmost vigor in the process by which we hope will be sound constitutional adjudication comes about.

We will not have sound constitutional adjudication in this country if we do not have a sound and vigorous adversary system. Whether or not in any given case, I might agree personally that my client's judgment was the best judgment, whether I might agree with the ultimate conclusion as to whether it was right or wrong, my own personal belief is that, as a lawyer, I will do my best fairly and honestly as an advocate.

We have a constitutional system in this country in which we are going to get the right result. I took that position as attorney general, and I have taken that position when, in fact, in an indirect way I was being sued myself. There was a case recently that was brought before the U.S. Supreme Court about the residence requirement for membership in the New Hampshire bar. That was a requirement that was set long before I was on the court, although I had not taken any step to change it and I thought there was a reasonable basis for it.

But I can remember—after the argument was made in that case, before the Supreme Court, in which the constitutionality of a rule of my own court was in issue—I said to the lawyer who had argued the case against us that I didn't know how it was going to come out. I thought there was, in fact, good reason in the court's disciplinary responsibilities to require some kind of a residence requirement.

But, in point of fact, the only thing I was really worried about in the long run was whether the issue had been vigorously presented to the Supreme Court. I said to him that I knew counsel representing us had done so and that I knew that he had done so, and I wasn't going to worry about the result.

That same attitude that we have a valid process which is going to get us through if everyone in that process does the best possible, I think, should be part of the constitutional animation of an attorney general.

Senator LEAHY. In general principle, I agree with you and I suspect that everybody does. But there are also certain responsibilities that attorneys general, or prosecuting attorneys have because of the unique power they have and the oath of office they follow.

I can think of a number of times when I declined prosecution because I questioned whether the methods used to gather evidence were constitutional or because of other issues—that, again, were based on my oath of office.

So, let me ask you about one other case—I know time is growing short on this—again, because of the issue you raised in my mind, in your answer to Senator Grassley.

As attorney general you handled a case, *Maynard v. Wooley*, which went all the way up to the U.S. Supreme Court. That is the case in which a couple who were Jehovah's Witnesses had moral and religious objections to the State license plate "Live Free or Die" motto and they blocked it out.

They felt so strongly that they ended up being prosecuted three times. I believe Mr. Maynard served a couple of weeks in jail—15 days in jail, in fact—

Judge SOUTER. That is right.

Senator LEAHY [continuing]. Rather than compromising his beliefs. Now, when they challenged the State law under which they were being prosecuted, you opposed the Jehovah's Witnesses.

The Supreme Court, in an opinion written by Chief Justice Burger in favor of the Jehovah's Witnesses, held that the first amendment prohibited New Hampshire from requiring these people to put the State motto on their license plate.

In fact, the Chief Justice said, "The first amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."

But in your brief, you dismiss the actions of the Jehovah's Witnesses as "bizarre behavior" and as "pure whimsy," even though they had been willing to go to jail for their beliefs.

So my question is: Without relitigating that particular case, what is your view of Chief Justice Burger's statement about the first amendment as protector of the rights of minorities, even very small minorities, who hold views different than the majority?

Judge SOUTER. There is no question about its correctness. There was no question about its correctness at the time of *Maynard v. Wooley*. The first amendment would be worthless if that were not true.

The issue—and I don't want to go into any more detail than you do, Senator—the issue in *Maynard v. Wooley* was whether requiring the display of a license plate with that motto was, in effect, requiring the person driving the car to appear to adopt or to affirm the truth or the soundness of the statement on the motto.

I did not, in fact, believe that it was reasonable to construe a license plate requirement in that way. In fact, the New Hampshire Supreme Court had already ruled on exactly that issue, and it held that it was not, for first amendment purposes, that kind of an affirmation that would be violative of the first amendment.

The issue in *Maynard v. Wooley* essentially came down to an issue of interpreting fact. The Supreme Court of the United States, although not unanimously, disagreed. My best recollection is that I think it was Justice Blackmun and Justice Rehnquist who happened to dissent in that case.

Senator LEAHY. I recollect it as being an 8-to-1 decision.

Judge SOUTER. Was it 8 to 1? I may be wrong on that. In any event, the Supreme Court of the United States had already ruled—not against the Maynards, it was in another case—but they had already ruled on exactly that issue.

So that I was not left simply to make a judgment on my own about what would be an appropriate case to defend, because that issue, in effect, had already been foreclosed to me by the New Hampshire Supreme Court ruling.

So we might disagree about the application of the principle in that case, but the soundness of the principle is beyond dispute and it was beyond dispute then.

Senator LEAHY. The reason I ask this, of course, is thinking back to wearing your judge's hat, for example, would you regard the interests of the State in putting its motto on license plates to be so compelling that it would justify prosecuting people who had religious objections to the motto?

Judge SOUTER. I am sorry?

Senator LEAHY. Whatever the motto might be. I don't mean to pick on New Hampshire. New Hampshire has a motto, Vermont has a motto, and most other States do as well. I am not singling out a particular motto, but the basic principle, is the interest of the State in putting a motto on a license plate so compelling that it should be allowed to prosecute people who have strong religious objections to the motto?

Judge SOUTER. Well, of course, as I think as you suggest the need to identify a motto on the plate, as opposed to identifying numbers and letters by which the car can be identified is, of course, not a particularly compelling interest, and it was not so regarded by the Court at the time.

Senator LEAHY. They were not trying to block the numbers on the plate?

Judge SOUTER. That is right, no, they just wanted that motto out.

Senator LEAHY. OK.

Judge, I am told that my time is virtually up, and I am going to want to go back to this later on. I am not, as none of us is, asking you to prejudge cases that might come up, but you know the establishment clause in the past few years has been reviewed again. I hold the very strong feeling that one of the greatest bedrocks of our democracy is in the first amendment and the right of free speech, the right to practice any religion we want or not to practice any religion because those two things almost guarantee diversity. And if you get diversity, untrammelled diversity, you have, by definition, a democracy that is going to work.

Judge SOUTER. I think you have.

Senator LEAHY. So I will go back into that, and I appreciate your answers.

Judge SOUTER. Thank you, sir.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Senator.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, let me give you a very brief roadmap of where I would like to go in my allotted 30 minutes. I want to pursue the freedom of religion subject for about one-third of that time, pick up the War Powers Resolution, and then discuss some of your testimony for Senator Grassley on what I would like to analyze as the differences between the original meaning from your *Dionne* opinion versus the Court filling the vacuum.

The beginning of the Bill of Rights refers to freedom of religion. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

I have two questions, and in the interest of time, let me put them both to you at the start. The establishment clause, and this goes to general approach, was defined by Justice Black in *Everson*, "In the words of Jefferson, in the clause against establishment of religion by law, was intended to erect a wall of separation between church and state."

And the words, "a wall of separation between church and state" were Jefferson's words. There is a sharp distinction which Chief Justice Rehnquist makes in *Wallace v. Jaffre* where he says, referring to the separation between church and state, the wall of separation, Chief Justice Rehnquist says, "it should be frankly, and explicitly abandoned".

I believe in terms of a general approach on the establishment clause trying to get a general philosophy that is as good a starting place as any and that is the first question on the first amendment.

The second question goes to the free exercise clause and the opinion of the Court in *Employment Division of Oregon v. Smith* where Justice O'Connor is very direct in strong criticism, saying that the majority opinion dramatically departs from well-settled first amendment jurisprudence, unnecessarily resolves the question presented, and is "incompatible with our Nation's fundamental commitment to individual religious liberty". She says that because of the essence which she cites a few pages later, that there is the failure to require the Government to justify any substantial burden on religiously motivated conduct by a compelling State interest and by means narrowly tailored to achieve that interest.

My second question to you is, Do you agree with Justice O'Connor that when you impede on the exercise of religion that there ought to be those two factors, a compelling State interest and means narrowly tailored to achieve that interest?

Judge SOUTER. Let me start with your first question on the establishment clause and the appropriateness of preserving Justice Black's adoption and the Court's adoption of the Jeffersonian view of a wall of separation.

The difficulty, I think, that is focused by the Court today comes to the fore because of the difficulty in applying the—as I mentioned a moment ago—the *Lemon v. Kurtzman* test. But for that difficulty, there is some question in my mind as to whether there would be the present ferment to rethink the very conceptual foundation of the establishment clause, which, as you indicated a moment ago, Chief Justice Rehnquist has been doing in some of his own opinions.

I think, like a lot of people approaching the establishment clause, I am loath to talk about scrapping *Lemon v. Kurtzman*, without knowing what comes next. With respect to Chief Justice Rehnquist's position, I have never done personal research on the issue of the original meaning on the establishment clause, as I said a moment ago to someone else.

I would receive evidence on the issue respectfully, if there were reason to present it before me, but it is not something upon which I can pass a judgment at this point.

What I think I can helpfully say is the difficulty which I think those who do, indeed, adopt the Jeffersonian view, must face on the *Lemon v. Kurtzman* test. In fact, it is a difficulty which has ultimately nothing to do with the final conceptual rethinking that may go on, on establishment, if, indeed, it does go on.

As you know, *Lemon v. Kurtzman* has sometimes seemingly been honored in the breach. In the first *Kresh* case, as I recall, the author of the *Lemon v. Kurtzman* opinion said, well, that is a general approach that we have to this issue, but it is not the exclusive approach that we have to it.

The discomfort—I suppose there are many reasons that have been expressed for the discomfort with *Lemon v. Kurtzman*—but I will tell you what my discomfort is. It is a discomfort which relates to the relationship between *Lemon v. Kurtzman* as an establishment clause test, and the so-called *Shurbert* test which has, in a series of cases, as you know, prior to the *Smith* case this year, been used as the test for free exercise.

The concern is this, that in the free exercise cases—and I think I would like to take the Amish school case as my favorite example—in the free exercise cases, individuals are claiming that a generally applicable State law unduly burdens their exercise of religion.

Once it is determined that, in fact, their position is a genuinely religious position and that there is, as a matter of fact, a burden placed upon it by a generally applicable State law, the Court has traditionally, since the time of the *Shurbert* case, applied a standard, as you say, of very strict scrutiny.

There must be a compelling State interest to justify that burden, and the law that does so must be narrowly tailored to have that effect alone. It was on that reasoning that, in the Amish school case, *Wise v. Yoder* the Amish parents were allowed an exemption, in effect, from the requirement that they send their children to school until they are 16 years old.

The great difficulty that arises is that, when we ask the question, what would have happened in the Amish school case, if, instead of coming to the Court as a free exercise case, it had come to the Court with a slightly different statute as an establishment clause case, what if there had been a statute in effect which provided that there would be an exception expressly for Amish parents, from the State law? The immediate problem that would have been encountered under *Lemon*, is that the purpose of that law, the first of the *Lemon* tests would have been a religious purpose.

The speculation is just inevitable that the Amish school case could have gone the other way.

Therefore, my concern is, since I have not personally had any reasons to raise questions about the appropriateness of the strict scrutiny test, and have no reasons to raise questions about the appropriateness of the strict scrutiny test for free exercise cases, have we not got to take *Lemon* to some degree of refinement which has not yet been articulated to avoid what has explicitly been recognized as the potential conflict between the two tests in which—

Senator LEAHY. Judge Souter, I don't want to interrupt you unduly, but I don't think that the broad analysis or treatise is required consistent with *Kurtzman*, to make an answer to a fundamental question about whether you agree with the Jeffersonian

principle articulated by Black and held by the Court for a long time about the "wall of separation".

Nor do I think that the interrelationship, and it is a very complex issue, is necessary to come down to the basic concern about whether you are going to have a compelling State interest and narrow tailoring.

I think those are two very threshold questions. I would press you for specific answers because I think those are within the range of general philosophy appropriate for this kind of an exchange.

Judge SOUTER. As I started to say and apparently got sidetracked on saying, I have had and have today no reason personally, in either research or philosophy, to want to reexamine the view which was expressed in *Everson*. But my concern is that that view has been identified with a *Lemon v. Kurtzman* test. And we have to face the fact that in the implementation of that view, there is a difficulty which sooner or later the Court has to resolve.

Senator SPECTER. I will take that as a qualified yes. How about the free exercise question?

Judge SOUTER. On the free exercise question, I have to be circumspect to a point because I believe that the *Smith* case is subject to a motion for rehearing presently before the Court. And without any question, I think the development of that issue is something that if I were confirmed would come before me. But I think there are some things that with a reasonable degree of specificity I can say.

The first is that I do not come here and prior to the decision of that case or after it I have not had personal reason to want to reexamine the strict scrutiny test which has been applied in a lot of cases since *Shurbert*. I recognize the reasoning of the majority opinion. I mean I can follow it; I understand what the Court was saying in the *Smith* case. But I also recognize I think the fact that that case could also have been examined under the *Shurbert* standard. And as you mentioned or indicated a moment ago, that, of course, is exactly what Justice O'Connor did in her concurring opinion in that case.

I do not know at this point whether we should take the *Smith* opinion, if it stands, as being a total rejection of *Shurbert*. The one thing I do know is that the way the opinion was written, *Shurbert* seems to have been reduced to a rule for unemployment compensation cases. And I can tell you that I did not so read it, and I did not so read its application to, let's say, the *Yoder* case, the Amish school case, as resting upon the kind of analysis which the Court indicated would be its only justification for applying it there.

Senator SPECTER. Well, I hope the *Smith* case doesn't go that far, and I hope that your predisposition to side with Justice O'Connor comes to fruition if you are confirmed, because the basic requirement requiring a compelling State interest and a narrowly tailored means to achieve that interest seems to me very fundamental in the exercise clause, just as I personally believe that the standards of Jefferson and Black on the wall, however you articulate it, keeping that as a basic philosophy, to be very important.

Judge SOUTER. May I just add one thing, Senator? That is, I would not want you or anyone else to take what I said this morning as a commitment if I were on the Court to join with Justice O'Connor if this matter were brought before me. What I do want

you to understand is that I approach the issue, or would approach the issue, if it came before me, with exactly the view of the value of the strict scrutiny test which I described to you.

Senator SPECTER. I accept that, Judge Souter. I do not believe that it is appropriate to ask you for commitments.

Judge SOUTER. I understand that.

Senator SPECTER. The extent is to get a general approach.

Let me shift at this point to the issue of the War Powers Act. The War Powers Act was enacted in 1973 because of concern about the involvement of the United States in the Korean war without a declaration of war and in the Vietnam war without a declaration of war. It was passed over the President's veto. It has been a bone of contention as to whether it is constitutional or not, whether the President has powers as Commander in Chief which make the War Powers Act unconstitutional, or whether, in fact, the President has exceeded his constitutional authority in what has happened in Korea and Vietnam, because Congress has the sole power to declare war. This is a matter of enormous current importance. Saddam Hussein even crowded David Souter off the front pages for a time.

Judge SOUTER. I had no objection to his doing that, I assure you.

Senator SPECTER. Glad to see you are back on the front page, Judge. However contentious this may be, this is a lot better arena for contentiousness than Saudi Arabia.

But there is a real issue now which is starting to percolate as to the President's authority to project U.S. forces into hostilities, and the President has taken the position that certain notification has been given to Congress, not a recognition of constitutionality, but it is a sort of a hedge.

On this subject, I start with the question whether you believe it was constitutional for the United States to engage in a war, the Korean war, without a declaration of war by Congress as called for in the Constitution.

Judge SOUTER. Well, Senator, I think the only answer that can be given to that is that that is an issue which was never focused by the action of the United States and the Korean war because the issue was one essentially of congressional versus executive power, and that issue was never raised. The Congress of the United States, in fact, did fund the Korean war. The fact is that there was never a declaration, as you know, with the international law consequences that would follow from it. But the issue of constitutionality, as I understand it, is essentially an issue of congressional versus executive power in this area, and that issue was never raised.

Senator SPECTER. Well, Judge Souter, if you are suggesting that to have a case in controversy or standing there has to be action taken by the Congress not to fund a military action, I would say that that might carry the matter too far; that Congress is not really in a position to stop funding when the U.S. military forces are on a front line or the planes are in flight; that there has to be some resolution beyond. And in a minute, I want to come to the question of standing and some of the litigation; 110 Members of the House of Representatives in one case took the matter to court in *Lowry v. Reagan*. But I think that the Korean war is sufficiently in the historical past that that issue is not likely to come before the

Court, and ask a flat question whether you think it was constitutional to fight that war without a declaration of war.

Judge SOUTER. I think that question, Senator, basically is a question about the constitutionality of the War Powers Act, is it not?

Senator SPECTER. No, I don't think so.

Judge SOUTER. My concern is that I don't think—

Senator SPECTER. No, I don't think so at all. There wasn't a War Powers Act. There wasn't an issue of withdrawing troops in 60 days. This is history. We all know the history. And I don't think there are any War Powers Act implications in it at all. Here you have a war which was fought and wasn't declared by Congress, and the issue is did the President have the powers as Commander in Chief, not an issue which is so impinging on any matter to come before the Court that I think a statement on that is well within the permissible ambit.

Judge SOUTER. Well, Senator, the reason that I was concerned to suggest that I think that raises the issue of the War Powers Act is not because there was any such resolution on the books at the time of the Korean war, but because the War Powers Resolution which is on the books today basically articulates a congressional position. And the congressional position would today be the focus for asking that question.

I think two things are necessary for me to say. The first is, of course—and I know you recognize this—that because of the reasonable likelihood that the constitutionality of the War Powers Resolution could come before the Court in some guise, I cannot give an opinion on the constitutionality of that.

Senator SPECTER. I agree with that and do not ask that question.

Judge SOUTER. And I think the most that I can say with respect to looking beyond that specific issue is that it is recognized, though it is not a matter of litigation at this point, that the President as Commander in Chief is not limited in the commitment of the U.S. troops to a formal declaration of war. In fact, the War Powers Resolution itself recognizes that the President is obligated to take action and must have the power to take action.

Therefore, it seems to me that the commitment of the United States troops in Korea in the first instance certainly could not be regarded, leaving aside the aegis of the United Nations, could not be regarded as itself an unconstitutional act. The only issue which it seems to me can be focused upon is: Is there an articulable way of limiting the President's authority as Commander in Chief which would focus this issue? And the only articulated attempt to do so that I am aware of has been the War Powers Resolution. I think, therefore, the only thing that I can properly say to you is we know—and it would, indeed, be my opinion—that the President is not certainly forbidden to commit United States troops without a prior declaration of war. How far he may go, in fact, I think can only be regarded today as a War Powers Resolution question.

I will, in any event, be candid to say that I could not sit here today, even if we had no War Powers Resolution, and articulate to you a limitation on how far the President could go with or without the express approval of Congress.

Senator SPECTER. Well, I would ask you, Judge Souter, to rethink your refusal to answer the question as to the Korean war. I would

ask you to rethink it in terms of the proposition that it is a part of history, that the War Powers Resolution was not in effect at that time, that the President took certain action, and there was follow-up action. The circumstances are so far in the history that it may have some relevance—but it certainly wouldn't be conclusive—on what would happen if the War Powers Resolution came before the Court at the present time.

Judge SOUTER. May I just add one thing, Senator?

Senator SPECTER. Sure.

Judge SOUTER. It seems to me that in approaching that kind of question, we really have to approach it in much the same way that we would approach a foreign relations question. One of the things that I think is standard analysis in the approach to questions of that sort is that when the President, in fact, is acting under the auspices of the foreign relations power and when he is, in fact, acting also with some expressed authorization by Congress, the issue of authority is probably an issue which does not arise or which is not focused.

And I do think that in approaching the Korean war question, we have to face the fact that it was undoubtedly within the power to commit troops to some degree and some instance without congressional approval; that, in fact, congressional support was expressed throughout that period by congressional appropriation and by the authorization which Congress thereby expressed. And it is difficult for me to see—although I will rethink this when I have some time to be quiet, it is difficult for me to see how the combination of the President's power with that degree of approval and support from Congress could raise a genuine issue of unconstitutionality that would be subject to adjudication.

Senator SPECTER. Well, when you start talking about foreign relations, that injects another element of complexity into a subject which is already complex enough.

Judge SOUTER. Yes.

Senator SPECTER. When you talk about appropriations, it isn't realistic for the Congress to stop appropriations at a time when a war is being fought. And if you follow through the logic of your last answer, that there is some implicit sanction—I left out Vietnam particularly because of the Gulf of Tonkin issue. I wanted to focus exclusively on Korea as a more distant event at any rate. But if you take that kind of implicit approval, then we have read out of the Constitution the congressional authority to declare war. The President does have authority to make a commitment to some extent, and once he makes that commitment, if the Congress has the options of not funding, as a way of litigating, it is no option at all.

Judge SOUTER. Well, I think the only thing I could say to that is you make the assumption that Congress never has a funding option. Not being a Member of Congress, I can't second-guess you on that, but that is a position—it never has an option once the troops are committed and engaged. That is an assumption that I would be loath to make.

Senator SPECTER. Well, we won't speculate about you becoming a Member of Congress.

Judge SOUTER. There is no chance of it.

Senator SPECTER. But I don't think we have that option, if I can answer one question.

Let me turn in the 5 minutes remaining, 4¾ that I have, to the question of original meaning and expansiveness of constitutional interpretation, and your testimony both yesterday on equal protection, and your testimony given to Senator Grassley's excellent questioning this morning, where you testified in very broad and expansive terms about the Court's role in filling a congressional vacuum. If the Court is going to fill congressional vacuums, the Court is going to do a lot of filling because there is a lot of congressional vacuum around.

You interpret the liberty clause very, very broadly as a starting point with the incorporation doctrine, taking into the due process clause of the 14th amendment the Bill of Rights, and then both yesterday and today you have expressly stated that that is just a starting point, which is very, very broad, indeed.

I have some concern about the scope of those answers when I take a look at the cases which you have decided. There are some—one, in particular *Richardson*, concerning a liberty interest. But the bulk of the cases I think is more accurately characterized by *Dionne*. There is a case where you had in issue a fee schedule where the majority said that the payment for the judges "smacks of the purchase of justice"; that "the spectacle of the citizen returning giving cash in one hand and calling for a judicial hearing and decision in the other is one that can no longer be tolerated"; and saying that "it is inconsistent with the professional judiciary," and then referring specifically to the contemporary culture—rather, "a contemporary injustice."

Then in your dissent, you start off with the proposition that you agree with the Court's disapproval of the fee system, and then proceed to look for original meaning by going to an unreported case from 1663 and statutes from 1781 and 1768 and 1878. And as I look at that opinion in the context of your description of *Brown v. Board of Education*, there was a situation where, if you look for original meaning, the District of Columbia schools were segregated, even the Senate gallery was segregated. Raul Berger in his analysis of the contemporary thinking was that the equal protection clause did not even give the right to vote or the right to desegregation.

It seems to me that the thrust of what you have had to say in a solitary dissent—the other four justices of New Hampshire were on the other side in the stated *Dionne* case—is very much at variance with the broad expansive answers you have given to Senator Grassley today and that you gave yesterday on the equal protection clause.

Judge SOUTER. Senator, you can pack a lot into one question.

Senator SPECTER. I wish I had more time. I would ask it more simply.

Judge SOUTER. Let me start first with an issue of adjectives because I think it is an important issue. You have characterized my testimony about the recognizable liberty interest as taking a very broad position, and you have spoken of my reference to incorporation as just a starting point. I want to go back to them for a moment just by way of preface.

What I said in response to the question about incorporation was that I did not believe that the definition of the concept of liberty, which was subject to recognition and protection in the 14th and the 5th amendments, could be limited by the incorporation doctrine. Indeed, if it could be limited by the incorporation doctrine, there would be no question as to whether some core right of privacy was cognizable under those two amendments.

With respect to how much further the so-called liberty concepts in those amendments should be treated as recognizing rights enforceable against the Government, I have not given an opinion. I have given an opinion that there is certainly a core concept of privacy which is to be recognized and that certainly aspects of marital privacy, which we discussed yesterday, are among them.

How much further, how much broader the concept to privacy and, hence, ultimately how much broader the enforcement power under the liberty clause may be is something which is going to have to be developed by the courts over the course of probably a great many years.

Going next to what you question is the inconsistency between my position in *Dionne* and my espousal of the correctness of the *Brown* decision, let me start by saying that, as you recognize, the interpretive position that I start with when I am looking at a provision which has not been construed is one of original meaning, and in discussion yesterday I distinguished that from the theory that would confine that meaning to those applications which were originally and specifically intended by the framers or by the adopters of that provision to be its application.

I have read Raul Berger's book, and I think—although people will dispute about his constitutional interpretive views—I think his history is well accepted by most people today.

There certainly was no intent whatsoever in the enactment of the 14th amendment to bring about school desegregation. And if in fact the meaning or the guarantee of equal protection were confined to specific intent, then of course, *Brown*, instead of being a correct decision, would have been a wrong decision. But my interpretive position is not one that original intent is controlling, but that original meaning is controlling.

In construing the 14th amendment, the first fact that has to be faced is that the best index, the point at which you start the quest for meaning, is with the text. And as I said yesterday, the text of the 14th amendment is a very broad text. It is not in fact, as we well know by its terms, limited to race, although race was obviously the problem most on their minds. It was not limited as the 15th was by reference to prior condition of servitude. And therefore whatever troubles some people may have with the 14th amendment, I think the point at which we have to start in the process of construing the scope of the equal protection clause has got to take into account that it was not written in such a way as to be restricted either to race or to the specific racial applications intended or on the minds of the people when it was adopted.

And given that as a starting place, as I said, I think there is no question that *Brown* was correctly decided and the provision correctly construed.

Now, is that inconsistent with my view on *Dionne*? It is not. Just as I said a moment ago, the text is the starting place from which we have to construe the 14th amendment; the text was the starting place from which we had to construe the provision of the New Hampshire Constitution that justice should be available freely and that right or justice should not be purchased.

The question is how much freedom, if you will, from cost was that provision intended to embody. If we read that provision in a totally, literally, expansive sense, we could have said, well, certainly there can be no filing fee for someone who wants to come into court in a civil case. In a sense, there is nothing free if you have to pay \$50 to file your case. And we could have gone on through a number of incidents of expense that are accepted in the system and have always been accepted in the system as being costs that could reasonably be levied.

The question before the court was, then, how free did they intend it to be; what kinds of costs were they trying to outlaw? And that, in the context of that particular issue, came down to basically a choice between two principles—the principle against paying anything beyond a filing fee to get into court, on the one hand, saying that anything beyond that would be a violation of the provision; and the other principle, which was the one that I thought was supported by evidence of the original meaning of the framers, that what was trying to be outlawed by that provision was essentially, in a word, bribery. I think the provision was traced back to the kind of fines which the medieval courts dealt with and which were still in people's minds at the time of the adoption, whereby money payments could be made to the courts either to delay a case or to bring about its resolution at the convenience and with the result intended by a given litigant.

And therefore the issue in the *Dionne* case was simply a narrower issue than the issue in *Brown v. Board*. The meaning came down to a closer choice between two possibilities. But the ultimate criterion of meaning for me in the *Dionne* case was exactly what I think the ultimate criterion should have been and was for the Supreme Court of the United States in *Brown*—not specific intent, but the principle intended. And of course, those distinctions will grow narrower and narrower the more narrow and exact the language it is that we are construing, but the ultimate criterion remains the same.

Senator SPECTER. Thank you very much, Judge Souter. We'll come back to that when I have some more time.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Our next questioner will be Judge Heflin, Senator Heflin, from Alabama.

Senator HEFLIN. Following up on Senator Specter's question on the *Dionne* case, was the equal protection clause of the Constitution invoked in that issue?

Judge SOUTER. In the *Dionne* case, sir?

Senator HEFLIN. Yes.

Judge SOUTER. No, it was not. The only issue that was raised there was the provision precluding the purchase—or, the requirement that justice be purchased.

Senator HEFLIN. Does your supreme court have a rule, as do some, that in civil cases the court will not address issues unless they were raised in arguments or briefs?

Judge SOUTER. We do have such a rule. I think the only times that we ever depart from them are times in which it would be so misleading to decide a case based on an issue which on our examination we later realized was there and cannot be avoided, that we might be forced to refer to it, although even there the preferred practice, of course, is to call for a reargument so that that can be expressly addressed.

Senator HEFLIN. I have a little problem in the *Dionne* case. It seems to me that—you cite the Magna Carta, which is dealing with selling justice, which was bribery. The New Hampshire framers of their constitution chose to use the word "purchase" as opposed to "sell." Do you see any distinction relative to the choice of that word, which might or could have been construed to be an attempt to change the language from the Magna Carta to a different meaning?

Judge SOUTER. Well, I can see the basis for making the verbal argument although, of course, you can't have a purchase without a sale. So I did not find when I looked really any basis upon which I thought I could really justify a distinction there. And as I think you know from the *Dionne* case, I would not have been unhappy to find that kind of a distinction because I thought the practice involved there was a bad one.

Senator HEFLIN. Of course, from a textual basis, as a method of interpreting, when you see words change that usually has some meaning to it. Well, that's quibbling over a point. I'm not going to spend a lot of time on that.

Let me ask you this. Have you ever been a crusader for a cause?

Judge SOUTER. Yes, I have.

Senator HEFLIN. What cause?

Judge SOUTER. I guess my greatest crusade was the cause against bringing casino gambling into the State of New Hampshire, which I thought would destroy the political fabric of the State. I did not believe that we could maintain—in a State with the resources that we had, I did not believe that we had a very good chance of maintaining the integrity of the law enforcement structure of the State when the economy would have been so totally overbalanced by the amount of money that would have come in for that purpose. And I devoted a considerable period of my time one year as attorney general to that crusade, if you will. It was not entirely popular in some circles. It was an issue upon which the Governor, who had appointed me, and I broke. I am glad it turned out the way it did, and I enjoyed the crusade.

Senator HEFLIN. I gather, too, that you have had an interest in medical issues, as some writer has mentioned, and an aunt of yours had such an interest in it. What has been your interest in medical research and your activities in that regard?

Judge SOUTER. Well, my interest there, Senator, has been perhaps less a research interest than an interest in local administration that brings health care to people. As I said yesterday, it all started when I was asked to serve on the board of a hospital, and it is one of those interests which sort of took off by increments, and I

ended up finding it virtually a second job for a period of about 5 years in my life. But the focus was not a focus on academic research so much as it was a focus upon the kind of administration that gets health care to people and determines the cost that they are going to have to pay for it.

Senator HEFLIN. Is there any other cause that you would say that you have been a crusader for?

Judge SOUTER. Not a public crusader, no. There are some causes to which I have contributed, but causes in which I have come out as a public crusader I think have been limited to those.

One of the things, I can tell you that the inhibitions on crusading when you are occupying the position of attorney general or of judge, of course, are there, as I think you know as well as I do. The number of organizations that a judge finds himself slowly resigning from in order to avoid recusal problems can sometimes be one of the tragedies and in any case one of the prices that we pay for being on the bench. And I have been through that experience, as you know.

Senator HEFLIN. Well, that is 7 years of your life. I mean, there are other years, too.

Judge SOUTER. Well, 12 years, actually; I was 7 on the supreme court—

Senator HEFLIN. That's right.

Judge SOUTER [continuing]. Then I was on the trial court for 5.

Senator HEFLIN. I want to go to the Seabrook demonstration issue. Critics of you contend that you acted too strongly against the demonstration. They contend that after demonstrators were arrested that they were not released on their personal recognizance, that bail was required; that when they refused to post bail that the State was required to house in the different instances as many as 1,400 detainees at enormous cost. The critics go on to say that in trials where first a judge gave suspended sentences that you, according to one critic, rushed to the courthouse to insist on the fact that there be sentences of hard labor; and that in the efforts to pay for the extra costs involved that there was an instance with the Governor's crime commission under an LEAA grant where you urged the crime commission to approve an application to LEAA to seek funds to help pay for the expense; and that then later, the State, through the Governor—perhaps some of your participation—sought contributions from corporations and other people to pay for it. They then cite that before a finance committee hearing on the cost of the Seabrook demonstration that you testified in answer to a legislator's question by saying that under certain circumstances that the State might use police dogs and fire hoses to keep the demonstrators from the site.

Now, I recognize that if you are the attorney general, you have certain responsibilities, and I want to ask you to relate your position as to today. What would be your position today relative to these various issues in regards to the demonstration that took place here yesterday? How should that be treated? How do you view today the demonstrators that hollered out when Senator Grassley was testifying, and we all turned around and looked; we were basically eyewitnesses to it.

Would you give us your opinion on the issue pertaining to personal recognizance versus bail; give us your opinion of what ought to be done if they refuse to make bail; efforts to pay any extra cost; the question pertaining to whether or not there ought to be sentences in regards to those people that demonstrated?

Judge SOUTER. Well, Senator, the first thing that I would have to say is that I wouldn't give any final opinion on what should be done with those demonstrators without hearing them; and the only place that I heard them was in the back of the room. I haven't heard them in a courtroom. I am happy that I haven't heard them in the back of the room again, and I probably will never see them in a courtroom, and I wouldn't make any final judgment about what ought to be done without doing that.

What I think I can usefully do is give you a sense of the significant contrast between what went on here and what went on in the case that I was dealing with when I did have to take a position and did take a number of positions as attorney general of the State.

The first thing you mentioned was the fact that I opposed their release on personal recognizance bail. That is correct. That position was taken on the night that the demonstrators were arrested following the second day of the demonstration.

Now, the arrest occurred because the demonstrators at that time, or the remnant of them—I think there had been about 3,500 or 4,000 there that day, and as it turned out there were about 1,400 left who refused sort of the last and final request to get out before arrests started. At the time the arrests took place, those demonstrators were occupying the parking lot that was used on a working day by the work force that was building the nuclear power plant, and they refused to leave it. One of the reasons that the State police made the decision to arrest—a decision which I was aware of and certainly took no exception to—was that they knew, this being late on a Sunday afternoon, that at 7 on Monday morning the work force was going to arrive in that parking lot, and they knew that if that happened they had an extremely combustible mixture, and what had been in fact a demonstration of civil disobedience was not likely to remain one if that happened.

When, therefore, they were arrested and arraigned at special sittings of the local district courts to determine what the bail should be, the question which confronted the State was: If personal recognizance is granted, what will be the effect of that? And, in fact, the demonstrators had indicated, as I recall it, quite publicly within the armories where they had been brought, that as soon as they were released on personal recognizance they were going to regroup and go back to the parking lot and presumably be there the next morning when the workers arrived.

Therefore, I made a judgment that personal recognizance was, in fact, simply going to render the action of removing of no use, and the next morning we were going to have trouble on our hands. I therefore decided that the appropriate requirement would be some cash bail, conditioned upon good behavior and showing up for court on time. I therefore recommended that cash bail of \$100—probably cash or bond, but that \$100 be requested.

As I think you know, that very issue was later litigated in a section 1983 action that was brought against a number of State offi-

cials, including me, and the U.S. district court concluded that that was perfectly reasonable bail, that there was not any indication that the people involved could not make it or that it was unreasonable.

I think it is safe to say—well, maybe I shouldn't say, but I think it is safe to say that we do not need or would not need, probably, in the aftermath of yesterday's incident, that particular kind of prudential concern.

The second thing you mentioned was my opposition to suspended sentences and a request for hard labor. I don't know. The first part of that is true, and the second is not, except in a very technical legal sense. I did oppose purely suspended sentences because, as a practical matter, they would not be sentences at all, and I thought they would have no deterrent effect. And I think they would not have had.

I think I may safely say, although there is no record of the court in question that I am aware of, that never in the course of my recommendation did I make any reference to hard labor. The only reference to hard labor that occurs in connection with these cases occurs—or at least it did then—in the New Hampshire statutes. The New Hampshire statutes refer to any incarceration, any incarceration following conviction, whether it be in a house of correction or the State prison, as being at hard labor. I know that in some county houses of correction, of course, as you know, there are work details just as there are in the prisons. But for practical purposes, there is only a very attenuated sense of labor today.

I was not interested in hard labor, and I don't believe I ever used the term. In point of fact, a substantial number—I don't know whether I could say most, but a substantial number of those demonstrators never, in fact, even saw the inside of a house of correction because most of them—because they refused to make bail—spent their 15 days in the National Guard armories where they had been taken awaiting trial. And at the end of that time, as I recall, I ordered them ejected because I didn't think they should be staying in the house of correction longer than they would have stayed if they had gotten the sentence that I had recommended. So, to the best of my knowledge, there was no labor involved in any aftermath.

With respect to the crime commission, I was a member of the Governor's Commission on Crime and Delinquency at that time. I couldn't possibly tell you what the category of money was that might have been available as Federal help for unusual law enforcement expense. But, apparently, there was some such category of it, and because this was a very expensive proposition for the State, I urged and argued very strongly that the crime commission ought to approve an application for it. I couldn't tell you at this point whatever happened to the application. I don't know whether the State got a grant to help defray expense or not.

Senator HEFLIN. It did not. But the issue is that some of your critics say that you argued before that crime commission to the effect of almost threatening them with their existence unless they went forward with—

Judge SOUTER. Well, I—excuse me. I reread one of the newspapers that I had not looked at for 14 years, and I think I found the

passage that you referred to. There was one member of the commission at that time who claimed that I had—I forget whether he used the word “threats” or “extortion” or whatnot as an inducement to the members to vote for it. And I remember in the latter part of that newspaper article the reporter said that he or she could not find anyone else who was in the crime commission at that time who would support that particular view.

I think it is fair to say on the record that that was an eccentric interpretation of what I had said, although there is no question that I had argued very strongly that the commission ought to support the request for the grant. And I have no doubt whatsoever that I indicated that the Governor felt very strongly that the commission ought to do so. It was standard practice to bring such opinions before the commission.

The next issue about seeking contributions to defray expense is, again, luckily once which I trust no one will have to face in response to what happened yesterday around here. My understanding of the sequence of what happened on that is this: The demonstrations took place on the last day of April and the first day of May back in 1977. According to my own records—and I think this is also indicated in one of the discovery affidavits that I filed with the U.S. district court—by the 3rd of May, I had formulated a position on what the State should request in the trial of these cases, which, as I said, was the 15 days and a fine of \$200, the fine to be suspended on good behavior.

My appearance before the court that you referred to took place on the 5th of May, which was the middle or the latter part of that week. As I understand it, on the 6th of May, 3 days after I had formulated the State’s position and 2 days or 1 day after I had appeared publicly in court to state it—on the 5th of May, the Governor issued sort of a request to the Nation to make contributions to help defray the expense. He sort of went out publicly and passed the hat.

I have no recollection of discussing with the Governor the funding that this was going to cost except for the fact that there was money available in an appropriation known as the emergency fund, which was under the control of the Governor and council. And there was also at that time—and I think it was during that same week—a meeting of the finance committee of the New Hampshire Senate before whom a request for an emergency appropriation had been made to be appended to a pending bill. And I do recall discussing with him my appearance before the Senate. I did appear before the Senate. Some people were relatively happy to vote money and some were not, but that was the extent of my fundraising activity.

I know—rather, I have been reminded in the last couple of weeks as material has been assembled on this—that subsequent to that, the Public Service Co. of New Hampshire, who was the principal owner at that time of the nuclear powerplant, made a contribution to the State of New Hampshire of around \$70,000, in round figures. That came, according to the records that I have gotten, late in June. I think it was June 30. At least, that is the date on which I have a record of State action to accept the funds.

If there was any particular appeal to the Public Service Co., it was something that had nothing to do with me or my office. The one thing I do know about it beyond the date is that the amount was determined as the amount necessary to offset the extra law enforcement pay expenses for the weekend of the demonstration. And so far as I know, discussions about any contribution from the Public Service Co. took place between the department of safety, which includes the State police, and the company. In any event, it was the department of safety that made the accounting for funds, and it did not involve me or my office.

The last thing you mentioned would similarly be happily unnecessary and inappropriate in the kind of disturbance we had yesterday morning, and that was police dogs and fire hoses. I was sort of unhappy to hear about the police dogs and fire hoses because I had spent a fair amount of my energy in the week or so prior to this big demonstration indicating that I was not going to use police dogs and fire hoses, and that I wasn't particularly happy to be facing the demonstration, but that a matter of civil disobedience did not call for police dogs and fire hoses.

I think in the course of that senate hearing in which the expenses that was being accrued was not the most popular political subject in the State at the time, one of the senators—in fact, I think it was the senator from my own district—said instead of wasting all this money and putting them through the criminal justice system and convicting and sentencing them, he said, "Why didn't you just drive them away with police dogs and fire hoses?" My recollection is that I said that was, if appropriate, it was only appropriate in a riot situation in which there was no other way to control it. And I said that is not what we had.

So I seem to have gotten metamorphosed from an anti-police dog and fire hose man into a pro-police dog and fire hose man. And I would kind of like to go back to the prior position and leave that as mine on the record.

Senator HEFLIN. All right. Another issue that critics have brought up is your letter pertaining to the parental consent on a minor's abortion, in which, in 1981, you wrote to the chairman of the New Hampshire house committee on health and welfare on behalf of the New Hampshire Superior Court judges.

Now, as I understand it from what Senator Rudman has informed me, you have a system of courts where the New Hampshire Superior Court judges go all over the State. They don't have limited geographical areas that they serve in, and they sort of travel a circuit relative to these matters. On that issue, of course, I read that you don't express any opinion one way or the other on the substantive issue, but it raises a question which has been always raised as to whether judges ought to become involved, in effect, in lobbying legislators. That raises an issue to what extent judges should participate in the legislative process.

Now, I notice in reading further that at a later date, some 7, 8 years later, when you were on the supreme court, this issue arose again, and you as a member of the supreme court referred the person that was asking you about it to the superior court judges, which could indicate that you didn't think as a member of the supreme court that you ought to be involved in what you were in-

volved in when you were a superior court judge. If you would address that, or whatever you want to say about this particular letter.

Judge SOUTER. Yes, sir, I will. That letter actually came back to my attention within, I think, the first week of my nomination, so it was one of the earliest pieces of prior history that I reread. That letter was written by me in my capacity, I think at the time, as chairman of what was known as the legislation committee of the superior court. The superior court did not take, and very scrupulously avoided taking, positions on general social issues—or even law enforcement issues, for that matter—except insofar as they would impinge on the capacity of the court to do its job. To the extent that there was going to be an expansion of jurisdiction without an expansion of judges to handle the business, we would bring that to the attention of the legislature, for example.

On this particular issue, the appropriateness of using a superior court judge as the deciding authority for permitting or refusing an abortion upon a juvenile when parental consent was not available, the court felt very strongly on two grounds that it was an inappropriate position to place the judiciary in. Those grounds were expressed in the letter.

There were some judges who, for reasons of their own moral scruples, would not under any circumstances authorize an abortion as, in effect, a surrogate for parents. There was another group of judges who believed very strongly, not because they opposed abortion personally but because they believed that it was inappropriate for a judge to make what was in their view an unavoidably moral decision for another person, that they should not engage in that kind of an exercise of jurisdiction.

The upshot of these two views was that if the bill was passed, it was a virtual certainty that a significant portion of the superior court bench—which at that time I think in the State was probably around 18 judges—would find itself, for one or the other of those reasons, unable to discharge the function that would have devolved upon them. And I think, as I said in that letter, the court's view was that this is necessarily going to lead to judge-shopping. No minor or no person on behalf of a minor would want to appear in front of a judge whose moral views were known to be opposed to abortion. And at the very least, the result was going to be that a very small number of judges were, in fact, going to find themselves exercising the entire court's jurisdiction in these matters.

It was for that reason that the court, as I recall, unanimously believed that it would be inappropriate for the judges to be given that job. I think I was chairman of the committee at that time, and I drafted a letter to that effect. But that is representative of the limits on lobbying that the judges do. It was lobbying only to the extent of bringing to the attention of the legislature matters which they would not know, but which we as judges felt they had to know if they were going to make intelligent decisions.

Now, you are quite right to recall to my mind the fact that the issue did arise later on when I was on the supreme court. And one of the members of the legislature came to me at that time and said, well, will you sort of reauthorize this letter as a statement of the judicial position. And I said that I could not do so for two reasons.

The first is it was the position of the superior court, and I was no longer on the superior court. The second and equally strong one was that if the legislature did not, in fact, take the advice—if that is what the superior court still wanted done, and the legislature did not take the advice—it was virtually inevitable that there would be issues brought before the New Hampshire Supreme Court involving matters of constitutionality, involving claims that judges, in fact, could not avoid this kind of responsibility. And it seemed to me necessary that I not become involved in the kind of legislation that might lead to that sort of an issue, and that I be very careful not to allow the name of the supreme court to be associated with it.

My own guess is that if there literally had been an action brought before the supreme court, it probably would have been in a posture in which I would have felt it necessary to recuse myself. But it still would have been the case that there would have been a supreme court justice taking a position. And so, quite apart from the fact that it was not an issue for the supreme court, there was a very strong reason to keep the supreme court at a distance from the resolution of the issue in case eventually there was litigation about it.

Senator HEFLIN. Mr. Chairman, how much time do I have left?

The CHAIRMAN. You don't have any more time, Senator.

Senator HEFLIN. That takes care of that.

The CHAIRMAN. Thank you, Senator.

Senator Humphrey of New Hampshire.

Senator HUMPHREY. Mr. Chairman, it is now after noon. Anxious as I am to have my turn here, I certainly would not object to your giving our esteemed witness a break, if you would choose to do so.

The CHAIRMAN. I have no objection to that. I have been talking with the witness and his people constantly, checking at every 15 minutes or so. Their preference is as follows—just so you know I am taking care of your brethren from New Hampshire.

Senator HUMPHREY. All right.

The CHAIRMAN. Their preference is that we go through and finish the first round, have you speak, then have Senator Simon and Senator Kohl, and then break, and then have three of us ask questions in the afternoon and then stop.

Do you have objection to that, Senator?

Senator HUMPHREY. None whatsoever, as long as the witness still has a pulse, we can continue.

Judge Souter, one of the things that we few non-lawyers on this committee have noticed is that the lawyers tend to get bogged down in what we regard, at least, as minutia and acrania, not to say that those things are not important sometimes, but for my part, I want to try to back off and approach from a fresh perspective.

I want to start by reciting what for me is the most fundamental statement, indeed the most eloquent statement on human rights ever written: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator"—and I emphasize "creator"—"with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

As you know, and as I will point out for my colleagues, the New Hampshire Bill of Rights, the New Hampshire Constitution, the

first part, the Bill of Rights incorporates that very same concept, not as a lofty expression, but as a concrete part of our Constitution.

I read articles I and II: "All men are born equally free and independent, therefore, all government of right originates from the people is founded in consent and instituted for the general good."

Article II: "All men have certain natural, essential and inherent rights, among which are the enjoying and defending life and liberty, acquiring, possessing and protecting property and," in a word, "seeking and attaining happiness."

Do you agree with the declaration in the first two articles of the New Hampshire Constitution, Judge Souter, that there are certain rights which precede even the State?

Judge SOUTER. Yes, I think, in fact, that is the kind of concept which is recognized and which is reflected in the theory of limited governmental power and which is at the focus of our search for an appropriate meaning to the scope of liberty protections.

Senator HUMPHREY. So, when you say, as you did yesterday, something to the effect that power comes from the people, you do not mean to suggest that a majority of the people have—that a majority of the people may violate, even through government, certain inherent rights of each human being?

Judge SOUTER. I mean, as you suggest, that power can only come from the people, yes.

Senator HUMPHREY. That is not quite my question, though. You made it quite clear in the response to my first question that you believe that there are certain inherent rights that precede the State. My question now is can a majority of people, acting through government, even acting through government, violate such inherent rights?

Judge SOUTER. Well, we know that some of those inherent rights, of course, are reflected in the specific provisions of the Bill of Rights, and I have also said in the course of my testimony today that it is one of the objects, as we now analyze these problems, is one of the objects of the liberty clause, both in the State constitution and in the National Constitution, to define and protect this point beyond which government simply cannot go or cannot go without the most strong justification.

Senator HUMPHREY. Well, I am heartened to hear your subscription to the belief of the Founders that we have certain inherent rights that precede the State.

I want to return again to the Declaration of Independence and pick up where so often people leave off. We all know that famous expression of Jefferson, "life, liberty and the pursuit of happiness." Unfortunately, he got the property part screwed up, but New Hampshire fixed it in their constitution and made it clear that "pursuit of happiness" means, as it was generally meant in those days, the possession and enjoyment of property.

But to get back to that famous expression "for all people for all times, that they are endowed by their creator," and so on, "certain inalienable rights," and then pick up where people so often leave off, because this next part is so important, too, "and that to secure those rights, governments are instituted among men."

Therefore, would you agree with the Founders that the fundamental purpose of government then is to secure those inalienable rights in which we are all endowed by our creator?

Judge SOUTER. That is a fundamental purpose and, as you know from just the structure of the constitution in our own State, that was the purpose which the drafters and the Founders saw fit to express before they had even addressed the question about the appropriate structure of government.

Senator HUMPHREY. Yes, indeed, they put it right up front. By this line of questioning, I do not mean to suggest that there are rights that are unlimited. When one's rights bump up against another's, then immediately we begin to have limits. We call for liberty, not license, and that is I think the concept on which our government was founded and has evolved in very great detail.

Well, Judge Souter, under the Constitution, can there be the right of one human being to take the life of another, except in self-defense, when threatened by that other human being?

Judge SOUTER. Well, we know, Senator, subject to the Constitution, that there traditionally certainly have been circumstances. The example of the death penalty, as you know, is recognized right in the Constitution—

Senator HUMPHREY. Permit me to interrupt there. What I mean was, is there the right of one human being, acting separately, not corporately as society or government, but one human being acting separately to take the life of another, except in self-defense, when threatened by this other human being?

Judge SOUTER. Well, are you asking this as a question of constitutional law, now, not a moral, not a personal moral issue?

Senator HUMPHREY. I will ask it first as a personal moral question.

Judge SOUTER. I can certainly conceive of circumstances in which it would be arguably justifiable to take another's life, even though mine personally was not threatened. There is the object of war, the example of war, the example of protecting one's family. You would protect your child, even though your life was not threatened.

Senator HUMPHREY. Fair enough, but the intent of my question was to focus on a situation where one individual, not acting with authority of government, as one does in war, and I did not anticipate the conditions of a family being threatened. But I am trying to focus on a situation where one human being elects to take the life of another, which other human being does not represent a threat to the life of the first.

Judge SOUTER. I think probably I and everyone in this room would accept the proposition, the general proposition that life, of course, morally should not be taken without justification. Where we would find our points of difficulty might come in either defining the concept of life or defining the very concept of justification that arguably would be brought up in argument.

Senator HUMPHREY. Defining life seems to be a problem that the Supreme Court has encountered, inexplicably, from my point of view, but that is something I will put off for a later time, if I may.

Would you agree with my understanding of *Roe v. Wade* and the subsequent decisions, the progeny, as the lawyers like to say? You know, there is certain lawyer language which is used to justify the

exorbitant hourly fees that they charge, so I will try to keep my language simple.

Judge SOUTER. Those were the millions that I could have been earning, if I—

Senator HUMPHREY. Yes. [Laughter.]

Those other decisions, *Roe* and the ones that followed, would you agree with my understanding that *Roe* and the progeny established an enforceable right to abortion during all nine months, if, for example, the mother asserted continued pregnancy represented a threat to her health, including mental or emotional health?

Judge SOUTER. The extent of recognition in the cases of mental or emotional health is something that I am not clear on the legal development on, but certainly there is recognition of the possibility of abortion to save the life of the mother or to save serious injury to her health.

Senator HUMPHREY. Well, it is much more than that, and I am not mistaken on this point, that *Roe* and progeny establish—the reason I raise this, it is kind of a rhetorical question, really, and I know you are going to stay arms-length from this, and I understand your point of view.

You know, there are a lot of people watching, including young people, for which this is a wonderful lesson in history and in constitutional government, who probably do not understand that *Roe* and the decisions which followed it and reinforced it and expanded it established a right to have an abortion during any time of the nine months of gestation, for the health of the mother, which includes the emotional or mental health. So that if a woman raises the claim that pregnancy affects here emotional health, that is sufficient to secure an abortion.

That, of course, is the massive loophole through which 98 or, say, 95 percent upwards of the abortions in this country are secured. And when you look at the surveys, the interviews with women who have had abortions, they never say that—I should not say never—they rarely say that they sought the abortion because of emotional health or mental health, or even physical health in most cases, but, rather, because they were unmarried or it would interrupt school plans and things like that, which are not insignificant, but I just want to make the point that this is a massive loophole in existing law through which most of these abortions are secured. At least I view it as a loophole; others may not, but I certainly do. That is a critical bit of information, that one can secure abortion during any of the nine months of pregnancy by establishing that claim.

Surely, you will be able to respond to this question: *Roe v. Wade* and progeny did not establish an obligation on the part of any individual or any institution to perform abortions. That is correct, is it not?

Judge SOUTER. Yes, we recognize that, and, of course, those issues have been raised in the funding cases, too.

Senator HUMPHREY. So there is no obligation on the part of anyone, including the Federal Government, as we have known from many challenges, to facilitate abortion in any way, either financially or in any material way, because, as the Court has said, there is no obligation on the part of the government to subsidize the exercise of rights.

Judge, you were a member of the board of trustees of the Concord Hospital from 1971 to 1985. In 1973, the trustees voted to begin performing abortions in that hospital. Have you said for the record how you voted on that issue?

Judge SOUTER. I think I have, but I voted for the resolution, and my recollection is that the specific terms of the resolution allowed abortion consistent with what was then the new legal era inaugurated in the terms of *Roe v. Wade*. My recollection—and this is simply something I am not clear of, after this time, but I think there had previously been probably a hospital or staff bylaw referring specifically to the preexisting New Hampshire statutes—

Senator HUMPHREY. Yes.

Judge SOUTER [continuing]. And that, as a result of *Roe v. Wade*, there was need to revise them.

Senator HUMPHREY. Right. So you voted in support of the policy change, the result of which the hospital began to perform abortions, consistent with the law, of course?

Judge SOUTER. That abortions could be performed within the hospital, and my recollection also is that the resolution was explicit in saying that this did not obligate a given hospital employee or medical staff member to do anything against conscience.

Senator HUMPHREY. Good. Good.

Well, I am not asking you in this next question to comment on *Roe v. Wade*, that is, its correctness, but I would ask you to explain your vote, as a trustee of the Concord Hospital. Clearly, the hospital was under no obligation to begin performing abortions. Why did you choose to support a change in policy such that the hospital began to perform abortions?

Judge SOUTER. Well, the change in policy was to allow doctors who chose to perform abortions as a medical procedure in that hospital, to do so consistently with *Roe v. Wade*. The resolution was not—and I do not think this was the point of your question, but the resolution was not intended to make the performance of abortions a hospital function, as opposed to a function of the medical staff which practiced independently within that hospital.

The reason the hospital took that position and the reason I voted for it was that Concord Hospital was a community hospital, it was not tied to any sectarian affiliation, it served people of all religious and moral beliefs, its medical staff represented all religious and moral beliefs, and so did the patients who went through the hospital.

We did not believe that it was appropriate for us, whatever might be the moral views of a given trustee, to impose those views upon the hospital, when in fact it was the law of the United States that a given procedure was lawful.

It was, of course, a further justification, and I cannot tell you off-hand how much weight that justification played in the minds of any one trustee, but it, of course, was a serious one, and that was, given the fact that the hospital would be available for abortions, if a doctor chose to perform one there.

One of the functions which the hospital was giving to the community was the function of the greatest degree of safety in medical care, and if abortions are going to be performed as, by law, they could be performed, it was appropriate in a nonsectarian hospital

to allow the full range of backup services for the safety of the mother and, indeed, for the safety of all participants, and we felt—and I do now feel—the hospital had an obligation to do that.

Senator HUMPHREY. So you did not feel in that case that it was appropriate to bring to bear any moral judgment, is that what you are saying?

Judge SOUTER. I did not.

Senator HUMPHREY. Does your vote back then in any way indicate that you feel that unborn human beings are not persons?

Judge SOUTER. My vote has no such implication. My judgment with respect to the appropriateness of the procedure in a hospital of which I was a trustee is no more a reflection of a personal moral view of mine, pro or con, than would be any judgment that I was required to make as a judge of a court.

Senator HUMPHREY. It might be fun to explore why you feel such a decision should be value-neutral, why you should not bring your moral judgment to bear in such a situation. I have already used more than half of my time and I want to keep going, but I certainly am willing to yield to you, if you want to reply in any greater depth on that question.

Judge SOUTER. I will leave the questions to you, Senator.

Senator HUMPHREY. Let's look at the other end of the continuum of human life. With respect to the 14th amendment, are there any precedents in our law that have stripped, for example, elderly persons of their right to life, without due process of the law?

Judge SOUTER. I am not aware of what you may be getting at or anything that I could respond to your question.

Senator HUMPHREY. Well, I am not aware of any such precedents. I could be mistaken, but I am not aware of any. My point is that: One retains the protection of the 14th amendment; namely that one may not be deprived of life without due process of law, no matter what one's condition. If one is unconscious, one is still a person and protected by the 14th amendment. Is that not so?

Judge SOUTER. I think there is no question, 14th amendment liberty includes liberty in that situation.

Senator HUMPHREY. Yes. If one—

Judge SOUTER. As you know, it raises very great difficulties.

Senator HUMPHREY. Oh, yes. If one is unable to fend for one's self, unable to speak for one's self, unable to defend for one's self, unable to eat or drink for one's self, unable to attend to toilet necessities, even unable to breathe on one's own, one is still a person and protected by the 14th amendment.

Judge SOUTER. There is no question, that liberty—

Senator HUMPHREY. No question about that.

Judge SOUTER. There is no question, that liberty interests extend to every living human being. In answering that, of course, as I am sure you do not intend, I am not giving opinions about the validity of living wills and things of that sort. But the appropriateness of the 14th amendment is an invocation of right and is open to everyone.

Senator HUMPHREY. Yes. You say the liberty provision of the 14th amendment extends to every living human being. What is the difference between a living human being and a person?

Judge SOUTER. Without being more specific about the legal context, Senator, I don't know that I would see any point in drawing that kind of a distinction. I portend nothing by that answer, but I just think that is the kind of statement that one really cannot make without being misleading, unless one makes it in a very specific context.

Senator HUMPHREY. Well, it is a very important question. It is a pivotal question. I may want to come back to that in a second round.

Yesterday you said you counseled a couple whose union had resulted in conception, in this case an unplanned pregnancy. That was in 1966?

Judge SOUTER. I think that was in 1964 or 1965.

Senator HUMPHREY. My information is that in no State was elective abortion legal until 1977, California being the first State to permit it. I don't want to even approach an intrusion into the privacy relationship in terms of identity or outcome, but did you counsel the couple to remain within the law?

Judge SOUTER. Without invading the privacy which they have a right to expect, I think the only thing, Senator, that I can tell you is that I counseled them against taking the kind of, in fact, dangerous action which one of them had described to me they had in mind.

Senator HUMPHREY. I think I misspoke a moment ago. The first law permitting elective abortion was enacted in 1967. Evidently I said 1977.

Judge, you remember the old television program "Queen for a Day"?

Judge SOUTER. Well, it wasn't something that I spent much of my youth watching, but I have heard the term. [Laughter.]

Senator HUMPHREY. Yes; going back to the days of black and white TV. Let's play Senator for a day.

Judge SOUTER. I still have a black and white TV.

Senator HUMPHREY. I don't doubt it. [Laughter.]

Judge SOUTER. They were right about me on that one, I'll tell you.

Senator LEAHY. We are surprised you have that.

Senator HUMPHREY. Well, I hope you don't watch it much. My theory is that nothing would do more good for this country than for everyone to smash his television set. So I outdo even you on that one because people would begin, especially parents and children would begin talking, and children would begin doing their homework instead of watching and having their minds filled with rubbish every evening from our wonderful networks. That is another subject and another speech.

Let's play Senator for a day, Judge. Put yourself in our shoes, if you will, for a few minutes. If you were up here on this side of the table in the room, what would you be concerned about in confirming or not a Supreme Court Justice? In other words, what is important? What should we be trying to do here? What is it we should be concerned about, and what should citizens be concerned about? What are the dangers inherent in this massive power which the Supreme Court enjoys by virtue of the lifetime tenure of members who are accountable to no one in any practical sense?

This is, again, not so much for my benefit—although I have no doubt I will learn something from your insights—but especially the young people who are tuned in.

The CHAIRMAN. On television.

Senator HUMPHREY. On television; yes. [Laughter.]

I might have to make an amendment to my statement.

Judge SOUTER. Even network television.

Senator HUMPHREY. No, cable; cable. The networks don't bother, too much.

Judge SOUTER. Of course, I would start just where you start, Senator. You have a responsibility to inquire into competence. You have a responsibility to inquire into personal integrity, a responsibility, certainly, to inquire into basic knowledge of the Constitution and its values. Then there is, as is frequently spoken of in connection with the ABA's inquiry, there is an inquiry into judicial temperament.

Senator HUMPHREY. Maybe my question was too broad, and excuse me for interrupting. I would like you to comment on the dangers inherent in a judiciary appointed for life and accountable, really, to no one.

Judge SOUTER. Well, the danger inherent, I suppose, is that the judiciary can devolve into an institution for the expression of purely personal values. The institution itself is one step removed from the democratic process. Fortunately, that is only one step because the democratic process is going on in this room. But—

Senator HUMPHREY. Yes, it is. Permit me again to interrupt. It is a mighty big one step removed. This is our one opportunity. You are going to be over there for decades, for good, I hope and trust and believe. But it is not a small step removed; it is a huge step removed.

Judge SOUTER. Because of that step, as you point out or indicate, subject to impeachment, there is no recall. There is no second-guessing.

I would not be true to my own sense of constitutional principle if I did not say that the Senate ought to be looking for someone who, in seeking the very difficult or in going through the very difficult process sometimes of seeking constitutional meaning, would seek for something outside that judge's personal views for that moment, who would seek to infuse into the Constitution a sense of enduring value, not of ephemeral value, and who would try to rest that process on as objective an inquiry as can be possible, given the great breadth that is necessary when we do search for value, for these massive generalities and magnificent generalities that are committed to us.

But I could not end an answer to that without saying that with the best will in the world to avoid the changing and the ephemeral and the purely personal, a judge in the long run is going to go wrong unless that judge is willing to listen.

The fact is we learn much from what goes on in courtrooms. I think some people tend to look upon—people perhaps who have not been through the judicial process, I think they tend to look at it with suspicion as to whether what goes on in courtrooms, including appellate courtrooms, is really capable of changing judges' minds

or influencing the way they think or forcing them to refine their views.

One of the things I know from personal experience is that the process works. I mentioned yesterday that although I didn't come down with any statistics, I have kept track of my own performance listening to oral arguments and reading briefs. And I can think of instances, some specific and some in general, when my mind has been changed by what I heard and by what I read and by what I thought after an argument. Ultimately, you cannot choose, you must not choose, a judge who is not open to that kind of influence.

Senator HUMPHREY. Yes; I quite agree with that. We all must be able to listen and to change our minds when the facts indicate.

Have you seen any trends in the Supreme Court? The Court changes, of course, in tenor over a long period of time, oscillating back and forth. Have you seen any trends in the Supreme Court decisions in the last 40 years that give you any cause for worry?

Judge SOUTER. There is no question that there have been times when I have been concerned about the wisdom of individual court decisions. I was in law enforcement once, and there were times when I used to chafe over the difficulty that law enforcement had in conforming to some of the Warren court decisions.

One of the things I am glad of is that that is an era which has, in large measure, passed. We do not have the same problems that we had 20 years ago. There are some who would say there is a greater pragmatic appreciation on the Supreme Court. You know, there is also a much greater degree of practical pragmatism in the entities who come before the Court. We have learned to live with much in the last 20 years, and we have lived with it reasonably well.

I am not standing here, leaving aside my position as the nominee, fearful of one trend or another. I could be critical about individual decisions. There are decisions which we will undoubtedly discuss in the course of the next afternoon or the next day or two, some of which I would have come out differently on. Any lawyer and any judge can say that. But I don't have an alarm to raise with you at this moment.

Senator HUMPHREY. Thank you. I may pursue that later, but my time is up. Thank you.

The CHAIRMAN. Thank you.

Judge, let me apologize for getting up and down this morning myself. I happen to be chairman of the European Affairs Subcommittee of the Foreign Relations Committee, and I have drafted an alternative to the War Powers Act, which I have been attempting to negotiate with the administration since it came into office. One of the issues before us now is whether or not there will be a congressional authorization proposed for the action taking place in the Gulf, and I have drafted such a detailed proposal. That is in negotiation among Senators now, and that, coupled with new actions today in the Gulf, have required me to occasionally get up and attend to another duty. But it is not because I don't want to hear every word you have to say. So I do apologize.

Judge SOUTER. No apology is needed, Mr. Chairman.

The CHAIRMAN. Let me propose the following, and this is a moving target here: Let me suggest that when I finish saying this we just stand for 3 minutes to get a seventh-inning stretch here to

give you a chance to stretch your legs, then come back back and have Senator Simon. That will take us until about 1:30. If Senator Kohl doesn't mind, we will have him come and be the first person after lunch, and we will spend 2 hours after lunch. We will have four people question after lunch. I don't know who the four will be because I am not sure whomever the four in order will be here. That would take us until roughly 4 o'clock, unless any particular Senator has an overwhelming requirement to want to question today.

It is now about 8 minutes of. We will recess until 5 minutes of, come back, and Senator Simon will begin with his questioning. Judge SOUTER. Thank you, Senator.

[Recess.]

The CHAIRMAN. In order to stop Senator Rudman's press conference, I think we should—[Laughter.]

Actually, I haven't given the witness an opportunity to get back out here yet. He has not been warned. We are about to begin.

Thank you very much, Judge. What we are going to do now, we will go to Senator Simon and then we will either break or, depending on what the Senator from Wisconsin has to entreat me, what he has to say, we will either go to lunch or go to him.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Let me just digress for one moment, Mr. Chairman, if I may have your attention over here.

The CHAIRMAN. I am sorry.

Senator SIMON. That is quite all right. I just wanted to call attention to one thing that Senator Thurmond just mentioned in passing. He said this is the 23d Supreme Court nominee that he is having a hearing on. That is a remarkable record. I wonder if any United States Senator has ever done that.

The CHAIRMAN. I doubt whether anyone has, but I am beginning to tally them up so much that I would like to pass a resolution that there be no more. [Laughter.]

Because I have nowhere near that number, but in half the number of years that I have been there, it has been an incredibly—it seems I have spent most of my life sitting here having the opportunity to be educated. I mean that sincerely.

At any rate, I don't think there is anybody else, I would imagine, that had that many in any one time frame.

Senator SIMON. I would doubt it. I just thought it ought to be noted.

Let me kind of tell you where I am at this point, Judge Souter. On the positive side—and some of these things perhaps some people will think are minor—your use of language is good. You speak clearly and concisely, not in convoluted sentences. We are going to get those kind of opinions out of the Court if you are there. Clearly, you are a listener and you are astute. I like that. Then there is one kind of amorphous quality I will simply call stability that I see in you, and I like that. You have indicated you are willing to stand against popular opinion. And when we look back, for example, on what the Supreme Court did in the case of Japanese Americans in 1942, I want a Supreme Court Justice who is willing to stand up to popular opinion.

What is less clear for me is in two areas, and that is what I want to question you about. One is whether you are going to be a leader for civil liberties; and, second, whether you will be a leader for those less fortunate. In the area of civil liberties, if I may follow through on the questions of Senator Specter, you indicated that you at least tentatively accept the tripartite test of the *Lemon* case that the Court has used since 1971.

Let me give you a specific example that is long past and just kind of get, without any kind of a commitment, your visceral response. I remember when we had a school prayer issue before the House when I served in that body. Congressman Dan Glickman from Wichita, KS—who happens to be Jewish—told me a story about when he was in the fourth grade. Every morning he was excused while they had prayer, and then he would be brought in. Every morning little Danny Glickman was being told “You’re different.” All the other fourth graders were being told the same.

Is your feeling that that kind of an exercise violates the *Lemon* test?

Judge SOUTER. Yes. I think to begin with it is an appalling fact. I happen to have a friend who is on the bench who described exactly the same experience to me growing up in Manchester, NH. He was Jewish. He didn’t leave the room every morning, but he was cut apart from the rest of his class when the Christian Lord’s Prayer was recited.

The fact is the Supreme Court today I think has carried the law to the point where a period of time for silence which may be used for any meditative or non-meditative purpose that a child may want has not been declared to be a violation of *Lemon v. Kurtzman*. But I think it is probably equally clear that the use of prayer which has, as you describe it so graphically, the kind of exclusionary effect is by virtue of that very evidence a kind of use of prayer which, under the *Lemon* test, would have presumptive religious purpose and presumptive religious effect. As I understand *Lemon v. Kurtzman*, that would certainly violate it.

It also calls to mind the alternative formulations which in some of the recent cases Justice O’Connor has been referring to, and she has been adverting to exactly the phenomenon that you have described. She has been saying what we should be looking for is whether the practice in question and its effect on people has the kind of effect of telling them that you are somehow outside the legitimate scope of our real community. She is looking for that kind of sometimes subtle and sometimes very gross exclusionary effect.

Senator SIMON. When you are 13th on a list of questioners, you have to skip around a bit when it’s your turn to question. Following up on what Senator Humphrey asked, in this case where you told Senator Metzenbaum about counseling the couple in Massachusetts, where the statute at that time prohibited all abortions, even if the life of the mother was at stake, did you reflect at all at that point on the wisdom of that statute in Massachusetts? Do you recall?

Judge SOUTER. On that particular afternoon, the immediate problem before me, as I recall, probably did not take me that far. I had a very immediate problem in front of me that afternoon, and I think we probably confined the philosophy to the immediate

danger. But that was a long time ago, and I don't remember the details.

Senator SIMON. I understand that, but afterwards even, not just that afternoon, did you reflect on that?

Judge SOUTER. No one could avoid recognizing the consequences of that statute for the options that were available. That was obvious to all of us.

Senator SIMON. In discussing the right to privacy, you used the phrase "the fundamental marital right to privacy." Let me ask why that is fundamental more than other rights to privacy, including, say, the right to have privacy in a phone conversation or other things.

Judge SOUTER. Well, I used that not as an implicit exclusion of something else but as a subject matter that we have become familiar with. Our approaches to it, our judicial formulations of it have varied back and forth over the years. But going right back to the time of the often disputed cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Court has confronted, whether precisely or imprecisely, the fact that there is a core set of family values which, in the general understanding and the traditional understanding of the American people, are protected. And so we, in fact, have had a great deal of time in this century to be thinking in those terms, and that is the most familiar focus for what we are talking about. But I do not mean that to be a focus which implicitly excludes other interests.

As I said a moment ago, there is no question that the judiciary of the United States is going to be spending a significant amount of time in the years ahead trying to give attention to other claims—indeed, giving attention to other claims and trying to adjudicate.

Senator SIMON. Yesterday, in discussing the right to privacy, there was a discussion of the 9th amendment and the 14th amendment. But in the Constitution there are other provisions which guarantee the right to privacy as well. You can't come into my home without a very specific search warrant. The Constitution says you can't quarter militia in my home.

There is in the Constitution a sense of a right to privacy. That is not a question. I guess I should reverse that. Is there in the Constitution a general sense of the right of privacy?

Judge SOUTER. Well, I think perhaps it is wrong to go back and say you have answered my question for me.

Senator SIMON. Yes.

Judge SOUTER. But you have there. We find, as you point out on the provisions against the quartering of troops, the provisions against unreasonable search and seizures, the provisions against compelled self-incrimination, which gets you out of a kind of physical context. There are, indeed, reflections of what we could in a general way describe as privacy interests there. And as it goes without saying, the great debate has been the extent to which a privacy interest not so specifically recognized must be assumed under the concept of liberty. I have taken the position, although I cannot say here what its extent may ultimately be determined to be or what I would find it to be, yes, there is a core that goes beyond those specific pinpoints.

Senator SIMON. Then if I can, I am going to shift over to the general area of your concern for those who are less fortunate in our society. For one reason or another, I received a letter from the AFL-CIO saying all of the David Souter decisions have been on the side of management, not on the side of the workers. I frankly haven't made an analysis of your record in that regard. Perhaps you have not.

Judge SOUTER. I have not either, no.

Senator SIMON. Does that sound like it is possible?

Judge SOUTER. I think the only thing I can say in the abstract is I have to decide the cases that come to me. I would only ask you to look at those cases and see whether in your judgment they were decided fairly. I do not have a pro-labor or a pro-management agenda. I can say that this gets us somewhat outside the labor area, but I can't help but remember that in one of the early weeks or so following my nomination, there was an article—I think it was in the business section of the Sunday Times—on "Is this a friend of business?" And I remember one of the conclusions in there was that this is not a nominee who is out to rescue business from its bad decisions or from its improvidence. And I hope in any such weighing as you may believe it right to do, you would bear that in mind, too, because I think there is, indeed, a record on that point.

Senator SIMON. There is a newspaper article that quotes you as saying in a speech that affirmative action is affirmative discrimination. And I combine that with your statement, if I jotted it down correctly yesterday, that there is no discrimination in New Hampshire. My guess is that even the two percent or three percent of the blacks in New Hampshire would probably give a different answer than you provided yesterday. My guess is that there are a lot of women in New Hampshire who would give you a different answer. There might be some French Canadians by origin who would give you a different answer.

I am concerned by a statement that says affirmative action is affirmative discrimination, if you were quoted correctly.

Judge SOUTER. I think that—I hope that was not the exact quote because I don't believe that. The kind of discrimination that I was talking about in that speech was discrimination, as I described it and as I recall being quoted in the paper about it, a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, having nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution.

That is to be contrasted in two absolutely essential respects, from on the one hand affirmative action and on the other hand the kind of distributive remedy which it is appropriate for courts and, to a degree yet to be fully developed, appropriate for Congress to consider.

I would suppose it would go without saying today that if we are in the United States to have the kind of society which I described yesterday as the society which I knew or found reflected in my home, there will be a need—and I am afraid for a longer time that we would like to say—a need for the affirmative action which seeks out qualified people who have been discouraged by generations of societal discrimination from taking their place in the mainstream

and in all of America and in all the distribution of its benefits and its burdens. That is an obligation of individuals, and it is an obligation of government.

I think it also goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say undo it. That is a judicial obligation to make good on the 14th amendment.

And as I said a moment ago, one of the developments in American constitutional law which is at the stage, I would say, of exploration now is the development about the particular power of Congress to address a general societal discrimination as opposed to a specific remedy for a specific discrimination. That is a concern which will be played out in constitutional litigation for some time ahead of us.

The CHAIRMAN. Excuse me, may I interrupt for the purpose of clarification?

Senator SIMON. I would yield to the chairman at all times.

The CHAIRMAN. Judge, when you say specific remedy for a specific situation, do you mean specific remedy for a specific individual, or do you mean specific remedy for a specific situation?

Judge SOUTER. Identifiable class within a situation, yes.

Senator SIMON. Societal.

The CHAIRMAN. An identifiable class.

Judge SOUTER. Yes. I think the difficulty that you have—and I mean you and I will have it here—in talking in the abstract is to say, well, how far do you go when you are imposed a judicial remedy.

The CHAIRMAN. No, I am not asking you that.

Judge SOUTER. No, I was just going to say how far you go to the point where you carry yourself across the line from a remedial order to an order which addresses a societal and not a remedial problem. And I don't know how you draw that line in the abstract, but you have to be conscious that you should not be either too shy or too bold in the use of the judicial power.

The CHAIRMAN. To put it in layman's terms, the debate among those on the court and constitutional scholars is whether or not you can remedy a situation for a specific individual, where that individual has to show I have been discriminated against, as opposed to I am part of a class of people that have been discriminated against. That is the debate, at least in part, that is taking place. And when you said specific remedy, I wasn't sure whether you were talking about the individual as you were describing this debate that is taking place right now. So you are not merely limiting the need for government to respond to stop, but as well as undo, to the case where a specific individual is asserting they were a victim of a specific act of prejudice that is outlawed. But you were talking about more broadly. Is that correct?

Judge SOUTER. That is right. I think no such abstract line can be recognized. There are going to be some cases in which the only thing that is going to be proven is going to be a specific act of discrimination. There are going to be other cases, in fact, in what is

proven is, in fact, a far broader but proven discrimination. And the remedy must be tailored to the proof.

The CHAIRMAN. Thank you very much, Judge. I appreciate it.

Senator SIMON. Let me, if I may, rephrase where I think we are going. First of all, while the word "quota" wasn't used, clearly that is not a desirable thing in our society. And we don't want that; the Court doesn't want that.

When you say "undo," sometimes that is not enough. Congress says we have some residual problems from the days of slavery, from other problems that have existed because of discrimination against African-Americans, Hispanics, women, and others. And so Congress takes affirmative action to say we ought to be encouraging—in a constructive way—a more open society where opportunities are here forever.

Without being specific, do those affirmative actions that Congress would take in any way leave you with a feeling of unease?

Judge SOUTER. No, it leaves me with a feeling that we are on the verge of developing law, rather than in a situation in which we can say with clarity that the law has developed and we know what its limits are going to be.

When we address the kind of issue that you raise, Senator, we immediately go back to the *Fullilove* case, in which the Court found that it did indeed pass muster under the congressional power to set-aside, I believe it was a 10-percent minority set-aside in that case.

There is certainly one reading of the recent *Metro Broadcasting* case, in which the Court upheld a—I forget the precise articulation of it, but upheld the use of giving some extra credit to a minority application subject to the FCC, simply by virtue of its minority origin, and approved the use of restricting for sales in those cases to minority buyers.

On the other side of the scale, we know that there is less flexibility available to the State and local governments to do that kind of tailoring to broader societal discrimination, and I think, without question, one of the most significant subjects which is going to be developed in the Court in the foreseeable future is a more precise definition of just what the congressional power is, whether it be under section 5 of the 14th amendment or under Congress' article I power.

Senator SIMON. And section 5 is a fairly sweeping kind of authorization.

Judge SOUTER. It was unprecedented, as you know, at the time it was passed.

Senator SIMON. Finally, just a suggestion that I am going to pass along to you. Growth is one of the things I talked about in my opening remarks. I think it is very important for Senators, I think it is very important for Justices on the Court, to be exposed to things in our society that maybe we have not been exposed to.

If I can use a personal illustration, we do not have any Indian reservations in Illinois. I know there are serious problems and, while we have some native Americans in the city of Chicago, reactively it is a handful of people.

I took the time to go to the Pine Ridge Indian Reservation in South Dakota and found 73 percent unemployment, 65 percent of

the homes with no telephones, 26 percent of the homes with no indoor plumbing, and 8 percent of the homes with no electricity.

Now when an issue about American Indians comes up, it is not an abstraction for me. You know, I think this good, great, rich country ought to be doing better. I do not mean this disrespectfully to your fine background, but I want you to understand perhaps a little more than you now do some of the aches of America.

If you were to get together—and I prefer you to not answer right now, but maybe you will want to respond in the second round, with your friend and mine Warren Rudman, maybe Fred McClure, who was here just a little bit ago, and think about some kind of an agenda, when the Court is not in session, where you would get to understand the west side of Chicago, or perhaps an Indian reservation. I am not going to spell out that agenda. But I think if that were to take place, you would be a better U.S. Supreme Court Justice.

Justice Cardozo has been quoted here this morning. Let me just give you a quote here: "Where does the judge turn for the knowledge that is needed to weigh the social interests that shape the law? I can only answer that he must get his knowledge from experience and study and reflection, in brief, in life itself."

When we get to this second round, I would like any reflections you might have on how David Souter is going to grow, as a Justice, not just sitting on the Court. I think your experience with that young couple at Harvard was a growing experience. I think your being on the hospital board was a growing experience. And when I talk about growing, I think of Justice Hugo Black, who started off as a Ku Klux Klan member, and ended up as one of the great champions of civil liberties.

Anyway, you have my suggestion and I look forward to asking you for any reflections, when we get to the second round.

Thank you, Judge.

Judge SOUTER. Thank you, Senator.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kohl.

Senator KOHL. Well, I am the last questioner before lunch. Judge Souter, can I order you lunch?

Judge SOUTER. Senator, if it is all the same to you, I would rather take the questions and we will have lunch after. [Laughter.]

Senator SIMON. He has heard how parsimonious you are on buying lunch. [Laughter.]

Senator KOHL. All right. Judge Souter, why do you want this job?

Judge SOUTER. I did not seek this job, as you know. I was asked by the President of the United States to do this. What I said to you yesterday afternoon is my answer to that question. If I am confirmed in this office, I will be given the greatest power that anyone in the judiciary of the United States can ever know, and that is, as I said, the power to preserve and to protect.

With it, as with all power, goes a like degree of responsibility, and 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.

Senator KOHL. So, this is a job, even though you were not seeking it, that you very much want?

Judge SOUTER. Yes, sir.

Senator KOHL. For the reasons that you have just expressed?

Judge SOUTER. Yes, sir.

Senator KOHL. You will be replacing, as we all know, Justice Brennan. Would you say, in a general way, that you are similar, dissimilar, vastly dissimilar? And how do you think he is going to be remembered and if you would wish to surmise, do you hope you will be remembered?

Judge SOUTER. I will be candid with you, Senator. That last part of the question, I would not be presumptuous enough to answer. We will have to wait and see. But I know how Justice Brennan is going to be remembered. It has nothing to do with Justice Brennan's philosophical position, it has nothing to do with any distinction that may or may not be drawn between him and me. I am not going to draw such a distinction.

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. All you can do is to say what perhaps once Justice Brennan said, "I will do the best I can."

Senator KOHL. Judge Souter, you have got a reputation, well-deserved, as a fine writer, and you are a scholar. Usually, those qualities in a person of your kind do result in some substantial writing, and there is not any substantial writing that I am aware of that you have done. Would you care to comment on that?

Judge SOUTER. Well, there are the 200-and-some-odd opinions which have represented a great deal of substantial writing to me, and I will not ask you to read all of those 220-odd opinions.

Senator KOHL. I was referring to public—

Judge SOUTER. That is right. No, in point of fact, I guess there have been two things that have motivated me. One, I describe I guess with caution, but in a fine kind of way they go to what Senator Simon was speaking of a moment ago.

I have loved the judiciary. I have been a trial judge, I have been an appellate judge, and I want to be nothing else. As the years have gone, I have found that my judging has become more all-consuming of me than I once thought it was going to be.

In earlier days, including the days when I was on the trial court and, in fact, before I went on the bench, when I was in public law practice, but still practicing law, one of the things that I wanted to do with my time was to do something other than as a lawyer, and that is why I served on boards and I had experiences, which Senator Simon was right in saying, that changed me. They made me grow.

Beyond that, I will admit that there have been some times when I have been tempted to write on things that concern me professionally very much, and I was once even given almost a cart blanche for a book publication, if I would write something. I have not done it or I did not do it in those instances, because the things that I would have wanted to write about most were the things that were coming before me, as a judge, and, frankly, I was afraid that if I

started writing too much, I was going to end up recusing myself too much, because, as I envisioned what I might have written, it would have been difficult to get into it without starting to take positions and do just what I should not have done.

There are many judges who have handled the business of writing with great subtlety and they have managed to come up with extraordinary outputs, without compromising themselves in what they did on the bench.

The thing in several instances that I would like to have written about I think probably would have either forced me into writing just generality, or into writing things that really would have started disqualifying me, and I chose not to do it.

Senator KOHL. Yesterday, when the protestors did their act, everybody in the room, of course, was startled and turned around or looked ahead to see what was happening, with one exception—you.

Judge SOUTER. Oh, I turned around.

Senator KOHL. Did you?

Judge SOUTER. Yes.

Senator KOHL. OK. I had not noticed that.

Judge SOUTER. Actually, I had some practice for this. I remember that something very similar happened during one of Governor Sununu's inaugurations, and there was a sense of *deja vu* to the whole experience. No, I turned around.

Senator KOHL. In connection with preparation for this hearing, it is our understanding that you have spent 4 or 5 weeks studying very hard to ready yourself for this hearing. You have had meetings and briefing books, and I am sure you have gotten a lot of advice. There are a couple of questions that I would like to ask about that.

Did members of the administration help you prepare for this hearing?

Judge SOUTER. Only in the sense of doing things that I asked to have done. There have been some lawyers, as you know, from the White House Counsel's Office and the Justice Department who have been there to help me. But the ground rules were at the beginning—and they were, in fact, not ground rules that I even had to impose, I mean they were ground rules that were offered and they were the only appropriate ones—were that they would pull together material that I wanted to review. As you can imagine, I have been revisiting a lot of cases, some of which I have read almost on a daily basis certain times in my life and some of which I have not read for a long time.

So, what was agreed upon at the beginning of the process was that we would work together on a suggested topic list. All nominees, obviously, are going to review certain subjects, so they had a topic list much in mind. We discussed it I think the first week of the nomination, and they then collected the kinds of material that I wanted to do my reading.

There have not been the kinds of briefings in the sense of saying, "Judge, this is the law or this is an appropriate position that you ought to maintain the hearings." There has been a very scrupulous regard for the fact that I am the nominee, and not the administration.

Senator KOHL. Well, there are, I believe, four members of the administration sitting right behind you.

Judge SOUTER. That sounds like the right count, yes.

Senator KOHL. And my question is, in terms of the future, in view of the fact that the administration comes to argue in court—and obviously the most disinterested attitude is the one that we need to have—do you think that we could sharpen up that process in the future, to create a larger, a bigger distance from day one, once a person gets nominated, a more independent distance than is what is normal, apparently, in the process, as I understand it?

Judge SOUTER. Well, I—

Senator KOHL. Again, as a person sitting here for the first time, I just get the feeling—and I do not believe you are the kind of a man who would let it happen—that there is too close a relationship here.

Judge SOUTER. I appreciate exactly the issue that you are raising and I think it is good to raise it. I suppose there is no question, that Congress could sort of create an office of legal adjunct to nominees to try to provide the help that we need, and we do need help. I mean I wanted to do a great deal of reading and rereading, as I said, in the time prior to these hearings. One of the things I know is that I could not very efficiently have spent my time alone pulling all the material together in a very usable way. I would have spent a good deal of time just running back and forth between stacks and libraries, so that at least a candidate or a nominee who wanted to approach the hearings as I did, would need some help.

It might be difficult, given the pace of Supreme Court nominations, to make that a very workable proposition. I must say I tend to analogize as closely as I can the role of the people who have helped me in a way, to the people whom I am very used to having help me, and that is the law clerks that I have on the court.

The role which the Justice Department and White House lawyers have played for me has, in fact, been a far less intellectually close one than the role that a judge and his law clerk plays. For example, one of the things that I want my law clerks to do is to argue me out of a position, if they think I am taking the wrong one. So there is a very intense kind of intellectual interchange that goes on or one hopes will go on between judge and clerk.

Yet, when that clerkship is over, that does not—and I think is not thought by anybody—to taint the possibility that some day that clerk can appear before the judge in court. My own personal rule has been, although I never formalized it, that I would not hear a law clerk's argument for at least a year had gone, and so—

Senator KOHL. What I was looking for an answer to is the question, do you think in the future our country would be well advised, from the moment a person is nominated, to create the same distance between the nominee and the administration, as exists between the nominee and Congress, or any other party, for that matter? Why should there be a closer relationship, as there is obviously today? I mean it is clear. It seems to me that your independence, as a Supreme Court Justice, is more clearly apparent, if you are here today without their company.

Judge SOUTER. I see the point that you are making. I am glad to have the opportunity to say that nobody has been subtly or otherwise lobbying me on a particular position.

Senator KOHL. I believe it.

Judge SOUTER. There is no question, a nominee needs help.

Senator KOHL. He also needs independence.

Judge SOUTER. You are absolutely right and, fortunately, these people have given it to me.

Senator KOHL. I understand, yes.

Just a couple of questions on *Roe v. Wade*. In 1973, when it was promulgated, you were in the AG's office——

Judge SOUTER. Yes.

Senator KOHL [continuing]. And it is hard to go back to what you did that day or in the days and weeks after, but I am just presuming that there was conversation between you and your colleagues at that time. Do you recall your feelings about *Roe v. Wade* back when it was promulgated?

Judge SOUTER. I frankly do not remember the early discussions on it. I mean everybody was arguing it. It was probably fodder for more argument among lawyers than any other case, certainly, of its time. The only thing I specifically remember is I can remember not only I, but others whom I knew, really switching back and forth playing devil's advocate on *Roe v. Wade*.

Senator KOHL. You had no opinion about it, other than just to say "wow"?

Judge SOUTER. Oh, I doubtless had an opinion. No, I did not just say "wow."

Senator KOHL. What was your opinion in 1973 on *Roe v. Wade*?

Judge SOUTER. Well, with respect, Senator, I am going to ask you to let me draw the line there, because I do not think I could get into opinions of 1973, without there being taken indications of opinions in 1976.

Senator KOHL. OK. With respect, finally, to *Roe v. Wade* just once more, is it fair to state, even though you are not prepared to discuss it, understandably, that you do have an opinion on *Roe v. Wade*?

Judge SOUTER. I think it would be misleading to say that. I have not got any agenda on what should be done with *Roe v. Wade*, if that case were brought before me. I will listen to both sides of that case. I have not made up my mind and I do not go on the Court saying I must go one way or I must go another way.

As you know, the issue that arises when an established and existing precedent is attacked is a very complex issue. It involves not only the correctness or the incorrectness by whatever lights we judge it of a given decision. It can also involve extremely significant issues of precedent.

Senator KOHL. Yes.

Judge SOUTER. And I do not sit here before you, under oath, having any commitment in my mind as to what I would do if I were on that Court and that case were brought before me.

Senator KOHL. Well, I think that is a significant statement.

I would just like to ask you for a moment about cameras in the court. How do you feel about cameras in the Federal court? How do you feel about cameras in the Supreme Court?

Judge SOUTER. Actually, I have never seen a camera in a Federal court. As you know, I have been a Federal judge for a comparatively short period of time and, as a result of what happened to me last July, my judicial experience on the Federal bench has been cut very short.

The only experience that I have had were with cameras in the New Hampshire Supreme Court, where they are allowed, as long as they are not obtrusive. The experience there was that, after the rule was passed allowing the cameras in, for a period of time there was a spate of great interest in taking photographs in the courtroom, and, you know, any case that rose in interest to sort of 5 on a scale of 10 would carry with it video cameras in the back of the courtroom and so on. That lasted for about 2 years, and I am sorry to say that apparently the news media or the New Hampshire public at that point grew so bored with what they were seeing photographed, that people stopped taking pictures and we have not seen them for very long.

I do not know whether, if this hearing went on for 2 years, the photographers would all clear out or not, but that was the New Hampshire experience.

Senator LEAHY. Do not do that to us, Judge. [Laughter.]

Senator KOHL. How about 2 more days? So, cameras in the Federal court, in your mind you have some ambivalent feelings about it, or do you feel it might be—

Judge SOUTER. Well, I am of two minds, in one respect. The fact is, if the cameras are unobtrusive and they are not making, you know, sound that is distracting, that is one thing. There is still a risk there, and I will get to it. Cameras which are obtrusive in the course of oral argument, so that they really do tend to distract your attention, I think is something that has got to be avoided.

When I am sitting there on a bench, you now, I am very much in the position that the members of this committee are, except that I am in an even tougher one. Several of you have said to me, well, after you leave here, if the Senate confirms you, we will never see you again. You have at least got a few days' worth and you can decide how long it is going to be that you do see me.

When I am sitting as a judge, I am seeing or I am hearing the sides of the case for 20 minutes or half an hour or whatever the case may be. It is a short period of time and I do not want distraction from that case. So, that is why a clicking camera can be difficult in a situation like that. [Laughter.]

That seems to have provoked a great deal of clicking. [Laughter.]

I think I need say no more. [Laughter.]

Senator KOHL. The last question on that is the educational value of cameras in the court, particularly oral arguments at the Supreme Court level—aside from its distraction, there is truly some value. I must say that even before I came to the Senate, I have learned an awful lot through C-Span, and I think that one of the best things we do in this country is to make C-Span one of our prime-time stations. While it is not exactly comparable, bringing the court into the home has some value for children and for adults. Now, I don't know whether it is counterbalanced by your own feelings in terms of the distraction, but I think you would agree with

that, would you not, there is some value in bringing the courts into our home?

Judge SOUTER. There is no question that there is as value there.

Senator KOHL. The last area: Going back to when you were attorney general in New Hampshire, you have been asked many questions about your time and conduct as the attorney general and you have responded, in part, by saying "that was then and this is now," which seems to imply that you feel that there is some sort of a change which has taken place in you between then and now, which would not be unusual. It happens to all people.

So let me ask you what you would do today, Judge Souter, if you were attorney general and you were asked by the Governor to make the same arguments you made then about ethnic statistics, flag lowering, literacy, or even the license plate case, would you do it?

Judge SOUTER. The big difference, you see, is you are rightly keeping me in the role of the lawyer and the advocate. The big difference is that, on those issues, we have got a lot of law today that we did not have then. Just take literacy, for example. At the time Attorney General Rudman and I were engaged in the literacy test case, *Oregon v. Mitchell* had not come down. *Oregon v. Mitchell* was decided, as I think I said yesterday, perhaps 4 months, 6 months after we argued that case. So, there were arguments which were there to be made then and they are not there to be made now.

As I said earlier this morning, the virtue of the system and one of the very responsibilities of the lawyer, as advocate, is to fight out the constitutional issues in a sufficiently illuminating way, to give the courts the help that they need from the adversary process to sharpen those issues and get them right.

So the fact is, I would not be making the same arguments today, but we would not be having the same cases today, either.

Senator KOHL. OK. I respect your answer and I guess I will ask once more, to see if there is some opening of a door, at least this wide, and not certainly good or bad, but just some. I thought you said and I thought I had seen a person today who was not the same person that he was 15 years ago, as none of us are. Hopefully, we all grow, develop, change, mature, get better as we go on in our life. Certainly in our profession we mature, and I still—I want to say that I believe that the man who is sitting here today would have a harder time—if not refuse—defending those cases as the attorney general 15 years ago. I want to believe that, so maybe that is how I will end my own personal questioning of you.

Judge SOUTER. I am content to have you end it there, sir. Thank you. [Laughter.]

Senator SIMON. Mr. Chairman?

The CHAIRMAN. Senator Simon.

Senator SIMON. Just one clarification. In response to Senator Kohl, who asked you about your writing, you said that you wrote 220, and I quote you exactly, "wrote 220-odd opinions." You may want to clarify that just a little. [Laughter.]

Judge SOUTER. Could I strike one word?

Senator SIMON. Yes.

Judge SOUTER. You know which one. [Laughter.]

Thank you, Senator.

The CHAIRMAN. Judge, the press will immediately go out and assess whether you did poorly or well today. I think you did well, but they will also have to assess that the networks obviously did not do well today, based on the discussion here that has been raised, and so maybe they will have a better afternoon.

Judge, we will recess for lunch until 3 o'clock. Let us start promptly at 3 o'clock, and we will have three, I believe, possibly four questioners, but no more than that, and we will end for the weekend after that. Is that all right?

Judge SOUTER. Yes, sir.

The CHAIRMAN. Thank you. We will recess.

[Whereupon, at 1:55 p.m., the committee was in recess, to reconvene at 3 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. Welcome back, Judge. As I said, I think the extent to which we are going to go this afternoon is the three persons you see here in front of you at this very moment. There are four, but three of us will ask our questions this afternoon, and then we will adjourn for the weekend and give you an opportunity to do something other than to sit there in that chair. Although as I said to someone who asked me earlier one of my staff people, they said, boy, he sure is good—I mean he can sit there. I said, look, that is what judges are supposed to do.

You have a lot of practice at doing it. But I really seriously admire your constitution, and we are not going to trespass on it, test it too much this afternoon.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Judge, as it will come as no surprise to you, I would like, as I said yesterday, to pick up where you and I left off yesterday. Yesterday, you told me that almost anything can be a liberty interest recognized, at least to some extent, by the Constitution.

Now, you refer to "whole range of human interests and activities" within the ambit of the liberty clause. That comes from yesterday's transcript, on page 118.

In the broadest context, for example, chewing gum is a liberty interest, or firing a gun can be a liberty interest, or smoking cigarettes can be a liberty interest. But the key question is, in these instances and all others, is, can the State interpose itself between the individual and the liberty interest that individual is seeking to exercise?

The State can take away your liberty interest in smoking in public, for example, because it decides that smoke from cigarettes is harmful to the health of other people. The State can take away your liberty interest in firing a gun if, in doing so, you are firing that gun at somebody else.

Now, the Supreme Court has historically dealt with this issue, the question of when a State can interpose itself between the individual and the liberty interest the individual wants to exercise, first by asking whether that liberty interest is a fundamental interest or an ordinary interest.

Now, yesterday you said the right of marital privacy "can and should be regarded as fundamental", to use your words. And you said, "the concept of an enforceable marital right to privacy would give it fundamental importance."

Now, that means, Judge, as I understand you, that a woman has a fundamental right to use contraceptives, to decide whether or not she wishes, in the first instance, to become pregnant. I think that nearly everyone agrees with that proposition, with notable exceptions.

Now, my question is this, Judge. If the liberty interest in choosing whether or not to become—for a married woman, so that we don't get off into a debate about *Eisenstadt*—if the liberty interest in choosing whether or not to become pregnant in the first instance is a fundamental liberty interest, fundamental right of privacy, is that liberty interest terminated when a woman becomes pregnant?

Judge SOUTER. Mr. Chairman, I think there are two questions in your question. First, is the interest that the woman would assert following pregnancy a liberty interest? Second, having asserted that, what weight should be given to it? Should it be given the same constitutional weight as the liberty interest which she asserts prior to pregnancy?

With respect to the first question, the answer is undoubtedly yes. I think that going back to an exchange you and I had yesterday, I think you alluded to that. There are the Supreme Court reports, including dissenting and concurring opinions, that are replete with references to the fact in just such contexts as this that liberty is not limited to locomotion. That is, that is exactly the sense that you have been explaining this afternoon. So, of course, it would be asserted as a liberty interest.

The second question, how should that liberty interest be valued, is one of the central questions in the *Roe v. Wade* debate. And with respect to that, for reasons that I mentioned yesterday, I think that is the point at which I must respectfully draw the line.

I wonder if I may ask you one thing, and if this is out of turn, you tell me.

The CHAIRMAN. Nothing is out of turn. As we said at the outset any question is appropriate.

Judge SOUTER. Well, in fact, that is one difference between my role here before this committee and my role as a judge. I can't ask questions here.

The CHAIRMAN. Yes, you can, Judge.

Judge SOUTER. Well, I just did. In any case, thank you.

I remember when this first came up when you and I were speaking yesterday afternoon, and I said you understand my position. I thought afterwards I am not sure that everyone does. Would it be out of turn for me to take a minute for me to explain why I feel that I have to take that position?

The CHAIRMAN. No. It wouldn't. As long as, Judge, you don't take all of the half hour to prevent me from getting to what I would like to go to next. If you take a few minutes, I would be delighted to hear it; otherwise, I would suggest that you wait until the end of my questioning to do it. You decide.

Judge SOUTER. I promise you this is not a New Hampshire ruse. I say that because there are a number of people watching what we

are doing today who have not heard an explanation from me, and I think they ought to have one.

I have alluded to the reason a number of times. Ultimately it goes to the fact, as we did say yesterday, that the continuing validity of *Roe v. Wade* is an issue which will come before the Court, and if I shall be confirmed it will come before me.

The reason it is inappropriate for someone in my position to express an opinion on an issue which would be comprehended by that request to overrule *Roe v. Wade* goes right to the heart of what the judicial process is.

And if the judicial process is nothing else, it is a process in which in every court and on every issue that may come before a judge the people who come before him can have a fair hearing. A fair hearing means something substantially more than simply judicial courtesy to sit back and let a person say whatever is in that person's mind. A fair hearing requires a willingness of the court not only to listen, but genuinely to examine the position which the court is inclined at that point to take.

Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest and I will close with this question.

Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience.

No one has also failed to know that it is much easier to modify an opinion if one has not already stated it convincingly to someone else.

With that in mind, can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?

You understand the compromise that that would place upon the judicial capacity and that is my reason for having to draw the line. I thank you for the time to say it.

The CHAIRMAN. That is extremely well stated, if that is what I was asking you to do.

You used several phrases in your comments you just made. You said, "substantially limit." What I am asking you does not, in my view—and let me explain why—"substantially limit" your ability to sit before any group of litigants and have a totally open mind, or a mind that although already inclined to rule one way, is open enough to listen intently, honestly, and with great interest to why the position you have tentatively taken in your mind should not be retained by you.

There are two parts, if I may respectfully suggest, Judge, to the equation in determining whether or not you would rule one way or another on any case relating to reproductive freedom.

One part is the value placed upon the liberty interest that is retained and constitutionally protected by the Court, recognized by the Court. The second is what the Court would conclude to be sufficient evidence to meet the test required under the law, to provide

countervailing weight to interpose the State between the woman and that right.

There are two sides to the equation, Judge. You can never solve a problem without both sides of the equation being present. If I only ask you for one side of the equation, you may think it takes you down a road, but no reasonable person, in my opinion, can conclude and walk out of this room with any clear notion of how you would rule only knowing the one side.

Let me be more specific, because I, too, am asked—a lot of people probably don't understand why I am. There are those out there who don't understand, why you are unwilling to answer. There are probably as equally as many people who don't understand why is Biden persisting in asking, if it is not for the purpose of finding out what this Judge is going to rule when the next case relative to the issue of reproductive freedom comes up.

Let me explain my side of that for a moment if I may. As I said, the first part of this question is to determine how Judge Souter thinks. What methodology Judge Souter would employ or be inclined to employ, even though, even that he can change his mind. No one here—let me say it for the fifth time, or sixth or seventh—no one here is seeking a commitment on anything. And nothing that you say here, today, on any subject, precludes you from doing what my friend from Iowa said the other day, when he said, I had a totally different view today about what is appropriate to ask and what isn't appropriate to ask. He changed his mind. He has a right to change his mind.

So no one is asking you for a commitment. Now, Judge, it seems to me that if you are willing to discuss with us, with me, the first part of the equation, whether or not this fundamental right of privacy of a married woman regarding procreation, regarding whether or not she wishes to be a mother, ceases at the time she becomes pregnant, or continues for some period of time, you have not answered in any way how you would rule on *Roe v. Wade* because if there is a fundamental right that exists, the State must have an extraordinary reason to interpose itself between the mother's judgment and her state of pregnancy or nonpregnancy.

What you consider to be an overwhelming reason is something I am not asking you. For you, an overwhelming reason could be there are just too many people or not enough people in the work force, that America's population is declining and the State has an interest in seeing to it that the birthrate is up, not down.

For you that could be an overwhelming reason. For you the fact that it is arguable that it is a fetus, that is able to be sustained outside the womb might not be an overwhelming reason. We don't know. I don't know. No one knows.

I am not asking you that. I'm not going to ask you that. But it seems to me that it is not at all inappropriate for me to ask you, how do you think as a constitutional lawyer and soon-to-be Supreme Court Justice about weighing the values that you spoke of yesterday.

Judge SOUTER. The answer to that question is two-fold, I guess. We think about that process of weighing values in essentially the same way and essentially by the same principles that we go about weighing values in the liberty case with which you and I began,

the circumstances prior to conception. We go about it in exactly the same way we go about assessing the value of any liberty interest.

As I have explained, basically my approach to it is the approach of Mr. Justice Harlan. The point at which I think you and I respectfully have to part company is on this point. You are saying to me that I am not, if I were to answer your second question, I am not in any way saying how I would rule.

With respect, I think I am a third to a half of the way down the road to saying how I would rule. Because as you say, there are a number of components in that ruling.

The CHAIRMAN. Can I interrupt you there, just so that we keep this as a little bit of a conversation? If I get in my automobile and I start in the westerly direction but there are three forks in the road between where I start and where *Roe* lives, and I get one-third the way down the road, and I stay on the road. I don't take the fork that leads me away from *Roe*, does that in any way tell you that I am going to end up at *Roe's* house?

Judge SOUTER. No, sir, it doesn't. But the road between here and *Roe's* house does not have 3 forks, it has 3 miles. It has—

The CHAIRMAN. How many forks does it have, Judge—

Judge SOUTER. Pardon me?

The CHAIRMAN [continuing]. To keep this silly metaphor—

Judge SOUTER. I don't think it is a forked road. I think we have to cross certain territories, if you will, of subject matter. We have to cross the issue of how the interest is itself valued. We have to cross the territory in which we explore what the countervailing interest may be and how they are to be valued. And in a case of re-examining a prior precedent we have to cross the territory of valuing that precedent in accordance with the general rules that we have.

You are saying to me and I respect the position from which you say it, sir, that I want you to cover the first third of the journey because that still leaves two-thirds of the way and you may or may not travel those two-thirds if you are asked to do it.

And my response has to be when I travel the first third, I am giving a third of an indication of what would be done, and with respect, I think I cannot do it.

The CHAIRMAN. You and I took different logic courses, Judge, and with all due respect on this one, it is probably the only thing I might get a better mark than you on. Because to suggest that to go one-third of the way in any way tells you where you are going to end, it diminishes the probabilities that I may not end, but it does not tell you.

But let me get off of this for a minute, because there is probably no course that I could think of that I would have done better than you in law school.

Judge SOUTER. I will drop my analogy if you will.

The CHAIRMAN. Let me explain, or use another analogy.

There was a good deal of discussion yesterday between you and Senator Kennedy and between you and, I believe it was Senator DeConcini—let me check, yes—and between you and me, less with me, and more with those other two gentlemen, about the equal protection clause as it applies against women.

Now, you discussed at length the various levels of scrutiny that are used in evaluating claims of gender discrimination. You talked about three standards of review that the Court uses when it looks at laws that classified people on the basis of whether or not they are male or female.

You said that strict scrutiny is the toughest standard. You said there is a rational basis test. You explained that. Then you said that there is a third test. There is the in-between—I am not quoting you—there is the in-between level of scrutiny which the lawyers call intermediate level of scrutiny and/or the middle tier in which one of the Justices on the Court calls God knows what.

Now, you came along at the end of that, I was kind of interested that you were willing to go so far the down the road to Mary's house. [Laughter.]

The CHAIRMAN. You got down the road and you said, yesterday—I looked at you and I said to you, now, let me understand, Judge. I said, well, let me understand, Judge, “there is a standard between strict scrutiny and rational basis? Is that where you are?”

And you said, “Well, I suppose there has got to be.” Then you certainly said the same thing in response to Senator DeConcini, when you said, “I am certainly satisfied that it would be too blunt a set of instruments just to have one test at the bottom and one test, if you will at the top.”

Now, in the area of equal protection, you are willing to tell me what ball park you are in. You crossed a lot more fields than you are willing to cross with me on the issues of procreation. How can you intellectually justify telling me what test you will use relative to the equal protection clause, and not tell me what test or principles you will use relative to the issues relating to procreation?

Judge SOUTER. Because there is no serious possibility, I think, today that anyone would maintain before a court, in the history of equal protection development that we have had in this country, that the only two focuses of equal protection have got to be at the one end least scrutiny of all, at the other end greatest scrutiny of all, as in the scrutiny for fundamental rights.

There may be disagreement within this committee, there may be disagreement within the court among lawyers as to how to articulate the way that we travel that distance between the least and the most scrutiny. But I think it is fair to say that there is no question today of anyone seriously arguing that there are not interests which are important enough to transcend the least scrutiny and which may not be important enough to get to the greatest. And my concern in the discussion, as you know, has been that the real tough question is whether the test for that place in between, if we are going to have discrete spots on the spectrum, should be the one that we have or a different test, if we could devise one.

The CHAIRMAN. But you think it is in between. You told us you think it should be in between. Judge, I think you are making a distinction without a difference. And with all due respect, the fact is that there are a number of gender discrimination cases you are going to have to deal with before this century is over. There are a number of issues you are going to have to confront. And you appropriately, not inappropriately, have told this body and the Nation that you have arrived at a standard that you would apply. You

said, "I haven't written it out yet." The fact that you reject the bottom one, Judge, and say everybody else rejects it does not speak to the question that there are two left. And you have chosen one of the two.

Judge SOUTER. Sir, I have not chosen the articulation of the middle-tier standard. I am saying that that is the one we have got now, and we ought to see if we can do a better job in articulating it.

The CHAIRMAN. A middle-tier standard.

Judge SOUTER. The position that I have taken—and I would have thought, and I do think that it would be unreasonable to take any other position—is that—

The CHAIRMAN. Well, Judge, why is it unreasonable to take the strict scrutiny position? Why is that unreasonable?

Judge SOUTER. I have not taken a position that it is unreasonable. What I am saying is that it would be unreasonable to take the position that the interest in avoiding discrimination on grounds of sex is of such obvious unimportance that you could seriously argue at this point that it should be left to the minimum scrutiny.

As to whether or not a sexual classification should be judged on the basis of the very highest scrutiny or not is a subject upon which I have not taken a position. I think the two things that I have said is clearly we must recognize that it is more important than minimum scrutiny. And if we are trying to devise a test for a middle tier, I am concerned, as I have said before, about the flexible quality of the one that we have.

The CHAIRMAN. Well, Judge, this is not a—I'm trying to find out information and rationales. I am not trying to bait you.

Let me ask you, then, from my perspective sitting here, it seemed to me that gender was not the only area you were able—you were willing, at least, and you acknowledge you narrowed the field. And you say the reason you are able to narrow it on gender, basically to translate what you said, the way I understand it, is because there is no longer any real debate about the lowest standard so it is all right to basically say there has got to be something other than the lower standard.

Judge SOUTER. I don't think there is a reasonable debate.

The CHAIRMAN. Yes, right. OK.

Now, in the morning, you had an exchange with Senator Specter. You were talking about the free exercise clause of the first amendment, the clause that protects a citizen's right to exercise their personal religion free from undue Government interference and applying the free exercise clause in particular cases requires the same kind of reasoning as is involved in the unenumerated rights area, like the right of privacy and the right of a woman to remain pregnant or not to remain pregnant, according to her choosing.

Judge SOUTER. Well, it involves the same level of scrutiny if a classification—

The CHAIRMAN. Right, that is all I am talking about. That is all I am talking about.

Now, in all these cases, Judge, the judge has to decide "how the individual interest should be evaluated and the weight that should be given to it in determining whether there is in any or all circumstances a sufficiently countervailing governmental interest." Now,

those are your words from yesterday, Judge, in describing what you would not be willing to tell us concerning a woman's right, when you were speaking of the woman's right. Yet in the free exercise case, you told Senator Specter that you recognized the value of the "strict scrutiny standard." You said that a person's right to exercise his or her freedom of religion is fundamental, and that to overcome it the State must have a compelling interest and a statute must be narrowly tailored to that interest.

In other words, you told him about free exercise exactly what you are unwilling to tell me about procreation.

Judge SOUTER. I think what I told Senator Specter was, No. 1, that the test as you have just quoted me as saying was the Supreme Court's test for it. And I told Senator Specter that there was nothing in my experience which had led me to believe that I would wish to re-examine that.

The CHAIRMAN. Well, now, what does that mean? Isn't that the same thing as saying that in your experience you are satisfied with the strict scrutiny test? Isn't that what you just told us?

Judge SOUTER. I am saying that there is no basis that I would raise in the discussion with Senator Specter or anyone else on this committee to give them an indication that I think there should be a change in the test that the Court has had. I also said to Senator Specter, when we were describing, for example, the concept of establishment, that I had not done any research or taken any position on the question of re-examining the concept of establishment.

The CHAIRMAN. I understand that.

Judge SOUTER. And I said to him then and I would now that if a case of that sort were brought and the argument were made, I would listen. But I do not approach those issues with any preconception that I—

The CHAIRMAN. In the establishment area, that is true, Judge, if I may interrupt you. But on the free exercise question—well, I won't beat it to death, but you said what you said. You said, "What I do want to understand is that I approach the issue, or would approach the issue if it comes before me, with exactly the view of the value of the strict scrutiny test which I described to you."

Now, I don't know how, Judge, in any plainer English—we can debate this, but I don't know how that says anything other than what it says: "I would approach the issue with the view of the value of the strict scrutiny test." Now, if that is not telling us what principle you would apply, I don't understand. But, again, I don't want to belabor it. I don't understand why in the free exercise area you are—on page 49 of today's transcript—explicitly prepared to tell us what standard you would apply, although I acknowledge, no matter what you told us, you are prepared to listen to arguments. No one doubts that. No one doubts that you are prepared to listen to an argument if Senator Specter were before you. And he would be arguing strict scrutiny. But if he were before you and said, no, it shouldn't be strict scrutiny, it should be rational basis, you would listen. No one doubts that. But you were willing to tell us what standard you would apply, but you would sit down—as they say, O ye, O ye, bang, you sit down, and you sit down strict scrutiny is where you start. That is all I am asking you about the other area.

But let me leave it for a second and go to one—I will take one last run at this. You have mentioned Justice Harlan several times. If I can't get you to do in the procreation area what you are willing to do, in my view, in the gender and free exercise area, let me ask you to try this with me so I can have a better insight into how you think, how you approach a problem.

I have thought about how can I possibly do this because I had no doubt where you were going to go. You are not about to tell me what principles you are going to employ. And so I tried to think last night about how could I get at your reasoning process. Forget the statement of what principles you would apply. We are beyond that. Let's just leave that aside. As I said, one more effort, so listen to me. Maybe you can give me some insight here, OK?

In response to a question—and what I came up with last night, and I drove my staff crazy. I said, look, how do you ask a guy how does he think? Not what standards, that is real easy. One of the ways to figure out how you think is you say, well, here are the standards that I apply, the principles from which I start. Another way to say it, if you don't use that—which met with the rejoinder, well, that is getting me too close to case-specific, so I won't—how do you get to the guy and say, okay, just tell me, how do you think? And I went back to old Harlan, God bless him. He was a great Justice.

This morning, Senator Grassley in a different context got you talking about that a little bit in a way that sort of clicked in my mind that maybe this is the way to go about it, and let me try it.

This is harder than talking to Warren Rudman, you know? [Laughter.]

As a matter of fact, it is similar. No wonder you guys are such close friends.

Judge SOUTER. I was going to say, at least you have gotten the chance to do that. You know, what I said yesterday, I just listen.

The CHAIRMAN. It is only because there are certain Senate rules on the floor. When one Senator has the floor, the other cannot speak.

In response to a question from Senator Grassley this morning, you said something that I would like to pick up on. You said that the one thing that judges need to “work on”—he was going into what is the proper role of a judge—is the “criteria they use” to determine which enumerated rights will be deemed protected by our Constitution. And I would like to ask you about the criteria that you would use, just like the criteria that Harlan used and enunciated.

In response to another question from Senator Grassley, you suggested that your criteria would be similar to those employed by Justice Harlan, and you identified two criteria in particular. And I want to be specific; that is why I am reading from this. I don't want to misrepresent your position.

You identified two criteria in particular that you used which you seem to find helpful. One was whether the deprivation of such a right, an asserted right, an asserted liberty, would be contrary to the concept of ordered liberty. So I am real clear for me because you are—and I am not being solicitous. This is stating the obvious. You are the scholar. I do this among other things.

What we are talking about here is an assertion of a liberty interest not enumerated in the Constitution by an individual, and a State coming along and saying, wrong, you can't do that, you don't have that constitutionally protected right. It is not constitutionally protected any longer. It may have been constitutionally protected to some degree, but the State trumps you. The State comes along and has a better right to take it away than you have to retain and exercise it.

You said when that debate is taking place, one of the issues is whether or not the right would be contrary to the concept of ordered liberty; and, second, you said, "A search of the American tradition" to see if the rights fall within that tradition.

Now, before I ask you about these criteria, Judge, that I want to get into, have I accurately stated the views you expressed to Senator Grassley: that ordered liberty and a search for the American tradition would be at least two of the criteria you would use for determining whether or not there is a constitutionally protected unenumerated right in the Constitution?

Judge SOUTER. Yes, with this one caveat, which I think is unnecessary: You and I, we are both abbreviating Justice Harlan's language when we were speaking of that second approach to reasoning. But with that, yes, of course.

The CHAIRMAN. Now, Judge, I am particularly interested in this notion of search of the American tradition that you spoke of. As you know, one heated debate in modern constitutional law—not about any specific case but about general principles—concerns just how judges should go about "searching for our traditions."

Now, Justice Scalia—in a case called *Michael H. v. Gerald D.*—and the facts of the case are not relevant so, please, in the time I have left, let's not get off into the facts of the case.

Judge SOUTER. I promise.

The CHAIRMAN. OK. Unless you think they are relevant or necessary in order for you to answer.

He explained his methodology this way in Footnote 6, which is becoming a famous footnote: "I would refer to the most specific level at which a relevant tradition protecting or denying protection to the asserted right can be identified." Now, this is understood to be a narrowing of the idea of unenumerated rights, because under it, unless the particular and specific right being asserted by the individual has long been recognized in our tradition, the Court, adopting this reasoning, would not recognize it.

Two other conservatives on the Court, I might add—Justices O'Connor and Kennedy—rejected this method as being too cramped. They said, "When identifying liberty interest protected by the due process clause, on occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be the most specific level available." Then they specifically cited *Loving*, and let me make sure we get into that.

*Loving*, as you know better than I do, was a Virginia case years ago, striking down the anti-miscegenation laws which said black folks can't marry white and white can't marry black.

Now, the way Justice Scalia would approach *Loving*, if his reasoning is consistent—and I think it is. He is a very bright fellow and totally consistent, to the best of my knowledge. He says don't

go back and look at whether or not marriage, the institution of marriage is granted and viewed in American tradition with a sense of sanctity and privacy. That is too general. Go back in our history and look at whether or not our American tradition recognized the rights of blacks and whites to marry.

That is the specific tradition we must investigate. Did it exist or did it not exist?

So, it depends from whence you start, it is like that old thing about computers, "garbage in, garbage out." Depending on where you start is going to determine in your little syllogism how it is built and what answer you give.

Now, Justice Scalia says you should look at the most specific right being asserted. In this case, Justice Kennedy and Justice O'Connor say no, you have got to go a little broader sometimes.

Now, Judge, without getting into how you would have decided *Michael H. or Loving* or any other specific case, could you tell me which of the two methodologies you would employ?

Judge SOUTER. I could not accept the view that, as a rule always to be applied, the most specific evidence is the only valid evidence, and I do not think that Justice Harlan would have done so, either.

It is a quest for a greater degree of certainty that we understand, and it seems to me that the quest for the kind of evidence that we are after should be a quest not for evidence which, as a matter of definition or a matter of absolute necessity has either got to be of narrow compass or of general compass, rather, it has got to be a quest for reliable evidence, and there may be reliable evidence of great generality.

The analogy that I thought of, as you were describing that, is far from a perfect analogy, but I think I will throw it out anyway. We do not say, when we are engaging in the normal evidentiary problems in the trial court, that we will accept only direct evidence and not circumstantial. We do not narrow down our kind of search for truth in ways like that, and I think—

The CHAIRMAN. But, Judge, does it not determine what evidence you are accepting to assert what proposition? If the evidence you are seeking is whether or not marriage is protected historically, that is one thing. If the evidence you are seeking out, the reliable evidence is to determine whether or not blacks and whites marrying has been a tradition in our tradition, that is a different thing, right?

Judge SOUTER. That is right.

The CHAIRMAN. OK. And that is what I am asking you, the fundamental issue, do you think we need to determine when the investigation begins, the narrowest application of the right asserted, or a broader application of the right asserted?

Judge SOUTER. The answer is we cannot, as a matter of definition at the beginning of our inquiry, narrow the acceptable evidence to the most narrow evidence possible—

The CHAIRMAN. OK. I now yield—

Judge SOUTER [continuing]. And I think Justice Harlan would have given the same answer to that.

The CHAIRMAN. Thank you very much. Maybe I can come back to it.

Judge SOUTER. Thank you.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Judge, we have a very distinguished and able Chairman, but I am glad you did not answer the questions the way he wanted you to answer them. [Laughter.]

Judge SOUTER. I hope you will have a persuasive effect on the Chairman, Senator Thurmond.

Senator THURMOND. Judge Souter, earlier this morning, one of my colleagues, I understand, referred to a letter suggesting that all of your decisions in the area of labor are in favor of management interests.

Let me refresh your memory by citing to you the opinion which you wrote in *Panto v. Moore Business Forms*, which concerns a continuation of a laid-off employee's salary. There are other cases in which you have ruled in favor of the employee. Is it not true that *Panto* and these other opinions can fairly be construed as rulings in favor of employees?

Judge SOUTER. Senator, yes, the answer is yes to that and I see your staff has been busy at lunch and I have had some help at lunch myself. I would be glad to supply you or the committee with some citations to things that I did not think of at that time.

Let me just say, if I may, just a word about the *Panto* case, since you have mentioned it and I think Senator Simon probably would have interest in it: *Panto* is a case brought by a so-called at-will employee or on behalf of an at-will employee who had been given what is known as an employee's handbook, which supposedly set out the terms and conditions of employment.

One of the terms and conditions that were described in that handbook was a right to deferred compensation upon the termination of his employment. The question in the *Panto* case was whether the employer could unilaterally simply revoke that particular condition, and one of the arguments made was that an at-will employee could be fired at any time, by definition, and, therefore, the conditions of employment can be changed at any time.

The holding of the court in New Hampshire, which was unanimous in adopting the opinion that I wrote, was that, in giving that kind of a handbook, you are engaging in exactly the same kind of enterprise that you do when you make a unilateral contract, you are holding out a set of terms and saying if you will do something for me, these are the terms upon which you will be recompensed or will be rewarded.

I have to say that I really did not think the reasoning in the case, including the analogy to the unilateral contract, was very remarkable, but I do know that in similar cases courts in other jurisdictions, particularly in times past, have gone the other way.

So, it is true, it was—I would not have put it, if I had been classifying my cases, as a pro-labor case, but if you are going to draw that kind of distinction, I think that is the decidable line that it belongs on.

Senator SIMON. If my colleague would yield, I want to thank Judge Souter.

Senator THURMOND. I would be pleased to yield.

Senator SIMON. I would just ask, Mr. Chairman, that the record be open here, if there should be any other cases that Judge Souter would want to enter in the record at this point, too.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Without objection.

Senator THURMOND. Judge Souter, recently there have been considerable scholarly debate in the Congress and opinions issued by the Federal courts concerning constitutional protection of expressive conduct under the first amendment. How would you characterize the distinctions of protections under the free speech clause between expressive non-oral conduct and the actual spoken word?

Judge SOUTER. Senator, the problem that has to be confronted in those cases is that when there is a combination of expressive conduct and speech in the most literal sense, the kind of conduct which is used for expressive purposes may be subject to reasonable and legitimate regulation by the government, in a way that mere words would not be.

Therefore, what the courts have done is to try to come up with a test for evaluating the government's interest in the conduct, as opposed to the speech or the merely expressive part of it, and the test that has been devised consists of asking whether, in some way infringing on what would otherwise be an absolute freedom to engage in that expressive conduct, the government has a substantial and legitimate interest which is unrelated to the regulation of free expression, and, if so, whether the particular law which tends to restrict the right of expression there does so in a way which is narrowly tailored to serve that governmental interest and to infringe on the right of expression no more than is absolutely essential.

It is a kind of line-drawing, when conduct is complex, some of it clearly subject to first amendment standards and some of it subject to regulation on grounds having nothing to do with speech.

Senator THURMOND. Judge Souter, under our Constitution, we have three very distinct branches of government. It is my firm belief that the role of the judiciary is to interpret the law and not make the law.

However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will, as judicial activists. Would you please briefly describe your views on the topic of judicial activism?

Judge SOUTER. Senator, there are, I suppose, a great many things we could say, but there are two aspects of it which I think are foremost in our minds. The first is the appropriateness of judicial remedy. Sometimes activists have been criticized for seeming to look for causes, rather than cases.

I do not know that there is much we can say, in general, about it, except what I said on the questionnaire which was filed with the committee, that the extent of a judge's obligation to provide remedies in a case in which some violation or infringement of right has been found is primarily and, in the first instance, a function of the case before him. It is a function of the extent of the violation that he has found.

The second sense of activism which I think is probably in the back of everyone's minds is a sense that I have touched upon in earlier remarks before the committee, and that is a sense of the judge as embodying pure personal preferences and value choices, however sincerely they may be felt, as opposed to embodying values which are found and based upon some kind of an objective

search for meaning, whether it be the meaning of Constitution and the meaning of statute.

I think I have said more than once during the course of these hearings that my approach to the obligation of judging is to try to find an objective source of meaning that simply does not force the court into, in effect, giving free rein to its own predilections.

Senator THURMOND. Judge Souter, the Supreme Court recognized a good-faith exception to the exclusionary rule in the case of *United States v. Leon*. This exception applies only to searches made pursuant to a warrant. Would you discuss the effect of the exclusionary rule and the good-faith exception in preventing police misconduct?

Judge SOUTER. As you know, Senator, the basis for the exclusionary rule, as it was explained in *Mapp v. Ohio*, the case that applied the exclusionary rule to the States, was to induce the police, to induce the executive branch of the government from engaging in activities which violated fourth amendment rights, and the theory was that if the police could not profit, if the prosecution could not profit by using evidence illegally seized, there would therefore be an inducement to avoid seizing evidence illegally, so that the object of the exclusionary rule as a means to enforce the values of the fourth amendment was a very pragmatic one. But the focus of that explanation was, of course, on police conduct.

That point is reflected in the *Leon* case, as you have just described it, because what the *Leon* case is saying is that if the mistake which leads us to conclude that there has been a fourth amendment violation was a mistake not made by the police, but made by the judge or a magistrate who issued the warrant, that should not preclude the introduction of evidence on the theory described in *Mapp v. Ohio*. If the mistake is not the police's mistake, then you gain nothing in influencing police conduct by keeping the evidence out.

The one overriding limitation which was placed, of course, on the *Leon* rule is that the mistake must not only have been a judicial mistake, but the kind of mistake which the police could nonetheless, as it were, in good-faith proceed without recognizing, and, therefore, I think the *Leon* rule is entirely consistent with the rationale for the exclusionary rule as described in *Mapp*.

Senator THURMOND. Judge Souter, the Supreme Court's decisions in the cases of *Teague v. Lane* and *Penry v. Linnow* have ended what has been an essentially ad hoc approach to the area of constitutional criminal law known as retroactivity. This area of the law deals with whether or not a Supreme Court decision is retroactively applicable to previous convictions.

As you know, the *Teague* and *Penry* cases limited the principle of retroactivity by creating the rule that the legality of a prisoner's sentence will usually be measured by the law in effect at the time of his trial and direct appeal, unless the Supreme Court declares that a subsequent ruling shall apply retroactively.

The effect of these decisions has the greatest impact in the area of Federal habeas corpus. Would you please comment generally about the legal basis for the Court's ruling in *Teague* and *Penry*?

Judge SOUTER. Senator, there is a curious parallel between the explanation that I am going to give you now and the discussion

that we had just a second ago on the good-faith exception, because as the Court has explained it and as you know, the *Teague* and the *Penry* cases refer to the availability of what is known as collateral relief by writ of habeas corpus in the Federal courts for State prisoners.

What that means in practical terms is that a State criminal defendant may well have been through the State criminal justice system by way of direct appeal or even collateral review in the State system, have taken his request for relief as far as the Supreme Court of the United States and have been denied discretionary review and still have an opportunity to raise constitutional claims by petitioning for a writ of habeas corpus in the Federal courts. And because the relief is sought by a new proceeding, we call it collateral, rather than a source of direct relief.

Now, as the Supreme Court of the United States has explained the theory behind underlying Federal habeas corpus relief in situations like this, it in effect has said we recognize that not all constitutional errors may get corrected in the course of direct review in the State system, and collateral relief by writ of Federal habeas corpus is provided as an inducement to the State systems to do a good and sound and reliable job of constitutional adjudication, because if they do not, they know that the prisoner has another avenue of relief in the Federal system.

Now, what the two cases that you describe have held, starting with *Teague*, what they have held is that if a prisoner is going to get relief on habeas corpus collaterally in the Federal system, with two minor exceptions—well, not minor, but two exceptions, that relief has got to be based on the law that was in existence at the time the State courts reviewed the conviction, and the reason for this is they are saying we provide this relief in order to induce reliability and good faith and constitutional adjudication by the State courts.

That is a value which is not going to be served, if we also grant relief on the basis of law which was not in existence or had not been declared at the time the State courts did their review. In other words, I suppose in a very simplistic way, we cannot blame them for failing to follow some law which was not there for them to follow at the time. Therefore, under those cases, Federal habeas relief is restricted and is available only for violations of the law as it stood at the time.

As I said, there are two exceptions to that for changes in the law which recognize conduct or penalty totally beyond the power of the courts to impose and for violations which go to the fundamental reliability of a conviction. But subject to those two exceptions, habeas relief is, therefore, limited and it is limited in a way which is consistent with its object.

Senator THURMOND. Judge Souter, the issue of capital punishment is a controversial topic, with strongly held views on both sides. However, the Supreme Court has ruled that the death penalty is a constitutional form of punishment, provided steps are taken to insure that it is not imposed with unfettered discretion.

Certainly, there are judges who are personally opposed to the death penalty. Since the Supreme Court has ruled that the death penalty is constitutional, what role, if any, should the personal

opinion of a judge play in decisions he or she may render in cases such as the death penalty?

Judge SOUTER. Senator, we all work with the ideal that the kind of personal opinion which may be at variance with the law is not going to play a role in the judicial decision. When we get to an area like the imposition of the death penalty, we also I think have to recognize the limits on what is humanly and morally possible.

I do not know whether there are any States, I presume there are none, in which the death penalty decision is one which is rendered in the discretion of the judge, and I presume that that is totally out of the question today. But even though a judge may not have the role of deciding that the death penalty may be imposed, the judge certainly may have great moral qualms, if the judge is morally opposed to the death penalty, in taking part in a proceeding which could have the result of an imposition which he believes is morally wrong.

I think what judges have to recognize in those circumstances is perhaps there are cases in which their moral views are so strong that they simply cannot preside, and I think we have to recognize the moral compunctions that a judge would feel in those circumstances and we have to recognize a right to recuse if a judge feels that way.

Senator THURMOND. Judge Souter, prison overcrowding is a major problem facing Federal and State institutions today. Several State systems are currently under Federal prisoner cap orders which limit committing additional inmates to certain prisons. At a time when violent crime and drug offenses are such a problem, what other alternatives are available to insure that prison space is available for those sentenced to serve time?

Judge SOUTER. Senator, as you know, one of the proposals that has gained attention and currency in some places has been referred to as the privatization of prisons, in effect, the contracting out of what traditionally has been regarded as a direct State function and State responsibility for imprisonment.

I am not sure, in response to the question that you describe, that that really is an alternative, because if any one thing is clear, it is that so many of our prison overcrowding problems are functions of the amount of money that can be spent or is spent in prison construction and prison administration.

There is no question that if prisons are not to be expanded, if alternative facilities are not to be found, and the rates and periods of incarcerations tend to rise, as in many places they are as a result of the activity in drug prosecution, then there may very well have to be value choices made by the States to change the possible penalties in other crimes, so that there will be room in the prisons for those thought by the legislature to have the first priority in the need for prison space.

Senator THURMOND. Judge Souter, Congress established the U.S. Sentencing Commission in 1984. Its function is to promulgate sentencing guidelines for Federal judges, to insure uniform and predictable prison sentences.

The Supreme Court ruled, in the case of *United States v. Menstrata* that these sentencing guidelines are constitutional. From your experience as a judge, do you believe that uniformity in sen-

tencing is more fair to those individuals who commit similar crimes and, in the long run, will sentencing guidelines create greater confidence in the criminal justice system?

Judge SOUTER. Senator, I think the sentencing guidelines will create a greater confidence in the justice of the system. I would not take the position, I do not think anyone takes the position that sentences have got to be imposed absolutely, without judicial discretion.

But I do think very strongly that the judicial discretion which is exercised in sentencing should be a very structured and disciplined discretion, otherwise the problem of disparity in sentencing is simply insoluble. Like countless other judges, I have sat on a court in which sentence is set to be rendered. One of the concerns that I and, I suppose, most other judges have is that, if Judge A gives a sentence twice as long as Judge B for the same offense, there has got to be a very strong and apparent reason for that disparity, without the belief that there is, in fact, injustice in the sentencing system.

My concern about the effectiveness of this perception of injustice is not limited simply to the perception of the public. I think there should be an equal concern for the perception of the defendants who are sentenced. If there is going to be any hope for any rehabilitative effect in sentencing, particularly on young and early offenders, it seems to me it has got to rest upon a reasonable perception that the system in which the sentence has been imposed is itself a fair system.

I applaud the efforts of the government to devise sentencing guidelines. As I think you may know, the chief judge of the court on which I now sit was one member of the commission that proposed the guidelines that we have.

Senator THURMOND. Incidentally, Senator Kennedy and I worked very hard on that question.

Judge Souter, the Sentencing Commission is considering whether the current Federal criminal sentences are adequate. In fact, the commission will promulgate new guidelines for white collar and corporate offenses. Congress has also seen fit to increase the terms of imprisonment for various white collar crimes, including those involving financial institutions.

From your experience, have penalties for white collar and corporate defendants been sufficient, and do you anticipate tougher penalties for white collar criminals in the future, as a result of the public outcry over the recent savings and loan offenses and securities-related crimes?

Judge SOUTER. My experience, Senator, has been entirely in the State system. As you know, I am a member of the United States Court of Appeals for the First Circuit right now, but I have sat there hardly at all.

I do have a very vivid recollection of the problem of white collar crime in the State. The problem there was not that penalties were insufficient in the sense of there being no penalties on the books which were adequate to the offense. But there was for a long time, certainly in the early years in which I was practicing law and engaged in the criminal justice system, an unspoken feeling that somehow the white collar criminal should at least get one free

chance or the feeling that the white collar criminal, even when caught, should never in fact be sentenced to incarceration. This seemed to me was both morally unjust and socially indefensible.

I can recall being, I think, part of the process within the courts by which a very different kind of look on white collar sentencing has been gradually taken effect, and suffice it to say, I do not take the position and have never taken the position that the white collar criminal should be dealt with in some way which is essentially different from any other brand of criminal.

Senator THURMOND. Judge Souter, is it your opinion that the Federal Government was designed to be a government of limited powers? If so, do you have a legal basis for your position which you would discuss with the committee?

Judge SOUTER. Senator, we know, without much fear of argument on the point, that the basic conception of the Constitution, as it was proposed in 1787, was that of a government of limited powers. That very assumption was the reason why a Bill of Rights was not proposed, because the reasoning went that a government whose powers were as limited as these were not a threat to civil liberties and that civil liberties could be perfectly well guarded by the bills of right in the State constitutions.

The position of the Federal Government, of course, has in some respects changed since 1787, and the biggest change has come about as a result of the enactment of the 14th amendment, which has given the government a power with respect to the subjects covered by the 14th amendment, which the constitutionalists of 1787 certainly never anticipated.

So we know that there has been deliberate action by the country in the adoption of the 14th amendment which has had an effect on the constitutional theory of 1787, and the difficult issues that are going to face the courts probably in the next decade or two is to work out with a precision, which the courts have never done, just the extent of added power, particularly to the Congress of the United States, which was intended to be conveyed by section 5 of the 14th amendment.

Senator THURMOND. Judge Souter, there have been complaints by Federal and State judges regarding the poor quality of advocacy before the courts, including the Supreme Court. Throughout your years of service on the bench, have you found that legal representation in the courts was adequate, and what in your opinion should be done to insure that individuals get quality representation in the courts?

Judge SOUTER. Senator, we all fuss, and frequently fuss with reason, that the level of performance in the trial courts and the appellate courts is not what we wish it could be.

There is not any ultimately generalization that is possible. I have heard splendid arguments in the Supreme Court of New Hampshire and I have heard some that were poor. I have seen lawyers who seem barely above the level of competence in the trial courts and I have seen others who seemed to be geniuses of trial law.

I think you put your finger on one approach to the problem of trial competence, when at the end of your question you refer to the adequacy of the level of representation, and I think when you do

that, you make reference particularly to representation in the area of the criminal law.

I alluded yesterday to the fact that, when I first started practicing law, every lawyer sort of took the cases that were assigned to him by people who needed representation without cost, and lawyers took on criminal representation under the same circumstances.

One thing we found is that in criminal law, as in anything else, it helps to be an expert. And one of the things we have found—and I am sure this is true not only in New Hampshire, but throughout the Nation—is that the federally funded public defenders, usually federally funded or State funded public defenders, have provided a degree of expertness in criminal representation which it is virtually impossible to get, simply by drafting a lawyer in private practice who does not do criminal law, suddenly to take over the representation of a defendant.

We have had exactly the same experience in looking at the criminal appellate work which is funded, whether by State or Federal dollars, as a result of which we have an expert criminal appellate bar which is the envy and the equal of the prosecution in the State. This kind of evening up of the level of representation has, in fact, brought about a quality of justice which was unknown when I got admitted to the bar.

Senator THURMOND. Judge Souter, the caseload of the Supreme Court has grown rapidly over the past several decades. Cases today are more complex, as our laws have become far more numerous and intricately fashioned. Would you please give the committee your thoughts on the current caseload of the Supreme Court, without going into great detail, and comment briefly on any innovative methods you may have utilized at the State or Federal level for handling this increased caseload?

Judge SOUTER. Senator, I think it would be presumptuous of me to try to give a disquisition on the United States Supreme Court's caseload, which I, of course, have had no personal experience with.

The one thing all of us outside the Court are aware of, although we are probably inadequately aware of, is the enormous pressure of that caseload, in the number of petitions for review and in the pressure on the Court to accept the maximum number of cases which may exhaust its limited time.

As you know, in the course of the last term of the Supreme Court, the number of cases taken has been reduced somewhat, and that seems to me an appropriate thing for the Supreme Court to do.

At the State level, we too have had caseload problems. One effect of that in my own State was, as a practical matter, to force the State Supreme Court to go to a system of discretionary review, deciding whether or not to take a given case for which an appeal is decided, as against the old system when I was younger, in which everybody had an appeal of right.

One of the other effects of the growing caseload, as we said the other day, yesterday, was to foster ways of disposing of cases outside of the traditional adversary judicial system, sometimes under its auspices, sometimes on a purely private basis.

I can tell you that the exploration of what everybody tends to group together under the title of alternate dispute resolution is, I think, an extremely hopeful sign. There is only one thing that I fear, and that is that, as State budgets continue to be squeezed and as money for the judicial system becomes harder and harder to find, in competition with the other claimants for limited State budgets, that there is going to continue to be such a squeeze, particularly in the civil area, where there are no mandatory constitutional standards or few mandatory standards for speedy trial, that in fact private civil litigants are going to get squeezed out of the judicial system, and as they get squeezed out of, simply because the system cannot handle their cases, they are, instead, going to resort, as they are already doing and are doing in my State, basically to private judging, in which parties will get together and they will hire somebody who may be called an arbitrator or may be called by some other title, in effect to decide their cases for them, entirely outside the judicial system, simply so that they can get the cases decided.

If this trend continues, the great fear that I have is that we are going to be creating in the United States essentially two systems of justice, and the only people who are going to be using the civil justice system, if this is carried to extremes, are in fact the people who cannot go outside and spend money out of their pockets to hire a judge or someone in the private sector to adjudicate their cases.

This seems to me an appalling prospect, not only appalling for the judicial system, but appalling for the Nation in the broader sense, that we are going to lose one of the institutions and one of the symbols that binds us together as a Nation, and that is a system of justice open to everyone, and that justice certainly has got to include civil as well as criminal justice.

Senator THURMOND. My time is up. Thank you, Judge.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge, just a few moments ago, in response to questions of Senator Thurmond, you talked about the moral dilemma that some judges might face who are against the death penalty and yet must impose it, and I thought you demonstrated some legitimate concern for those particular judges.

Then you talked about the whole question of the morality of sentencing, in terms of white collar criminals, and I thought you were very eloquent when you talked about the fact that some of those who were involved in white collar crime might expect that they should, at least for the first offense, not do time, and you expressed your own kind of moral concern that that was not correct.

Picking up on that question, let me ask you this, whether, as a matter of your own individual and personal moral beliefs, do you believe that abortion is moral or immoral?

Judge SOUTER. Senator, I am going to respectfully ask to decline to answer that question, for this reason, that whether I do or do not find it moral or immoral, will play absolutely no role in any decision which I make, if I am asked to make it, on the question of what weight should or legitimate may be given to the interest which is represented by the abortion decision.

I think to answer that question and to get into a matter of personal morality of mine, when it would not affect my judgment, would go far to dispel the promise of impartiality in approaching this issue, if it comes before me.

Senator KENNEDY. Well, as you pointed out, it would not affect what you may or may not do in the *Roe v. Wade* case, and I think that is certainly understandable. Something could be moral, and yet not be protected by constitutional law; other things can be immoral and be protected by constitutional right, so this is irrelevant, basically, on the question of how you would rule on *Roe v. Wade*.

Judge SOUTER. It would be irrelevant to my decision, yes.

Senator KENNEDY. Why do you feel hesitancy or reluctance, then, to express what you were willing to express about the morality in the application of the death penalty for individuals who have moral beliefs, and what you are willing to express about your own moral belief when it came to the question of white-collar crime? Why can you not share with us your view about whether abortion is moral or immoral or perhaps moral in certain cases and may be immoral in other kinds of cases? Obviously, you have given a great deal of thought to this? When you were on the New Hampshire Supreme Court, you were concerned about physicians and the rights of physicians not to counsel a patient on the availability of abortions. We know how you feel on the question of morality of that question. You were quite willing to express it.

Judge SOUTER. Well, Senator—

Senator KENNEDY. Why the reluctance now to indicate what your view is on this?

Judge SOUTER. Senator, there are two things here. The first goes to the *Smith v. Coady* concurring opinion that you referred to. That opinion did not rest upon any moral judgment of mine about the morality of the procedure. It represented a perception that those who may be engaged in counseling that could affect that procedure could find themselves, as the result of their moral positions, in an impossible bind if the Court did not allude to what their responsibility should be. That was an expression of my concern about their moral dilemma, not an expression of my moral position on the issue itself.

The other distinction is that the other moral questions that you referred to are not implicated by any case that I see reasonably coming before the Court; whereas, the moral position on the abortion issue is, of course, clearly implicated by the request for *Roe v. Wade* reexamination because people on each side of the issue are impelled by very profoundly felt moral beliefs.

Senator KENNEDY. Well, we won't get into the question of whether we still have a strong division of the country for and against the death penalty or on the question of sentencing. But Sandra Day O'Connor responded to that question, Judge.

Judge SOUTER. With respect, sir, I do not believe I could do so without creating the impression that I could not give a fair hearing to people whose views might differ from mine on that. And I am not familiar with Justice O'Connor's answer on that subject. It may have depended upon prior opinions that she had given.

What I do believe, Senator, is that for me in this forum to start in the most serious discussion, even with you, to an expression of

my views of the morality on that subject would be taken by a substantial number of people as the beginning of a commitment on my part to go in one direction or another. You and I undoubtedly could agree that it should not be so interpreted, and it would not so portend my decision one way or the other.

I do not believe it is realistic to expect that a substantial number of people listening to our discussion would share our views.

Senator KENNEDY. Why is that? Why do you arrogate to yourself the feeling that the American people can't understand that or make a judgment? What do you know and I know that is superior to the common sense of the American people when you are being recommended to serve on a Court that is going to be the guardian of the basic rights and liberties of those people? I find that kind of comment and statement troubling, Judge—

Judge SOUTER. No; I—

Senator KENNEDY [continuing]. To say that I can tell you and you can tell me and we can understand, but the great number of people who are watching this whole hearing can't understand it. I mean, I think that attitude is troublesome.

Judge SOUTER. Well, I am taking you at your word, Senator, that you believe it would not affect my judgment, and I know that you are taking me at my word that it would not affect my judgment. But I believe also—

Senator KENNEDY. And you expect the American people to take that as well.

Judge SOUTER. I believe that there are a great many people who would not accept the view that you and I are willing to hold. And I don't believe that those people should be subjected to the kind of moral discussion which in their view would clearly compromise my objectivity. I think a great many of those people would say I am willing to accept his judgment that his own moral view will not influence his decision in the case. But if he then engages in a public moral disquisition on what that judgment is, it must be because there actually is some indication about what he would do in that discussion.

And I do not think we should ask people, as it were, with a double standard, number one, to accept that the position is irrelevant, and yet at the same time to engage in a discussion of the subject which you and I agree is irrelevant.

Senator KENNEDY. Well, you wouldn't even share with us whether you think in the circumstance of rape or incest that there is a moral question or issue? You wouldn't tell us whether you feel that that was morally repugnant?

Judge SOUTER. I can certainly indicate, as I hope anyone would, that the complexity of the moral equation may change in those circumstances, but I would respectfully be asked to be excused from answering that question.

Senator KENNEDY. I thought you gave us a very moving story yesterday when you indicated that a number of years ago you counseled this student and the anxiety that you went through over that 2-hour period in that closed room. And, clearly, no one asked you what our counsel was, and I think that that is certainly appropriate, nor were you willing to share that counsel with us, which I think was appropriate as well.

But I think that the refusal to answer a basic kind of question on the issue of morality when you have just within 15 minutes talked about the morality of the death penalty and about sentencing white-collar crime, must be troublesome to many women in this country, on this issue which is of such basic and fundamental importance, where there is extraordinary division. Certainly there is in this panel.

Can you understand the anxiety that they might feel that you are not prepared to make even a comment?

Judge SOUTER. Senator, I can understand anxiety on both sides of the issue. I also think it is important to distinguish the significance of the subjects that I was talking about a few moments ago. I was not talking about my personal views on the death penalty. I was talking about the personal concern that a judge who believes the death penalty is wrong would have if he is asked to take a part in its administration.

With respect to the morality of sentencing on white-collar crime, that did not involve a question of whether it is moral to sentence or not. It involved the question of whether sentencing should take place on the basis of evenhanded standards evenhandedly imposed on all sorts and varieties of crime. And upon that matter, I think there is no division within the country.

Senator KENNEDY. Well, you were the one that used "morally" as associated with white-collar crime. I wrote it down. I will let the record rest on it, but you were the one that used the words, the moral issue with white-collar crime.

Judge SOUTER. And I believe there is, indeed, a moral obligation for evenhandedness in criminal sentencing.

Senator KENNEDY. You are sensitive to the issue of morality on death penalty, sensitive to the issue of morality on sentencing of white-collar crime; but on the issue of abortion—I am not asking you at all about *Roe v. Wade*, but on the issue of abortion you are not prepared to make any comment or statement—

Judge SOUTER. On the issue of abortion—

Senator KENNEDY [continuing]. On what is your view, whether it is moral or immoral, or at least whether you have some feel for the outrageous circumstances of rape or incest that you are prepared to make any kind of comment or statement on.

Judge SOUTER. Senator, I think you know from the discussion yesterday afternoon of my concern for the circumstances in which these questions arise. But a discussion of morality in the context of this hearing of the *Roe v. Wade* decision I believe would be interpreted, in effect, as inconsistent with the view I have expressed that my personal views would not play a part in the decision. And I will respectfully ask you to excuse me from answering that question.

Senator KENNEDY. Just to get back very quickly on the matters that we talked about yesterday on the EEOC, the church and state issues that were talked about this morning, literacy tests that we talked about, you indicated that you were acting as the lawyer for the Governor. I reviewed with you the oath. I didn't put it in the record; I will. The oath of office that you take as attorney general talks about upholding the Federal Constitution as well as the State constitution and the statute. It sets out the responsibilities for the

State attorney general as well. But you have taken the position that these cases were brought as a result of representing the Governor.

What I would like to ask you is whether you formed any personal view when you were preparing those cases. Did you form any personal view about their rightfulness or wrongfulness? I think as lawyers we know we take the cases, and we do the best we can as lawyers in those circumstances. But sometimes when the outcome is in, even if we are on one side and we don't prevail, we are kind of relieved that the other side won.

Judge SOUTER. As you rightly say, we can sometimes accept our losses with great equanimity because we recognized that, in fact, the right result has been achieved. Our responsibility in those circumstances is the responsibility to be the best advocates that we can.

As I said this morning, one of the foundations upon which I think the vitality of our constitutional system rests is that there will, in fact, be vigorous litigation to give the courts the best chances that they can have to get it right. And if we play a part in good faith and with vigor in those circumstances, I think we can be proud of ourselves.

Senator KENNEDY. Well, I come back to this, Judge, because I thought yesterday you talked in a very convincing way about each time that you make a ruling or make representation, you are conscious about what the impact is going to be on individuals.

Judge SOUTER. That is correct.

Senator KENNEDY. That was stated a number of times yesterday by yourself. So when I think of what the impact would be of your position, if it had prevailed in opposing or questioning the authority of the Congress on abandoning the literacy tests, or on collecting information in order to be able to strike down discrimination, what the impact would be on blacks, what the impact would be on women, on minorities—I am just wondering whether during that period of time you ever formed an opinion as to what you hoped that that judge would rule?

Judge SOUTER. Senator, I doubtless formed an opinion, but the opinion was related to the case that I was arguing. The question that you make assumes that I was arguing, for example, as advocate for the State in the EEOC case, that the EEOC could never lawfully collect statistics when there was an indication that discrimination had taken place. That, of course, was not the position of the State.

The argument assumes that in the case of literacy tests I might have been arguing that literacy tests should be enforced, even when they were being enforced for discriminatory purposes. In fact, what I was arguing is that a literacy test which had already been declared constitutional when used for nondiscriminatory purposes should be within the power of the State.

Senator KENNEDY. Let me ask this: Do you believe the right result was achieved in those three cases: church/state, the literacy test, the EEOC statistics?

Judge SOUTER. I think the right result for the Nation was, indeed, achieved. The question in the cases before us was: Can you get the right result for the Nation and still leave States which have

done no wrong in the position that they were in? The Supreme Court of the United States said, as a practical matter, Congress is correct to say no.

Senator KENNEDY. Well, do you agree with it?

Judge SOUTER. I accept that decision, yes.

Senator KENNEDY. Well, I am not asking whether you accept it. You have to accept it. I mean, if you—

Judge SOUTER. Well, when I say I accept it, I say I am willing to agree that, in fact, Congress has that power and properly used it in those cases.

Senator KENNEDY. But you don't tell us whether you personally think that that was the right outcome.

Judge SOUTER. Well, if you—sir?

Senator KENNEDY. You are telling us that you accept it, which you have to. If it is 9-0 on the Supreme Court, you have to. I am just asking you personally. Do you think it was right?

Judge SOUTER. Are you asking me whether I think literacy tests should be used—

Senator KENNEDY. I am asking you whether the final result—

Judge SOUTER [continuing]. For any discriminatory purpose?

Senator KENNEDY. No, no. Listen. You are a good listener here.

Judge SOUTER. OK.

Senator KENNEDY. In each of the final outcomes of those three cases—the EEOC and the literacy test and the church and state cases—when they were decided did you think that the outcome was right?

Judge SOUTER. I think today the outcome is right.

Senator KENNEDY. Was the outcome right then? Did you believe that the outcome was right then?

Judge SOUTER. On the literacy test, I had a more complex reaction than that. The trouble in the literacy test case was—

Senator KENNEDY. Just answer, Judge, please. Those three, yes or no. Can I get a yes or no?

Senator THURMOND. He can explain it.

Judge SOUTER. The answer is yes with one qualification on the literacy test case, and that was it seemed to me at the time that a State which was acting consistently with the 14th amendment—and the State was—had done no wrong. I think it is correct to say my judgment today is that probably the problem of literacy tests could not have been dealt with as a national problem except in the way that Congress did. But, I would not concede that there was something inappropriate about defending a practice which the Supreme Court of the United States had declared to be constitutional.

Senator KENNEDY. Talking about your position that you took on the literacy, keeping in mind what you said yesterday about the impact of your rulings or your representation on real people, you also said that those who were illiterate, their votes diluted the votes of people who can read. I remember that as well.

Judge SOUTER. That is a mathematical statement, I think.

Senator KENNEDY. It is a what?

Judge SOUTER. I say that is essentially a kind of statement of math.

Senator KENNEDY. What is a statement of math? That if you have people who can't read—as Father Hesburgh pointed out,

when they were considering the 1970 Voting Rights Act, when he said that American people can get information from television and from radio and can make informed judgments, and you were reaching a decision virtually at the same time—you said their votes dilute the votes of people who can read, and now you are telling us it is a matter of math?

Judge SOUTER. Senator, I think what I was referring to in the quotation that you are making is a problem that Father Hesburgh was not referring to. That is, we were concerned—and I think the context in which that was made—you correct me if I am wrong—was the context in which questions were being placed on constitutional amendments in which the questions themselves were of some great length and complexity, so that somebody who could not read simply could not know what was before that person.

Senator KENNEDY. Well, I will let the record be corrected by either one of us. But as one who was around in 1970, the point was made by many of those who represented States where these literacy tests were lifted that we ought to have it nationally, uniform, across the country; let's not target just Southern States. If we want to have something as a matter of national policy, let's do it uniformly. The issue came up about what had been the impact the last 5 years when we had effectively eliminated the literacy tests. And the question was brought up during that time, well, if you have any illiterates, what has happened in those States? What has happened? Has it somehow distorted the whole voting process? And Father Hesburgh, who was the head of the commission at that time, said his commission made the finding that it had not, that people could gain information through other means. I mean, you can have people who work with their hands. You can have poor people who haven't had the benefits of education, formal education, and can be remarkably intelligent and informed.

The real point is when you say that it is really just a question of math, whether it is diluting the vote, you know, I think that that is something I find troublesome.

As I understand, then, on the other two matters—the church/state and EEOC—did you believe at the time that they were the correct decisions?

Judge SOUTER. I would not have been engaging in the particular practice in the church/state issue, and I think it is appropriate to have a national collection standard on the EEOC.

Senator KENNEDY. You know, you demonstrated—and I admired—the quality of resisting and standing up, and I think in response to an earlier question today you said “crusading” on the issue of gambling casinos in New Hampshire.

Judge SOUTER. I am not sure I would use the word “crusade.”

Senator KENNEDY. OK. Well, I think it was asked whether—what was it? Anyway, you took on a tough issue. You took on a tough issue, a controversial issue, and were ready to stick your neck out, which I have a good deal of admiration for. Second, you stood up to the Governor on behalf of your attorney when they went down to investigate certain of the preliminary safety requirements at Seabrook. I understand that there was a confrontation between you and the Governor, or a difference. But at least as I understand it,

you stood your ground, and I think that that is admirable. You obviously felt strongly about it, fulfilling your responsibilities.

I am just wondering how you reacted in those cases, particularly in the church/state issue, after you got the preliminary ruling from Judge Skinner in Boston that found that the declaration was violative of church/state separation, and after they went back to redraft it. The new draft came out and talked about Jesus being a historical figure, I believe.

Judge SOUTER. That was the tenor of it.

Senator Kennedy. "Honored him as an historical figure without regard to the religious issue."

The thing I would ask you is, did it ever occur to you that that was kind of demeaning religion, Christianity? You know, I mean, I think those of us who have observed Good Friday—12 to 3 are the special hours for the churches.

Judge SOUTER. Well, Senator—I am sorry.

Senator KENNEDY. And now we are talking about Jesus as an historical figure. Did that tick into your mind at all? I mean, it just caught me sort of right away when we were looking through this, and I just wondered whether it troubled you at all.

Judge SOUTER. Well, I think, Senator, if that had been my proclamation, I think that would be a very fair objection to it. My own religion is a religion which I wish to exercise in private and with as little public—little expression in the political arena as is possible.

Whether or not my client, at the time, believed it was demeaning, I do not know. I am sure he did not intend it in a demeaning way.

Senator KENNEDY. Mr. Chairman, I don't know what the time-frame is.

The CHAIRMAN. Finish up.

Senator KENNEDY. I have just one area that I would like to direct your attention, and this was in the *Bouselet* case. I think I indicated to you I was going to inquire of you about that.

Judge SOUTER. You did, yes.

Senator KENNEDY. In that case, we had two elderly brothers, 76 and 79 years old, who shared a single full-time job as janitor and they had been doing it for 22 years. Then they lost their jobs and were denied unemployment compensation on the ground that they were not ready, willing, and able to work full-time as required by State law. They felt the statute was not fair and tried to appeal the decision against them. A hearing was held by the State Employment Commission. As I understand it, they didn't have a lawyer at this stage, but they were assigned what is called a lay representative.

They testified that they could not work full-time because one of them had a weak back and the other was suffering from partial blindness and angina. They said they could work 4 hours a day but not 8 hours a day.

Their unemployment benefits were denied by the Commission. They had been paying in unemployment compensation over the years that they had been working.

Judge SOUTER. Well, their employer had been doing so, sir.

Senator KENNEDY. Right. Well, in the State, there is no participation at all by the employee?

Judge SOUTER. I think it is just the employer who pays in.

Senator KENNEDY. Well, in any event, so they got a lawyer to represent them at this point and they took the issue to your court, the New Hampshire Supreme Court. They raised claims under the Federal disability statute and Federal age discrimination law. You wrote an opinion in that case and you rejected their claims.

You know, perhaps the result was the correct one and perhaps it was completely clear under the law you were bound to apply. This case caught my eye because your personal reaction to the claims of the two elderly brothers seemed, quite frankly, so hostile and really so heartless.

The way that you reached the result and the language you used in reaching it is very troubling. Let me read an excerpt from your opinion. I quote, "It is neither common knowledge, nor do the plaintiffs claim, that a weak back, poor eyesight, or angina necessarily prevents an individual who can work 4 hours a day, from working 8. The back was described as going out of joint when least expected and there was no indication that the eyesight got worse in the course of a day. Nor was there any testimony that the risk of angina symptoms varied with the duration as distinguished from the intensity of work."

They are rather harsh words. It seems to me to be remarkable that these two brothers were working at all, quite frankly. [Laughter.]

But you seem to be questioning their willingness or their refusal to work harder. And one of the legal reasons you gave for rejecting their claim was that they had not properly raised them in the State commission hearing. They did not have a lawyer there, of course.

Isn't that rather a technical and excessively legalistic ruling? I mean, why couldn't you just have simply sent the case back to the State agency for a fair hearing of their claims?

Judge SOUTER. There are three things, I think, that I should say in response to that, Senator. The first is one upon which I do not have a sufficiently detailed recollection to say a great deal. But I believe my recollection is correct that when that case first came before us for review, we found what had happened in the lower administrative tribunals sufficiently unclear that we sent it back with an opportunity to modify what had been done or to clarify the record in some way. And if my recollection is correct, this case had come back to us, in effect, a second time.

The second thing is, is there something inappropriate about the factual determination in the case? And I think that is a subject upon which there simply cannot be a sound judgment without recognizing one thing, and that is the fact determination in this case is a fact determination just as in the usual case of an appeal from a trial court. It is a fact determination for the trier of fact and not for the appellate court.

The question is whether the trier of fact had a basis in the evidence for coming to the conclusion that it did reach. So this was not a case in which the unanimous Supreme Court was coming to unsympathetic findings. It was a case in which the Supreme Court was faced with the issue that it is always faced with on appeals of

this sort. Was there an evidentiary basis upon which the finder of fact below could have made the determination that was made?

The third thing that I think should be said is whether there is, in that opinion, an insufficient degree of sympathy appropriate to an appellate court. Let me suggest to you that there are two things in that opinion which I think belie that suggestion. The first one, and this is the lesser of the two, in my judgment, is the fact that everyone on the court recognized what, on behalf of myself and the court, I tried to express, I think, at the end of the opinion—I won't say that it is the absolutely last paragraph, but I think it is in there somewhere—about, in fact, how admirable we believed these two men to be.

Here they were, at their ages, with health which was uncertain, and yet they had worked as hard as they had and still wanted to go on working, if they could, on a part-time basis rather than simply giving up.

And I remember—I don't remember the exact words that we used, but one of the things we did not want to do was to end our opinion without some reference to the fact that we had great respect for the clients—for the petitioners before us.

The second thing that I would suggest in determining the kind of the willingness of the court to hear these people's claims goes to the fact that at the end of the opinion, as you pointed out yourself, the court did, in fact—although it did not feel itself obligated to do so, it did, in fact, take up the equal protection claim and the Federal claim; I think it was under the Rehabilitation Act.

Someone said to me afterwards, if you are really going to be consistent in enforcing your rules about how things must be raised, both at the trial level and brought to you on appeal, why did you make any comment? Why did the court make any comment on those two points?

There was really a two-fold answer to that. One was that at the last level of administrative review, there had been a reference to those points and we believed that there was some utility to be gained by referring to it.

The second reason is one which, in fact, is not in that opinion. But it is one which I know the court felt, and that is we believed—as you suggested we might be able to do, we believed on the record before us and the law before us, we had come to the only decision that we could come to.

We also believed that if we said nothing about the substance of the claims of these two brothers under the equal protection clause and the Rehab Act, they were going to leave our court after that case was over believing that they might very well have had a claim on which they were entitled to win, and yet they had lost it because of some legal technicality or some technicality of the Supreme Court.

And we said, basically, these are two good people; they should not spend the rest of their lives believing that on some kind of a legal technicality of procedure they have lost rights that they otherwise would feel entitled to.

So we went that extra step out of the way and we looked at their claims on the merits, and I think that is reflective, not just on my part but on the part of the entire court, of a sympathy with the

claimants before us that was personal to them and that took into account the respect that we felt for them.

Senator KENNEDY. Well, you wrote the opinion?

Judge SOUTER. Yes, I did.

Senator KENNEDY. And I didn't see in the file the procedure which you referred to.

Judge SOUTER. I don't think it is set out there, no. I am stating that from recollection and I think my recollection is correct.

Senator KENNEDY. Just the material that was provided does not reflect that.

Judge SOUTER. That is correct.

Senator KENNEDY. Nor in the conversation with the attorney did he indicate that to my staff.

Judge SOUTER. My best recollection is there has been a remand.

Senator KENNEDY. I will have the record show whatever way and we will try just to have that.

As I understand, included in your opinion is that the issues on disability and age discrimination had not been raised in a timely fashion.

Judge SOUTER. I believe that is correct. Frankly, the opinion is so complex, I would have to have it before me, but I am sure you are right.

Senator KENNEDY. They were not raised in a timely fashion, and I think any fair reading would indicate that it was not raised at the time of the appeal when they were represented by a lay person. And I think a legitimate question could have been, why not send it back and say, the timely fashion is now, perhaps—it was not raised by a lay person who wasn't even a lawyer—and let them bring it up in the lower court.

Judge SOUTER. Well, I think where your question, in a way, Senator, has the advantage is that—and I want to be very careful about what I say on this because I do not recall the procedural history of it, as I said, in any detail prior to that opinion.

But I think that if the petitioners had said to us, we don't want an appeal right now, what we want to do is to be able to raise claims below which we didn't in the first instance because we didn't have counsel, I think the court would certainly have considered seriously a request to go back.

And the point, as I said earlier, that I simply cannot remember because it has nothing to do with the opinion as we wrote it, is the extent to which such a request was made before the court. The only thing I can remember is—if I remember this correctly, I think there was at least one remand for a clarification of the record, and whether there was an opportunity at that time to enlarge it, I don't remember.

Senator KENNEDY. Well, I would ask, Mr. Chairman, whatever was the factual situation be made a part of the record.

Just the final point is that the outcome of your decision effectively left these two elderly persons that had been working 22 years virtually out in the cold.

Judge SOUTER. Senator, what left them out in the cold was a law passed by the legislature of the State which was not unconstitutional. One of the respects which the judiciary must have for the coordinate branches of the Government is that whether we do or

do not like or sympathize with the results that legislatures sometimes give us, if they are constitutional, they are legislative judgments and they are intended to stand.

Senator KENNEDY. But the issues about the violations of 504 of the Age Discrimination Act which were raised by their attorney—part of the conclusion in reading your brief is that they were not raised in a timely manner because they were not raised when they were represented by a lay attorney. And because they were not raised and were not adjudicated they were left out in the cold. Now, whether they could have been able to make that case in a lower court or not, just the final and bottom line is that was the end of it.

Mr. Chairman, I have taken more than my time.

Senator THURMOND. Mr. Chairman, I think the record ought to show that Judge Souter's decision was a unanimous decision, was it not?

Judge SOUTER. I believe it was.

Senator THURMOND. In that case.

The CHAIRMAN. Well, Judge, we are going to end. I want to tell you that when we come back on Monday, you don't have to worry about my asking you any more questions along the lines I pursued. There will be other issues, but the whole issue of privacy, I think you and I have explored as much as we are going to be able to explore it.

I thank you for your graciousness today and I look forward—

Senator LEAHY. What time Monday?

The CHAIRMAN. We will reconvene Monday morning at 10 a.m.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. The hearing is adjourned.

[Whereupon, at 5 p.m., the committee adjourned, to be reconvened on Monday, September 17, 1990, at 10 a.m.]

# NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

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MONDAY, SEPTEMBER 17, 1990

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:04 a.m., in room 216, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Thurmond, Hatch, Grassley, Specter, and Humphrey.

The CHAIRMAN. The hearing will come to order.

We are convened today to celebrate Judge Souter's birthday. Happy birthday, Judge.

Judge SOUTER. Mr. Chairman, that is up to you. [Laughter.]

The CHAIRMAN. The judge and I had a very brief conversation before we came in, and he indicated that whether or not he had a happy birthday was up to me. And I told him no, that occurs in about 2 or 3 weeks.

Judge, you are a veteran at this process by now. When we left off in the second round of questioning—and we will proceed, by the way, as we have the last 2 days. I believe, Judge, it is likely that your testimony will finish today, although we will go as long as Senators have questions. But my inclination is, based on what I have been told, that we will probably, Judge, be going after lunch. But it depends on how many of my colleagues feel that there are areas that they need to pursue.

I hope you have been satisfied with the procedures thus far, and we will continue as we have the first 2 days.

With that, let's begin immediately by yielding to my colleague, Senator Hatch from Utah, who was next in order for questioning, and then to Senator Metzenbaum, and we will work our way down the line.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge Souter, welcome back and happy birthday. We didn't bake a cake, but perhaps we will let you go home after today, and that will be even a better gift.

Today also happens to be the 203d anniversary of the adjournment of the Constitutional Convention in Philadelphia. It is remarkable that the Framers designed a system of Government

which, with the amendment process established by article V, has endured so long and so well.

The genius of the Constitution is that within the specific written limitations set forth in that document, it gives to the people, through their elected representatives, the right to govern themselves. Sometimes that right is poorly exercised, but so long as it is exercised within the Constitution's framework, only the people are entrusted with the power to correct their own mistakes or those of their elected representatives.

Now, Judge, I think you demonstrated to us last week that you are and that you will be a good listener. I am convinced of that, and I think that is a wonderful attribute in an appellate judge, and certainly in a Supreme Court Justice. You also demonstrated in my view that when you join the High Court, you are going to be listened to. I think you will have immediate contributions to make to the deliberations of your soon-to-be fellow Justices. I am convinced of that as well.

Now, of course, the staffs on both sides, the majority and the minority, have had the weekend to look over the transcript, and the representatives of dozens upon dozens of special interest groups have also gone over your earlier testimony with a fine-toothed comb. I suppose they have all been searching for inconsistencies. They have also looked for ways to suggest to some of us here how we can get you to commit on issues without sounding like that is what we are trying to do.

You may well be asked to expand on what you said last week, and you may be picked at over this or that particular phrase. In my opinion, if you will continue to adhere to what you think is right in how you answer questions put to you, or whether you answer them at all, I think you are going to be all right.

I have had an interest in the concerns and problems with persons with disabilities since before I entered the U.S. Senate. A number of us on this committee are on the Labor and Human Resources Committee. My counterpart, Senator Kennedy, is the chairman, and others on this committee actually are on the Labor and Human Resources Committee. So we are always concerned about these issues involving persons with disabilities.

I was quite struck by your opinion in the *New Hampshire Disability Rights Center* case in 1988. As I understand it, the Disability Rights Center is a nonprofit corporation that provided legal services to poor individuals with disabilities. The group filed a petition to expand those services to individuals with disabilities who really are not poor.

Now, what was the legal problem that they faced in that case?

**TESTIMONY OF HON. DAVID H. SOUTER, TO BE ASSOCIATE  
JUSTICE OF THE SUPREME COURT OF THE UNITED STATES**

Judge SOUTER. Senator, the problem that they faced was a regulatory scheme in New Hampshire for the practice of law, which I think probably was characteristic of what would be found in a good many States. There were prohibitions against the practice of law in corporate form unless all members of the corporation which would be providing legal services were, in fact, attorneys admitted to

practice. And the only exception to that rule was for the benefit of corporations, legal corporations, that would be providing services to the poor alone.

Senator HATCH. How did you address that particular issue?

Judge SOUTER. Well, we had to address it first on the level of statutory construction to see if, in fact, the New Hampshire statutes were as restrictive as they had been assumed to be. And to make a somewhat long story short, we found that they meant what they said.

As a result of that, the Court was faced with a genuine first amendment challenge based upon the right to associate exemplified in cases like *NAACP v. Button*, and basically the claim that was made was that the New Hampshire statute was unenforceable because individuals, not necessarily all lawyers, were entitled to associate together for the purposes of advocating and, if appropriate, litigating the constitutional rights of their members.

The claim was that the New Hampshire statutes, in restricting the Disability Rights Center from representing those who were not poor in such challenges and in restricting their membership, or purporting to do so, to those who were only lawyers, were, in fact, infringing on the kind of associational right which the *Button* case had recognized. Having confronted the issue squarely, it was, in fact, our judgment, expressed in an opinion that I wrote, that there was such an infringement.

In the course of doing so, we dealt with some of the State's claims of countervailing interests necessary for the regulation of the practice of law, and we confronted the State's claim that, in fact, there had not been a demonstration; that in the absence of recognizing this associational right and without allowing the Disability Rights Center to engage in the representation that it proposed to do, the State argued there had been no claim that these people would be denied legal services entirely.

What we recognized in the course of our own examination of the case, and expressed in the opinion, is that this simply was not a sufficient countervailing State purpose which was adequate to in any way trump the first amendment claim that had been made. We therefore recognized it. We declared the New Hampshire statutes regulating and restricting the practice of law to that extent unconstitutional, and we decreed that the Disability Rights Center could do exactly what it proposed to do.

Senator HATCH. I want to compliment you on it, because I think that ruling by you showed great constitutional sensitivity.

Judge SOUTER. Thank you, Senator.

Senator HATCH. I think it is a very important case. And in this case, the result was, as you have explained, that persons with disabilities could get legal services from this nonprofit group, even though those persons with disabilities were not poor.

Judge SOUTER. They did; and I think it is probably also unquestionable that there is a further public benefit in a case like this. It is the same kind of public benefit that I alluded to when I was speaking on Friday with Senator Thurmond about the provision of legal services in the criminal area. That is, the result of allowing organizations like the Disability Rights Center to provide this kind of representation is to develop a body of expertise among a seg-

ment of the bar that we would be unlikely to see if this kind of informal specialization were not allowed. And I think just as in the area of the criminal law, I think in the long run there is no question that the quality of advocacy on this subject will be better in very practical ways as a result of what the Rights Center is doing.

Senator HATCH. Good. Well, that decision was very heartening to me. I want you to know that.

In my opening statement last week, I observed that your record in criminal cases reveals—at least to me, and I think anybody else who reads your cases carefully—a judge who is tough on crime but also fair when it comes to balancing the competing interests of the public and criminal defendants. And I noted the importance of your balanced views in this area for citizens across the country because, starting with the period under Chief Justice Earl Warren, many feel that precarious balance has swung way over to the side of criminals and against law enforcement agencies.

While the Court in recent years has continuously chipped away at some of these inventive decisions that were done under the Warren and Burger Courts—refusing, for example, to extend here and there the *Miranda* and *Mapp* decisions—many feel it has not yet swung the pendulum back to the middle.

Now, I was encouraged by your dissent in *State v. Koppel*. It was a 1985 decision where you argued for upholding the constitutionality of sobriety checkpoints under the State constitution. Earlier this year, the Supreme Court basically came out exactly for your position in upholding the constitutionality of this important police procedure in *Michigan State Police v. Sitz* just in 1990. Under the Federal Constitution, the basic constitutional issue is the same under the New Hampshire Constitution, at issue in the *Koppel* case.

Now, does the State's interest in detecting drunk drivers outweigh the intrusive effect of such procedures? And you decided that it did. Your dissenting opinion seemed to recognize the importance of the State's interest.

I would appreciate it if you could describe your reasoning in the *Koppel* case.

Judge SOUTER. Well, Senator, as you know, I think one of the points of common ground from which all of the parties and all of those with strong opinions on that case begin is that when there is a stop for a sobriety checkpoint, there is, to a very limited degree, a search and seizure and inquiry subject to fourth amendment standards. In New Hampshire, and I daresay probably all of the State constitutions, the stop and the inquiry is subject to regulation under their search and seizure provisions.

What we do not have in this kind of case is the sort of inquiry which is exemplified by the situation in which there is a search for evidence of prior crime, which, as you know, as a general rule must take place under the auspices of a warrant issued by a detached and neutral magistrate. Because at the point automobiles are asked to pull over for a sobriety checkpoint, there simply is not the particularized knowledge about what may be found inside which would support a warrant under the traditional probable cause standards of the criminal law.

What, therefore, the court did—and what, indeed, I did in my dissent—was to engage basically in an analysis which balanced the State and the private interests involved to determine whether the stop and the inquiry could be regarded as a reasonable one within the standards applicable to search and seizures, both for State and national purposes.

What we are particularly concerned with in these kinds of cases is that the discretion of the police be something other than an uncontrolled roving and inquiry covering no matter what period of time, no matter what elements of surprised and fright. The concern is to require a very tightly controlled discretion on the part of the police who may engage in these sobriety checkpoints which does not go one iota beyond what is necessary to satisfy the public interest in detecting driving under the influence before a tragedy occurs.

What we found or what I analyzed in my dissenting opinion in that case is that the practices there under consideration were, indeed, consistent with the need for strict control of this kind of discretion. The searches, the stops, were not at random. They followed a particular set plan at the beginning. They were very short in duration. The intrusion of the stops was comparatively minor. And there was no discretion given to the police to go beyond what seemed absolutely necessary to detect the one significant fact which was of concern to them.

The majority of the court in my case took what seemed to me a somewhat restrictive view of the demonstration of utility that was necessary. They were concerned that, despite the use of sobriety checkpoints, the great majority of arrests and prosecutions for driving under the influence still eventuated from routine controls and the kinds of police observation which, in the absence of checkpoints, would bring drunken driving to their attention. As you know from my opinion, I thought that they were taking an unduly restrictive view of what was necessary mathematically to justify these checkpoints.

The third point upon which the majority and I disagreed was a subject which I think was well raised; that is, in allowing a sobriety checkpoint like this, is the court starting down the road which would then lead to the possibility of what I think someone described as shopper checkpoints, whereby the police could stop anybody on the street and look in shopping bags and so on to see whether the merchandise in them was accompanied by a sales slip. Was it, in other words, sort of the thin end of the wedge for watering down very important fourth amendment protections?

My response to that was that we couldn't answer that question without attending very carefully to the kind of activity that was under consideration. And I contrasted the activity of driving an automobile which, simply because of the power of an automobile to harm, was a very highly regulated activity. The machinery was regulated; the people who operated the machinery were regulated; they had to pass tests of competence before they would even be allowed legally behind the car. And I contrasted that, as I said, with the kind of innocent activity of shopping, which, with the exception of things like pedestrian safety laws, is not a regulated activity.

I said that in judging what is reasonable, we have to take into consideration the potential danger which the activity poses and the State's expression of that danger by its decision to regulate or not to regulate it. And what might, indeed, be a perfectly reasonable inquiry in a highly dangerous and regulated activity, like driving, would not be reasonable at all in an innocent pursuit like walking down Main Street and doing errands. And I therefore concluded that there was not a danger, that a sobriety checkpoint approval under the fourth amendment was going to be taken as thin end of the wedge for an assault on civil liberties. I think that view has since been recognized.

Senator HATCH. It sure has. I am also encouraged, Judge Souter, by what I see as a reluctance on your part to reverse criminal convictions on the basis of strained constitutional arguments. In the case of *State v. Bruneau*, a man murdered his wife—killed her and then later confessed his crime to a friend by calling that friend long-distance. Although the friend contacted the police, they did not discourage the friend from taking later phone calls and reporting further incriminating evidence when the defendant volunteered.

When the defendant later asserted that the Constitution in the *Miranda* case required the reversal of his murder conviction simply because the police had allowed him to continue his compulsive voluntary confessions through his friend, your court rejected that claim. And in an opinion which you authored, you decided that his claim was absolutely wrong.

Could you just give us the benefit of your reasoning on that occasion?

Judge SOUTER. Yes, sir, I will. What the case on that particular point boiled down to was a question of whether the friend to whom the defendant has made his admissions was, in fact, acting as an agent of the State for the purpose of soliciting those admissions and, of course, passing them on to the police after he had received them. It, again, is common ground that if any criminal defendant makes a spontaneous admission or confession to a third party, as a general rule the third party, of course, is perfectly free to repeat that, and the State is perfectly free to use that as a matter of evidence.

The difficulty comes when the State is using ostensible third parties to make an end run about regulations on confessions under the fifth amendment and under the sixth amendment. And the question, therefore, in that case was: Was the friend, in effect, acting as an agent for the State so that every activity of the friend in talking and, indeed, in listening to the defendant should be imputed to the State and judged as if the friend were, in fact, a police officer working on the case?

At the time the case came to us, there was no law under the New Hampshire Constitution on that matter. And because the defendant raised both State and constitutional claims in support of his argument that the statement should be kept out, the first task that we had was, in effect, to read the New Hampshire Constitution to try to determine what was behind its provisions, providing the right to counsel as well as rights against compelled self-incrimination against the defendant; and to determine whether the princi-

ples that the New Hampshire Constitution embodied were, in fact, being violated by the use of the friend, as it were, as a conduit for information in this case.

What we determined was that the test that we should employ to determine whether an end run was being made around these constitutional guarantees was to determine whether the friend should be regarded as an agent of the police or as, in effect, a free third party who passed things along. And the test or tests that we came up with came down to the question: Was the friend acting at the behest of or under some kind of a contractual arrangement with the police so that he thought that he was doing an expected job for them or was doing something for which they had indicated he would receive some benefit?

What we were doing was trying to find a basis to determine whether there was an agency relationship. In asking those questions, we found that there was none in the case before us. We didn't use the exact terminology that the Federal courts have used in discussing similar issues under the national Constitution, but I think we came down with a substantially similar standard.

What the Federal cases ask for in these instances is whether there was such a substantial relationship between the third party and the police that, in fact, there should be really seen as an identity between the two of them. And applying that test, we likewise found that there was no agency relationship in the case, and we held that the statements had properly been admitted.

Senator HATCH. Well, thank you, Judge. I have 10 or 15 minutes left, but I am going to end it at that. I don't want to take all my time, and I hope others won't as well.

I just want to compliment you because you have been very forthright in your testimony. You have been very firm. I think you have covered a lot of issues that have been very interesting to everybody up here regardless of ideology or feelings. And I think you have conducted yourself in a very, very strong and important way during these hearings. I don't know anybody who really could see what you have done and watched you and listened to you that could disagree with the statement that you are incisive, you are intelligent, you apply the law, you really look at it carefully. You are very sincere and dedicated to trying to do the best job that you possibly can.

You are precisely the type of person I think ought to have this opportunity to serve on the Supreme Court, and that is in spite of the fact that many of those up here aren't sure what you are going to do on these litmus test issues. I have been kind of interested that during the Reagan and Bush administrations, some of our colleagues have been so concerned that they might impose litmus tests on their nominees, which they never did. And yet I see almost the opposite when it comes to their right to impose litmus tests. But, to your credit, you have handled this very well, and you have, I think, gone down that fine line and that fine road between being candid on what you really can be and not imposing upon yourself the obligation to vote in a certain way or to rule in a certain way in the future because of statements you have made here on these very, very important issues that are very difficult, and will be difficult, and will be complex and will be different, factually different

and legally different in so many ways as you serve on the Supreme Court.

So I have to hand it to you. I think you have done an excellent job, and I for one have a great deal of admiration for you.

Judge SOUTER. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Metzenbaum?

Senator METZENBAUM. Judge Souter, I join Senator Hatch in saying I have a great deal of admiration for you also. But I also have some reservations and some concerns, and my colleague has mentioned some earlier hearings where litmus test questions were asked. I would like to refresh his recollection that those on both sides have seen fit to use litmus test questions when they deem the occasion appropriate. I am going back to the days of Senator Fortas' confirmation hearing, others as well, and so I guess it is just a question of whose ox is being gored on any particular day on whether or not we do or do not believe in litmus test questions.

Let me proceed, however, to questions that still remain of concern to this Senator. You had a discussion with Senator Grassley that I would like to follow up on. In that discussion, you stated that all three branches of Government are sworn to uphold the Constitution; and when Congress fails to use its full authority to uphold the Constitution, the Court is forced to resolve difficult social problems. You referred to the vacuum that is created when the issues are not resolved elsewhere.

Of course, in the realm of fundamental rights, the Supreme Court has the unique obligation to interpret the Constitution and define those rights. The first amendment rights of political protesters, the fourth, fifth, and sixth amendment rights of criminal defendants, the due process and equal protection rights of minorities and women, frankly only the Supreme Court can protect those rights, no matter how unpopular their decisions may be at times.

Now, even though Congress has the responsibility to enact legislation to address difficult social problems, you believe that the Supreme Court has the unique obligation to interpret the Constitution and to declare rights to be fundamental and, therefore, entitled to scrutiny, as I understand your response to Senator Grassley. Am I correct in that?

Judge SOUTER. Well, Senator Metzenbaum, there is, of course, no question that the Court does have that jurisdiction and obligation. Its obligation is constantly to search, to identify those rights which are fundamental, and to implement them.

In my exchange with Senator Grassley last week when I made the remark about the constitutional vacuum, I was thinking, in fact, of a particular example, and I don't remember now whether I went on to that example or not. But I was thinking specifically with reference to the 14th amendment. I thought the case of *Brown v. Board of Education* was an example of what can happen, because the unusual situation in the case of the 14th amendment is that under section 1 there are provisions which are to be applied by the judiciary, following justiciable standards, and under section 5, Congress has its own specific enforcement power there. And as you know, for some time before the *Brown* decision came down,

there were requests and hopes that there would be legislation to deal with the continuing problem of segregation in the schools. But no political solution was forthcoming.

Therefore, that is what I had in mind when I spoke of there being a vacuum in which the responsibility to deal with a 14th amendment problem had to be faced, and the Court rightly faced it.

Senator METZENBAUM. Now, the Supreme Court—I think we both would agree—also has the unique obligation to enforce those rights sometimes against the will of the majority. Over the last 2 years, the Nation has been embroiled in a debate over whether to prohibit flag burning as a form of political protest. Without exception, Americans found the acts of Gregory Johnson to be detestable and contrary to everything that we hold dear. But the Supreme Court concluded—quite rightly, to my mind—that burning the flag is part of the fundamental right to free speech protected by the first amendment.

Do you believe that the Supreme Court has the obligation to enforce fundamental rights no matter how unpopular the cause, no matter how repulsive the acts may be to the majority?

Judge SOUTER. Senator, there is no question about it. If that were not the case, there would be no point in having a Bill of Rights. If that were not the case, there would be no point in having any substantive protection for civil liberties. We would leave the entire issue to whatever majoritarian impulse there might be at the time, and we would have a vastly different society from the one which the Framers of the Bill of Rights intended us to have.

Senator METZENBAUM. Following up on that, I would like to return to our discussion of last week as to how you would go about deciding whether a right is fundamental. Last week, you and I discussed what is at stake for a woman in the debate over reproductive rights. You indicated that through personal experiences you could empathize with a woman who was faced with a very difficult—very difficult—decision as to whether to terminate a pregnancy. And I appreciate your candor in response to my question.

I asked those questions not because I believe that we will once again allow women to die from botched illegal abortions, nor do I believe that the American people would stand by for 1 minute for putting women in jail for having abortions or for granting periodic testing of women to determine if they have had an abortion. Even President Bush has said he would not put women in jail.

My point is just this: It is inconceivable that we would take these steps in order to prevent a woman from making a decision to terminate an unintended pregnancy. That is precisely why it is a fundamental right. It is a personal and basic freedom for a woman to make her own reproductive choices. It is basic to her health and to her dignity.

In your view, are these considerations I have described an essential part of determining whether a particular right is fundamental?

Judge SOUTER. Senator, those considerations to me point exactly to the kind of inquiry which the Court must make. As I said, in dealing with the question of what unenumerated rights may be regarded as fundamental and what require a lesser standard of scrutiny, the courts from time to time have tried different tests. One of

those tests was the one that is identified with *Palco v. Connecticut* in which we asked whether the right in question is essential to or comprehended by the concept of ordered liberty.

I think I indicated that my own view of the best approach to these problems is the one which is probably best identified with the late Justice Harlan. Justice Harlan said that we cannot approach these questions of weighing the value of asserted rights without an inquiry into the history and the traditions of the American people, in order to try to find on a historically demonstrable basis their commitment to a set of values which either do or do not support the claim that a particular right in question is fundamental.

I think Justice Harlan, in taking that approach—I am convinced that Justice Harlan in taking that approach was, in effect, asking for a broader inquiry than we might be engaging in if we limited ourselves to the formulation in *Palco v. Connecticut*, the concept of ordered liberty, because, as was demonstrated in many other cases, there are many limitations upon what we regard as almost garden variety constitutional rights which still could be found in a society which we would not say was fundamentally unjust. Do we have a right to a jury of 6 or a jury of 12, for example?

I think Justice Harlan, although he himself quoted the *Palco* formulation from time to time, I think he was clearly pointing to a broader inquiry into the history and traditions of the American people as being the basis upon which a fundamental valuation or a finding of no fundamental valuation should rest. And I think he was right.

Senator METZENBAUM. Thank you.

You have discussed your view that there is a right of marital privacy recognized in *Griswold*, and you have agreed that marital privacy is an aspect of privacy that is fundamental. What is it that led you to conclude that marital privacy is fundamental?

Judge SOUTER. I came to that conclusion, Senator, because, in fact, it is a subject which has received a great deal of attention within the courts themselves. Much has been said over the years about the proper way to interpret cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. But leaving aside the interpretive categorical problems that constitutional lawyers may come up with, one thing that is undeniable is that going right back to the discussion of those cases in the early part of this century, the courts have recognized a kind of core of what might be called marital or family liberty. And it has become so familiar to us that we can at least start with that core in any inquiry about the scope of unenumerated rights or their fundamental character.

I don't want to rest this discussion on a purely ad hominem basis, but, of course, I have to come right back to the Justice that I was referring to before. Justice Harlan engaged in an examination like this, as you know, both in his own opinion in *Griswold* and in the opinion that preceded that case, *Poe v. Ullman*. So, in a way, it seems to me that the notion of a marital privacy and a privacy which takes into account certain basic familial values has got to be our starting point. I think we have plowed that ground well, and I think we do have a secure starting point there.

Senator METZENBAUM. I think the starting point is that marital privacy is fundamental, and the use of contraceptives is part of

that fundamental aspect of marital privacy. I would ask you, Judge Souter, could you give me an example of an aspect of marital privacy that would not be fundamental under your formulation?

Judge SOUTER. Well, of course, I think it is very clear—again, there is no real dispute about this, I think, among people on both sides of this issue—that even marital privacy is not free from regulation by the State. A spouse is not entitled to assault another spouse. We do not build a sort of shield against all State intrusion. There certainly is an example of a subject which I suppose somebody could argue ought to be within the shield of scrutiny from State concern, and yet I think we would all agree that that was a reasonable subject of regulation, without which we would have an extremely barbaric marital society.

Senator METZENBAUM. I would agree.

You also commented on *Eisenstadt v. Baird* in which the Court recognized the right of unmarried people to use contraceptives. Justice Brennan writing for the Court in that case stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions in a matter so fundamentally affecting a person."

Do you agree that unmarried people enjoy an equivalent fundamental right of privacy to use contraceptives as you have recognized for married people?

Judge SOUTER. Well, I agree that *Eisenstadt v. Baird* engaged in an appropriate analysis. I didn't go back and reread it this weekend. I probably should have. But my recollection from reading *Eisenstadt* is that the case rested primarily on an equal protection analysis; and that having found in the *Griswold* case as they did, the Court then felt it was appropriate to apply an equal protection criterion going beyond the express due process concepts that they had come up with in *Griswold*. And I think there is no question that the area of privacy is not immune to this kind of equal protection analysis any more than any other subject of the law is.

Senator METZENBAUM. May I conclude from that that your answer would be in the affirmative, that unmarried people do enjoy a fundamental right of privacy to use contraceptives in the similar manner that you have recognized their right to use them?

Judge SOUTER. I would just like to enter this caveat: that because I have not reread *Eisenstadt v. Baird*, there may be some things in there that I am just not advertent to. But on the basic proposition that I refer to, the equal protection analysis based on the point at which *Griswold* left off, I would see no basis to approach the problem differently.

The CHAIRMAN. Would the Senator yield on that for a second?

Senator METZENBAUM. Yes.

The CHAIRMAN. You very rightly and skillfully, Judge, always refer to the equal protection aspect of that case, which was not the basis upon which *Griswold* was decided. What would have happened had *Eisenstadt* come before the Court before *Griswold*, so that there was not an equal protection portion to it?

Do you believe that there is a constitutional right to privacy in the liberty clause of the 14th amendment, not the equal protection clause of the 14th amendment for unmarried couples?

Judge SOUTER. I don't know the extent an answer to that question can be given in the abstract without the kind of Harlan inquiry that I'm talking about. It was not made and I have not made it. The thing that I can say is that if that question had come up before *Griswold* as you posit, exactly the same kind of analysis that Harlan would have used and did use in his concurring opinion should be used to address the same issue of nonmarital privacy.

The CHAIRMAN. That is worrisome, because I know of no tradition in American society where an inquiry into the history and traditions of the American people have guaranteed a right of privacy to unmarried couples relating to procreation or sexual activity. So it seems to me that you would have come down and concluded that married couples do not have a right to privacy, based on that set of inquiry.

Am I wrong about that?

Judge SOUTER. I think, yes, I think it is wrong simply to draw that conclusion because as you, yourself, have pointed out in the analyses that go on, there is a two-part inquiry. The first inquiry is No. 1: Is there a liberty interest to be asserted and how may it be valued? The other inquiry that goes on is, when, in fact, is the weight to be given to the State interest which may be brought up as a countervailing interest when the liberty interest is, in some way, restricted?

One of the questions, of course, that would have to be asked if we were approaching *Eisenstadt* first and not *Griswold* first, is not merely the weight to be given to the privacy interest to be asserted, but the weight to be given to the State interest in asserting the right to preclude people under those circumstances from obtaining contraceptive information and devices. I do not think that is a simple question to answer.

The CHAIRMAN. I thank my colleague and I will be happy to yield time from my time, when the time comes.

Senator METZENBAUM. Judge Souter, to change the area of interest, historically the commerce clause of the Constitution has been the source of congressional power to enact nationwide economic and social welfare legislation. Labor laws, health and safety legislation, environmental laws, civil rights statutes are just a few of the many laws rooted in the commerce power.

In 1918, a national child labor law was struck down as an invalid exercise of the constitutional power under the commerce clause. In the early years of the Depression much of President Roosevelt's New Deal legislation was invalidated by the Court on commerce clause grounds. The tide turned in 1937 in the *Jones & Laughlin Steel* case. In that case, the Court upheld the validity of the National Labor Relations Act against a commerce clause challenge.

Since 1937, the Court has broadly construed congressional power under the commerce clause and has rarely, if ever, invalidated legislation under commerce clause grounds. On Thursday you stated in response to Senator Thurmond that, "The commerce power has grown to and has been recognized as having a plenary degree which would probably have astonished the Founders."

Are you troubled by the scope of the commerce power exercised by Congress and do you have any doubts or qualms about the

breadth of congressional authority under the commerce clause as it has been interpreted by the courts since 1937?

Judge SOUTER. No. I do not have a concern to raise about it at this point, Senator. What I was referring to, I think, in my remarks to Senator Thurmond, was probably an historical fact. It illustrates something in our constitutional history which is not just confined to the commerce clause. That is the sense of State autonomy which doubtless motivated the Framers, I think, probably got a jolt as early as the tenure of John Marshall when it came to commerce clause analysis.

I think many of the Framers probably had not thought through the generality of the grant of power which Marshall recognized so early in our history. I think this phenomenon is probably paralleled in another example that we have been talking about in the course of these hearings and that is the effect of the powers granted to the courts, and indeed, to the Congress under the 14th amendment.

I remember in our discussion the other day about the appropriateness of *Brown* as a decision. We all agreed, I think, that historically none of the Framers of the equal protection clause would have had the slightest inkling that that clause was ever going to be applied to school desegregation. They doubtless would not have had the slightest inkling that that clause was going to be applied to sex discrimination.

Yet, the fact is they wrote a clause of great generality which they did not confine to the specific objects which they had in mind or had contemplated when they passed it. Therefore, as I was saying last week, the legitimacy of the application of the equal protection clause to school desegregation, to gender discrimination, and so on seems to me beyond argument.

I think probably historically the same phenomenon has gone on with the commerce clause. They wrote more generally than they probably intended by way of application at the time that they wrote it, but they wrote what they wrote.

Senator METZENBAUM. So actually, you are saying that those who would look to strict constructionism and original intent would have to move forward 200-and-some odd years in order to understand the Supreme Court interpretations of the commerce clause in today's world?

Judge SOUTER. Well, that is true. I would repeat something that I have said before, but I don't want to leave any mistake on this.

My approach to interpretation is not a specific intent approach. The approach has got to take into consideration the text of the provisions in question and it is not to be confined, the meaning of that text is not to be confined by reference simply to the specific applications that may have been, as it were, in the mind either individually or institutionally of the people who proposed the amendment.

We are looking, when we look for the original meaning, we are looking for meaning and for principle. We are not confining ourselves simply to immediately intended application.

Senator METZENBAUM. Now, in the 1976 brief on EEOC regulations, which has been a subject of questioning by Senator Kennedy, your office took the position that regulations designed to help battle discrimination in the private sector were an unconstitutional

exercise of congressional authority to regulate interstate commerce.

Is it your view today?

Or I guess I would ask you, in view of your previous answers, do you think that that same kind of position would be the one you would be taking were you the attorney general of the State of New Hampshire in today's world, in view of more recent Supreme Court decisions?

Judge SOUTER. Absolutely not.

Senator METZENBAUM. In the mid-1960's, Congress passed national legislation designed to end segregation in public accommodations. The legislation was challenged on commerce clause grounds. In *Katzenbach v. McClung* the argument was made that Congress had no authority to combat segregation in local restaurants because the effect on interstate commerce was too remote.

Do you think there is any validity to that argument?

Judge SOUTER. I don't think in view of the understanding of the commerce powers you, yourself, have said since the late 1930's, since the NLRB, I don't think there is. I recall the analysis in *McClung* and it came down to a straight factual analysis. That is, would the segregation, if it were permitted in these accommodations have an effect on the flow of goods in interstate commerce; would it have an effect on the movement of people in interstate commerce?

The Court, as you know, had no difficulty in concluding that it would have such effects, and therefore, that it was within the power of the, within the scope of the commerce power for Congress to regulate.

Senator METZENBAUM. Let me switch the area of inquiry for a bit. I think over the weekend a number of your responses have been of concern to me and I have been thinking about them. I think the exchange you had with Senator Heflin concerning the Seabrook demonstration is probably as troubling to me as are some of the other issues.

That involves this \$74,000 contribution from the owner of the plant, Public Service Company of New Hampshire, to help defray some of the law enforcement expenses.

What bothers me is how far down the road can you go with that kind of a concept? When a labor union is on one side, and management is on the other, can a State start to think well which one is going to be willing to help us defray the expenses and don't you get to that conclusion when there is an environmental issue?

Don't you have that kind of contrast? When you have an abortion issue, whether or not it is closing down or picketing or whatever the case may be, unlawful conduct in front of an abortion center? I am so disturbed about the fact that when the State or public body accepts money from a private litigant.

Now, you actually testified that the \$74,000 contribution was made in order to offset the extra law enforcement expenses for the weekend of the demonstration. You also suggested that because the contribution arrived in late June, over a month after both the demonstration and your appearance in court, it did not raise any problems of propriety.

I might say I would take strong exception to that but let's pass on because the facts are a little different. You also stated that if there was any particular appeal to the Public Service Company it was something that had nothing to do with me or my office.

Now, talking about the purpose of the \$74,000 contribution and the date that it arrived, you suggested that you knew nothing about it until June. But on Friday, May 13, 1977, the last 500 of the 1,400 demonstrators who were arrested were released from the National Guard Armory pending appeal after having been found guilty of criminal trespass.

Two days later, on May 15, the Manchester Union Leader reported that, "Public Service Company of New Hampshire, the prime backer of the Seabrook plant has contributed more than \$74,000 to the State to help pay the costs of prosecuting and detaining the protesters, and officials of the firm have said another contribution will be given."

Now this account suggests that the contribution was given at a much earlier time than you indicated. It also states the contribution went toward the "costs of prosecuting the protesters" and you testified that on Tuesday—well, let me just get to that point. Is that Manchester Union account accurate and it does change the picture somewhat as to learning about it in June, but even learning about it in June does give me some concern. I wonder if you would respond to that, Judge?

Judge SOUTER. Yes. In fact, I would like, if I may, Senator, respond to a couple of the specific points you made.

Let me start, of course with that one. When I went back to check on this when the subject first came up, the only record that I could find—to begin with, I didn't recall the contribution at all—but the only record that I could find was the record of the action by the Governor and Council which I think was on June 30, when they had accepted or had on their agenda to accept the contribution of around 70-or-74-whatever it was, thousand dollars from the Public Service Company.

I had not been aware of the Manchester Union Leader report on May 15, and you have seen a copy of the paper and I am sure that's accurate.

The report was something I was not aware about, until you just told me now. But I think going to the issues of substance that you raise, I think there are two particular points that I do want to emphasize.

The first is that at no time did I engage in a solicitation of the Public Service Company or, indeed, of anyone else, except the New Hampshire Legislature for funds to defray the costs of the law enforcement work and the prosecution.

The request for those funds that were made came, as I recall and I think as has been reported here, from the Governor. The only consultation that I had with him that I have any recollection of is my preparation to go to the legislature, as I said, to ask for funds.

I can state categorically that the Public Service Company had no consultation with me about what would be an appropriate response by me as a prosecutor or by what would be appropriate policy for me as a prosecutor in appearing before the courts. There was no

consultation, there was no message going back and forth, and I would not have tolerated one.

I made the decisions that I made based on what I thought were evenhanded law enforcement criteria, considering, among other things, other cases of civil disobedience which had been prosecuted, particularly in the State of New Hampshire in recent years.

So, there was no opportunity and there was, in fact, no influence by the Public Service Company or by any other contributor of funds to the State of New Hampshire, in my position as attorney general.

The second thing that I think it is important to say is something which you rightly raise, and that is when the State, regardless of who solicits the money, when the State receives funds in a case like this from what might be regarded as a party in interest, two dangers arise and they simply cannot be divorced from those situations.

The first danger is that we are starting down the road, not as a particular attorney general's office which may not have been involved in it, but simply as a State, we are starting down the road of dependence upon people with particular interests in the specific subjects of law enforcement, which would tend to give them an opportunity for an influence which they should not have.

The second concern is related to the first, and that is whether particular parties or groups in interest do exert that kind of influence. When funds are accepted in this manner, there is a risk of an appearance that they would have had this influence—

Senator METZENBAUM. The appearance of impropriety is what concerns me.

Judge SOUTER. And the appearance that justice can be deflected by this should be avoided. If I had been consulted as to whether or not these funds should be accepted or, indeed, solicited, if there was any specific solicitation, I trust that my answer would have been no, for exactly that reason.

Senator METZENBAUM. Do you not think you had a responsibility, when you learned about it, to say to Governor Thomson, I insist that the funds be returned, because it gives the appearance of impropriety, they were not a factor in the case, taking their money does not look right, and I insist, as the attorney general of the State, that that money be returned, otherwise it might appear to some that our integrity has been compromised?

Judge SOUTER. Yes; I think that would have been an appropriate position to take and I wish I had taken it.

Senator METZENBAUM. Let me just go one more point about this question of whether you knew or did not know, and I appreciate your agreeing that that would have been the appropriate conduct.

In a civil action brought by some of the Seabrook protesters, Assistant Attorney General James Cruz, who participated in the Seabrook prosecution effort, was deposed. We do not have Mr. Cruz's entire deposition, but one portion which we do have indicates that Mr. Cruz testified that, on Tuesday, April 26, 1977—now, that is several days, 4 days before the demonstration—there was a meeting in the Governor's office to discuss the upcoming protest at Seabrook. Do you recall if you attended that meeting?

Judge SOUTER. I am almost certain that I did not. I did not go through the preprotest meetings. The deputy attorney general did, Mr. Cruz did, so I am reasonably certain I was not at that meeting.

Senator METZENBAUM. According to the transcript, Mr. Cruz testified that, "During the meeting with the Governor, a couple of things came up. One was the possibility that the Public Service Company would be paying some of the bill for the law enforcement at the site."

Now, on Friday, you testified that, "If there was any particular appeal to the Public Service Company, it was something that had nothing to do with me or my office." But Mr. Cruz, a member of your office, testified that, 4 days before the protest and the arrests occurred, he was in a meeting in which a contribution from the Public Service Company apparently was being considered by the Governor. Did he inform you that such a plan was being considered?

Judge SOUTER. I can only say that I have no recollection of it whatever.

Senator METZENBAUM. Were you aware of his testimony about the April 26 meeting, the deposition?

Judge SOUTER. No; I had not seen his deposition, again, until you referred to it now.

Senator METZENBAUM. Judge, I will——

Judge SOUTER. Senator, may I—I am sorry.

Senator METZENBAUM. Go ahead.

Judge SOUTER. I am sorry. I was going to say, I think in one respect I just misspoke inadvertently. I said I did not see his deposition again. I am not sure that I have ever read his deposition.

Senator METZENBAUM. I think your recognition that there was not an appearance of impropriety and that probably if you had it to do over again, you would have told him to give the money back. I think I understood your answer to be to that effect.

Judge SOUTER. We learn as we go along.

Senator METZENBAUM. Pardon?

Judge SOUTER. I say we learn as we go along.

There is one other thing, if I may, that I would like to add, not because I think I said anything that gave a contrary impression, but I think it should be put on the record, and that is that, in this kind of maelstrom of events surrounding the Seabrook protest. At no time, did Governor Thomson ever tell me what he wanted to do, as a matter of law enforcement, with the protesters.

Despite his feistiness and his assertiveness, he was in this instance, and I think in our general relationship, he was respectful of my role as attorney general, and at no point did he tell me I think you ought to recommend this or recommend that. That issue was left to me, and the Governor was very careful to do that.

Senator METZENBAUM. I do not suggest that your judgment was compromised. I do suggest and maintain that the appearance of impropriety is self-evident, when one side in a matter of that kind is permitted to pay part of the legal costs in the State. It should never occur. I think now you agree.

Mr. Chairman, I yield back.

Senator KENNEDY. Thank you very much.

Now, Senator Simpson is next, but he, in his leadership position, is over on the floor of the Senate, so what we are going to do is go to Senator Grassley, and then when it is Senator Grassley's turn, we will go to Senator Simpson.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge, I would like to return to the dialog that we had last Friday morning, and as I review the transcript from Friday morning, I am quite comfortable with most of your responses on the role of a Justice, as one who must be every bit as constrained by the law and the Constitution as we are. I appreciated your statements about having to guard against at all times the temptation to be a knight errant, when dealing with the majestic generalities of the law, and also where you spoke of having to resist the urge to substitute your own values or morality for those of the people's representative. Finally, you spoke not just in terms of liberty, but also ordered liberty.

All of this is, I think, in the best traditions of judicial restraint practiced by Holmes and Harlan—two Justices that you say that you admire. However, you mentioned, not just once but three or four times, a concept that I have never detected in any of your opinions or in any of your testimony up until this point. In fact, as it hit me on Friday, it seems to me more the terminology likely to come from a judicial activist.

Specifically, you spoke of courts "filling vacuums," of courts—and these are your words from page 14—"forced to take on problems which sometimes might better be addressed by the political branches of government." To be candid, I am a little troubled by this vacuum concept, because if we are going to have a Supreme Court that thinks it can fill vacuums every time there is a perceived problem, then I have to agree with my colleague here on my right, Senator Specter, that you are going to be a very busy person, because democratic self-government does not always move with the speed or the consensus or the wisdom of philosopher kings who might best fill those vacuums.

I think Senator Specter is also right, that if you think that you have a warrant to fill vacuums, then you are coming dangerously close to acting like a politician, and then that means that coming before this forum, we have a right as well as a responsibility to see your whole "campaign platform" on a wide array of issues.

Now, I do not want that and I do not think you want that, and I do not think this confirmation process could stand that. Therefore, would you please clarify the use of the term "vacuum" or, even better, rephrase it in favor of something different? [Laughter.]

Judge SOUTER. I think you are giving me a hint, Senator. [Laughter.]

I certainly do not want to start my answer by saying that the last thing in the world I would want to be taken for is a politician. [Laughter.]

But I think I had better go back, as I did a moment ago, to the specific context that I had in mind when I made that statement. Let me start it with a couple of general thoughts.

The first is that the jurisdiction of the Supreme Court of the United States, of the lower Federal courts, of every State court in

America is derived from the Constitutions that respectively create those courts. It is not derived from perceptions at the moment about what ought to be done.

Courts do not self-define their jurisdictions and they do not have the authority to define them simply when they perceive what they think is a vacuum in the political process which leaves a problem unsolved.

What I had in mind when I made that statement was the example of the 14th amendment example in *Brown*. There are a great many who argued at the time and certainly have argued since that we might have been better off if the *Brown* decision had been not that of the Supreme Court, but had been the—

Senator GRASSLEY. Let me interrupt, before you get too far down that road. Are you saying that the power given to Congress under the 14th amendment, clause 5, can be usurped by the Supreme Court?

Judge SOUTER. Certainly not. The Supreme Court's action in the *Brown* case was derived from the fact that it was charged with enforcing the Constitution, including the provisions of section 1 of the 14th amendment, not section 5. Section 5 is an empowerment of the Congress alone.

But the situation that was presented to the American populace at that time was a situation in which Congress could have taken some action and which the courts, acting under section 1, had a responsibility to take some action.

The fact was that for 58 years, separate but equal was the law of the United States, and no political branch of the Government responded to modify that, including the Congress under its section 5 power, and, therefore, it was incumbent upon the Supreme Court, when *Brown v. Board of Education* came down, to apply the equal protection clause as it thought right, and in my judgment, as I have said, I think there is no question, it applied it correctly.

But there is an example of a case, and that is the one that I had in mind, in which there had been no action by the political branches and, therefore, sooner or later, there was no question that a justiciable issue would be brought before the Court and that the Court would say the time has come to act upon it.

But let me leave no mistaken impression in your mind that the jurisdiction of the U.S. Supreme Court to act in that case had nothing whatsoever to do, one way or the other, with what any other branch of the Government did or did not do. The Court's jurisdiction derived from the Constitution and from its obligation to apply section 1 of the 14th amendment, and vacuums do not create jurisdiction.

Senator GRASSLEY. If you are saying that when a State fails to live up to what the 14th amendment says, in terms of equal protection and due process, that the Court can step in, then that is fine. But if you mean that the Court can otherwise fill vacuums, that is another thing.

Judge SOUTER. No; the former is exactly what I mean.

Senator GRASSLEY. Therefore, you do not read the 14th amendment as a kind of admonishment to Congress to solve all social problems, because if we do not, then the Supreme Court will step in and solve them for us?

Judge SOUTER. No. Section 5 of the 14th amendment empowers Congress to implement the provisions of the amendment itself and, as you know, Congress is moving these days to do exactly that.

Senator GRASSLEY. So, the 14th amendment, then, is not some kind of loaded revolver just sitting around waiting to be fired by the Supreme Court any time you become impatient with the people's representatives?

Judge SOUTER. I assure you, I would not regard it in that light. [Laughter.]

Senator GRASSLEY. Well, I also asked you about the criticism of the Court's creating rights inconsistent with the text and tradition of the Constitution, and you responded, on pages 17 and 18, with a discussion of the differences between the creation of rights and the recognition of rights which are implicit in the text of the Constitution.

Judge SOUTER. Yes.

Judge GRASSLEY. This answer came right on the heels of your talking about filling vacuums, when the people's branches or the political branches of Government might be slow to act, so I would like some elaboration. Please give me an example of when you think the Supreme Court improperly created rights and one when you think they properly recognized rights.

Judge SOUTER. Well, I do not want to over-use the example, but I think I cannot give a better example on the proper recognition of rights than *Brown* itself. The Court in that case recognized that the equal protection provisions of the 14th amendment were not confined to those specific problems that were in the minds of the Framers as the objects of its application in 1868. The Court recognized that there was as general concept of equal protection and it was just as applicable to school segregation as to other enterprises.

If you simply read the text of the Constitution and somebody said, well, where does it refer to schools, where does it refer to school desegregation, of course, you would not have found anything there, but I think clearly implicit in the text of the Constitution itself and in the concept of due process was the proper basis for the Court's exercise of its jurisdiction.

Senator GRASSLEY. Well, is it not more true under *Brown* that the Court was striking down a State practice, rather than creating a right—

Judge SOUTER. Well, in order to—

Senator GRASSLEY [continuing]. A nonconstitutional practice by the State of Kansas?

Judge SOUTER. Well, in so doing, the Court had to recognize and did recognize that the right under section 1 of the 14th amendment, the right to the equal protection of the laws, was a right which applied to those particular plaintiffs and applied to the subject of school desegregation. So, in order to strike down the State laws, what the Court had to do was to recognize the right of the plaintiffs, in effect, to strike them down or to have them struck down. So, I think it was doing both, but in order to do so, it had to recognize the plaintiff's right.

Senator GRASSLEY. Well, let me see where I can help you—where you may think that the courts improperly created rights. You have great respect for Harlan and referred to him quite regularly during

these hearings. Harlan, and hopefully you, would think that the Warren court rulings in the areas of criminal procedure or in obscenity might be some cases where the courts created rights.

Judge SOUTER. Well, take the criminal procedure area as an example. I think so much of the difficulty that the States had with some of the Warren court decisions came in part, came in large measure from the difficulty of administering them. One could, I suppose, perfectly well argue today—as many people argued in the 1960's—that there was not a warrant to impose the exclusionary rule, for example, on the States once it was understood that the fourth amendment standards applied to the States.

But the difficulty that the States had under the exclusionary rule—and I can speak from experience here because I was in the trenches in those days. I was an assistant attorney general, and I was concerned with criminal administration. The difficulty that the States were having was the difficulty in learning how to do what the Court had held that the States ought to be doing.

I can remember in those days lecturing at State police training academies on the requirements to demonstrate in applications for search warrants what was known as credibility and reliability of the sources of information, what people in the business refer to as the old twin *Aguilar-Spinelli* tests.

It was very difficult for law enforcement officers and for judges in the field to engage in the kind of very close textual analysis almost of search warrant applications which seemed to be called for by *Aguilar* and *Spinelli*. A great many of those difficulties have been alleviated in the meantime as the Court has moved from the kind of the technicality of those two-pronged tests to a test which looks rather to the overall effect of the warrant and does not rely on that kind of technicality.

The difficulty that we were having was the difficulty in understanding exactly what it was that the Court was requiring and how to go about satisfying it. One of the most telling experiences that I can remember having that illustrates this point was in the course of an argument in the Supreme Court of New Hampshire after the *Spinelli* case had come down. One of the justices on the New Hampshire Supreme Court said to me, "Do you believe that *Spinelli* has changed the law?" I said, "No, I don't." I said, "I think the standards are the same after *Spinelli* as they were before."

And he said, "Well, that is my view, too, but," he said, "you know, not everybody agrees with us." And if you looked at the opinions of the U.S. Supreme Court in the *Spinelli* case, you would see, as I recall, that the Justices themselves could not agree on whether they were coming up with anything new in the *Spinelli* case or not. And that is why I say I think the great difficulties that we labored under some of the Warren decisions was in implementing them, in trying to understand what they meant, and that is why I think I said the other day that in the meantime we have learned to live with a great deal, and lived with them pretty well today.

Senator GRASSLEY. Has there never been an occasion where the Court improperly created rights? And these were your words from last Friday. What did you mean by "improperly created rights?"

Judge SOUTER. Going to the latter part of your question, I think what I was referring to on last Thursday were the—I think we were talking—I don't know, but I think we were talking about the area of criminal procedure again. A lot of the decisions in that period were what I would describe as kind of pragmatic implementing decisions. I think probably everyone would agree that the Court could have gone on reviewing confessions simply on the basis of the voluntariness standard which was implicit in the concept of due process, which the Court had been doing for some time; and that it could have continued to do that without adopting the *Miranda* tests.

What the *Miranda* tests were intended to be a very pragmatic procedure that would cut down on the likelihood, cut down on the degree of possibility that confessions actually would turn out to be involuntary confessions. Was it right for the Court to say we have just reached the point where the judicial system cannot continue to go on litigating every case for voluntariness under due process? We have got somehow to have a more pragmatic approach to this that is going to cut down on the number of problems.

People of good will could disagree about that, but the fact is, at the time the *Miranda* decision came down, it created a lot of problems for people who didn't know how to respond to it. Those problems are over and done with today. I think most law enforcement officers can respond to it, and anyone who wants to attack *Miranda* today has got, I think, the same kind of pragmatic burden which those had who argued for *Miranda* in the first place. What would be the effect of changing it? Was *Miranda* the creation of a new right, or was *Miranda*, in fact, an experiment by the Supreme Court in how to protect a right?

People can argue back and forth on the terminology. I personally have looked at *Miranda* as a pragmatic decision intended to protect a right, and the only sense in which I think probably you can say there was an extension of a right was that sense which Justice Harlan referred to when he said that what *Miranda* had done was to extend the fifth amendment from the courtroom to the police station. But I think the reason the Court was taking the tack that it was taking was not merely for the purpose, or for the purpose of extending rights so much as in trying to find a pragmatic way to protect those rights. And it was a very difficult pragmatic way at the time the opinion came down, unlike the situation today.

Senator GRASSLEY. Judge Souter, you have said many times and again in your last statement about your admiration for the philosophy and the approach of Justice Harlan. If there is one Harlan message that I would like to leave with you as I conclude my dialog with you, it is this one from the reapportionment cases of 1964, and I quote:

I believe that the vitality of our political system on which, in the last analysis, all else depends is weakened by reliance on the judiciary for political reform. In time, a complacent body politic will result.

Continuing the quote:

These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional principle, and that this Court should take the lead in promoting reform when other branches of

Government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a haven for reform movements. The Constitution is an instrument of Government, fundamental to which is the premise that in the diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court does not serve its highest purpose when it exceeds its authority, even to satisfy the justified impatience with the slow workings of the political process.

Now, this to me is classic John Marshall Harlan. Whether or not you would have signed on to his dissent in 1964 is immaterial because, of course, there is no turning back the clock in this area. My point is simply that Harlan has articulated a principle that, it seems to me, leaves no room for vacuum-filling. So I commend that particular bit of Harlan for you to reread and consider as you move to those lonely marble halls just a few blocks from here.

Thank you, and I wish you good luck.

Judge SOUTER. Thank you, Senator.

Senator GRASSLEY. I yield back my time.

The CHAIRMAN. Judge, was one-person, one-vote, rightly decided, Baker?

Judge SOUTER. I think it was. But I will tell you, Mr. Chairman, I think the Harlan dissent was a very powerful dissent. And the truth is I don't have a simple answer to the Harlan dissent. I don't have a simple answer to it today.

As you know, Justice Harlan relied so heavily on the provisions of section 2 of the 14th amendment for saying that that was an indication that any problem of the maldistribution of votes or the apportionment of votes was intended to have a congressional solution period. And yet on the other side, you would be facing the fact that there was less protection for this most fundamental right than there would have been for one of the garden variety economic rights. And that argument of his was a tough argument.

The CHAIRMAN. But you think it was rightly decided.

Judge SOUTER. I think I would have to have gone along with it, yes.

The CHAIRMAN. Thank you.

The Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you.

Judge Souter, I want to go back to a couple of areas that we discussed last week. Excuse my voice. I have a bit of a cold today. We talked at some length about the equal protection clause as it relates to discrimination cases.

In your opening statement, Judge, you stated that part of your role as Supreme Court judge will be to "preserve the Constitution for the generations that will follow." I think that statement is very accurate, and it is the reason why I have spent so much time on this particular issue.

Judge Souter, I have two daughters. One is a lawyer, one is a doctor. I have a son who is a lawyer. I see no reason why my son should be treated any better under the law than my two daughters. I also see no reason why the Court should give the same scrutiny to law that distinguished trucks or automobiles as it does a law that treats men different than women. To do otherwise, in my judgment, I believe would not preserve the Constitution for generations to follow.

Along that line, Judge, let me just pursue this a little more. Last week, we discussed the middle tier scrutiny that the Court applies to gender discrimination statutes. You described it to Senator Kennedy as "too loose"—those were your words, I believe—and you criticized its flexible quality.

Could you refer to any cases that you have analyzed that lead you to believe that the test may be too loose?

Judge SOUTER. Well, Senator, I think I can recall some. That test has a peculiar history. To the best of my knowledge, the first case in which the middle-tier scrutiny test, substantial relationship to important government objective, the first case in which that was mentioned was a case early in the century, and it was an economic regulation case. It may have been an antitrust case. It was an economic regulation case, in any event, and one of the parties was a corporation known as the Royster Guano Co. I don't remember the other party, but I will never forget *Royster Guano*.

The issue in that case, as I said, was strictly one of economic regulation. It is the kind of issue which today would merit what we would call first-tier, rational basis analysis. And, in fact, that was exactly the kind of treatment that *Royster Guano* got. So this test which today is being used and has evolved into a middle-tier test began its life right down at the other end of the spectrum.

Some of the cases that have applied it as a middle-tier test even since then have seemed to me, as I have read the opinions, to seem to slide back and forth as to whether they were applying middle-tier or first-tier. I think someone the other day mentioned the case of *Reed v. Reed*, which involved an issue of probate administration and the eligibility of a woman to serve under the same conditions or subject to the same conditions of eligibility as a man. There are portions of the *Reed* opinion in which they seem to be doing nothing but applying first-tier analysis.

Senator DECONCINI. I agree.

Judge SOUTER. And at the other end of the spectrum, I had a case in which I wrote a separate opinion on the New Hampshire Supreme Court this past year in which I know my colleagues did not agree with me, but it seemed to me that they were using the middle-tier test for the highest level of scrutiny. And so it is examples like that that have made me wish that we could come up with a less flexible formulation. That is a lot easier said than done. I hope you are not going to say to me, "OK, Judge, here is your chance, give us the word," because I don't have an alternative formulation written.

Senator DECONCINI. Well, maybe not, and maybe you could pursue it a little bit. If the intermediate test requires that a classification must serve—as we, I think, agree—"an important governmental objective" and be substantially related to that objective—you went into at great length last week. And yet the strict scrutiny test provides a classification of compelling government interest and the narrowest means must be used to achieve that objective or interest.

Now, what in your opinion is "too loose," or can you discuss the difference between these two? I have trouble with them, but I understand the strict scrutiny test much better than I do the intermediate and where it follows with your reference to the looseness. I

tend to agree. It is interesting to me how you see the difference between this. Where is the looseness? And where would you tighten it up, if you can say, obviously without any reference to potential pending cases?

Judge SOUTER. I think the reason why we tend not to be quite so concerned about the flexibility in the highest tier test, the compelling State interest test, is that traditionally we have been working with classifications which affected rights of such fundamental importance that it was very, very difficult for anybody to meet the test. Therefore, there has tended, I think, just as a historical matter, to be fewer cases calling for third tier, the highest level of scrutiny, which have seemed to be debatable cases at all. And you are entirely right to say, well, compelling interest, that calls for an evaluation. Narrowly tailored, that calls for it. And you are entirely right. If you look at some of the recent cases that have come down on examining race-conscious remedial order by courts. They are being subject to the highest level of scrutiny.

Senator DECONCINI. Exactly.

Judge SOUTER. And yet, for example, when you come down to narrow tailoring, there is undoubtedly room for maneuvering there in the kind of factor analysis that has gone into the narrowly tailoring analysis.

Senator DECONCINI. It doesn't trouble you that you would make that statement, that there is room for maneuvering?

Judge SOUTER. It is a fact. There is no human formulation that is going to give you any kind of mathematical precision. And as I think I said when I first brought up the subject the other day, I am by no means convinced that I can do better at it. But the examples that we have been through, of which I gave you some—

Senator DECONCINI. Yes, you did.

Judge SOUTER [continuing]. Are what disturbed me.

Senator DECONCINI. Judge, to go to another area, last week we talked a little bit about the effects opinion polls should have on judges' decisions, and you stated that they should have no effect. In some eighth amendment cases, dealing with the death penalty, the Court has looked to many diverse factors in determining "evolving standards of decency," including opinion polls. That is made reference to in the *Gregg* case. Do you think that the Court erred in making reference to public opinion polls, in deciding the *Gregg* case? There are several other cases that judges' majority opinions have made reference to opinion polls.

Judge SOUTER. I was referring to opinion polls about the rightness of their decisions or not.

Senator DECONCINI. Yes.

Judge SOUTER. And I will stand by my answer there.

I will say that I would be much more comfortable to look to what legislatures do, for example, in expressing the sense of the communities on matters of appropriate criminal penalties.

So I would look at them very warily because I think we have better evidence.

Senator DECONCINI. Well, I agree with that and it seems like it's maybe unfair to even suggest that a Supreme Court Justice can really be so pure in his or her legal thinking that they are not

going to be influenced by newspaper articles or television opinion polls that they see over the news.

Judge SOUTER. You know what Charles Evans Hughes said: "They read the papers."

Senator DECONCINI. They read the papers, yes. After your comment I asked my staff to give me the *Gregg* case, which I had not read for some time. I remember opinion polls being cited someplace. It was there and in a number of other cases.

The CHAIRMAN. The question is, Senator, do they watch color television, that's the real question.

Judge SOUTER. I can tell you one nominee who doesn't unless he is visiting somebody.

Senator DECONCINI. That may be one of the biggest pluses you have had, for your credit.

Judge SOUTER. Well, I'm not about to get rid of that set right now, if that's the case.

Senator DECONCINI. Judge, let me go into the judicial activism that was discussed last week. Senator Thurmond asked you last Friday to describe what you thought the term judicial activism meant? I did not have as much luck as my colleague did when I asked you that question. You told him that you would consider it judicial activism if a judge imposed his personal values rather than searching for the values embodied in a constitution.

Is that, in essence, correct?

Judge SOUTER. That is fair to say.

Senator DECONCINI. Do you think it is judicial activism to rule that capital punishment is always cruel and unusual punishment?

Judge SOUTER. I think that would be an insupportable decision under the Constitution and I say that, sir, with a recognition that there are members of the Supreme Court who disagree with me. But that is an opinion which I could not join.

Senator DECONCINI. Because, as you know, Brennan and Marshall, at least in this lawyer's and Senator's opinion, certainly reach for judicial activism in their efforts to state that that's how they interpret the eighth amendment as it relates to capital punishment.

You went into the *Miranda* and exclusionary rule at some length with Senator Thurmond also. In your response you stated that *Miranda* created a pragmatic rule, as you did just recently with Senator Grassley, you described the exclusionary rule in the same way. Let me read back your response just to refresh your memory, because I am concerned about these decisions as to their activism and what appear to me to be activism, although I can't disagree with the decision in at least the *Miranda* case.

"I think it's important to note"—this is you, Judge—"I think it's important to note that when we look back on a decision which has been on the books as long as *Miranda* has now, we are faced with the similar, I think practical, obligation, if one wants to modify or expand or contradict, to ask very practical questions about how it actually works. That is a judicial obligation if the judiciary is going to be imposing pragmatic rules."

Your response leads me to this question. Should the Court be imposing rules such as *Miranda* and exclusionary and are they not

really experimenting? And isn't that what you have indicated that the Supreme Court was doing?

Judge SOUTER. With the hindsight of history there is an experimental cast to some of them. As you know, over the years, for example, on the exclusionary rule there have been calls within the Supreme Court to turn the *Mapp* decision around on the grounds that it has simply not worked out, and that that is a fact which the Court ought to face.

I don't know of any theoretically satisfactory way of saying when a pragmatic experiment sort of crosses that line it is something that has to be condemned as activism. The courts have got an obligation to, in effect, enforce standards. In the *Miranda* area what the courts were concerned with was the amount of litigation which was going into the question whether given confessions or admissions had been obtained voluntarily or not, was simply placing such a severe burden on the courts themselves, that there had to be a better way to protect the ultimate interest which the 14th amendment was trying to protect without, in fact, tying the courts up in the kind of litigation which just seemed endless, fact-specific, and detailed.

The idea was if the police can get the *Miranda* warnings right, they're going to obviate a large percentage of the voluntariness cases. So that in the long run, law enforcement and judicial administration are going to be more efficient. Well, that was not a very easy argument to sell to law enforcement when *Miranda* came down, as you well know.

But the fact is the intent of the *Miranda* decision was an intent to provide better administration for the imposition of a standard which we all, on each side of the issue, recognize had to be enforced.

Senator DECONCINI. I think today I agree with that. I agree that that is how they came to that conclusion. When that case came down I was a prosecuting attorney and I certainly didn't agree to it. I was outraged.

In essence, isn't that really experimenting by the Supreme Court? Wasn't the Court really trying to find a solution to its own problems of being inundated on these types of questions?

Judge SOUTER. Well, it was its own problems and it was law enforcement's problems, too. Yes, it was experimentation.

I remember——

Senator DECONCINI. When——

Judge SOUTER. I am sorry.

Senator DECONCINI. No, go ahead.

Judge SOUTER. No, that is all right.

Senator DECONCINI. In your own standard, Judge, and maybe you can explain this, where do you draw the line? Does it have to be a crisis matter of the Court, or is it just totally discretionary when a majority of the Court thinks that experiments, "activism," or whatever the majority decides the opinion is going to be, is that where the line is, or where do you draw it?

Judge SOUTER. Well, as I said a minute ago, I wish that I had a neat formulation for it. At the very least, in searching for the line we have got to keep in mind what I said in my discussion with Senator Thurmond. It is one thing to try to come up with a pragmatic

approach to the enforcement of a constitutional value or standard which is, itself, accepted. It is another thing to derive standards based simply on personal judicial views of what would be desirable in the world.

I will grant you that when we get into the area of pragmatic experimentation, that can be a darn tough line to draw and I don't know of any theoretically easy way to tell you how we would do it.

Senator DECONCINI. Does it violate your interpretivist approach to the Constitution, which you have expressed and explained quite well, I think?

Judge SOUTER. Well, I don't think it should be seen as any peculiarly interpretivist issue. Regardless of what your view may be of the various schools of interpretivism, the fact is that the courts have got an obligation to come down with practical decrees that implement whatever rights and standards we do find in the Constitution.

When we are talking about decisions like *Miranda*, we are talking about the best way for a Court to exercise its—I guess you might call its prudential power, to get to the right result, to enforce the appropriate standard with the least amount of damage to the body politic—because there is a price to be paid when confessions are thrown out—and with the least damage to the judicial system, which is constantly overwhelmed with litigation. I guess I tend to look upon that as an issue more about the appropriate scope of the Court's power to fashion remedies than an issue of interpretivism about constitutional meaning as such.

There is, of course—and this was true of the 1960's and 1970's and it is always in the background of our thinking today that when that kind of pragmatic experimentation does go on, it has an effect on the Federal balance in the country, too. I think it is safe to say that that is a value which the Court has also got to bear in mind and that is not merely prudential.

Senator DECONCINI. Well, Judge, would you agree that the *Miranda* decision is not likely to come back before the Court? It seems to me pretty clear where we are on that. I want to ask you whether or not you think that decision was correct?

Judge SOUTER. Let me, if I may—let me approach it this way. I do not rule out the possibility of that coming back before the Court, but I think what I can probably say to it is that—and I have said similar things from the bench in New Hampshire—that if that issue does come back or one similar to it, I think there is an obligation on those who want to raise it to address the pragmatic issues. How is it working today? How do we assess, if you say the price is high, how do we assess that price? What do we really know about what is going on?

I think we are engaged in significant measure if such an issue comes up in a very pragmatic weighing, and it must be addressed that way.

Senator DECONCINI. Then I take it from that if you conclude, as a judge, that a decision is, indeed, pragmatic, experimental or judicial activism, whatever term or adjective we might use, that because of that nature it probably ought to be reviewed or revisited. Is that putting words in your mouth?

Judge SOUTER. Well, I think that is a way of expressing, Senator, a conclusion that you have to approach on what I call the threshold question of the matter of precedent, and that is, was the decision wrong or not?

Senator DECONCINI. Judge, what about the Court ordering an elected official to raise property taxes as they did in *Missouri v. Jenkins*? Could this ever be within the remedial powers of the judge or is it just clearly judicial activism?

Judge SOUTER. Well, as you know, Senator, that is an issue that no matter how things turn out the Court is going to be revisiting. The scope of the decision of last term is subject, as you know, to great debate, and I think I have got to be very careful about what I would say on that.

Senator DECONCINI. Let me phrase it in a different way, if I can. If the Court rules or continues to rule that it is within its jurisdiction and its interpretation, that elected officials must take some action as to their proprietary interest regarding financing anything. I am trying my best to stay away from that particular case.

My point is, in your opinion, does that disturb you that the Court would move into an area of legislative, clearly legislative prerogative and certainly one of long-standing precedence that the Court, itself, has recognized and failing in the past to rule certain things should happen because it is up to the "appropriators" or the legislative body to fund them if they want to have them.

Can you give me a feeling of how you would address that theoretical area?

Judge SOUTER. I think I would start by addressing it, by asking whether, in fact, that question really has to be raised? I do not say that lightly.

One of the peculiarities of last term's case was the fact that the case came to the Court in almost a friendly posture. A decree was being worked out in that case on a cooperative basis and, in fact, the school administrators were apparently very well satisfied to include a great many extremely expensive items in the decree which the Court was being asked to enforce, as you know, as a remedy to a school segregation issue.

The case seemed to come to the Court in the posture that we can't afford all of the other things that we have got to spend money on and fund all of the very expansive details of this consent decree consistently with the tax rate that we can impose, subject to certain State restrictions on the raising of school taxes.

The case was presented to the Court in that posture. It seems to me one of the issues that ought to be faced before the question of the Court's remedial power is finally decided is whether that is the posture in which such a case should come before the Court?

For example, shouldn't the issue be phrased in these terms, that once a decree is ordered by the Court, the question is not whether necessarily taxes have got to be raised and, if so, under what authority they may be raised to do it, but whether, in fact, the political branches of the Government responsible have made a decision that they are going to put the implementation of this court decree first. They are going to give that its highest priority in funding.

Because if that is the appropriate way to go about it, if there is, as it were, a primacy of obligation to obey a court order, then the

real question that is going to face the local taxing authorities is not whether they have to raise taxes to fund the court order on top of everything else, but whether they are going to continue to fund everything else in addition to the court order?

It seemed to me that one of the difficulties of trying to focus the issue in last term's case is that the political priorities at the local level simply don't seem to have been addressed. If they are addressed, there is a real question in my mind as to whether or when the Federal courts are going to get to the point of having to rule on the question that so many people take that case of last term as really standing for, and that is the right to impose or order the imposition of a property tax.

Senator DECONCINI. Well, of course, that is the point. How can the Court justify stepping into that area? They can certainly hold constitutional rights as being denied, but to go so far as to say you must shift your appropriations—and I think that's what you are suggesting might happen if the Court isn't careful in reviewing the cases before they consider them—shift your appropriation, local school board, or State legislature, or the Congress of the United States from building a B-2 bomber, which is not perhaps as constitutionally protected, assuming you can argue that the defense is adequate and putting it into prisons, because you are not treating and granting prisoners a constitutional right that they have to safety and other equal protections that they have.

It just is very disturbing to me to see the Court moving in this direction, and I have great respect for you, Judge, and the way that you have answered these questions. It doesn't give me a lot of encouragement, other than you are going to think about it. And you have thought about it. It seems to me that what you are saying is, yes, we have got to consider it. The best I can tell you, Senator, is in my objective observation now is that we ought to consider it at the early stage before we accept a case for argument, and maybe we can decide there that we shouldn't take it. But, yes, it is something that we have got to get into. Is that understanding—

Judge SOUTER. Ultimately we will.

I say we, we on the judiciary will, where I will be on the judiciary, I will not say.

Senator DECONCINI. Judge, thank you. I just want to say to you, Judge Souter, that I am very impressed with your presentation over the last 4 days and also the openness that you have come forward with, different than other nominees that we have had, I must say. Though I think you have adequately and properly protected your need to withhold answers in some areas, because of decisions before the Court I believe you will be confirmed to sit on, you took advice from a number of us, I guess a number of us, that I hoped you were forthcoming. Indeed, you have been in this Senator's judgment, and you have expressed time and time again your great intellectual capacity of the law that is, indeed, very impressive to this Senator, one I am envious of, quite frankly, of your knowledge of the cases that you have read over a long period of time or you crammed in over the last month, however you did it, it is quite remarkable. [Laughter.]

Whatever tutoring Senator Rudman gave you, I guess he deserves some credit, too, but quite frankly, Judge, I think you have conducted yourself—

Judge SOUTER. I think you are going to have a fight on the committee here, Senator. [Laughter.]

Senator DECONCINI. I think you have conducted yourself exceptionally well. It is not that I agree with everything you have said, but you have certainly, in my opinion, not dodged some very tough questions, and that is appreciated by this Senator very much.

Judge SOUTER. Thank you very much, sir.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator THURMOND. Would the Senator from Arizona yield?

Senator DECONCINI. Yes.

Senator THURMOND. I just want to make this observation: In the *Missouri* case you referred to, the Court held that a judge does not have the power to impose taxes, but he could order officials to do that. That is a very disturbing decision. We have introduced a bill to reverse that decision. That is a legislative function. Whether taxes are put on or how much taxes or how much or for what purpose is not a judicial function, and we hope to reverse that decision, and so I just thought I would mention that to you.

Judge SOUTER. I appreciate that, sir. [Laughter.]

Senator DECONCINI. I could not quite say it that tactfully, Mr. Chairman.

The CHAIRMAN. It is amazing, Judge, how the degree to which people think you respond depends upon whether you answer questions, how you view capital punishment and not other things that are before the Court.

Also, Senator DeConcini had great credibility in his comments until he suggested that possibly you were tutored on the law by Senator Rudman. That is when we all began to have our doubts. [Laughter.]

Judge SOUTER. I think I can claim privilege on that, Mr. Chairman. [Laughter.]

The CHAIRMAN. What I would like to suggest is let us recess for 3 minutes, come back with Senator Specter's questioning, and during that 3-minute recess, maybe you and I can confer as to how long you would like to go before lunch.

We will recess now for 3 minutes, to give you a chance to stretch your legs.

Judge SOUTER. Thank you, sir.

[Short recess.]

The CHAIRMAN. The hearing will come to order.

Let me briefly describe the very brief discussion we had. What we will do is continue with two more rounds of questioning from the Senator from Pennsylvania and the Senator from Vermont, who will each question for a half hour. That will bring us roughly around 1 o'clock. We will then break until roughly 2 o'clock. Actually, it is probably going to be quarter after 1 and quarter after 2, and then what we will do is we will come back, starting with Senator Humphrey, our first questioner this afternoon of our witness, and we will proceed on until we finish the second round, at which time we will probably take a brief recess and then Senators who still have questions, and I know that there are a handful who still

have additional questions, will continue to pursue those questions and we will make the judgment as we go, from that point on.

Now let me yield to my colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, I began with our point of departure last Friday on your view of judicial interpretation. The starting point, from my understanding of your judicial philosophy, comes in your extensive opinion in the *Estate of Dionne*, where it is encapsulated, as follows, as I interpret it: "The Court's interpretive task is, therefore, to determine the meaning of the article 14 language as it was understood when the Framers proposed it and the people ratified it as part of the original constitutional text that took effect in June of 1784," so that you refer to understanding as the Framers proposed it and the people ratified it at a specific time in 1784.

Now, there has been a modification in what you have said, when you move from meaning at that time to a broader interpretation of meaning as that meaning might be understood at a later time. You have given a very expansive interpretation of judicial authority, when you talk about filling a vacuum, and as you go through the points of analysis, a great deal of what you have had to say would apply to a legislative judgment as well as to a judicial judgment.

You talk about what liberty interest is involved for an individual, then you talk about what are the countervailing considerations, it sounds very much like what a Senator might do, then you add to that a test which we do not have, and that is the precedent *stare decisis*, but you articulate that in terms which are very flexible, how long it has been in effect, what the principles are, what reliance there has been, so that at every turn you come to something which is extremely flexible.

The cases involving civil rights and taxing power and contempt power in the *Yonkers* case are far-reaching applications, as I see it, as to what the Court has done, which really moves into the position of being a super legislature. Let us start with the point where Senator DeConcini ended, and that is with the decision in which the Supreme Court of the United States said that the court had the power to direct the local authorities to impose a tax, and your response there was, "Political priorities at the local level are simply not being addressed."

Now, the difficulty that I see, the threshold with your response is that you say political priorities are not being addressed at the local level, and that the court can order the local officials to address those political priorities.

It is hard to find an issue which is more contentious in the political arena than the tax issue. In the 10 years that I have been here, that is about all we have talked about, as we have wrestled with the issue of the deficit. The summiteers on the budget conference, meeting at Andrews Air Force Base, are devoting their time, virtually exclusively, to the tax question.

The political process in 1984, I think was decided largely, if not exclusively, on the tax question. That issue was paramount again in 1988, and it is the most essential political function that there is in our society, to figure out when to raise taxes and how to raise

taxes is subordinate and the Court did leave that to the local government here.

But I would start with this question on this subject, Judge Souter, and I would again refer to your language in *Dionne*, to look to the Constitution, to the meaning of the language as understood by the Framers and the people who ratified it, and ask where is the constitutional authority on the very basic level for the Court to introduce into what is the most essential legislative function on taxation.

Judge SOUTER. Senator, I think the approach to that question is a two-fold one. The first is, I know certainly from my familiarity with my own 1784 constitution in New Hampshire, and I can speak with equal certainty of the national Constitution, that the taxing power in the sense of the Framers understood that is a power subject to the separation of powers was legislative, it was not judicial.

The difficulty in the question that faces us and that was facing the Supreme Court and, I presume from what I have been told this morning, will definitely face the Supreme Court again, is in drawing a line, if indeed a line is to be drawn there, between the appropriate scope of the judicial power in enforcing its own decrees and the point at which those decrees cannot be enforced without a tax increase.

When I spoke earlier of what seemed to me the failure or uncertainty of the means by which political priorities had been addressed at the local level, what I was trying to get at was that we never take on a constitutional issue if there is a means of adjudicating on a nonconstitutional basis. And it seems to me that the question of how far the court's remedial authority goes, when it runs smack up against a lack of money in the local treasury, should be posed in this way. I do not think it should be posed by saying will this judicial remedy exhaust the treasury; it should be posed by saying can this judicial remedy be enforced within the money available to government, bearing in mind that government may have to put the judicial remedy first and decide that there are other priorities for which it would like to spend which it can no longer spend for, without raising taxes.

Senator SPECTER. What is the authority of the court to establish the priority?

Judge SOUTER. Well, I do not think the court has the authority to establish the priority as such, but I think that the constitutional issue does not really arise, unless the priorities or it does not arise in a way which requires adjudication, unless those priorities have been addressed at the political level, the local level. In other words—

Senator SPECTER. Judge Souter, I do not think that advances us very far, when you take up the relative responsibility of the court versus the legislature on something as fundamental as taxes.

Let us go to another example, on the *Spillone* case, where you have a contempt citation which was reversed against councilmen of the city of Yonkers. The Court said that it was reversed only because they first should have proceeded with sanctions against the city alone, but then added "only if that approach fails to produce compliance within a reasonable time, should they then move to the issue of a contempt citation against the council."

Now, where does a legislative responsibility begin and end, if the court can order the council what to do? My question to you, is there any difference between a city council in Yonkers and the U.S. Senate? Does the court have as much authority to order the Senate on what it should do in discharging its legislative role, as the court has to order the city council of Yonkers, NY?

Judge SOUTER. I would suppose that the answer to that is clearly no, because the Senate of the United States is not going to be the party to the kind of litigation which the Yonkers litigation produced. In other words, the Senate of the United States, I presume, is not going to be a defendant in a civil rights action.

Senator SPECTER. Well, let me give you a case. The Court holds that it is unconstitutional to have prisoners in quarters which are unacceptable. That has been a judicial interpretation, and the Congress of the United States, including the U.S. Senate, is the only agent which can impose taxes to build the prisons. The case comes to the Supreme Court of the United States, there is a constitutional right not to have cruel and unusual punishment under the eighth amendment. The Supreme Court of the United States says that there are too many prisoners in the Federal prisons, and then orders, as the Court ordered the Kansas City authorities, says to the Senate raise taxes to grant the constitutional rights of petitioners under the eighth amendment. There is a case.

Judge SOUTER. Of course, the—

Senator SPECTER. The Court can do that, and now what is the Senate going to do? Is that any different than the city council of Yonkers, NY?

Judge SOUTER. Of course, the difference is that the city council of Yonkers, NY, is bound by the supremacy clause of the Constitution, so that there is an entirely different structural relationship between the two.

The second difference, it seems to me, is that the suit, even if in fact there were a Federal action, the suit would not be against the Senate of the United States, it would be against a subordinate branch, a subordinate contingent of the executive branch.

The third difference would be that the Court in those circumstances, if the executive branch could not get the funding to do the construction and so on, would have an alternative, not merely the alternative of ordering relief as in the *Yonkers* housing case, but it would have the alternative of nonappropriation or nonfinancial relief under the habeas power over conditions of prisoners, so I do not think the Senate of the United States could ever possibly be in that position.

Senator SPECTER. Well, Judge Souter, the Senate could be named as a party-defendant. You say that it could not be, but it would take too ingenious a plaintiff's lawyer to name the Senate as a party. You say the Court could order habeas corpus relief, that is true. That translates, habeas corpus relief means that there would be an order for the Federal prisons to release perhaps thousands of prisoners, but the Court might not choose to do that. The Court might choose to exercise its own remedial jurisdiction to say build the prisons, we do not want the responsibility for releasing so many thousands of prisoners.

Then you say that Yonkers is bound by the supremacy clause. That is a question I want to get into at a later point, in terms of jurisdiction of *Marbury v. Madison* and the authority of the Congress to take away jurisdiction, but it seems to me that the Congress is bound by the supremacy clause, unless we are to say that the Congress can legislate and say that the Court does not have the jurisdiction to order the Congress what to do.

But in our system, *Marbury v. Madison* has already been respected, so conceptually, it seems to me that we could come to a situation logically where, if the city of Yonkers can be ordered what to do, the council people can, so can the Senate.

Let me turn to another subject which is illustrative along the same line, and that is the issue of a super legislature and the interpretation of the Civil Rights Act, this last year in *Ward's Cove*, overruling the decision of the Supreme Court of the United States in *Griggs* in 1971. That is a particularly troubling issue today because the Senate and the House have each passed bills which would reverse *Ward's Cove*, and the President has made plain his intention to veto that legislation. It is an extraordinarily contentious issue and one that I think would really be very injurious to the country, would really tear the country apart in a lot of ways if the Congress passes a civil rights bill that the President feels constrained to veto and it does not stand.

This issue has arisen because of the Supreme Court's decision in *Ward's Cove*, which has shifted the definition of business necessity and changed the burden of proof. Without getting into all the particulars of the case, I find it particularly troublesome because four of the five members of the Court appeared before the Judiciary Committee in the past decade and talked very strongly about judicial restraint, nonactivism, and then came to the Court and saw a decision of the Supreme Court in *Griggs*, which had stood from 1971 until 1989. And, of course, the considerations on a reversal are very different—which we all recognize—between a constitutional decision, interpreting the Constitution as opposed to a statutory decision because it is easy for Congress to alter an erroneous interpretation of a statute; whereas, a constitutional amendment is much more difficult. So the Courts have articulated the principle—and I think you may have alluded to it earlier—that there is a different standard on overruling a constitutional interpretation, which the Court ought to have greater latitude in overruling a prior decision interpreting the statute. I think it is a fair legal conclusion that given 18 years that the *Griggs* opinion had stood, a presumption of congressional acceptance of that interpretation of burden of proof and business necessity.

In articulating this question, I want to do so in a way which will not intrude on a case which is likely to come before the Court, so I will ask it first in general terms. Do you think it is appropriate for the Supreme Court to affect a longstanding Supreme Court decision which has stood interpreting a congressional enactment?

Judge SOUTER. I accept as a general rule, just as you said, Senator, that statutory interpretations are entitled to the highest claim to be followed for the very reason that as statutory interpretations, if there is anything wrong with them, legislatures—in this case, the Congress—can take action to change them.

One of the kinds of facts that I don't know about the controversy over *Griggs* and *Ward's Cove* goes to an issue of precedent that I got into to some degree last week. We sometimes raise it under the term of "acquiescence." I was speaking of it, to a large extent, under the rubric of reliance. That is the extent to which in the period between *Griggs* and *Ward's Cove* the Congress had specifically in one fashion or another addressed this problem and had expressly chosen to leave the law as it understood it to be following the *Griggs* case.

What we can say is that to the extent that the record shows that the Congress has not merely sat passively, as it were, in the aftermath of *Griggs* but has specifically addressed the question and has made choices to leave the law as it is, a record of that fact would, of course, present an even stronger argument for leaving the interpretation as it stood. And I don't know whether there are facts that could be adduced in this case or not.

Senator SPECTER. Well, Judge Souter, that might present a stronger argument, but you need a stronger argument to leave standing congressional acquiescence, even if the Congress has sat passively.

Judge SOUTER. You have a very strong argument for leaving the precedent as it is. I think the point that—and this has come up from time to time in cases when I was on the New Hampshire Supreme Court. I do not accept the position that never under any circumstances can a statutory interpretation be reexamined. I think "never" is a pretty strong word. But there is a very, very strong claim of precedent to be followed in those circumstances.

Senator SPECTER. Well, why is "never" a strong word? If the Congress has let it sit and the Congress has the authority to change it, it seems to me "never" is the right word.

Judge SOUTER. Well, except that I am not sure, as reviewing courts, we always have the luxury to consider that interpretation simply in a vacuum by itself. What I am trying to leave the door open for are situations in which, in fact, in the time, let's say, after the first decision the Congress itself has taken legislative action, which if not directly contradictory, is at least arguably inconsistent with the principle.

If we get to a point on the issue of statutory interpretation where the earlier statutory interpretation has become a kind of isolated fluke, and we know that the Congress has, in fact, contributed to this process by its own subsequent legislation, then I think we ought to leave the door open for the fact that some coherence in the law would justify a reexamination of it.

Senator SPECTER. Well, that is an interesting hypothetical that doesn't apply here, and I know you didn't suggest that it did.

Judge SOUTER. I don't know one way or the other. That is right.

Senator SPECTER. Well, I will testify for just a moment. It doesn't apply here.

Judge SOUTER. OK.

Senator SPECTER. But even if it did and the legislative body has legislated around it, they can legislate on that, too.

But let me pick up on this business of vacuum. When you say if the Congress has sat passively, that is less persuasive than if the Congress has considered it and rejected it. But I would differ with

you very sharply on that, Judge Souter, because when the Congress sits passively, the Congress is deciding not to act. When you talk about a vacuum, which you talked about on Friday—and you have narrowed the vacuum substantially today, and I hope to have time to come back to that—it is not a matter of a congressional decision which should be taken lightly. Perhaps our strongest ability is to do nothing. But frequently—

Judge SOUTER. I won't touch that one, Senator. [Laughter.]

Senator SPECTER. Thank you. But frequently we do nothing with deliberation. But I think it is highly dangerous for the Court to say that you start to move into a vacuum because the Congress has done nothing. We do nothing because we don't want anything done. And there is a real concern if you take your interpretation—I hope to come to interpretivism. There are a lot of subjects to be covered.

When you talk about due process being more extensive than incorporation of the Bill of Rights, and then you talk about the liberty interest being expansive, and then you say today that even defining liberty as it was defined by Cardozo in *Palco* in terms of the ordered concept of liberty, the interpretivists think that the definition of central to the concept of ordered liberty is an anathema, as I read interpretivism. And you were saying that even if you have the concept of ordered liberty, that is only a beginning point, because *Palco* and the concept of ordered liberty goes beyond.

The concern that I raise here, Judge Souter, goes to a lot of very important constitutional and governmental issues. And when you have the Court functioning as a superlegislature, as I think the Court did in *Ward's Cove*, and when you have the Court functioning as a superlegislature in the *Garcia* line, which just takes too long to get into now, but you have Chief Justice Rehnquist and Justice O'Connor explicitly saying in *Garcia* we are just waiting for another judge to come on our side, because the decision in *Garcia v. San Antonio Transit Authority* won't stand, then you come to the matter that when a judge is up for confirmation, we may not respect the judge's right not to answer the ultimate questions if he is really joining a superlegislature and should have to give answers, just like Senators do when we run for office.

I started with the proposition, as you know, that you ought not to answer ultimate questions; you ought not to say how you are going to decide the next case that comes before you, because the tradition of the Court is briefs, argument, deliberation, case in controversy, specific facts, and then you decide the case. But if the Court is going to move into political priorities in taxes, and if the Court is going to move into contempt citations against councilmen and Senators, and if the Court is going to take an 18-year-old precedent in a civil rights case and reverse it, then in that context, as a superlegislature, Judge Souter, I would ask you the question: Why shouldn't the nominee be compelled to answer the ultimate question as to how he is going to decide the next case?

Judge SOUTER. I think the answer to that, Senator, is that to the extent to which the Court is perceived, reasonably perceived as acting as a superlegislature, to exactly the same extent the rules against getting into ultimate questions are going to weaken.

You know, as you well know, the judgment about what is an appropriate question to ask, the judgment about what is an appropri-

ate answer to that question, has ultimately got to be your judgment. The American people have their views. I have mine. But the responsibility for making that judgment rests on this committee. And I understand what you are saying.

Senator SPECTER. Well, we have come a long way. There are those who are saying now that we ought to compel or ought to do our best—we can't compel, obviously, anything. That is your call—but that we ought to push that issue and compel that answer because—they don't really articulate it in terms of the superlegislature, and they don't take it down these lines. They really want a judge predisposed in their favor. And I don't think anybody is entitled to that, no litigant is and no group which articulates any interest.

Judge Souter, that brings us to another really important issue, and that is the relative authority of the President versus the Senate to select Supreme Court Justices. I was surprised to find years ago that in an original draft of the Constitution, the Senate was given the authority to pick Supreme Court Justices. That surprised me. Then you have a question as to is the Senate subordinate or equal to the President, and I made the comment in my opening statement that I think the Senate owes great deference to the President's selection. But that always hasn't been the case.

In the famous case involving John Rutledge, he voted against the Jay treaty, so on purely critical grounds, the Senate rejected him by a vote of 14 to 10.

Now, there has been articulated a fascinating proposition that the American electorate is intuitively imposing limits of power in the United States by electing a Republican President and by electing a Democratic Congress, so that they want that kind of limitation. There have also been those who have said that the President may be seeking through the Supreme Court to put into effect an agenda which the President can't achieve without having the Court.

I do not believe that President Bush has sought that. I think that in his appointment of you the evidence is conclusive—I was about to say virtually conclusive. Never say never. It is conclusive, I think, that he is not seeking to find some way to carry on an agenda. To make an appointment within 72 hours shows a lot of courage. He had some good fact witnesses to attest to your good character because the FBI investigations are not infallible.

But that brings us to the question, if the Court is to be a superlegislature and to carry out an agenda which is different from the congressional agenda—and we face that in the civil rights area, and we can't get it passed, the Presidential veto—then the issue arises as to whether the Senate may come to the point of trying to exercise its authority. Congress may try to exercise its authority through the Senate to have an equal voice in the selection of Supreme Court nominees, to decide it very much as it was decided in John Rutledge. If we don't like where you stand on the issues, then we are going to come to a different conclusion and try to assert the balance that the electorate has tried to impose with a President from one party and a Congress from the other.

My time is up. I just got a note. But your time isn't up. I would be interested in your thoughts on that.

Judge SOUTER. My response to that, Senator, is that that does not raise, it seems to me—you raise a very serious issue, but you do not raise a justiciable issue. You are raising an issue of the self-definition of the Senate in relation to the President, and it is a matter which should not and cannot come before the Courts.

Senator SPECTER. No, I know I am not raising a justiciable issue, Judge Souter. I am raising questions about how far we can go in asking you questions and a discussion as to the process and where we are going to end up. Those are really very, very important questions. A lot of people have already decided that your nomination process is over. Not everybody, but a lot of people have.

Judge SOUTER. I don't necessarily have that feeling as I sit here in the well of this room, Senator.

Senator SPECTER. Well, I think that is a further testimonial to the high quality of your responses.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Judge, I noted you smiling when the Senator from Pennsylvania said sometimes the Congress deliberately does nothing. I suspect you understand that better than others because sometimes people deliberately say nothing in answer to the questions. [Laughter.]

Judge SOUTER. Sometimes they have to work at it, Senator.

The CHAIRMAN. And you have worked at it very, very well, I must say, with great aplomb. And I thought you defined very well the responsibility of the Senate and your responsibility relative to answering questions. That is why some of us still have not made up our minds about how we are going to vote, myself included.

Senator THURMOND. Mr. Chairman, will you just give me half a minute?

The CHAIRMAN. Surely.

Senator THURMOND. The distinguished Senator referred to John Rutledge not being confirmed. Well, over the years the Senate has made some mistakes, and that is one mistake they made. He was from South Carolina. [Laughter.]

Incidentally, his brother Edward signed the Declaration of Independence. They were both very prominent people. In their homes, standing today in Charleston, if any of you ever go to Charleston, SC, get on Broad Street, and the home of Edward Rutledge is on one side, and right across is the home of John Rutledge. One signed the Declaration, one signed the Constitution.

I just thought I would call that to your attention. [Laughter.]

The CHAIRMAN. I will now yield to the Senator from Vermont on the condition that we don't hear anything about Vermont. I am only kidding, Senator Leahy.

Senator LEAHY. I was waiting for the part where Senator Thurmond was going to give us a list of good hotels to stay in. [Laughter.]

Senator THURMOND. If you promise to go down there and learn about South Carolina we will give you a free hotel accommodation. [Laughter.]

Senator LEAHY. Are you going to go there with me, Strom?

Senator THURMOND. I won't promise you that. We will be glad to have you though. The yankees come down and make the best southerners you ever saw.

Senator LEAHY. I will leave that one.

Where I come from, we think of Massachusetts as a Southern State.

Judge, I know that the chairman has already wished you a happy birthday and I would join in that.

Judge SOUTER. Thank you, sir.

Senator LEAHY. I don't know what I will be doing on my 51st birthday but I suspect that it won't be as memorable for me as yours will be for you. You will probably have a much easier time remembering yours.

Judge SOUTER. I won't forget this one.

Senator LEAHY. Judge, let's go back, if we could, to the Seabrook issue. As attorney general—and, as I recall, you were attorney general at the time I'm talking about—the Governor used public funds to promote a private utility by putting pro-Seabrook petitions—in fact, they were printed and distributed at State cost—in State liquor stores.

Was that an appropriate use of State money?

Judge SOUTER. No. I think it was not.

Senator LEAHY. Were you asked to advise him on that at the time?

Judge SOUTER. No, sir.

Senator LEAHY. According to press accounts, those who were opposed to the Seabrook plant were not given a chance to place their petitions in State liquor stores, is that correct?

Judge SOUTER. I think that—I'm sure that is, yes.

Senator LEAHY. Would that be appropriate? They were denied a chance to do that while public funds were being used to promote this same private business?

Judge SOUTER. Well, I think by the use of the public funds or the use of the stores, in effect, as a forum, in effect, implicates a first amendment right.

Senator LEAHY. So that if the State was using State funds to promote that, those who wanted to use private funds to oppose it ought to have been allowed to do so, is that what you are saying?

Judge SOUTER. The State, in effect, had designated that as a forum, at least, for the collection of views, for expression; to that extent, yes.

Senator LEAHY. Justice Scalia wrote a concurring opinion, in the *Vvitton* trademark case. He noted, and let me quote him, "And no one suggests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation."

Now, going back again to the Seabrook case, where money was raised for the prosecution. If a State is bringing charges is it not the responsibility of the Executive—whether the prosecution or the Governor—to go to the legislature and say, "here is what it's going to cost; give us the funds" rather than "passing the hat," as you described it on Friday?

Judge SOUTER. I think the appropriate place to go is to the legislature and as I think you know, that is where I went.

Senator LEAHY. Yet, the principal owner of Seabrook—the Public Service Company—raised a considerable amount toward the cost of that prosecution, is that correct?

Judge SOUTER. They did in the instance of the 70-some-odd-thousand-dollar payment. Something was said earlier this morning about the possibility of a second one. I'm not aware that they made a second one, but I think \$70,000 is a lot of money.

Senator LEAHY. Now, most of the protesters were part of the so-called Clam Shell Alliance, is that correct?

Judge SOUTER. Yes. What I don't know offhand and certainly have forgotten is the proportion of protesters who were members of the Clam Shell Alliance and those who belonged to other affiliated organizations. But the Clam Shell Alliance was certainly the central organization, as I recall.

Senator LEAHY. And during the time when they were carrying out protests against Seabrook, was the State of New Hampshire carrying out an undercover operation, infiltrating the Clam Shell Alliance?

Judge SOUTER. I was not aware that they were. That was the subject, I was reminded last week, that was the subject of a question to me in a deposition. To the best of my knowledge, no one in the attorney general's office was aware of any activity of that sort. I am not aware now what there was but nobody in the AG's office, I think, was aware of any activity of that sort until a year or more later.

Senator LEAHY. Well, the executive director of the New Hampshire State Police said in a deposition in 1984: "The State had been carrying on undercover surveillance of the Clam Shell Alliance since 1976."

Was there no reporting to you as the chief law enforcement officer of the State about that?

Judge SOUTER. No; there was not. My understanding—

Senator LEAHY. Did you, would you normally check on what the State police were doing in a major area in their intelligence gathering?

Judge SOUTER. Well, it didn't occur to me to ask, I guess, any more than it would occur to me to ask in serious criminal cases whether they were using informants.

My understanding is that what the State police officer was referring to was the use of members within the organization who would report to the State police. There was no wiretapping going on; there was no surveillance by police officers, as such. There was, apparently I gather from the response in the other deposition that you alluded to, that there was someone or some persons who were reporting to the State police on what the plans were.

So that there was nothing that required the State police to get my permission, as for example, there would have been if there had been a wiretap involved or electronic eavesdropping.

Senator LEAHY. According to the deposition, there was undercover surveillance going on, I am told. But you were not aware of such surveillance?

Judge SOUTER. No. In fact, as I said a moment ago, the only thing that even to this day I thought they were referring to, in the period in question in the Seabrook demonstrations, was the passing on of information from somebody within the organization. But, in any event, I do not know of it.

Senator LEAHY. Senator Metzenbaum raised a question this morning about a deposition of James Cruz, the assistant attorney general working on the Seabrook case with Mr. Rath. He said that at a meeting with the Governor on April 26—this was 3 days before the protest began—one possibility that was discussed was that the Public Service Company would be paying some of the bill for the law enforcement effort at the site.

So the idea of getting money from the PSC was discussed by your office prior to the actual demonstration, was it not?

Judge SOUTER. Well, I don't know whether—I am taking that deposition just on its face; that's all I know and I guess just to be careful about what's in the deposition—I don't know whether anybody from my office discussed it, but if it was mentioned at that meeting, then he heard about it.

Senator LEAHY. My concern and the reason I have raised these issues—and you and I have discussed them privately also—is that, as a former prosecutor, I get very concerned if prosecutors do anything that appears that they are in a position of not being impartial when they bring charges, or when they decide they will drop charges, or carry the charges on, or decide what they might seek for sentences.

You were very active in the prosecution. You went to the court after the first person was given a suspended sentence and raised objections to that, saying that you wanted prison terms and were opposed to suspended sentences, and you have given your reasons for that.

My concern is, if a private company was paying for part of the prosecution, part of carrying it on, does that private company become your client rather than the people of New Hampshire?

Judge SOUTER. Well, that private company did not become my client. The difficulty that has to be faced is there is a question raised. Hence, as I was saying in the discussion with Senator Metzenbaum, the appearance of justice is an independent value in its own right.

Senator LEAHY. You discussed the *Dionne* case here and you said that the clause in the New Hampshire Constitution about, in effect, private individuals paying into the court fund was designed to prevent bribery.

But here, there is an ad hoc fund; it was established by the Governor, not by the legislature; it doesn't have the kind of public scrutiny that goes into the development of a statute; it is not limited to contribution from the State on whose behalf you brought the prosecution.

If the fund in *Dionne* was to prevent bribery, does this fund not look as though it goes in just the opposite direction?

Judge SOUTER. Well, I hope it doesn't give the appearance of bribery. The appearance that I am concerned with is the appearance of influence. The fund, as I understand it, both what the Public Service Co. contributed and what other people around the country contributed in small contributions went into the general fund of the State so that there was no, I think, there was no question of anybody being bribed with the money.

But the question that is properly raised with respect to the Public Service contribution is does it give the impression that they

were thereby in a position to exercise undue influence over what should be independent law enforcement decisions?

Senator LEAHY. Did you ever express that concern to the Governor?

Judge SOUTER. I do not recall ever discussing the subject with the Governor. As I said, the only recollection that I had which I mentioned last week was the—well, it wasn't, in fact, even a recollection—the only record that I found last week was on June 30 there was a reference in the minutes of the Governor and counsel that the acceptance of the funds had been proposed. I didn't otherwise recall the incident.

Senator LEAHY. Now, on another subject, you talked with Senator Simon and expressed empathy, which I think we all agree with, for a Jewish friend who grew up in Manchester, NH, and who was, to quote you, "cut apart from the rest of the class each morning when the Lord's Prayer was recited."

But when you were attorney general you publicly defended a law passed by the New Hampshire Legislature which permitted school districts to authorize the recitation of that same prayer in school.

I understand and I accept the sensitivity that you expressed to Senator Simon, but in light of that, how could you publicly support that law?

Judge SOUTER. What I said was that if the law were called into question, in a lawsuit, that I would defend the law. Quite frankly, I think if we had reached the point, which we never did, I think probably I would have had to state to the court, that following *Lemon*, that the law couldn't be enforced.

Senator LEAHY. Well, let me follow on that because the papers had you saying that you would do everything you could to uphold the law at the time.

Judge SOUTER. That's correct.

Senator LEAHY. So is your attitude about it different today than it was then?

Judge SOUTER. Well, I think it's not a matter of attitude, it's a matter of reflection and research. I think if, in fact, the law had been called in question and it had become incumbent upon me to file a brief with the court on the State's position, quite frankly, I don't think we could have found a defensible basis for it. I think we would have confessed constitutional error.

I was ready to do everything I could to defend that or any State statute. But I think if we had gotten to that point, I think we would have to have admitted that there was a constitutional deficiency.

Senator LEAHY. And if the quote in the paper is accurate, "in that case our concern is to do everything we can to uphold the law," that quote would be inconsistent with what you are saying here?

Judge SOUTER. I have no reason to say that the quote isn't accurate and I assume it is accurate, but the standard for any action by an attorney general and my standard was that I would uphold, I would act as an advocate to uphold State action if I could do so in good faith and without taking a frivolous position before the courts.

I think when we had finally gotten through analysis and reflection I don't think we could have found a basis to uphold it and I

think I would have been forced in that situation to say, no, we have got a constitutional defect here.

Senator LEAHY. In the *Abington* case where the judge said the law was patently and obviously unconstitutional, you do not have any problem with that?

Judge SOUTER. No.

Senator LEAHY. You said, Judge, that you would listen respectfully to the school of thought that says the establishment clause was originally intended to have a very narrow scope, only to prevent the literal establishment of a State religion or to prevent Government from favoring one Christian sect over another. The same school of thought says that we should not require Government neutrality on religious matters, that Government action should be permitted as long as it does not tend to create a State religion or coerce people.

Now, let us assume for a moment that this original intent school of thought is historically correct—that, as many argue very strongly, the Framers did have a very narrow view of the establishment clause—would this lead you to modify the principle of neutrality that has been accepted by the Supreme Court for decades?

Judge SOUTER. It would lead me to raise the question but it would not give me the answer. There are basically two other considerations. The first in this, as in any such case, is the claim of precedent. The second consideration which may fall, to a degree, under the claim of precedent, which is, at least, I think worth stating, stating separately, is whether, in fact, assuming that was the view of the Framers, the best way to affect it today is the way that the Court has, in fact, already taken.

So that I do not regard the issue in this or in any other case as simply being a simple issue of what exactly was the original understanding because we are not being asked to adjudicate on a clean slate.

Senator LEAHY. But we are talking about a constitutional doctrine that has been accepted for what, 40 years now?

Judge SOUTER. Yes, sir.

Senator LEAHY. Do you see the necessity of changing that constitutional doctrine?

Judge SOUTER. As I think I said, in any case, say now, I do not approach the Court with any inclination or agenda to do so. I will listen to that argument if it is made before me and I will listen respectfully as I would to any argument that is made before me.

Senator LEAHY. I understand that, Judge. Maybe we are just going past each other on this issue, but I'm not talking about something that seems to be in a rapid state of flux. We are not talking about the tax issues that have been very appropriately raised by other Senators based on cases that have occurred just in the last few months or a year.

Judge SOUTER. No, I appreciate that.

Senator LEAHY. We are talking about something 40 years old. Are you saying that you do not have a view, irrespective of what that view is, are you saying that you do not have a view in your own mind whether that 40-year-old doctrine is correct or not?

Judge SOUTER. I think it would be better for me to say that I do not have the view, if I were to go on the Court, that that doctrine

should be changed. I am not approaching it with an inclination to upset the law in that respect.

Senator LEAHY. Well, let me ask this question, without saying what it is, do you have a view, in your mind, today, as to the correctness of that doctrine or not?

Judge SOUTER. Not a personal view. I have read the opinion in which that view was expressed. I have not done research on it myself, and I do not necessarily adopt it or reject it. I realize that it is there, and it has been put forward by some members of the Court.

Senator LEAHY. Suppose the original meaning of the clause was only to prevent a State religion or Government preference among Christian sects, would you then think it was appropriate for Government to favor Christianity over Judaism or any other religion?

Judge SOUTER. Well, I think any such conclusion as that would make the claim of precedent an extremely crucial one. I mean, I think you are saying is, well, let's assume that we found that the establishment clause had a very narrow intended meaning. Do we ignore, essentially, the development of the law for the last 40—

Senator LEAHY [continuing]. That's right.

Judge SOUTER [continuing]. Or the last 200 years? The answer is, no, we don't deal with constitutional problems that way.

Senator LEAHY. But you are taking account of people's changes in attitudes over those 200 years.

Judge SOUTER. And as particularly embodied in the precedent which exists.

Senator LEAHY. Would you similarly take such changes into account in interpreting other aspects of the establishment clause or other constitutional provisions? I am thinking of due process, equal protection, liberty, things like that.

Judge SOUTER. Certainly.

Senator LEAHY. Judge Souter, on Friday you said that whether you considered abortion either moral or immoral would play absolutely no role in any decision you make on the issue. You said further that with respect to the death penalty there are cases in which—and let me just read it to make sure I have it right—"in which judges' moral views are so strong that they simply cannot preside, and we have to recognize the moral compunctions that a judge would feel in those circumstances, and we have to recognize a right to recuse if a judge feels that way."

You also said in an answer, I believe it was to Senator DeConcini, that you do not support the concept that the death penalty by itself is cruel and unusual punishment.

Judge SOUTER. Given its recognition in the Constitution, I don't think we can start with that, no.

Senator LEAHY. And obviously it leaves you open on an individual case, but as a blank statement of law you don't agree with that.

Judge SOUTER. That is correct.

Senator LEAHY. You have expressed concern about doctors being compelled to advise patients on the abortion issue and judges being forced to decide whether minors should have access to abortion. You have told us that you can empathize with the woman who faces that difficult question and decision.

Now, are your own views on abortion, whatever they might be, so strong that you could not preside over a case dealing with either abortion or parental consent?

Judge SOUTER. No. I think I could deal with those issues.

Senator LEAHY. In the—

Judge SOUTER. Senator, may I just make one word?

Senator LEAHY. Sure.

Judge SOUTER. I don't mean in answering your question in the short way that I did to give any indication of the strength or weakness one way or the other of my feelings. What I mean to say is my feelings are such that I could still deal with those issues.

Senator LEAHY. In the same way that a judge may have a personal feeling on capital punishment but could still preside over a capital case?

Judge SOUTER. That is right. And I think what I was referring to in the several cases that you have alluded to are situations in which judges recognize that their feelings are such that they simply cannot deal dispassionately with those issues or that they cannot do so without breaking their own moral codes.

Senator LEAHY. Just to go back a bit to earlier questions about Seabrook and the establishment clause. We have talked about different things that came up when you were attorney general and statutes that were passed by the legislature and signed into law by the Governor and found unconstitutional.

Did you ever have a time when you went to the Governor or the legislature and said, look, you cannot do this, it is just downright unconstitutional?

Judge SOUTER. I don't ever recall being asked for legislative advice on that. I may very well have done it in the course of testimony, but I don't remember it. I do remember one specific instance in which the Governor discussed proposed action with me and asked for an opinion as to whether it was constitutional or not. I gave him an opinion, and I cannot break into the attorney/client privilege, but I can tell you that he took my advice on the subject.

There were other instances—and these weren't during my tenure as attorney general, so they may be outside the scope of your question. You tell me if they are. But I can recall times during Mr. Rudman's tenure as attorney general when we were asked to give advice on that sort. The one that immediately comes to mind was the limits on permissible State action under the doctrine of *Brandenburg v. Ohio*. Advice on that score was requested by Governor Peterson, who was Governor I think in 1969, as he anticipated a visit of what was called the "Chicago Three"—those were three of the Chicago Seven—to speak at the University of New Hampshire, which was not universally popular. I worked on the memorandum which discussed the constitutional limits of State action in that case, and that advice was taken.

Senator LEAHY. Judge, you have said that the marital right to privacy is a fundamental right. And if I understand correctly the answer you gave to Senator Metzenbaum earlier today, you feel that *Griswold* is settled law. Is that correct?

Judge SOUTER. Well, I have been careful not to endorse the specific holding of *Griswold* or its opinions, but I think I have been very clear in saying that I believe that there is a marital right to

privacy. And we have discussed some of the incidents at its core, including the reproductive right to determine whether or not to conceive a child as certainly being right at the center of it.

Senator LEAHY. Do you believe the idea of marital privacy is settled law?

Judge SOUTER. Well, it is clear to me. I think the only point at which I will quibble about the settled law is, as I think I said in one case last week, I suppose that everyone assumes that if there were a successful attack on *Roe v. Wade*, that would then call into question prior privacy cases. So I suppose one simply cannot say that it is settled in the sense that it is inconceivable that it could be challenged.

Senator LEAHY. You do not have the same sense, to whatever degree you consider privacy in *Griswold* settled—to whatever extent that is—you do not have in your own mind the same sense of settlement on *Roe v. Wade*. Is that correct?

Judge SOUTER. Well, with respect, sir, I think that is a question that I should not answer because I think to get into that kind of a comparison is to start down the road on an analysis of one of the strands of thought upon which the *Roe v. Wade* decision either would or would not stand. So, with respect, I will ask not to be asked to answer that.

Senator LEAHY. But you don't feel the same compunction against answering the same question regarding *Griswold*?

Judge SOUTER. Well, I have drawn a fine line on *Griswold*. I have said that I believe there is, in fact, a marital right to privacy which is at the core of any privacy doctrine. I have not endorsed the *Griswold* decision as such. It is a fine line to draw, Senator.

Senator LEAHY. That is my point.

Judge SOUTER. Yes, it is.

Senator LEAHY. Last week, you told us a very powerful story, a very moving story, about the counseling you gave to a young woman who faced the question of an unwanted pregnancy. Obviously, it is a very personal issue. You counseled that woman. Many, many, many more face the same decision each year. You did not tell us what your advice was, and I understand, from the two or three times you have been asked that question in various forms, you do not intend to tell us what that was.

Might I ask you this: Would your advice to that woman be any different today now that abortion has been legal for nearly 20 years?

Judge SOUTER. With respect, I do not think I can answer that question.

Senator LEAHY. Let me then close with this, at least on this round. You have spoken movingly here and in our private conversations, and I have been very affected by what you have said. I was very impressed by your response when you said—and I hope every judge thinks about this—when you said that any decision a judge makes is going to affect somebody, probably for the rest of his or her life—no matter what your decision is. That is something every judge should keep in mind. Those of us who are prosecutors know that prosecutors should think about it; everybody should.

Applying that principle, what, in your view, would be the effect—not the legal, but the practical consequences of overturning *Roe v. Wade*—the practical consequences?

Judge SOUTER. There would be the obvious practical immediate political consequence that the issue would become a matter for legislative judgment in every State. I think it is safe to say that those legislative judgments would not be uniform. There would be, I daresay, a considerable variety in the scope of protection afforded or not afforded. The issue of federalism would be a complicated issue.

Senator LEAHY. When I was a prosecutor, at that time it was prior to *Roe v. Wade*, or in Vermont, the case of *Beecham v. Leahy, et al.*, cases that changed the laws. Abortion was against the law prior to *Roe*. I prosecuted an abortion case. It was the only abortion case I picked to prosecute.

A call came to me in the middle of the night from the emergency room of our hospital. A young woman who was hemorrhaging nearly died. She did not. She did, however, end up sterile from a botched abortion. Our investigation found that the man arranging the abortions would bring young women from the Burlington area in Vermont, across the border to Montreal. The abortions were then performed by a woman who had learned the procedure while working for the SS at Auschwitz. The man I prosecuted would then blackmail these women after the abortion, either for money or for sex. In this case, it came to our attention because the woman nearly died and was brought into the emergency room; that opened up the whole issue. We found out about it, I conducted an investigation, prosecuted the man, and he went to prison.

I am not asking—and you have stated that you are not going to state how you would rule on *Roe v. Wade*. I mention this incident only from a legislator's point of view based on my experience as a former prosecutor about what the practical effect of outlawing abortion might be.

Judge SOUTER. I appreciate that. Thank you.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. We will recess until 2:15.

[Whereupon, at 1:18 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. Judge, I and my colleagues apologize for starting—I guess we are 12 minutes later—not guess, I know, looking at the clock.

Next time there is a Supreme Court Justice, I would respectfully request that that Justice decide not to announce his retirement until he is certain everything is calm in the world and that we are going to be in recess the whole time so nothing else can interfere with these very important processes. But I apologize, Judge.

Judge SOUTER. No need to, sir.

The CHAIRMAN. Now, we are to go next to our colleague from Alabama, Senator Heflin, but I have been entreated by our colleague from Utah, who says that he would just like a few minutes to correct the record. My friend from Alabama indicated he did not

mind. If the Senator from Utah really means a few minutes, there is no problem at all—excuse me, the Senator from New Hampshire is seeking recognition.

Senator HUMPHREY. An inquiry. It was my understanding that I was to be the first questioner following lunch.

The CHAIRMAN. I am sorry. Maybe you are. I beg your pardon. You are absolutely correct. The way it was supposed to work is that whenever Senator Simpson came back, we would have him. If he were the next Republican in order to be recognized, it would be him. Quite frankly, I didn't think he was coming back. That is why I indicated you would be next. I will let you two fellows fight that out while I recognize our colleague from Utah for just a few minutes. I will be bound by whatever the two of you conclude is the better way to do it.

I was wrong. It was not you, anyway, next, Senator. It is one of our Republican colleagues. So I am sorry.

Having said that, a few minutes to correct the record.

Senator HATCH. I thank the chairman. I have to go manage a bill on the floor, but I did want to correct the record a little bit.

I would just like to make this point, Judge Souter. Not even Justice Brennan adopted the view that mere congressional silence equals acquiescence in erroneous Supreme Court decisions or construction of a statute. Some Justices have spoken in more deferential terms toward prior errors in statutory construction because it is easier for Congress, they think, to revise a statute and repair the Court's mistake than it would be to amend the Constitution. But Justices Brandeis and Powell and Justices Potter Stewart and William Brennan, among others, acknowledge that erroneous interpretations of Federal statutes are also subject to correction by the Court. I would think that just goes without saying.

Judge, would you comment on this remark by Justice Brennan in the *Boys Market* case which overturned an 8-year-old interpretation of a labor statute in *Sinclair Refining Company v. Atkinson*? He said this, Brennan said, "The Court has cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

I might add that in *Boys Market* Justice Brennan also quoted Justice Frankfurter's opinion in the 1940 case of *Haverling v. Halec*: "Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision"—precisely what you have been saying—"however recent and questionable, when such adherence involves a collision with a prior doctrine more embracing in its scope, intrinsically sound, or unverified by experience."

Now, that is all I want to say, but do you disagree with those comments?

Judge SOUTER. No, I wish I could have said it that well. I think one of the points that I was trying to make this morning is that in deciding the degree of weight to be given to a longstanding statutory interpretation, we cannot make that decision without looking not only to the time which has elapsed since that first decision, but to what else both the legislature and the courts have been doing. And the vitality of an earlier interpretation depends in part upon its coherence with what has passed since that time. We simply cannot divorce that possibility from our thinking.

Senator HATCH. Thank you. I just wanted to correct the record, and I want to thank the chairman and my two Republican colleagues who have deferred to me in this matter. I will go to the floor and get out of everybody's hair.

The CHAIRMAN. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Apparently the Senator from New Hampshire will be next. Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

Good afternoon, Judge. One of the things that fascinates me about the law, Judge, is the consistency and the striving for consistency. That is admirable. However, when we uncover inconsistency, it can be very frustrating. I want to explore a couple of areas that I regard as inconsistencies and see what thoughts they provoke.

Judge Souter, is an unborn child capable of inheriting or owning an estate?

Judge SOUTER. Well, in the civil law, for example, the rule on future interest recognizes the possibility of inheritance by an unborn child who is born alive and able to take.

Senator HUMPHREY. But even during gestation, an unborn child may have an interest in an estate, may be left an estate, a legacy—is that not correct—even during gestation, and that interest can be protected under the law?

Judge SOUTER. With respect, that is an issue which is capable of varying from jurisdiction to jurisdiction, and I will be candid to say to you that I don't recall a specific decision on it in the law of New Hampshire, which is the jurisdiction I would be familiar with.

Senator HUMPHREY. But I think it is known—as you say, it is more than likely to be a substantial difference from State to State, but it is a fact that an unborn child may be left a legacy and that may be protected under the law. How do you reconcile the fact that an unborn child has the capacity which may be protected by law to inherit and own an estate or a legacy on the one hand, while under *Roe v. Wade* on the other hand the very same unborn child has no enforceable right to life?

Judge SOUTER. Senator, I really cannot take up the task of reconciling that. As I said a moment ago, I am not sufficiently familiar with the specific body of civil law that you refer to, and the only thing I can say, as you know, is that *Roe v. Wade* is discussing a constitutional issue. One of the elements in the equation to which it speaks is the right of the mother. And the kind of inconsistency that you pose is, in fact, in the terms in which you pose it, an apparent reflection of weighting different interests of differential potential parties. But, beyond that, there really isn't anything I can say about reconciling it.

Senator HUMPHREY. Well, again, these are in some measure rhetorical questions. I am hoping to advance the public dialog on this issue by means of these questions.

You talk about weighing the interests. What interests of the unborn child does *Roe* acknowledge?

Judge SOUTER. Well, Senator, I think with respect that it is necessary for me to take the same position in response to your question that I have in response to the questions from some of your col-

leagues; that a dissection of *Roe v. Wade* is simply a step, and a significant step, in the direction of an evaluation of that case which, in view of its likelihood in some form or another on the docket of the Supreme Court, if I were to be confirmed, is just a subject that I cannot discuss without giving misleading suggestions.

Senator HUMPHREY. We need to develop an abbreviated answer so that each time this situation arises you can just say whatever it is you choose to say in a few words, so we don't have to go through the long explanation. I understand where you are coming from, and I didn't expect an explicit answer on that. But, in fact, *Roe v. Wade* assigns no weight at all and no rights at all to the fetus.

Let me just read the core of *Roe*. The Court held that, "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." First 3 months, no State interference.

"For the stage subsequent to and approximately the end of the first trimester, the State, in promoting the interests and the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." Second trimester, no rights or interests assigned to the fetus.

Third trimester: "For the stage subsequent to viability"—after viability now. We are talking—if that is an important dividing point for some people. I don't think it is terribly important myself, but for some it is. "For the stage subsequent to viability, the State, in promoting its interests in the potentiality of human life"—whatever that is, a cute phrase—"may, if chooses"—"may, if it chooses, regulate and even proscribe abortion, except where necessary in appropriate medical judgment for the preservation of the life or health of the mother."

So in *Roe* the Court found that the fetus has no rights and no interests. It says the States may if they choose. May. But it leaves that matter entirely up to the States and finds nothing, apparently, under the 14th amendment or any other provision of the Constitution that needs to be brought to bear in the interest of the fetus. So that when we talk about weighing the interests of the mother and the fetus, there is no weighing in *Roe*. None. All of the rights and weight are assigned to the mother and nothing, zero, to the child. And here is why.

The majority in *Roe* recognized the importance of the personhood issue to the disposition of the *Roe* case. Quoting from the majority opinion, "If this position of personhood is established, the case for a right to abortion collapses, for the fetus' right to life is then guaranteed specifically by the amendment." Referring to the 14th, of course.

So the issue of personhood is all critical and all important in this controversy. The Court found—wrongly, in my opinion—that the fetus is not a person, even though the fetus may inherit and own property, a legacy, that it is not a person, has no right to have its life protected by the Constitution.

Let's look at another inconsistency. Judge Souter, is a corporation a person?

Judge SOUTER. Again, in the abstract, we really can't answer that question. We have to know exactly what the context is. We

know, for example, that in civil law corporations may be parties to litigation. We know that corporations can be defendants under the criminal law, and that probably is in your mind if you asked the question.

Senator HUMPHREY. Yes. Well, for over a hundred years, corporations have been considered formally persons in various Supreme Court decisions, the first of which was *Santa Clara County v. Southern Pacific Railroad Company* in 1886, which found that the corporation is a person for purposes of the equal protection clause. Then 3 years later, in *Minnesota and St. Louis Railway Company v. Beckwith*, the Supreme Court found that corporations are persons with respect to the due process clause.

So we have the incredible and the ironic and the tragic situation where corporations, which clearly are not human beings from the biological point of view, are found to be persons under the 14th amendment. But the offspring of human beings, which by any standard of science and biology are clearly human beings, are found by the Supreme Court in *Roe* not to be persons. Corporations are persons and may be protected under the 14th amendment, but human beings, even a day before birth, are not persons under the 14th amendment.

Now, if there was ever an inconsistency and a revolting inconsistency and a cruel inconsistency, and one that begs for correction, sir, that is it. You needn't respond to that.

Let's talk about the 14th amendment. Its origins are important, obviously, in the interpretation of the Constitution. Let me ask you this question, Judge Souter. I don't know that it has been clearly established yet. Do you consider yourself an interpretivist, or just what school do you claim?

Judge SOUTER. I regard myself as within the broad umbrella of interpretivism, and I have tried in response to a couple of questions to explain that the search that I am engaged on is a search for principle as opposed to specific intent when I approach a constitutional provision initially.

Senator HUMPHREY. Would you repeat that last part again, please?

Judge SOUTER. I said when I am approaching a constitutional provision, leaving aside entirely the question of precedent that may have accreted around it, what I am searching for is the meaning, which in most cases is a principle, intended to be established as opposed simply to the specific application that that particular provision was meant to have and that was in the minds of those who proposed and framed and adopted that provision in the first place.

Senator HUMPHREY. The principle that underlies the provision.

Judge SOUTER. Yes.

Senator HUMPHREY. That is your first resort.

The principal sponsor, the chief sponsor in the House of Representatives of the resolution to amend the Constitution which, upon ratification, became the 14th amendment, Congressman John Bingham, said with respect to the scope of the 14th amendment language that it was to include "any human being." Any human being. He didn't say anything about persons. He said "any human being."

And Senator Jacob Howard, the main Senate sponsor of the amendment, said the language should be applied to "even the humblest, poorest, and most despised of the human race."

These are things that no doubt you are going to be reviewing one day.

Friday, you and I had an exchange on the 14th amendment and whether it extends to every human being. And I asked what is the difference between a living human being and a person, and you said, "Without being more specific about the legal context, I don't know that there would be any point in drawing that kind of distinction."

Let me try to put it in a narrower context, then. With regard to the 14th amendment's protection of life, what is the difference between a living human being and a person?

Judge SOUTER. I think the only thing that can be said, Senator, is we know that one distinction is drawn in the language of the first section. Whereas privileges or immunities refers to citizens only, the other guarantees refer to persons. And the issue that must come up and I think the issue that is implicated by your concern is whether that concept of person extends, as you have put it, to an unborn child.

Senator HUMPHREY. Is an unborn child a human being?

Judge SOUTER. Well, Senator, again, I think that is the kind of definitional issue that can only be discussed in the specifics of the kind of litigation which I cannot get into this afternoon.

Senator HUMPHREY. It is hard to believe that the offspring of a human being can be anything other than a human being. I have never in my life seen such a strained effort to rule out of the human race by legalistic means a whole class of human beings. It is shocking. It is shocking. And it is shocking how far this dishonesty has been extended to the point where it has raised all kinds of inconsistencies in our law. It is undermining the respect for our law.

All of the rights and all of the weight have so far been assigned to the mother, and nothing whatever in the law protects the unborn child, even on the day prior to natural birth. It is pretty shocking.

Senator Grassley has raised with you what he and I and others regard as dangers raised by cases such as *Missouri v. Jenkins*, where the Court seemed to have declared that they have the power to order State and local governments to impose new taxes or to increase taxes. Do you see in that any violation of the separation of powers?

Judge SOUTER. The case involves, really, two separate concepts. It involves the concept of federalism, and as Justice Kennedy's opinion pointed out very explicitly, it involved the question of whether, given the separation of powers as we recognize it, the judicial power can be construed to include the order in question, the inevitable result of which was that State officials raise taxes, so there is no question there is such an issue in the case.

Senator HUMPHREY. You do not see a distinction, do you, between the courts somehow directly raising taxes, on the one hand, and on the other, causing them to be raised, ordering them to be raised?

Judge SOUTER. I think, again, that was a distinction which I know Justice Kennedy felt was a specious distinction.

Senator HUMPHREY. Yes.

Judge SOUTER. No doubt, of the case or its aftermath as the result of any congressional legislation is before the Court, that will be a distinct issue.

Senator HUMPHREY. I have not been present for the entirety of these hearings, but I do not recall so far hearing from you, Judge Souter, any substantial concern raised about judicial usurpation of the legislative powers. Have I missed anything in these several days?

Judge SOUTER. Well, we have had several discussions on the problems which focused on 14th amendment enforcement. I think that has probably been the subject of our discussion on the matter up to this point.

Senator HUMPHREY. On Friday, you had high praise for Justice Brennan. Do you have any problem with Justice Brennan's views on capital punishment? Do you see them as being consistent with the Constitution and precedent?

Judge SOUTER. I think as far as I can go on that subject is what I have indicated so far, that, of course, I recognize that, as a simple matter of the text, the Constitution of the United States recognizes capital punishment. Beyond that, given the fact that there will be capital punishment cases before the Court and I believe are on its docket now, I do not think I can go very far on a discussion, without getting into something that is going to be before the Court.

Senator HUMPHREY. But you do acknowledge that the Constitution comprehends, anticipated capital punishment?

Judge SOUTER. It does so by express preference.

Senator HUMPHREY. That is one point on which you and Justice Brennan very significantly disagree, it would seem.

Well, I would like to address this murky subject of privacy rights. Where do they begin and where do they end, and how do you know?

Judge SOUTER. Well, I think where they begin is in the several textural references in the Constitution to the assumption that there are some rights not expressly enumerated. As I said to you, my thinking on the subject goes back to the State constitutions which form a preface to the National Constitution of 1787, including our own, with its recognition of unenumerated liberty interests. It includes the express reservation in the ninth amendment.

As I said, I have found as a matter of our constitutional history that, given the other interpretations that have been placed or interpretations that have been placed on other sections of the provisions of section 1 of the 14th amendment, that the appropriate place to focus a question about the existence of a particular unenumerated right is with reference to the liberty clause of the 14th amendment or of the fifth amendment.

What we have to find, what we are looking for, when we raise a question as to whether a given right is protected as fundamental liberty, is the kind of question on which I said I preferred the approach of the late Mr. Justice Harlan above all others, and that is we are making a search on his approach into the principles that may be elucidated by the history and tradition of the United

States, and ultimately the kind of search that we are making is a search for the limits of governmental power, because it seems to me if there is one point that is clearly established by both State and National constitutional history, it is that the powers of the Government were not intended to be unlimited, that the grant of legislative power was intended to have limits, and those limits are reflected in the liberty concept.

Senator HUMPHREY. Regarding *Griswold*, and I am not arguing with the outcome, I just want to cite some of the language from the majority opinion: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance." What do you think of that language?

Judge SOUTER. Well, as I said, I think the first time the subject came up, I would not adopt as a kind of personal view any of the particular opinions in the *Griswold* case. My preference was for Justice Harlan's approach, rather than the approach that Justice Douglas embodied in the opinion that most members of the Court joined in.

Senator HUMPHREY. I would just like to say that if you cannot ever find a better explanation than penumbras formed by emanations, maybe you ought to conclude that you ought to leave it to the legislative body to deal with it. I mean that is real rot gut. Penumbras formed by emanations, that is constitutional law? By gosh, that is an expression of some kind of philosopher king, it seems to me.

What objective external standards are there to guide Supreme Court Justices in the declaration of new privacy rights, Judge Souter?

Judge SOUTER. Well, Senator, let me say two things: In the search for a content to the concept of privacy, we are not really looking for something new, as opposed to something which the constitutions assumed. We are looking for the principle that was intended to be recognized.

The material on which we are going to base our conclusions is basically the corpus of material that we regard as reliable evidence about the understanding of the limits of State or, in appropriate cases, national power. Those limits in those materials include everything from things like Federalist Papers, debates, philosophical treatises of the times in question, which reflected a concept of limited power, and we certainly do not ignore the precedents of the Court that over the years have tried to treat with the subject.

Senator HUMPHREY. Is this an area that you would approach with caution? How would you characterize your approach to this area of constitutional interpretation?

Judge SOUTER. Well, I guess I would use the term "care." The sound is of profound importance, it is not something that we are going to approach by winging it. We have to recognize that what we are searching for is a meaning which is independent of our personal predilections, and we have to guard against reading our predilections in what we find. I do not know of any other way to say, except that we would use great care in that enterprise, as we would in any interpretive enterprise on anything as of profound

and ultimate political importance to us as the meaning of the Constitution.

Senator HUMPHREY. Do you suppose there are any more profound privacy rights lurking out there in the penumbra formed by emanations?

Judge SOUTER. Well, I am not going to—as I said, I do not necessarily adopt the penumbral emanation terminology in my approach to things, but there is no question that, over the course of the next decade or decades, the scope of privacy will be explored in Court decisions, but we do not know until we have done the exploration. We cannot sit here with kind of an easy theoretical premise which is going to give us answers.

Senator HUMPHREY. I do hope you will approach this with great caution and conservatism and leave to the legislative branch, the elected branches the primary responsibility for amending the Constitution.

Judge SOUTER. I appreciate that, sir.

Senator HUMPHREY. I have a few minutes left, so I want to explore one further area. You mentioned a moment ago the necessity of consulting contemporary treatises, speeches and so on. In the broader context of—

The CHAIRMAN. Excuse me, Senator.

Senator HUMPHREY. Yes.

The CHAIRMAN. Point of clarification. You say “contemporaneous” or “contemporary?”

Judge SOUTER. Contemporary.

Senator HUMPHREY. Which did I say?

The CHAIRMAN. No, you said it correctly. I just want to make sure—

Judge SOUTER. I think that is what I said. That is what I recall saying.

The CHAIRMAN. Yes. I was just asking. I was not challenging, I was just not certain. Thank you.

Senator HUMPHREY. Well, going back to the—the Constitution, of course, is contemporaneous with the Declaration of Independence, and the Federal Constitution is contemporaneous with the early State constitutions, all of which explicitly posited the belief in inherent rights.

If we are endowed by our creator with certain inherent rights, among which is the right to life, is it possible that we are endowed at birth or endowed by ability or endowed in the second trimester or the first or in some other nice convenient spot, or is it more logical, in your opinion, that we are endowed by our creator when we are created with such rights?

Judge SOUTER. Senator, I am afraid that I see that as really a question that cannot be answered, without throwing a suggestion on the *Roe* issue, and I will ask to pass on that.

Senator HUMPHREY. OK. One last question, I think I have time for one last question. Is the Declaration of Independence reduced only to Fourth of July rhetoric, or does it have some operative status with respect to interpreting the Constitution?

Judge SOUTER. The Declaration is certainly one of the sources that we look for meaning on disputed issues. Some of the language, as you know, that is contained in the National Declaration of Inde-

pendence is mirrored in our own State constitution, in its reference to rights which are not only inherent, but some of which are indeed inalienable.

Senator HUMPHREY. And when do they inhere?

Judge SOUTER. There again, Senator, I think you have passed that point with me.

Senator HUMPHREY. Well, they are not inalienable, in the eyes of the Supreme Court, with respect to unborn human beings, that is clear.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you.

Before I yield, another point of clarification, if I may. If I remember from law school about decedent estates—and there is very little I remember from law school, with good reason, I might add. [Laughter.]

There can be vested rights in a child that is not even a glimmer in the eyes of his mother or father. In other words, there can be a vested right in a decedent who has not even reached the status, by anyone's definition, of being a fetus. Is that not correct?

Judge SOUTER. Well, I was referring to the rule that an unborn child may take a contingent remainder, if the child is born alive. That is what I was referring to.

The CHAIRMAN. But by "unborn child," just so we—

Senator LEAHY. I am sorry, I missed part of that last answer. I wonder if the Judge would repeat it.

Judge SOUTER. That an unborn child, a child who was unborn at the time a prior interest terminates may nonetheless take a remainder interest, if the child is born alive.

The CHAIRMAN. The point I am making is that the child unborn does not necessarily refer to a child who is, arguably from the position of the Senator from New Hampshire, that is in the mother's womb. There may not even have been a—how can I say it—a child may not even have been anything other than a thought in the mind of a parent at the time the right vests, if born alive, is that not correct?

Judge SOUTER. Well, on the rule that I was referring to, the child must be born alive in order to ultimately take the remainder, and the question is the remainder will simply remain in abeyance until the law find whether a child comes along.

The CHAIRMAN. The child comes along somewhere, some day.

Judge SOUTER. That is right.

The CHAIRMAN. That is right, but it does not relate to whether or not, in the law, whether or not there is a fetus, it relates to whether or not there is ultimately a child, correct?

Judge SOUTER. Yes, sir.

The CHAIRMAN. Thank you. I just want to make sure I understood that.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Judge, I am going to try to ask you some questions about issues that have not been raised. I think we duplicated enough of some of the issues and there have been a lot of efforts, directly and indirectly, flanking, collaterally and every other way, to get you to a point and you are pretty good on just not answering

it, and so I am not going to try to test wits with you, to see whether or not you might say one word or two words on the issue of *Roe*.

There are still some issues that I would like to inquire about. One involves an opinion that you wrote in *State v. Hewitt*, which was a case where a defendant was convicted of forgery, and during the trial the judge came to the conclusion that one of the jurors might know the defendant, so he excused the juror, and the defendant's attorney, when asked, said this was all right.

The issue arose as to whether or not the defendant had a trial by jury in the sense that it was not a 12-man jury, from the viewpoint of the U.S. Constitution and the New Hampshire Constitution. In that case, you wrote the opinion and you held, basically, that he did not waive his right to a 12-man jury. Would you give us the background relative to that in your decision and your reasoning therein?

Judge SOUTER. Yes, Senator. One of the issues that was raised by that case was whether—or the issue I guess that was raised by that case—was whether the defendant was bound by his own counsel's expression of approval, when the judge decided to excuse the juror.

What happened in that case is what does happen from time to time, and that is between that moment and the moment at which the case was argued before us, the defendant had obtained new and different counsel and that counsel was then claiming that the defendant was not bound by his first lawyer's decision to accept the judge's determination that the juror should be excused.

The issue that we had to confront in that case is whether to recognize that there are certain constitutional rights of a defendant, which are indeed so personal and fundamental that they may not be waived by someone on the defendant's behalf, that they would be exceptions to the general rule the defendant is bound by decisions of counsel, and we held in that case that the right of a trial by a full jury was indeed just such a right, and because the defendant had not on the record indicated a waiver of his right to 12, we reversed the conviction.

Senator HEFLIN. In your opinion, you recite the split in the Federal circuits pertaining to this issue and other issues.

Judge SOUTER. I believe that is right, yes.

Senator HEFLIN. You made a determination to decide the case on the New Hampshire Constitution?

Judge SOUTER. Yes, sir.

Senator HEFLIN. Now, would you tell us basically your reasoning for doing that?

Judge SOUTER. Well, we decided on the basis of the New Hampshire Constitution, because the New Hampshire Constitution was extremely clear on the right to a 12-person jury. That was an issue which had been litigated in the past, I think around 20 to 25 years ago, prior to the time that we were writing. So that we were in a situation in which there was extant constitutional law in the State that was clear and explicit on one of the fundamental issues in the case.

We took the position that where the State constitutional law was clear on a very significant issue, that it was appropriate to rest the decision on a State constitutional basis.

Senator HEFLIN. Would you give us your general feelings on the right of trial by jury? It is under attack today in a lot of different ways. What are your feelings on jury trials?

Judge SOUTER. Well, my feelings are very strong on their value. I think I said earlier, when I was referring to some of the experiences that I had had as a trial judge, one of the best of those experiences was simply the continual exposure to jurors. I watched what they did in hundreds of cases. I talked with them after the cases were over. I left virtually every trial with an enormous respect for the jurors and the jury system.

If there are two kinds of cases that I would emphasize that I found the jurors just indispensable in and dependable in, it was in criminal cases and in civil damage actions where the determination of an appropriate damage remedy was a reflection and should be a reflection of community standards.

Let me just say a word about my feeling about the soundness of the jury system in criminal cases. I have heard lawyers, from time to time, wonder cynically whether, in fact, in front of a jury a defendant really does enjoy the presumption of innocence when that defendant does not take the stand and testify?

One of the happy conclusions that I can report after presiding over hundreds of jury trials in criminal cases is that the answer to that question is, yes, juries do take that right seriously and they are, in my judgment, scrupulous and capable in following instructions.

I had a number of instances, over the years, in which I would speak with jurors after a criminal case was over, in which jurors have said to me—cases in which there had an acquittal, in a criminal trial, and the defendant had not taken the stand—and I have had jurors say to me—I never ask jurors questions, by the way, about their views on the case—but they would often volunteer them, and they would say to me, Judge, we thought the defendant was guilty but not beyond a reasonable doubt. We weren't that sure.

Those were cases in which the defendant had not taken the stand. I came away with an unbounded respect for the jury system in those circumstances.

I think if I were giving advice to any party, in any case and certainly to a criminal defendant in a criminal case, my advice would be, at least in the State I'm familiar with, you may depend upon the jury's good faith in applying the instruction on the presumption of innocence even if you do not testify. But the one thing you must not do is take the stand and lie because jurors have an extraordinary capacity to perceive untruth.

That is advice that I would never hesitate to give. When you have had the kind of experiences that I'm alluding to there, you come away a great champion of the jury system.

Senator HEFLIN. I'm delighted to hear your feelings on that.

*Richard v. McCaskell* was another instance relative to a waiver of a constitutional right in which you held that such waiver didn't exist. This was where a defendant, I believe, was charged with writing bad checks or something in this regard, and he entered a plea of *nolo contendere*. Later, he was put on suspended sentence. Later he was arrested for similar offenses, and the issue arose as to

whether or not the defendant knowingly and voluntarily waived certain rights when he entered the plea of *nolo contendere*.

Would you give us your background of that and your reasoning relative to that? It is somewhat similar, perhaps, to the case that I previously asked you about.

Judge SOUTER. Well, Senator, I'm going to have to make a confession. I remember the case of *Richard v. McCaskell* and I remember the circumstances from which it arose, but I did not reread that case in the last couple of weeks and I'm shaky on it. Could I look at the opinion when we take a break and perhaps address your question afterward?

Senator HEFLIN. Sure.

It goes basically to a fundamental right that a person has to knowingly and voluntarily waive, and it's part of constitutional law, I think, particularly in the field of criminal law that many of us are interested in.

You also, in another case which was sort of a unique case, *State v. Vanderhaden*, in which a majority of the New Hampshire Supreme Court held that the presence of unauthorized police officers in a grand jury room warranted the quashing of subsequent indictments. You wrote a dissent in that case, arguing primarily that the criminal defendant should have the burden of showing prejudicial effect.

Why did you reach this opinion? If you can, tell us about that.

Judge SOUTER. My recollection is that in that case the police officer was in the grand jury room contrary to the instructions of the Court. No issue was raised, as I recall in the case, that the police officer had acted in any affirmatively inappropriate way. The question was, whether the integrity of the grand jury system was best served by quashing an indictment with respect to which there was no indication of prejudice to the defendant, or whether the grand jury system was best preserved by, in effect, requiring the Court to enforce its own orders, and to keep tabs on what was going on in the grand jury room.

My view was that in the absence of any indication of prejudice by misconduct by the police officer that the social balance was best served not by quashing an otherwise valid indictment, but by depending on the trial court's authority over its own proceedings, including the conduct of grand jury proceedings, to police the grand jury room in that way.

Senator HEFLIN. I notice that the Supreme Court of New Hampshire gives advisory opinions to the legislature on proposed enactments as to the constitutionality of certain provisions, or the act itself.

Judge SOUTER. Yes, sir.

Senator HEFLIN. My State does the same thing. I've realized that there are a lot of faults with advisory opinions. They are looked upon somewhat where they're not supposed to be *stare decisis*. But advisory opinions are looked upon as being just the opinion of the individual justices combined collectively. It is not in a factual setting, and I have some criticisms of advisory opinions from a decision-functioning process as to whether they should establish law to be considered under the concept of *stare decisis*.

Do you have any feelings about that?

Judge SOUTER. I do. That is or was a function of the Supreme Court that I was most reluctant to undertake. There was no question that I had a constitutional duty to do it, and I did so. But the faults of the system are exactly as you describe them. We are asked to give opinions on subjects where we have no benefit of any factual record. I don't know how it works in your own State, Senator, but in mine it is rare, and perhaps—I'm not sure it has ever happened in my experience—that we have oral arguments in those cases. They are submitted on the basis of memorandums, and frequently it's the case that we are faced with the constitutional duty to give an advisory opinion in which one side of an issue is not even represented by memorandums, and let alone, resting on a factual record which is necessary to sharpen any issue.

So we find ourselves giving opinions and we do it sort of with our hearts beating fast because the fact is we need the help of oral advocacy. Courts do not do well or would not do well to sit by themselves and decide cases without the help of lawyers, and indeed of pro se parties, and we don't have that kind of help in any systematic way in those advisory opinions.

If you were going to poll, I think, the New Hampshire judiciary on the article of the Constitution they were most likely to amend, that one would win.

Senator HEFLIN. Well, in one of these advisory opinions there was a decision pertaining to a proposal which prohibited gays and lesbians from running daycare centers, but held that the provisions to exclude gays and lesbians from adopting children or becoming foster parents were consistent with State and Federal constitutions.

Would you give us your reasoning relative to that decision?

Judge SOUTER. Well, the distinction turned, well, the issue arose on the question, whether there was, in fact, a legitimate State interest which would justify the legislative decision made in that case.

The reason the court drew the distinction that it did, saying that the prohibition against the operation of daycare centers would not pass constitutional muster, but that the prohibition on adoption would, turned on their being an evidentiary basis for the legislature to hold that there was a role model function served by adoptive parents, but conversely that we did not see that there was a strong argument or an indication of evidence that the same thing could be said with respect to those who operated daycare centers.

In fact, as the bill was written—a daycare—an individual would be prohibited from operating a daycare center even if there were no contact between the individual and the children, and we found that that was just outrageously too broad.

There is no question that I think that case probably illustrates one of the difficulties inherent in any advisory opinion of the sort that we've been talking about, and that is we did not have, as a record behind us, a developed evidentiary record on the role model theory. The most that we could say is, yes, there were thinkers and child psychologists who believed that that was, in fact, a proper analysis. We realized that it was a disputed point, but we believed it was within the legislative power to make a judgment on that.

But there is no question that in that case, as in many others, we might have had a very different record if we had had an actual

piece of litigation coming to us, instead of an advisory opinion request.

Senator HEFLIN. The United States Supreme Court, in 1984, rendered the decision in *Pulliam v. Allen*, which was a case involving a magistrate in Virginia where a person was charged with an offense that did not have any punishment by imprisonment. I think it was a fine alone. There was a denial of bail, and the defendant went into Federal Court and obtained an injunction and later obtained a judgment against the judge for substantial court costs, including an attorney's fee.

The issue, of course, arises as to judicial immunity and the doctrine of judicial immunity. The Supreme Court, by a sharply divided case of 5 to 4, held that the doctrine of judicial immunity neither prevented the injunctive relief in the Federal civil rights action challenging the decisions of the State judge, nor barred attorney's fees awards against the judge.

I have legislation in the Senate attempting to remedy that, but without expressing yourself in any matter that might come before the Court, do you feel the independence of the judiciary—particularly the State judiciary—is a necessary protection?

Judge SOUTER. Well, I do, without question. As you know, Senator, the threats to the State judiciary, to the independence of the judiciary are less probably in an injunctive situation than they would be in a situation in which monetary fines could be recovered and monetary damages could be recovered. There is great concern throughout the country about the susceptibility of actions to monetary awards based on actions by the courts which are administrative in nature as opposed to the exercise of core judicial functions.

The judges, in the aftermath of those decisions, have had to exercise great care in trying to draw the lines between what they deem as the exercise of a core judicial function, as opposed to administrative functions. But there is no question that there is a threat which is felt. Whether ultimately that threat is justifiable or not I suppose is an issue that could, indeed, come before the Court again in my time, but I understand the argument on the side that you refer to.

Senator HEFLIN. You have written a number of opinions on the issue of insanity and the commitment to mental institutions. In one case, in particular, you broke with prior precedent and established a new burden of proof in cases of involuntary civil commitment. This is the case of *In Re: Sanborn*.

Judge SOUTER. Yes.

Senator HEFLIN. In that particular case you lowered the burden of proof in these types of cases from one of reasonable doubt to one of clear and convincing. What led you to the belief that a lower standard was necessary?

Judge SOUTER. What led us to that belief, Senator, was the fact that the people of New Hampshire had already amended the New Hampshire Constitution to provide that in cases in which there had been a commitment based on what we generally call insanity arising out of a criminal case, the burden of proof would be clear and convincing.

Now, that constitutional provision was adopted in the train of a series of New Hampshire decisions going back before the time that

I was on the supreme court, in which the court had held that, both with respect to commitments based on mental illness and dangerous propensity arising out of purely civil proceedings and the same kinds of commitments arising out of criminal proceedings, the standard of proof required for the State to prove the probability of dangerousness, if the subject were allowed to go at large, would be the standard of beyond a reasonable doubt.

In those prior cases, the court had taken pains basically to say that although the proceedings from which these commitments arise are different kinds of proceedings—one is criminal, one is civil—the justification for State action is essentially the same in each case. It is a concern with safety, both for the public and for the individual committed.

What those prior cases had done, in effect, was to put the civil and the commitment cases on the same footing so far as the factual and, in fact, constitutional justification for commitment. When, therefore, the New Hampshire electorate amended the constitution to provide that in cases arising out of criminal proceedings, the standard would be reduced to clear and convincing—when, in effect, they overruled the New Hampshire Supreme Court with respect to the criminal commitment cases—it was necessary to follow the same rule with respect to the civil commitment cases because in each case the justification was the same. It was a kind of self-policing of equal protection, in a way. And so, therefore, we believed that we were compelled to adopt the—in effect, to take the constitutional change in the criminal area as a mandate to change the standard in the civil area as well. It, in fact, was probably inadvertence that the drafters of the constitutional amendment had not expressly referred to both. But, in any case, we had a very simple question of evenhandedness.

Senator HEFLIN. There have been efforts, particularly in the field of legislatures, to file resolutions calling for Congress to call a Constitutional Convention, particularly pertaining to a balanced budget. There is a lot of debate going on relative to whether a Constitutional Convention, if called, would be limited to the resolutions in which three-fourths of the States would have petitioned Congress to call such a Constitutional Convention; that is, the specific grounds and reason for calling the Constitutional Convention.

On the other hand, there are those who feel that a Constitutional Convention, if called, would not be limited and could be wide open, addressing whatever it might choose to address, and whatever was done through the ratification process could become our Constitution.

Do you have any general thoughts pertaining to whether or not such a Constitutional Convention, if called, would be limited, or is it wide open?

Judge SOUTER. Well, Senator, I have never done any research on the question of whether it could be limited. I have tended to assume that it would not be if it was called. And I would not in my present position give advice to the Congress or to the Nation about what they should do. But it is instructive to remember on the assumption that I have made that when the Convention of 1787 was called, its charge was to revise the Articles of Confederation. And we all know what happened. That was a magnificent departure

from the intent of the Convention. Whether we could expect such happy results another time is a question I think everybody had better face.

The CHAIRMAN. Well said.

Senator HEFLIN. I believe my time is about up. Is my time up?

The CHAIRMAN. You still have 2 minutes, Senator.

Senator HEFLIN. Well, I noticed, too, in your opinions on the Supreme Court, trying to review quite a large number of them, that you wrote a lot of concurring opinions and dissenting opinions the first 3 years, but in the last 4 years you have hardly written any other than the opinions that you have written yourself. How do you account for the absence of your writing concurring opinions? Have the issues changed, or is it that you are spending more time doing something else?

Judge SOUTER. No, it is not that I got tired or took up another activity. I would like to think that I probably got a little bit more persuasive with my colleagues in conference. [Laughter.]

Senator HEFLIN. That is a good answer. That is all I have. I wish your colleagues—well, your colleagues probably listen to you a lot more. It is hard to get them to listen here in this forum. [Laughter.]

The CHAIRMAN. The judge longs for those days when he was on the Alabama Supreme Court. But we all do listen to him here, anyway, notwithstanding that.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

I was very interested in the dialog between the two judges, and I have the greatest respect for both of them. That is a very interesting part of what you will be doing. I would think that that obviously is something that you thoroughly enjoy doing. You like that interchange of judge to judge and discussion of distinction upon distinction and case upon case and that kind of—I guess to some it would be excitement. [Laughter.]

But not me. I am fascinated by that because that never appealed to me in my practice of 18 years. When there would be a vacancy and they would say there is a judgeship available, boy, it almost made me cower in the corner. Many people are aware of why that would be, I think. There are certain of us that enjoyed the give and take, and it is always most intriguing to me to hear the discussion of very able lawyers, who I think would have been great jurists—and one who is a great jurist, and that is the judge from Alabama. But enough.

Let me just say I do apologize for being absent on Friday. I was necessarily so. I spent the day with two former Governors, one my predecessor, U.S. Senator Cliff Hanson. And while I was gone, I was able to watch some of the activity later in the day, and then I have seen some tapes of the activity. And I can just tell you that out in the land—and I was with a very diverse group of people from all over the United States, jurists, lawyers, Medal of Honor winners, football players—there is a good feeling about you. There is a good feeling out among those people from all over the United States who have a good sense of who you are. That has come through to them. And I think that that is because you are there, in this very patient way, answering every single question that can

possibly be presented and necessarily blunting some that you just cannot feel that you can respond to which I understand.

But I also understand the intensity of my friend from New Hampshire because I know him well. We came here the same year, and he leaves now and we shall miss him. I will miss him personally as a friend. We have had some great times together on the Judiciary Committee.

This issue of abortion, it has been really the essence of this hearing. I shared with you my views. I think Senator Leahy shared with you some very poignant personal things. Senator Humphrey can share those. It is so curious to me as to how our fine country came to the point where such an intimate and personal and searingly wrenching decision made by a female about her own condition and body and substance is the stuff of full page ads and lobbying of an intensity that you can almost hear whirring, by sometimes very thoughtful people, but sometimes—maybe more often, in my personal opinion—by extremists on both sides.

Where are the people in the middle ground? Who represents them? Who are they, people who anguish in and pray about the terrible choice to be made? And to me it must be the most terrible choice of a lifetime other than another one that the Supreme Court will be dealing with, and very soon, and that is the right to die. That is next on the agenda. The right to life, the right of choice, the right to die, and, as euphemistically and crudely put, "to pull the plug"—a terrible choice.

It is curious to me how it came to this where people come to pray about this terrible choice they make, but that they need, at least in my view, to have all of the legal options open and available to them after the critical choice is made. I am not going to ask you anything more about that, but it just seems to me that you will handle that.

As a person who is personally pro-choice, I don't think that either side should press upon a nominee their personal views. I don't like that. And I don't think that is what the Court is there for, either side.

I guess I was quite impressed by an article in this week's papers—Parade, I believe—by former Chief Justice Warren Burger, who I have a great respect for and have come to know as a friend, about the questions to be asked in these types of proceedings. What are the types of questions to be asked? He had his own pungent view of that, like Warren Burger does about things. He was a remarkable jurist because he laid it right out on the line. But I certainly subscribe to what he said about questions to be asked in these types of proceedings. Are we looking for a superlegislature? And what are we doing when we impress deeply held, intimate, personal views on a nominee and insist and insist and insist and insist that he come up with an answer? I think that is an error. That is my personal view.

I hope you go on the Supreme Court. I think you will. And when you get on there, let me ask you, what will you do when—and I think Senator Grassley spoke to this—I looked at some of the transcripts—when he talked about creating rights and remedying every social wrong. How would you approach a case which comes before you in which a party is clearly deserving of some kind of relief as a

human being, but the Congress has just as clearly refused to enact any legislation that would provide that desired or requested relief? What would you do?

Judge SOUTER. Senator, I would recognize that I was not sitting there with the power to revise the decision of Congress; and that the only power that I was sitting there with was the judicial power; and I would look to the Constitution of the United States.

Senator SIMPSON. And in doing that really be able to remove your own deep personal feelings about the issue confronting you?

Judge SOUTER. We always ask, we constantly ask ourselves, Senator, whether we can do that. We have no guarantee of success, but we know that the best chance of success comes from being conscious of the fact that we will be tempted to do otherwise. And by keeping that in our consciousness, we develop a judicial self-discipline, not a perfection, but of doing the best we can to approach a level of objectivity and to repress a level of purely personal choice.

Senator SIMPSON. Do you feel you have attained that in your professional career?

Judge SOUTER. I believe I have done the best I could, and I think I have done reasonably well. One is never perfect.

Senator SIMPSON. That is a very difficult thing for me to imagine anyone really being able to do. I guess it is because of the combat of politics that goes with that. I think that sometimes it is very difficult for a person to divorce their deep personal feelings and prejudices—and I don't mean that in the racist sense of the word. I mean that in the prejudice sense of the word before it was tilted in that direction.

I think that is a difficult thing to do, and it would require, as you say, a judicial self-discipline. Is that the way you described that?

Judge SOUTER. Yes, sir.

Senator SIMPSON. And that comes from your training? That is something you have learned to do? It is?

Judge SOUTER. We try and we work at it.

Senator SIMPSON. I think, if anything, you have displayed self-discipline in these proceedings, and I could only imagine that that would be something you could attain in decisions as well as here in this nomination proceeding.

I noted, I think it was Justice Brennan, as he wrote, there was a singular series of decisions off and on that were written with regard to immigration, illegal immigration issues, when I happened to be working on the issue in the legislature. In essence, what he would say would be that—Justice Brennan would say that—he would admonish the legislature to do its work. He would say: I will not respond to this portion of the requested relief. This is for the legislature to do. Admonishing Congress, if you will, to do its job.

Now, how do you visualize you would press Congress to do its job when you get to a point and say this decision is not for this Court, this is for the legislature to do? How do you press a legislative body to do its work?

Judge SOUTER. I don't know how you press a legislative body. I think you do it with the same respectful assumption that you would like to be given by the legislative body itself. That is the assumption that when an obligation to act is clear, people who have taken the oaths that we all take will follow them and will act. And

I think probably I would not regard it as my business to lecture so much as my business to record that in a given instance I think the appropriate time to act is there. And I would, beyond that, rest on the sense of obligation of the legislative branch itself.

Senator SIMPSON. Well, I was interested in your remarks as I reviewed them, and the essence of them is, I think—and let me paraphrase, that you said Friday that it was certainly—you didn't use the word "regrettable," but it is unfortunate that if the American people should believe that it is only the Court that really is the vanguard of protection on a constitutional issue, but that it is also equally important that the legislature be doing that, protecting constitutional rights. And I certainly think that is true. But in legislating, whenever one of our colleagues on either side of the aisle rises to say that is unconstitutional, that is usually looked upon as the final futile debate. Why, you can't do that; that is unconstitutional.

I have legislated for 25 years, here and in Cheyenne, WY, and it seemed to me that, oddly enough, in spirited debate, the final refuge is: But that is unconstitutional. And then they just trample right over the top of that poor soul and pass the bill anyway. And that is not good, but at least the issue is addressed, and then we talk about it.

Let me ask you, do you think a judicial decision can be quite instructional to a legislative body or to the Congress on an issue, giving guidance even? Do you think that is possible?

Judge SOUTER. It is certainly the judicial aspiration. I admit that I have read some opinions of my own sometimes, and I have wondered just how much guidance they gave. But that is our aspiration, and it is an aspiration to a very respectful guidance. We are not there to tell legislators how to legislate, but we are there as judges, whatever the court may be, to try to tell legislators and the rest of the State and the rest of the Nation, as best we can and as comprehensively as we can, what we believe the law to be.

Senator SIMPSON. I know that is true. Would you hesitate to lay out some suggested remedies respectfully submitted to the Congress when you come to one of those situations that is unresolvable because of your interpretive theory of judging?

Judge SOUTER. Well, I have had cases of my own in the past in which I have called the legislature's attention to what seemed to me an unresolved statutory problem which the case before us touched upon but which didn't require a solution. The effect of opinions like that is to direct the legislature's attention. But I think what the court has to be very careful about—again, whatever the court may be—is in observing the line between doing that, crossing over the line and start laying out substantive options, because then I think we are beginning to tread into the legislative arena. You can't lay out options very well without somebody thinking that you are winking on one of them. And that is where we have to draw the line.

Senator SIMPSON. I hear that. I think more and more now though, with the number of things we address and the absolute obsessiveness of picking through Supreme Court decisions, every word, every nuance and meaning, that it is—I say to me it is—helpful to have the Supreme Court suggest respectfully, always, of

course, that the Congress do this or that with this statute. That is a helpful thing.

Would you do that?

Judge SOUTER. I would try to respond, I would try to make that kind of a suggestion, so long as it did not cross that line, in effect saying to Congress what it is that Congress ought to do. I think the courts can address the fact that there is a problem without trying to tell the legislature how it ought to solve that problem.

Senator SIMPSON. Well, I think that that is something that is necessary for any court, and with the three branches of Government, we often recommend—we say, well, we think the Supreme Court should do this. We don't hesitate to say that here and would expect the same from the Court.

You were asked about the relationship between the Court and Congress in specific instances, specific issues. If I might ask a more philosophical question, one of the Federalist Papers—and I hope that this has not been asked before because, as I say, I was absent during the entire proceeding on Friday, necessarily so. One of the Federalist Papers described Congress as “the most dangerous branch,” and therefore, the Constitution was crafted with the potential of congressional overreaching fully in mind.

What is your view of Congress in the constitutional scheme? How does the Court balance the needs for representative government, proper compliance by all, including Congress, with the Constitution?

Judge SOUTER. I think the only way it can balance it is simply by keeping in mind that there are constitutional values ultimately to be served and constitutional limits ultimately to be respected. And I will not this afternoon personally adopt the Federalist language on that point, but I will say that for anyone who shared that concern, *Marbury v. Madison* is a happy answer because, by and large, at least there is a judicial reviewability on the question of constitutionality, and it is our obligation to make sure that that, in fact, is the extent of the scope of review.

Senator SIMPSON. There have been some highly technical discussions here on legal issues with regard to, again, trying diligently from all sides to get you into the issue of *Roe v. Wade*. And I think you have done a very adroit and responsible job of dealing with that. But we get into issues there, again, of technicality that go back through remainder-men and contingent remainders and fee tails. I remember those things, fee simple, fee absolute, fee conditional, defeasible fees, determinable fees, and you might imagine that I had a very difficult time in that course. The transcript would reflect that.

Judge SOUTER. I hope you are not going to ask me to define all of those.

Senator SIMPSON. No. The last time we did this exercise, some minion of the Fourth Estate said: Aha, we want to find out what your grade average was in law school. We want the transcript.

The CHAIRMAN. No, don't tell them, Judge.

Senator Simpson. No, no, Joe, I'm in as bad a shape as you are on that. [Laughter.]

And so they asked for the transcripts, and I said, well, I am offended by that. I said I was among the top 20 in my class, to which

this one fellow scurried away and he didn't know that there were only 18 in the class. [Laughter.]

I had to scratch for everything I could dig out of that law school experience, because there were 18 in the class and 5 of them graduated cum laude, which meant that there were only 13 places for me to mess around in. There were five gone before I got to the table. It was a troubling, you know, and difficult time. And I knew I wanted to be a lawyer, and I knew I would get that degree wherever it was that I could get it. I did, and then I did sober up a bit and get serious.

Anyway, let me ask you this: I think of this because of my own personal life. The Al Simpson of 18 is nothing like the Al Simpson of 59, with some very fine, distinctive, solid, stable points in between. What is the difference in philosophy between the David Souter of his entry into the 51st year of life today and the David Souter of 20 years ago just 4 years out of law school? And what do you think about that?

Judge SOUTER. Well, the answer is relative, but I think probably I would sum it up by saying that I have learned something about the wisdom of Benjamin Franklin's advice. When he was addressing the Constitutional Convention and asking them to accept the draft, he said, if I remember him well, he said, "Join with me for a moment in doubting a bit your own infallibility."

Well, I have learned to do that.

Senator SIMPSON. He said, again?

Judge SOUTER. "Join with me in doubting for a minute your own infallibility."

Senator SIMPSON. Well, I like that. Well, I didn't intend to refer to the chairman in any way other than with greatest respect, but, I tell you, whatever he did in law school—and he referred to it first—could never have matched the anguish of mine. I will leave it at that. God, I hope so.

Hearing you answer questions about cases you were involved in, decisions you were involved in, things you did, got me thinking of the things I did in the first 4 years of law practice were absolutely stupid and absurd. And I am just fortunate I didn't take some clients down the tube with me. I remember making it right with one. I just put the money up. I said, you know, I didn't know that was a nonnegotiable note. I thought it was a negotiable instrument you showed me. And he said, "Well, whatever you told me, Simpson, it cost me five hundred bucks." And I remember making that one right.

I wrote a Law Review article called "Indirect Legal Consequences of a Felony," or some other trivia of unknown dimension. And I couldn't even imagine sitting out there trying to define it or what I was thinking about when I did it. I knew I was just doing it to get a grade and hope they wouldn't find out how little I knew of the subject.

So, but that is there for all to witness, that article, and several others that are really quite startling. I hope everyone will read them. They are not published, but they are marvelous. But I hope we will remember this in the midst of all this, and the chairman has been very fair, and now we are winding down.

But if we can keep in mind that there really is one, only one great exercise of the mind here, and it is very simple for lawyers, and that is to see people go on the bench and see people who practice law who will assure a just and fair determination of rights based on the facts and the law of each case that comes before us, and not do the head-of-the-pin dance, or "what would you do?" or the hypothetical. Rule 1 of the Code of Civil Procedure: Simple, just, determination, whatever it is, swift and fair. And that is the issue. And I think that you are highly capable of that, skillfully so.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

For the record, I would like to publicly dissociate myself from the Senator from Wyoming's law school record. The only thing I learned in law school that turned out to be true, Judge, is that the A students go on to be judges and professors, and the B students work for the C students. That is the only axiom I have ever found that turned out to be true. [Laughter.]

And I don't know why everyone is so worried here about the Court overreaching. Bickel went on to point out that the Federalist Papers basically made the assertion—and I think this is Bickel's—it is paraphrasing him if not quoting him. [Laughter.]

Bickel said something to the effect that the Court was the least dangerous branch of the Government. I am not sure why everyone is so concerned about overreaching of the Court if it is the least dangerous branch.

But having said that, let me yield to my colleague from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Souter, when I questioned you yesterday, I mentioned this growth idea, and what you might do as a member of the Court to understand a little more the desperation of some in this country. Have you reflected on that at all? Do you have any ideas?

Judge SOUTER. I have. I don't have an itinerary to lay out, and I know that that is not what you were expecting me to do. But the one thing that was so clear to me when I was thinking about your question afterward is what you yourself suggested when you asked it. You said in so many words that when you had come to the Senate, you didn't know what those things are that would be sort of the objects of your own growth. But suddenly you were presented with them, and it was clear to you that there were blank spaces in your life which you had never concentrated on before. And once you knew that, it was obvious how to go about filling them.

I have had that same experience. I never knew when I started practicing law what I was going to see as problems in society that would occupy a great deal of my time, but suddenly they were there. And without any expectation, you knew what you needed to know or you knew what you didn't know and what you should concentrate on.

I have no doubt that if I should go on the Supreme Court, the stimulation of my colleagues and perhaps even more importantly the stimulation of the issues and the cases that come before us will make the path of what I think I would call an organic growth as clear to me as it has been to you. That is the way my life has

worked up to this time, and I have no doubt that it is going to continue.

The one thing I do know from just my experience on the New Hampshire Supreme Court is that one of the fears that we really do have to fear is the fear of isolation, which the disciplines of the judicial power force upon us. And we have to be constantly aware that we cannot seal ourselves away.

Senator SIMON. If I could just comment on that, I think that that growth is not going to be an automatic thing. I think you will have to consciously be working on it. I think it is very easy, whether you are a U.S. Senator or a member of the Supreme Court, to isolate yourself. I think it is much more of a temptation as a member of the Court. And when the Court is not in session, you can attend the seminar in Aspen or the one in Salzburg or somewhere and not really reach out to get a little greater breadth of what is happening in this country. And I don't mean any disrespect to you when I say I think it is extremely important that that is one of the things you consciously be aware of.

Judge SOUTER. Well, it is. You know, you refer in a way—you speak of the country. It is only natural when you have been a State court judge to have that kind of sense of your State as a whole. You know where all the diversity fits in it. And I would assume and hope and expect that the kind of same imperative within ourselves would apply if in your judgment I should face a national jurisdiction.

Senator SIMON. In response to a question I asked on Friday on discrimination and "affirmative discrimination," the phrase that you were quoted as using in the newspaper, your answer in general was an excellent answer. There is one sentence here though that does bother me just a bit, and I simply want to clarify it. I am not asking for a response on your part. You said, "The kind of discrimination that I was talking about in that speech was discrimination—as I described it, and as I recall being quoted in the paper about, a discrimination in a sense that benefits were to be distributed according to some formula of racial distribution." Congress has never ordered any such formula. We have not ordered quotas. Now, the courts may from time to time in order to remedy a specific situation.

Judge SOUTER. As part of the remedial power, yes.

Senator SIMON. Right. Following that, and in a sense following the question of Senator Simpson about how you are different than you were 25 years ago, it was just about 25 years ago you were a law school student, and we were in the middle of the civil rights struggle. Do you recall your reflections at that point in the civil rights struggle?

Judge SOUTER. Yes, to a degree. One of the things that it was difficult for me to understand—this is one of the subjects of my own growth, this is really a growth question, I think, that you asked me—is the entrenchment and the commitment in places other than the places where I lived to the perpetuation of a discriminatory and unjust system.

I had grown up, as you know, in an atmosphere in which the kind of institutionalized discrimination that was of concern to us in those days did not exist on my street or in my town, and you never

really do face those facts of human nature until they are forced in front of you, and they were forced in front of all of us then.

I remember the—I suppose no one in New Hampshire could forget it, but I remember if there was ever one thing that brought that home to us, it was when a boy from Keene, named Jonathan Daniels, was killed one summer, when he had gone I think to Mississippi on a voter registration drive, and suddenly we realized, in the most particularized way, what the Nation faced, and I think we could not have realized it before that time.

Senator SIMON. Let me shift to another area. In 1983, a column appeared in a newspaper—I do not have the name of the newspaper here—by Ed DeCorsi, in which he—and let me just quote a few sentences: “David Souter was New Hampshire’s brilliant young attorney general when he addressed the Newport Chamber of Commerce nearly six years ago.” In his characteristic, clear English, Souter told that Newport audience that:

America’s determination to avoid a strong central government “has dropped from our consciousness in the past two decades.” That determination, he said, was the central theme in the Declaration of Independence. In fact, when the States were considering ratifying the Constitution, the issue was whether a national government could be tolerated at all.

By 1978, our prevailing determination had changed. No longer were we stubbornly resisting a strong central government. We were, instead, resisting anything that would cost us money, and that meant abdicating the local and State control America once cherished.

He cited three instances in which the State had yielded control over governmental expenditures to the Federal Government, which had no constitutional authority in the matter. All of them were causes to be applauded, but he said, “the government to which we now look to provide them is no longer the government we control.” They were the nationwide 55-mile-per-hour speed limit, unemployment benefits for State and local government employees, and providing education for every handicapped person between the ages of 3 and 21.

Now, the last one of those three, providing education—and the technical term in the law is 94-142—I had something to do with creating that, and your neighbor from Vermont, Senator Bob Stafford, was the chief mover over here in the Senate. Prior to the passage of that, the majority of mentally retarded individuals were not being given any help by our public schools, and you had two court decisions or consent decrees that grew out of 14th amendment cases. One was a Pennsylvania case, the *Pennsylvania Association for the Mentally Retarded v. State of Pennsylvania*, and one here in Washington, DC, *Mills v. the Board of Education*.

I would like to tell you that I think that Congress overwhelmingly passed this legislation just purely on the merits, but I think it was also the fact that the Court looked like it was going to say the 14th amendment applies to these people, and I think that is also the reason President Ford signed the legislation.

I would be interested in any reflections you have now—1978, this was 12 years ago—any reflections you might have, looking back, and then, even assuming that you think you disagree with those of us in Congress who enunciate something like that, your posture on the bench. You have stated that, but I would just like to have that reiterated.

Judge SOUTER. Going back to the news account that you referred to, Edward DeCorsi is a person for whom I have unbounded respect, and I appreciated his reference to me in his column.

The only thing that I might question and would question is the possibility of having left the suggestion that in respect to these three subjects, Congress had no constitutional power. Congress does have constitutional power in it.

I know what was on my mind back at that time 12 years ago, and it was pretty well suggested by the remainder of the quote that you referred to, and that was that, because we on the local level simply are not able or willing to face the problems that are in front of us, those problems, in fact, will be faced by someone else and our control, our ability to kind of do our best at home, perhaps with the least amount of money, is simply an ability which we are allowing to be taken away from ourselves, because if we will not solve our problems, Congress will and Congress should.

I am afraid that that rule, if you will, that rule of dwindling responsibility is just as good a rule today as it was back when I first spoke of it.

Senator SIMON. I think you are correct. I hate to use the term "vacuum"—

Judge SOUTER. I stayed away from that word, believe me. [Laughter.]

Senator SIMON. In fact, if local government does not act, the Federal Government inevitably will.

When one of your predecessor nominees was before us, Judge Bork, he stated that what a court adds to one person's constitutional rights, it subtracts from the rights of others.

In my discussion with Judge Bork, I asked about this statement and he told me, and I am quoting, "I think it's a matter of plain arithmetic," to which I responded, "I have long thought it to be fundamental in our society that, when you expand the liberty of any of us, you expand the liberty for all of us." Which one of these equations do you find yourself more comfortable with?

Judge SOUTER. The second one, because I would rather have the right to do something than a right to stop somebody else from doing something.

Senator SIMON. I like that answer.

Recently, some of us in the Senate got together for lunch and we had a little discussion. There was at least a semiconsensus that the basic defense of civil liberties may be shifting back to Congress from the Supreme Court. Do you agree with that assessment, and do you think it is a good thing, if that is taking place?

Judge SOUTER. I am not ready to agree with that. I do not think the—I know the criticism that is being made and I know that Congress has been very well made aware of its power, as we were saying earlier, under section 5 of the 14th amendment, but I would simply be reluctant, on the basis of the evidence that is in at this point, to say that the Supreme Court is trying to wash its hands of protection. I trust that is a day we will not see.

Senator SIMON. You were asked earlier—and I cannot remember, but I think it was by Senator Specter—a little about this process. If I may be more blunt, what is your impression of this process? Right now, it is probably one of a little weariness on your part, but do you think the Nation is served well by how we are handling all of this?

Judge SOUTER. I think the Nation is served well by seeing me and by seeing you. Naturally, not every moment in this process has been totally much to my liking as some, but what I am appreciative of is in being part of a process and a visible one. You are right, the afternoon, it is afternoon and I have been sitting here for a while and I will be here for good while longer, and perhaps I will be back tomorrow, but the fatigue at the hour has nothing to do with the value of the process and I am glad that you have had me here.

Senator SIMON. Finally—and I will not take my full time, Mr. Chairman, I know that will be a great disappointment to you—do you feel in any way inhibited by what you have said here, in terms of your service on the Court, assuming you are approved?

Judge SOUTER. No, because the committee has been very respectful, even in cases in which it may not have agreed about the point at which it has seemed to me necessary to limit my answers for the sake of the integrity of the judicial process, and I have been grateful for that respect.

Senator SIMON. If I can just go back—and this is not a question—to that first question on growth. I am going to take the liberty, if you are approved and after you are sworn in, of sending you a note with a few suggestions that you may reject. At that point, you can do whatever you want, anyway—but I would hope you would consider them, as you look at making David Souter a Supreme Court Justice who is as responsive as possible to the needs of this Nation.

Judge SOUTER. I would like that, even if I do not go to the Supreme Court.

Senator SIMON. Thank you, Judge.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Judge Souter, earlier this summer we celebrated the centennial of the Sherman Act. For over a 100 years, as you know, this landmark measure has protected treasured American principles: competition; fairness; and equality. The antitrust laws are important, because they have led to a flourishing economy and they have also led to lower prices for consumers. These laws, as you know, are nonpartisan. They have been vigorously defended and enforced by both Republican and Democratic Presidents and, as you know, one of the most current advocates of strong antitrust enforcement is your good friend Warren Rudman. And so on his behalf this afternoon, I would like to ask you just a few questions.

In your mind, Judge, how important are the antitrust laws in shaping our economy?

Judge SOUTER. Well, as you know, Senator, I do come from a tradition that involves Senator Rudman, and it is a tradition that goes back to the days in New Hampshire when Senator Rudman was establishing a consumer division in the State of New Hampshire, with jurisdiction over the State antitrust laws and was bringing about the passage of a Consumer Protection Act, which I later, as attorney general, had the responsibility to administer.

I also have been well educated by Senator Rudman over the years in the value of small business. Small business has no better friend than he has, and I think one of the lessons that I have ab-

sorbed from a long period of my professional lifetime with him, if I needed to absorb that from anyone else, is the importance of a degree of competition which will allow small business to emerge and allow for diversity in the American economy, which it is the object of the antitrust laws to secure, as much as that is possible.

Senator KOHL. Do you agree, Judge Souter, that an important purpose of the Sherman Act is to protect against consolidation of economic power and make sure that consumers are not abused by companies engaged in monopolistic business practices?

Judge SOUTER. There is simply no question about it, either as an historical matter or as a strictly legal matter, as one examines the precedents. The ultimate object of the system, it seems to me, has to be judged on its systemwide effects. I do not think the antitrust laws should even be seen as merely consumer laws or as antibusiness laws, but as laws intended to assure a free and open and competitive economic system for everyone.

Senator KOHL. I believe that the principal beneficiaries of vigorous enforcement of the antitrust laws are consumers, and yet, as you know, over the past few years the courts have made it more difficult for consumers to bring antitrust suits. Do you have any opinions about this trend?

Judge SOUTER. Well, I know I was attorney General at the time of *Illinois Brick*, and so perhaps my reactions go back to those days. By the same token, I suppose I should be weary of making predictions about who is an appropriate plaintiff in an antitrust action, because issues of that sort are going to be before me.

I think the most that I can say is that I do remember the days of *Illinois Brick* and I remember when that decision first came down, and I think you may safely assume that I am sensitive to the concerns that you have just alluded to.

Senator KOHL. Judge Souter, I believe that the people who wrote the Sherman Act, for example, Senator Sherman of Ohio and Senator Spooner of Wisconsin, wanted to help the little guy by preventing large concentrations of corporate power.

I am concerned that some judges and other theorists are willing to disregard entirely this legislative intent, and a few have gone so far as to suggest that the legislative intent of the Sherman Act "shouldn't be controlling at all." Do you believe that this approach—ignoring legislative intent—is a legitimate approach to interpreting statutes, in general; and, in particular, should the courts interpret the Sherman and Clayton Acts without exploring the legislative intent of their authors?

Judge SOUTER. Well, I am afraid we would be ships without anchors, if we tried to do that. In perhaps the more garden variety cases of statutory interpretation, we are used to looking to legislative intent to resolve questions of ambiguity and vagueness, when the statute is not clear on its face.

But when we are dealing with the antitrust laws, we are dealing with one of the most spectacular examples of delegation to the judiciary that our legal system knows, and if that delegation is not going to be, as it were, sort of a delegation of totally free choice to the judiciary, certainly a respect for the legislative intent has got to be our anchor in interpretation.

Senator KOHL. I would like to talk for just a minute about price fixing, because it is of particular concern to me and many others. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits manufacturers from setting the retail price of their products sold in retail stores, but some people have begun to argue that vertical price-fixing should be treated differently from horizontal price-fixing.

As Robert Bork wrote in "The Antitrust Paradox," "It should be completely lawful for a manufacturer to fix retail prices." I have a presumption that you do not agree with that.

Judge SOUTER. Well, I do not start with that presumption. To begin with, of course, with the repeal of the fair trade laws, Congress has indicated its more plenary acceptance of *Dr. Miles* than was true before, so I think we have an expression of congressional philosophy on the issue.

It is perfectly true that, in theory, any manufacturer could also be his own distributor and run his own retail outlets, in which case the price-fixing issue would not arise, but that does not seem to me to be a basis for saying that it should not arise in the economic world in which we live.

I will be candid to say that I do not set myself up as an expert in antitrust matters, as much as I think in some other fields of constitutional law or in statutory law, in which I have a greater background, and I am certainly going to be willing in an appropriate case to consider the economic testimony in determining what cases should be adjudicated on rule of reason basis and what should not.

But I certainly cannot start with the assumption that, in fact, there should be no restraint, no limitation on vertical restraint because it seems to me, as I said, that the congressional expression of policy is otherwise.

Senator KOHL. Just one question on civil rights. Because racial discrimination has been illegal for some time, most institutions do not openly discriminate. This makes it difficult, as you know, to prove intentional discrimination.

Since so much discrimination is now hidden, do you believe that the proper standard for action should be discriminatory impact rather than the higher threshold of discriminatory intent?

Judge SOUTER. Well, of course, as you know, Senator, we are familiar under title VII with the discriminatory impact concept. And I think the best respond to your question is that it is an obviously inappropriate concept for Congress to adopt, and we will administer it.

Senator KOHL. Last question. Let's change direction entirely. Justice Brandeis once said that "You can judge a person better by the books on his shelf than by the clients in his office." And I read a piece in this morning's Chicago Tribune which said that we here who were talking to you were asking all the wrong questions—that if we really wanted to know what kind of a person you were and how your thoughts went from subject to subject and what you have learned from life, we ought to ask you about what you have read because reading has played such an important part in your life. So I would like, as my last question, to ask you about your reading habits, the things that have interested you in life from a reading

point of view, and what some of the things are that you have learned as a result of your reading.

Judge SOUTER. Well, I have a weakness for history in my reading. I think oddly enough—and it wasn't planned with this appearance in Washington in mind, but I think the last two history books that I read were Joseph Lash's book on the New Deal, "Dreamers and Dealers," and Katie Lockheim's book on "The Making of the New Deal." And I didn't realize I would be in Washington quite so soon after I read those books.

I have gone through sort of periods of reading kicks in both American and English history, too. I can remember there have been a couple of summers which I have just sort of set aside and really bored through things. So there is an awful lot of history books on my shelves. Unfortunately, the trouble that I find, as I have spent more and more time on the bench, or at least more and more time in judicial writing, more and more books don't get on read, do not get read. So if the day ever comes that I retire, I am going to have one of the most magnificent unread libraries in New Hampshire. The stuff is all sitting there. And the only consolation I have got is I was reading a life of Lord Melbourne, Philip Ziegler's book on Lord Melbourne a couple of years ago, and he said Melbourne had that problem. He just couldn't stop buying books, and they piled up, and he didn't have time to read them. And Ziegler said that, "Defensively, Melbourne became a believer in the osmotic power of literature to seep through." So I can only hope that he is right.

As I said, I probably read more history than anything else, but I go on novel kicks. I went through a period in which I read everything of Faulkner's, everything of Fitzgerald's. I haven't read everything of Hemingway's. That is one of the things that is sort of there in abeyance.

And then I read sort of whimsically unrelated stuff. My law clerks from time to time think I lead too sheltered a literary life. One of them got me to read "Fear and Loathing in Las Vegas" a little while ago. [Laughter.]

So there are some wild cards on the book list.

Senator KOHL. Thank you.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. You sound like Justice Holmes.

Senator LEAHY. Mr. Chairman, I notice that the National District Attorneys Association is going to testify here in a couple of days. They will be delighted to know about "Fear and Loathing in Las Vegas." [Laughter.]

I would hasten to add that the book is about the Association's meeting in Las Vegas the year before I became a member of the meeting committee.

The CHAIRMAN. Well, I wasn't being facetious when I said Justice Holmes has apparently had similar reading habits, and one of the things that was mentioned, if I recall correctly, is that his wife once said that he read too many books like "Fear and Loathing" of the day. At any rate, you are in very good company.

Speaking of company, I suspect that you would like to keep your own company for a few minutes here and have a bit of a break. So why don't we recess until 10 minutes of. Before we do, let me ex-

plain what we are going to do next. We are going to come back. There are some wrap-up questions that could take anywhere from a total of a half an hour to 2 hours. I don't know. My practice has been with every nominee—and I am going to continue it as long as I am the chairman—that as long as Senators have reasonable questions—and I don't think anyone would suggest we have been asking unreasonable questions to this point. I will allow the process to continue. But my guess it—and it is only a guess—that we are talking about somewhere around 7 o'clock—I am guessing—before you would finish.

Now, the ABA, as is the tradition of this committee, at least of late—by late I mean the last several decades, to the best of my knowledge, is always the first public witness. They are prepared to testify today and very much wish to testify today, so I will follow through with them as well. And your own Governor from New Hampshire very much wishes to testify on your behalf and do that today. And so we will take the public witnesses, unless for some reason we go on well beyond 7 o'clock in terms of the committee questioning—which I do not anticipate. Unless we do, we will go to the two public witnesses today and the only two public witnesses, the ABA and the Governor from your home State, in which case we will end the hearing for today.

Now, let's recess for 15 minutes until 10 minutes of.

[Recess.]

The CHAIRMAN. The hearing will please come to order.

Judge, let me begin by touching briefly on an area I don't think is a problem—a problem in the sense that I don't think you will have a problem speaking to, that is, the free speech area—and briefly discuss with you three areas that are the core of free speech doctrine. I would like to discuss a little bit *New York Times v. Sullivan*; then prior restraint and speak very briefly to the Pentagon papers and how *Near v. Minnesota* was applied; and I would like to speak a little bit about the whole notion of civil disobedience, incitement to violence, *Abrams* and *Brandenburg*, if I could. Again, not seeking an opinion how you will rule on anything in the future, nor looking for a precise judgment as to whether or not you agree with the precise reasoning in any one of the cases, but if you will talk with me a little bit about each. So the issues that I want to talk about are prior restraint, libel, and political speech advocating law-breaking or violence, and what principles control.

Judge, one core issue under the first amendment is when the State can impose what is called prior restraint—that is, prior restraint on a newspaper or on any publication which the State attempts to step in and suppress, like with regard to the Pentagon Papers, which is 1972. The Government wanted to prevent the publication of the Pentagon Papers, as you well remember, by the New York Times and by the Washington Post of classified documents dealing with the activities of the United States in the Vietnam war.

Now, the Government said that publishing the documents would prolong the war by providing harmful information to the North Vietnamese, and the Supreme Court rejected this claim because it was not presumed that publication of the papers would definitely

cause the harm alleged by the Government. The Court thought the Government's claim only amounted to speculation.

Now, Judge, my question is this: Do you agree with the principles enunciated by the Court in the *Pentagon Papers* case with respect to the first amendment doctrine of prior restraint?

Judge SOUTER. Yes, the principle being you have got to prove your harm, and the burden of proof is the highest known in our constitutional law.

The CHAIRMAN. Judge, let me speak a moment now about a case that all public officials say, particularly when there is press around, that they strongly defend; but they all kind of hold their breath, and I am not sure whether they really believe, public officials, elected public officials primarily. That is *New York Times v. Sullivan*. As you know, that case is the one in which Justice Brennan, writing for a unanimous Court, said that the public official cannot recover damages for a defamatory false statement unless he proves that the statement was made with what the first amendment experts call "actual malice;" that is, unless the person making the statement knew it was false or acted with reckless disregard for whether or not it was false.

Again, Judge, in the interest of time, without going into detail, unless you would like to, do you agree with the level of protection that the Court accorded the press in its decision in *New York Times v. Sullivan*?

Judge SOUTER. I think that level of protection reflects the significance of the libel laws in modern society. I take that decision as a judgment by the Court that that was the only appropriate way to effect the freedom of the press, given the economies of the modern society that the first amendment protects. And I have no reason to gainsay that or second-guess it.

The CHAIRMAN. Now, the last area relating to freedom of speech that I would like to discuss with you is this. As you know, during World War I and the period that followed, the Supreme Court looked at what circumstances speech calling for breaking the law or actual violence could be prohibited by the State. At that time, the majority of the Supreme Court said that this kind of speech calling for violence would and could, in fact, be prohibited even though there was no immediate threat that the law was about to be broken or that violence was about to break out.

Now, in those cases, *Abrams* and *Gitlow*, Justice Holmes and Justice Brandeis, as you well know, wrote their stirring and passionate dissents that everyone who has looked into this area is fully familiar with. They said that the Constitution allows political speech to be stopped only when there is a "clear and present danger of violence and law-breaking." Their dissents were eventually adopted as the correct view by the majority of the Supreme Court, and a similar but somewhat more stringent test was accepted, in fact, by a unanimous Supreme Court in *Brandenburg v. Ohio* in 1969. In *Brandenburg*, the Court said that speech calling for violence or law-breaking could be forbidden only if that speech called for and would probably produce imminent lawless action.

Now, Judge, do you agree or disagree with the free speech principles articulated by the Supreme Court in *Brandenburg* and at an

earlier time the dissent articulated by Justices Holmes and Brandeis in the 1920's?

Judge SOUTER. Yes, I have no reason to call them into question. And as I think you may recall from my answer to one of your colleagues today, I have been in the position of giving advice to the executive branch on the implementation of *Brandenburg*.

The CHAIRMAN. That was my last question. I assume that the Chicago Two, two of the seven or three of the seven, whatever it was—

Judge SOUTER. We had three.

The CHAIRMAN. Three. I assume based upon your statement that you made earlier that they ended up speaking at the University of New Hampshire?

Judge SOUTER. Yes, they did. There is one subchapter of that story which I wasn't personally involved in and on which I am a little vague. But, apparently, as I recall it best, late in the day when they were going to speak, some concerns with an evidentiary basis were raised about security, and my best recollection is that both the State and the sponsors of the speech and the speakers ended up before the U.S. district court. And I think the judge of the U.S. district court actually issued an order restricting the time within which the speech should be given for some security reason that I do not now recall. But they did speak.

The CHAIRMAN. Now, Judge, with the time remaining, I would like to go back, as briefly as possible—I don't mean that to in any way curtail your answers, but as succinctly as I can state the question—and speak once again to something that has not been accidental but has been a significant subject and topic of interest, where on the interpretivist spectrum you fall.

I might add, once again, I might state the obvious, that the reason I suspect for that is that there is an intellectually defensible and politically—with a small P; it is not part of any political party organization—politically active school of jurisprudence which has as its core, as one of its advocates said, hopefully creating a new wave of thinking about American jurisprudence, that it generates, it followed, from the perspective of many on this panel—and I suspect many in the Senate—a relatively cramped reading of the Constitution. And I suspect that is why so many of us are coming back and answering it. I am not suggesting—as a matter of fact, I am suggesting the opposite. It appears to me that you don't fall at the extreme end of that interpretivist spectrum. But that is a very important question for me to determine and, quite frankly, one upon which, just as you have to make a judgment for yourself as you have sat there the last several days as to what you should and should not ask, there is no precise guidance for us in the Constitution as individual Members of the Senate precisely what basis upon we should make our judgment. And many of us have very different views as to how that judgment should be made by us individually.

But for me, when I said at the outset I have a keen interest in your views, the views to which I was speaking were your interpretivist views, not how you would come out on any single case. And so I would like to pursue it just a little bit more because I think you have come—I think I understand it. I don't want to mis-state it.

You have explained that your approach is to start with the text of the constitutional provision in question; and then if the text is unclear, the judge should proceed to examine not the original intent, but the original meaning.

Judge SOUTER. That is correct.

The CHAIRMAN. Is that correct?

Judge SOUTER. Yes, and I mentioned that when I speak of original intent, or the intentionalist school, I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted and ratified the provision, and that the provision should be applied only to those instances or problems. I do not accept that view.

The CHAIRMAN. Then I have correctly understood it. Now, Judge, under your approach does the correct interpretation of a constitutional provision, does the meaning, the correct meaning, the correct interpretation, does that change over time?

Judge SOUTER. I think the best way—you know this is one of those difficult issues to talk about only because as you, yourself, suggested at the beginning, it is difficult to state the problem the way we want to. I think the best way to describe it is this way.

Principles don't change, but our perceptions of the world around us and the need for those principles do. I wonder if we do not have, as a good example, and I know we keep coming back to this, but I wonder if we don't have, as an example of how this evolution takes place in *Brown v. Board*, itself?

The CHAIRMAN. Good. That is exactly what I was going to ask you to go through with me. Thank you. That would be very helpful.

Judge SOUTER. The majority who decided *Plessy v. Ferguson* in 1896 accepted as a matter of fact that in the context in which they were applying the 14th amendment there could be separateness and equality. Whatever else we may see in *Brown v. Board*, there is one thing that we see very clearly and that is that the Court was saying you may no longer in applying this separate but equal doctrine, ignore the evidence of non-tangible effects. When you accept that evidence, then you see that you cannot have separateness and equality.

In 1954 they saw something which they did not see in 1896. Now I will say, as I have said before, that I think *Plessy* was wrongly decided, but I also understand that there was a perception which the experience of 58 years had allowed the Court in 1954 to make and they saw an application for a principle which was not seen in 1896, and they saw the factual impossibility of applying the terms of 1896 in 1954.

I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses.

The CHAIRMAN. What really is, in fact, equal protection.

Judge SOUTER. Yes.

The CHAIRMAN. Let's pursue this a little further. Let's talk about the principle, if any, is enshrined in the Constitution, of everyone of us who have the franchise having an equal opportunity not only to exercise it, but it having equal weight.

Now, in *Baker v. Carr* which is early 1960's, 1964, 1963, 1964, in that range—

Judge SOUTER. I want to say 1964.

The CHAIRMAN. 1964? They looked back at that principle and applied it differently than it had been applied any time in our history.

Now, again, explain how your interpretivist doctrine as you apply it allows you to reach the conclusion, and I believe you do reach the conclusion, that *Baker v. Carr* was correctly decided in 1964, when, in fact, prior to that time, the principle was incorrectly applied. I assume, based on your answer on *Brown*, the principle was always present, but the principle just wasn't properly applied; is that a fair statement?

Judge SOUTER. I think that is a fair statement. As I said to you when we were talking in kind of a short-handed way earlier today, the hurdle in *Baker* was the argument which Justice Harlan raised. One cannot deny the power of Justice Harlan's argument, that section 2 of the 14th amendment indicated an intent not to apply the principle to the situation at hand.

As I said, without underestimating the power of that argument, if I had been on the Court, it seems to me that ultimately I would have had to have rejected it. But once that hurdle was passed, then the principle of equal protection or the applicability of it, it seems to me was reasonably clear.

Senator THURMOND. Now, Judge, keep your voice up if you can.

Judge SOUTER. I am sorry.

The CHAIRMAN. Now, let me try it another way—not try it another way—I mean this is very helpful to me in understanding how you reason these things. I understand how *Bolling v. Sharpe* was arrived at essentially, as you used—I don't have your quote, but you said basically: these are a practical bunch of folks. How in the devil could they say the 14th amendment said that you could not have separate but equal schools in the States, yet, you could have separate but equal schools, that is segregated schools, in Washington. Even though the due process clause of the fifth amendment had been around a lot longer than the 14th amendment, the 14th amendment only applied to the States. The Court had to go back and look at the due process clause for its rationale to outlaw segregation—the due process clause of the fifth amendment—to outlaw segregation in Washington, DC.

Now, again, with regard to your interpretivist view, I assume what we are talking about here is that when it is not clear on the face of the document what the words mean and if you look at the fifth amendment and I think most people would not disagree with the proposition that the phrase due process is at least not absolutely clear what it means on its face in every circumstance.

So when you have a phrase like that, due process, then you go back and you look at the time this amendment was drafted to determine the principle enshrined in that phrase, is that correct so far?

Judge SOUTER. That is correct and it's also the case that I suppose there is no provision in the original Bill of Rights that has been sort of any more modified in its understanding than that one has been. We recognize that as a starting point.

The CHAIRMAN. And it has been like a pendulum, its modification, but having said that now again I assume based on your answers it's not that the principle has changed from the time the fifth amendment was made a part of the Constitution until 1954, it is that by 1954 the Court had figured out the proper application of the principle—

Judge SOUTER. Well, I think there are two things.

The CHAIRMAN. Is that fair

Judge SOUTER. I'm sorry. I think there are two things to be said about that. The first is going back to the time of Holmes. Holmes said, look, it is too late in the day for us to take a strictly originalist view—he did not use the term originalist view—of the due process clause.

He said there is, at the very least, or there is a substantive component to due process. He would have or did express it in terms of the principle that the State must demonstrate a rational relationship between the substance of what it legislates and the obtainment of a legitimate governmental object. Holmes said that is something other than pure procedure and we accept the fact that that is the way the clause is being interpreted. We don't turn the clock back. We accept it. So do we all. So do I.

The second thing that to me is interesting about *Bolling* and trying to find the correct application with the principle starting, let's say starting at the Holmes point, is that *Bolling* is so often described as a case which held that due process has an equal protection component. In point of fact, that description of *Bolling* came later. What *Bolling* was doing was, in the first instance—as you said a minute ago let us all be realists—in the first instance, the Court was saying, look we can't have *Brown* here and do nothing about the question of segregation in the public schools.

What the Court did in *Bolling* was not simply to say, look, all along there was an equal protection component in due process. They said something very different. They went through a kind of fairness analysis and ultimately I have always read *Bolling* as coming down to this question. We are going to apply to segregation in the Washington, DC schools the old kind of, the accepted kind of substantive due process analysis that even the conservatives accept. We are going to say is there, at the present time, a legitimate governmental object which is being served by this particular restriction, that is, the restriction on total freedom to attend schools in an integrated basis?

The most interesting thing about *Bolling* is that the Court said, no, that is not a legitimate governmental objective. Hence, the Court solved the problem of segregation not by pretending that due process simply means equal protection but we never noticed it before. They solved it by doing a kind of due process analysis. They said there is no legitimate governmental objective to be served here.

I have sometimes taken, in my own mind I have taken *Bolling* as an example of a general rule that I sometimes invoke and that is a lot of equal protection cases don't have to be equal protection cases. If somebody is being discriminated against on first amendment rights, why don't you go right to the first amendment? Don't worry

about equal protection. Say is there any justification for restricting this person's first amendment right?

Well, something like that was going on in *Bolling v. Sharpe*. As you know, subsequently that has been kind of transformed in a way and has been put in this short-handed way saying, oh, well, *Bolling v. Sharpe* says there is an equal protection component and that is the accepted view today, but the Court, I think, was more subtle than that in *Bolling*.

The CHAIRMAN. I am not sure I disagree with you on that. Let me pursue this a little further. In the reapportionment cases or the reapportionment case, *Baker v. Carr*, if that case had been brought up in the Supreme Court in 1869 would the correct judgment have been, in 1869, the judgment rendered in 1964?

Judge SOUTER. I don't believe that judgment would have been regarded as correct, and it would not have been rendered at that time.

The CHAIRMAN. But do you think that would have been the correct judgment?

Judge SOUTER. I am sorry, the 1964 judgment?

The CHAIRMAN. Yes.

Judge SOUTER. I accept the 1964 judgment as correct. Whether I would have been as prescient in the 19th Century as I think I am post-1964 is something I will make no claim to.

The CHAIRMAN. Well, you understand why—

Judge SOUTER. Sure.

The CHAIRMAN. I am sure you know what I am trying to get at here, which is probably, the audience and the public are probably wondering what are these two guys doing here, because this will come off, at a minimum, arcane, if not totally irrelevant. But I think it is very important because we get eventually down to the question of when you talked about yesterday—what is the phrase you used—let me see if I can find the pad—I don't want to misquote you. When you say in *Dionne* the Court's interpretative task is to determine the meaning of the constitutional language as it was understood when the Framers proposed it and the people ratified it as part of the original constitutional text.

If one were to argue that the meaning of that particular text does not change, then it is very difficult to figure out how you could get from 1869 to 1964 on reapportionment cases

Judge SOUTER. I know.

The CHAIRMAN. And that has always been my—as you acknowledged when you said, you know—I think I am beginning to understand better. What you are saying here is that the principle was there. But as society has moved on and changed, the real meaning and application of that principle has become more apparent as to what that principle is; the application of that principle.

Judge SOUTER. Yes, and we understand the significance of facts that bear on it in a way which we or our predecessors did not understand a century before. *Dionne*—well, this is beside the point. I was going to say *Dionne* is a slightly, I suppose—

The CHAIRMAN. I acknowledge—

Judge SOUTER [continuing]. In a slightly different category from what we are talking about in equal protection because we were dealing with a far more specific—

The CHAIRMAN. By the way I think that is true, because I don't doubt that. When I first read the *Dionne* case, at first I thought, well, wait a minute. Then when I realized the precedents in New Hampshire and the face of the New Hampshire Constitution as compared to some of the more controversial and oft debated phrases within the Constitution that could be given very cramped or expansive interpretation, like equal protection, due process, liberty clause, et cetera, I realize it is not necessarily applicable.

But this is helpful. Look, I remember not from law school but from undergraduate school—I remember a lot more from undergraduate school—from undergraduate school one of the courses I remember taking was American jurisprudence. I remember at the time being struck by Cardozo's judicial philosophy in which he talked about, tried to deal with the same dilemma you and I are attempting to deal with. That is the location of the principle in the Constitution by going back to the time and establishing the principle, as opposed to a specific application, and then how that principle can justify the sort—of how he can say that and still justify changes in application of that principle without seeming to undermine your judicial theory.

He talked about judicial postulance as you may recall. He talked about the fact that there were certain sociological jural-postulates and he compared them to cumulus clouds. He said, if you are lying on a summer's day, as one rolls into view, another one rolls out of view. It is not a massive wholesale change in application of the Constitution, but there are very discreet changes in applications of the very principles that we all like to find precise argumentation for their existence, so that we don't end up in the position of where you have ended up to some extent and I have ended up and all of us, of being one of those awful people who give meaning to the Constitution that is not there.

That is the dilemma that we are really wrestling with here, because none of us want to be one of those judges, or to seek a judge who has no leash, if you will; who is not at least leashed by the Constitution to some degree so that his or her personal values cannot be inserted in the Constitution.

At the same time, we are looking for women and men on the Court who understand, to use the trite phrase often used in high schools, that it is a living, breathing document. That is a fancy way for saying it has been vibrant and lasting for over 200 years, because it has been one of the few documents written by man that has, in fact, been able to overcome the tumultuous changes that have taken place in the values and in the application of those values in the society, and still remain cogent, still have some meaning.

So, as I understand you, you are not suggesting, if we were in a debate, I would be trying to make the case that the flaw in your interpretivist doctrine was that you were, by definition, wrong, because you go back and look at the text of the document and the establishment of the principle at the time, and then you find it difficult to find varied applications of that principle over the 20, 30, 50, 100-year period. But I think you have explained it pretty well, if I understand it, which is that the application of the principle is enlightened by changing facts and circumstances in society.

Judge SOUTER. Of course, it is.

The CHAIRMAN. Is that fair?

Judge SOUTER. I think that is a good way of putting it.

The CHAIRMAN. Well, I want to pursue this a little bit longer. They gave me a sign that 5 minutes is up. I think this is very, very helpful to me. I realize that it is boring to everybody else, and I hopefully think it is of some consequence to those scholars are wondering as much as I am as to how the application of your basic conceptual framework within which you view the Constitution is applied.

With that and without further giving justification for my questioning, why don't I stop and yield to my colleague from South Carolina, and I will come back just for a few minutes after this is over.

Senator THURMOND. Mr. Chairman, I do not think I have anything else at this time. I reserve my rights at a later time.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like, if I could, judge, come back to where we were a couple of days ago on the issues of civil rights and, really, the significance and the importance of article 5 of the 14th amendment.

I believe that very substantial progress has been made, in terms of striking down the barriers of discrimination in the case of race, gender, national origin, and disabilities in recent time. Over the period of the last 30, 35 years, the period since the mid-1950's, this change has been really a result, as you have pointed out repeatedly, of the *Brown* decision. After *Brown*, Congress began to move in these areas, and in the 1960's passed laws in a number of different areas, as you are very familiar with, the right to vote, to ban discrimination in public accommodation, to ban discrimination against the disabled, section 504, banning discrimination in women's education programs. That was title IX, 1972.

What I want to express is some personal frustration with what has been happening in the more recent times by the actions of the Supreme Court in taking a look at both what the intent of Congress was and what the statute stated. Different members have talked about this in related ways, but I would like to approach it in a somewhat different way.

We saw, for example, that in 1972, Congress banned sex discrimination in education programs that receive Federal money. I think there was a general assumption in the 1960's, on the part of Congress and the President, bipartisan in nature, that we were not going to use Federal taxpayers' funds to subsidize discrimination. There were some that, perhaps, had a differing view, but I believe that that was an underlying basis of the Civil Rights Acts that were passed during that period of time, and certainly that was true of the 1972 act. That concept was upheld by a number of the lower courts, until we had the decision in the *Grove City* case.

As you remember, in the *Grove City* case, the basic concept was, if there was not discrimination against women in the admissions office and the student financial assistance office, it did not really make much of a difference if discrimination existed in other parts of the university, particularly in this case with regard to women's athletic activities.

Now, that, I think was an extraordinary conclusion by the Supreme Court. Clearly, what Congress was driving at when it passed title IX was no Federal funds were to be used to subsidize discrimination, and that was underlying most of every one of those acts.

Now, the Congress took 4 years to override *Grove City*, but we overrode it and it was bipartisan and has effectively changed the Supreme Court ruling in that case.

During that 4 years, there were numbers of incidents of discrimination and gender discrimination that were described to us. We were unable initially to get the support, it was actually vetoed, we overrode it, but it took 4 years in Congress.

Then we find a situation that goes back to 1989, regarding the *Patterson* case, where for a number of years, probably some 13 or 14 years, we were talking about discrimination in contracting. The lower courts' general understanding was that if you are going to ban discrimination in contracting, under an old post-Civil War statute, but one that was interpreted for a period of 13 or 14 years, it was also not going to permit discrimination in hiring, you were not going to permit discrimination in firing, discrimination on job sites, and promotions—this was generally understood.

Then the Supreme Court, in 1989, takes that same basic statute that had been on the books since the post-Civil War period and had been interpreted for the 13- or 14-year period prior to the 1989 period, and interpreted that particular statute as only applied to hiring. You could not discriminate in hiring someone because of the color of the skin, but, by God, after you hired them, you could fire them because they were a minority, or you did not have to promote them, or you could subject them to racial harassment on the job.

It just, I think, defies common sense to understand why you would have a decision that said, look, you cannot discriminate on the basis of someone's race to hire them, but once they are in there, you can discriminate like anything against them. Effectively, this is what the *Patterson* case said.

But when I was listening over the course of the last few days, you talked about article 5 and the power of the Congress to guarantee equal protection rights under the 14th amendment. I think what many of us have seen in recent times, in these recent holdings—and I am not going to take the time to go through it, because it is basically repetitive of those two examples—that we have had a very crabbed and narrow interpretation by the Supreme Court, both in terms of their understanding of what we meant and, second, in terms of congressional power under article 5.

I am sure you are aware, I think our colleagues certainly are, of the amount of time and the effort required, which is our responsibility to our fellow citizens, if we take seriously our oath about the equal protections, to try and catch up again with the Supreme Court, rather than attempting to move this country to strike down the barriers of discrimination—I mean for most of us who have been involved, it is across the board, you have heard many speak about a related subject over the period of the last few days about this question—are just spending time catching up and holding on to where we have been in the past, rather than trying to work with our fellow citizens in the States and local communities, in the pri-

vate sector, to move this country further down the road to reduce all of the discrimination barriers in all different forms. Lord only knows, we understand full well that you are not going to be able to accomplish it by legislation, I think all of us assume, but you can do a good deal.

Really, what I am driving at is how you are going to view the statutes that are passed. My concern is that, when the choice comes now to a closely divided Supreme Court, and you are going to be really a swing on this issue, as well as on many others, that the favor has been given not to the Congress and their sense of trying to fashion a remedy that clearly cannot anticipate every simple possibility in the future, but is basically rooted in its dealing with discrimination, whether you are going to interpret it generously or if, as I believe and speaking for myself, that there is a balance too often in these past Supreme Court decisions, the two I have mentioned and others, they have made to tip the scales against a generous interpretation and interpreting that statute to try and do something about the discrimination into a narrow interpretation, which results in additional discrimination.

During the *Grove City* case, when that was the law, we had constant examples of that, and we have found it to be the case since 1989 in the *Patterson* case, and I am just interested in what comment you might like to make.

Judge SOUTER. I think there is only one comment to make, Senator—maybe there are two. The first is a personal one. I have made it before, but I think I should make it to you, too, that I appreciate what you said a moment ago about the fact that we cannot, by legislation, erase all discrimination in our society, but we can try. We can go as far as we can.

In this process, there is no question that when a legitimate issue of the scope of protection or the scope of remedy arises, that it is indeed the intent of Congress, which is the touchstone for determining what the results should be, not a crabbed intent or, on the other hand, a speculative inquiry, but a fair reading of Congress' intent placed on the record, and if I am in the position to do it, I will engage in that process.

Senator KENNEDY. Well, that is certainly helpful. I was trying to get somewhat of a broader concept about this issue, because as we went over, the other day, your own briefs with regards to the power of Congress, article 5, in terms of literacy and job discrimination, you have expressed—that was a number of years ago—some real concerns about how much power and how much authority Congress has under article 5, and we have gone over that.

Now we are really at an absolutely, I think, crucial time. We have seen the holdings of the courts in a number of different areas which, as you mentioned earlier by reference, that the Congress is addressing, and I am not interested in the specifics on those questions, although they do not involve constitutional issues, but statutory intentions, which obviously has a different rule. But I was trying to get some sense and some feeling, you know, from you on this issue.

As you pointed out, I thought very eloquently 2 days ago, every time you make a judgement and decision, it is going to affect some people's lives, and every day that we fail to remedy the decisions

which permit, like the *Patterson* case does, continued discrimination in employment, people are going to be affected, lives are going to be affected, families are going to be blighted, and that is taking place today. It is taking place today, and I was hoping that perhaps you would express some kind of concern about those that, as a result of some of these decisions or rulings, are going to have their lives affected in one of the cruelest aspects of life's experiences, and that is discrimination.

May I have the benefit of the Chair for just one final area that I would like to go into, as a member of the committee. You have been extraordinarily patient with all of the members here, Judge, and I for one certainly appreciate it.

In response to a question of Senator Leahy, just at the end of the morning, about what would happen if *Roe v. Wade* is overruled, you replied that the States would take up the issue in their legislature. Basically, your reply was an answer in terms of what the States would do.

I would like to ask another question: What would women do? What is your sense of what the impact of this would be on women in this country?

Judge SOUTER. I think, as I understand your question, you are asking can anything but a free choice system, in fact, be enforced, a right to choose is anything but a right to choose system, as a practical matter, enforceable in this country, and the fact is I do not know the extent of its enforceability, but I recognize the problem that you raise by your suggestion.

Senator KENNEDY. Well, the problem, I suppose, would be for women in this country that did not have the resources to go to another country or to go to another State, would be left with this heart-rending decision about whether to carry to term or, in this case, violate the law in their State and risk, in a very important and significant way, their own lives.

I was just interested in what kind of gut reaction you have to that kind of dilemma that would face women, if this decision was altered, or if it was so shaped or trimmed so effectively, that it was just sort of a shell left out there, without real kind of meaning.

Judge SOUTER. I do not suppose, Senator, that there is any more moving example of the application of what I did try to say the other day, that whatever the Court does, someone's lives, and indeed thousands of lives, will be affected, and that fact must be appreciated.

Senator KENNEDY. No further questions, Mr. Chairman.

Thank you very much, Judge.

Judge SOUTER. Thank you, Sir.

The CHAIRMAN. Senator Hatch?

Senator HATCH. I will only take a second. I just want to say to you that I think you have outlined pretty carefully your standards of statutory construction. You know, with regard to some of the points that Senator Kennedy was making, yes, the administration, myself and a whole raft of others, were for the overrule of the *Patterson v. McLean* case.

On the other hand, you know, back to *Grove City*, when *Grove City* was decided, it decided that title IX did not apply institution-wide, because they actually read the actual language of the statute

and the statute was clear as a bell on that issue. The Supreme Court decided it the way we wrote it up here, which is the way I think the Supreme Court has to decide issues.

It was not two hours after the Supreme Court decided that, that we had discussions with the White House, suggesting that we really ought to apply title IX institution-wide, and President Reagan agreed and said, you bet, it ought to apply institution-wide. So, it was necessary, because the Court ruled properly on the actual precise language of the statute that we passed up here, well-intentioned and well-meaning and some thought applied institution-wide, but the language was just as clear as a bell.

It became necessary for us to pass another statute. Now some of us up here would like the Supreme Court to just do those corrections for us. If you think it should apply institution-wide, regardless of what the statute says, you apply it. You just actively make a new ruling from the bench and just redo the statute right from the bench.

Now, unfortunately, that isn't the way the Supreme Court should act. If we're going to pass stupid statutes that aren't written properly, I think you have got to construe those statutes in accordance with what we've passed, and if you don't do that, where is the law? How can you have any definiteness in law?

So all the criticism of the Supreme Court, I think, was misplaced. It should have been criticism of the Congress. By the way even though Reagan and myself and a whole raft of others said, yes, we should apply title IX institution-wide, there should be no sex discrimination against women anywhere, we could have done that in 10 seconds on the floor. Both Houses would have passed it. It would have been through.

We wouldn't have had to have all this anguishing about the Supreme Court missing what the statute said. They came up with a big Civil Rights Restoration Act of 1984. It went way beyond anything that was contemplated in title IX. Consequently, that was fought and it was stopped.

When it was rebrought up in 1988, 4 years later, it was a considerably different statute because most of the principles that were thought to be changed in the statute in 1984 had been changed in 1988.

That is what the legislative process is all about. It is that you don't just buy whatever anybody comes up with, but you, as a Supreme Court Justice—I don't think you have the right to just rewrite the statute because some of our people up here of the more liberal persuasion love to see that done, especially when it is rewritten in a liberal way, which has been the case for most of the last 50 years.

I think we have got to understand here that the Supreme Court is limited. If it wants to have consistency in the law, the Supreme Court is going to have to apply the law as written by these wonderful elected people up here on Capitol Hill who sometimes foul it up so badly that I am sure that you, as a Supreme Court Justice, will want to rewrite it in an activist way. I am also equally sure, or at least feel equally sure that you are going to not do that. You are going to look at the statute and try to interpret it the way we in-

tended it when we wrote it, and frankly, in accordance with the actual language of the statute.

It is nice to complain about the *Patterson* case, but nobody disagrees. It goes back to *Runyon v. McCrary* and that whole set of cases. Administration agreed to overrule *Patterson* right away. We are still in a tremendous lock-jaw battle over the so-called Civil Rights Act of 1990 because some believe that the *Ward's Cove* case overruled the sacrosanct *Griggs v. Duke Power* case. Even though they said we just want to go back to the *Griggs* ruling, when we offered the exact *Griggs* language to them, it was not good enough. They wanted to go beyond it. It was another chance to use a civil rights bill to go far beyond what they originally said they wanted to do, you see, and overrule not only *Ward's Cove* but *Griggs* too.

Frankly, I don't think that there was a Justice on that Court that thought they were doing anything but complementing *Griggs* and extending the rule of *Griggs*. Now, whether that is so or not, that's the way it looks to me.

So you are going to have lots of these problems when you become a member of the Supreme Court. I suggest to you that if your rule of statutory construction is to do what your gut tells you to do, rather than what that language says, to ignore what Congress really said, then I think you are going to be a lousy Supreme Court Justice. There will be no definiteness about the law, and there will be no real way of knowing where we are going with regard to American jurisprudence.

Frankly, that has been the problem over much of the last 35 years, maybe as long as 50 years. We have activist judges doing whatever they feel ought to be done rather than what the language says.

Now, one of the things that impresses me so much about you, Judge Souter, is that you have a heart. You are willing to listen. You'll find some innovative ways of seeing that things are done right, and maybe there are some legitimate innovative ways that *Patterson v. McLean* could have been overruled by the Supreme Court, not decided to begin with, but the fact of the matter is I believe you will apply the law as written. If Congress makes a mistake and Congress doesn't do what is right, Congress will have to take the responsibility for it and not bank on the Supreme Court rewriting the statute so that Congress is off the hook.

We are going to have to go through the battles that we did on the Civil Rights Restoration Act that took 4 years until we finally got the bill which was considerably different from what I considered to be a reprehensible bill filed back in 1984, and what many people today look back and say really was an overreach.

Now, we are going through that right now in the so-called Civil Rights Act of 1990, a tremendous overreach. Everybody knows it, but it has got the term "civil rights" on it and therefore a lot of people just roll over and say, I'm just not going to be against the civil rights bill even if it really isn't right.

Now, I have been impressed—and I don't want to take any more time because I think you have been here long enough and you have gone through enough pain here. You have answered the questions forthrightly. You have answered them intelligently, intellectually, in a very, very forthright and good way.

I think you have impressed everybody up here, regardless of what our different ideological viewpoints may be. I want to tell you that I believe you are going to make a great Justice of the U.S. Supreme Court. I believe the reason you are is because you are not going to substitute your own notions of what you think the law ought to be for what it really is and for what the elected representatives have put on the books. I think that is going to be a very, very good thing even though both sides up here make tremendous mistakes in legislative enactments.

I just want to wish you the very best and tell you that I very greatly respect the testimony that you have given over these last 3 days. You deserve the respect of everybody in America, and I wish you well on that Supreme Court and I believe that we shouldn't drag this out any longer. We ought to get you on there so that you can sit on the first Monday in October and start participating in a way that I think everybody will be pleased with.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Judge, as you have just learned, one man's innovative ways is strict construction and another man's application of innovative ways is judiciary running rampant. I think you have found that out by talking to us all up here. Judicial activism is in the eye of the beholder. That seems to me—as the Senator from Utah just pointed out, he knows you will be innovative and if you are innovatively conservative you will be a strict constructionist.

Senator HATCH. We will certainly be pleased. [Laughter.]

The CHAIRMAN. If you are innovatively liberal, you will be running rampant and the flip will be reversed. But anyway—

Senator HATCH. Mr. Chairman, can I just say one other thing?

The CHAIRMAN. Sure.

Senator HATCH. I would like to just personally express my appreciation to the chairman. I think—not for his recent comments, because that is really wrong. [Laughter.]

But I would like to express appreciation to him and his staff because I think they have, thus far, run very fair and open hearings here and I think the hearings have run very smoothly because of the chairman and the approach that he has taken. I want to personally be on record as expressing appreciation to him for the leadership he has provided here. I certainly have enjoyed being here.

The CHAIRMAN. That's very gracious.

Senator THURMOND. We are not through yet.

Senator HATCH. No, but that may be the last time I get to say it.

The CHAIRMAN. I appreciate it very much, and the Senator from South Carolina will agree with that or disagree with it based on whether I vote for you or against you. [Laughter.]

The Senator from Vermont, do you have any further questions?

Senator LEAHY. I do have a couple, Mr. Chairman, and I also will concur in the facts. You have run the hearings very fairly and evenly, and you might say when Senator Hatch announced earlier that he was only going to give you a 1-minute lecture, don't feel, Judge, you got the whole load. I suspect that Senator Hatch was directing that lecture as much to some of his 99 colleagues in the Senate as he was to current or potential members of the U.S. Supreme Court.

Also, understand that some of us have heard the lecture before, but whether you live up to it or not will, of course, be in the eye of the beholder and that will change depending upon how you rule in close cases.

Let me go to a couple of specifics. Going over the criminal law cases that you were involved in—and I admit, based on my own past experience, those things have always jumped out at me, I would like to talk about *State v. Valenzuela*. I may have not pronounced that the correct way, but I believe you know the case as one where you ruled that the use of a pen register without a warrant was legitimate?

Judge SOUTER. Yes.

Senator LEAHY. For those who are not aware, a pen register traps telephone numbers of outgoing calls. Now, I understand the U.S. Supreme Court reached a similar conclusion in *Smith v. Maryland*?

Judge SOUTER. Yes, sir.

Senator LEAHY. So you are basically following what the Supreme Court had decided. Did you follow *Smith v. Maryland* because that is the way the Supreme Court ruled or did you follow it because you also agreed with it?

Judge SOUTER. We followed it because we agreed with it. The case in *Valenzuela*, and that is the way I pronounce it too, was a case which was—or an issue in this respect that was raised under the State constitution because the defendants who raised the issue knew that *Smith* had been decided, so that so far as their Federal grounds were concerned they realized that they did not have any possibility of obtaining relief.

The peculiar aspect of the *Valenzuela* case was that in raising the issue under the State constitution of whether or not a pen register recording was a search, they made the assumption that the New Hampshire Supreme Court had accepted as its sort of framework for analyzing search and seizure problems the same basic premise that the U.S. Supreme Court had adopted in *Katz v. United States*, which was the reasonable expectation of privacy theory.

In point of fact, the New Hampshire Supreme Court had never adopted that theory as its kind of unifying search and seizure theory. But, in any event, there being no disagreement, we simply took the case on the assumption that assuming arguendo that a *Katz* reasonable expectation of privacy analysis is going to apply, is there any good reason to come out differently under the State constitution on that theory from the way that the U.S. Supreme Court did under the fourth amendment on *Smith v. Maryland*?

Senator LEAHY. Well, the reason I asked, Judge, I am just interested in what expectation of privacy you believe a person has with regard to the phone numbers he dials? Now, as I understand, and correct me if I am wrong on this, in that case the defense assumed that article 19 of the New Hampshire Constitution would apply to wiretapping. You said the New Hampshire Supreme Court never actually decided what the appropriate scope of privacy was under article 19.

You did mention *Katz*. In construing article 19 could, you have read it more narrowly? Let us take this step by step. Could you

have construed article 19 more narrowly than the Supreme Court read the fourth amendment in *Katz*?

Judge SOUTER. Well, I don't know whether we could have reasonably or correctly done that, but the issue is, in theory, open in New Hampshire, so that I suppose that as a theoretical possibility, yes. Whether it would be a sound decision when and if the Court reaches it is not something I would make any suggestion on, but in theory, yes.

Senator LEAHY. You don't think the supremacy clause would require you to construe article 19 at least as broadly as the fourth amendment?

Judge SOUTER. I think I would draw this distinction, Senator: the supremacy clause would not require us to construe the State constitution as broadly, but if we construed it in a way that, in fact, afforded less right to a defendant, the New Hampshire Constitution would, in that respect, be inoperable because under the supremacy clause the fourth amendment standard would always be the one that would apply and would govern.

Senator LEAHY. Do you recall—I should have noted and given you a chance to read this before, but do you recall Justice Black's position in the *Katz* dissent?

Judge SOUTER. I have not reread it, but my recollection is that Justice Black said when you are trying to carry the fourth amendment to intangibles like conversations you are carrying it beyond its terms. Justice Black was a very strict textualist, and my recollection is that was the basis for his decision in that case, although I have not read it in a long time.

Senator LEAHY. I have one quote from him which I did pull out which bears out what you say about being very, very strict on this. He said: "Since I see no way in which the words of the fourth amendment can be construed to apply to eavesdropping, that closes the matter for me. I will not distort the words of the amendment in order to keep the Constitution up to date."

He said the fourth amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of persons, houses, papers and effects. He refused to extend it to seizure of a voice by means of a wiretap. Do you agree with that?

Judge SOUTER. Well, Justice Black was saying that you cannot have a search without some tangible to be seized. I guess I do not think that is a self-evident proposition.

Senator LEAHY. Did you agree with his position at the time of *Valenzuela*?

Judge SOUTER. Well, we didn't agree with it, but we were not asked to agree with it. The issue was not placed before us.

Senator LEAHY. The reason I asked that is that in your own decision you singled out Justice Black's dissent and I was wondering what your view was at that time, why you picked out Hugo Black's dissent?

Judge SOUTER. I picked it out simply because we were signaling the bar of the fact that a unifying principle in a decision that would indicate the ultimate scope of the article had never been rendered, and we simply said that when and if the time comes that the Court is asked to adopt, let's say, the reasonable expectation of

privacy analysis, there are competing views. Therefore, those views are going to have to be considered before we make a decision.

But there was no intention there to indicate that the Court was likely to agree with Justice Black or to go in any particular direction.

Senator LEAHY. I am sorry, I didn't hear that last comment.

Judge SOUTER. I was going to say that I think there was nothing in the opinion that was meant to indicate that the Court was likely to agree with Justice Black and to go in his direction if the issue was raised. We simply said that the issue has never been raised and there is disagreement about it.

Senator LEAHY. How do you look at Justice Black's dissent today?

Judge SOUTER. Well, as I said, I haven't reread it before coming in here, but I don't necessarily accept the proposition that you can't have a regulated search without an intangible to be seized. That was Justice Black's premise.

Senator LEAHY. I have two brief followup questions. Senator Biden asked whether under a privacy analysis rather than an equal protection analysis a State could ban the sale of contraceptives to unmarried adults. You responded—and correct me if I'm wrong, as I'm just trying to summarize your response—that it would be a difficult question that would require you to weigh the privacy rights of the individual against the countervailing interest of the State. Is that a fair statement of your response?

Judge SOUTER. Yes, if you found an interest subject to potential protection. As you know, in the *Eisenstadt* case, because it was an equal protection case, the Court did not go through the kind of due process analysis that would inform sort of your first premise there, and I have not gone through it, either.

Senator LEAHY. Does that mean that equal protection—

Judge SOUTER. The case has not been decided.

Senator Leahy [continuing]. Aside, the State could ban the sale of contraceptives to unmarried adults?

Judge SOUTER. The case has not been decided and the privacy analysis that would be its first step simply has not been done. I have not done it and the Supreme Court of the United States has not done it. That is an open question. *Eisenstadt*, as I recall, and I think I said before, I did not reread *Eisenstadt* before coming in here and I wish I had, but my recollection is that *Eisenstadt* went on straight equal protection grounds. I could be wrong on that, but I thought it did.

Senator LEAHY. Last, Judge—I am not trying to get you to change your mind on this—you told Senator Metzenbaum last week that you were not going to tell us what you had counseled the unmarried pregnant student.

Judge SOUTER. Yes.

Senator LEAHY. I raised a question with you this morning of whether that would be different, in light of the changes in the law today, whether your advice would be different, and you said you did not want to go into that. I understand that you are not going to tell us what your advice was, and that is, of course, your choice.

Could you just tell me briefly, because there seems to be a lot of confusion about why you will not tell us what the advice was, and rather than us trying to guess, I wonder if you would just tell us.

Judge SOUTER. Without getting into a long analysis, anything that I could conceivably say could conceivably read as an indication of not only what that advice was, but what I was being asked to address, and I think that would be unfair to the student involved. I think the possible answers to that question could be a revelation of some of the things that the student may have said to me and I think that would be wrong for me to reveal.

Senator LEAHY. Except that you were, of course, the one who raised the fact of the student and obviously did it, feeling that there was no way we would ever know who the student was.

Judge SOUTER. Well, I do not know whether that is so or not.

Senator LEAHY. OK. Thank you.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Thank you.

Senator Simpson.

Senator SIMPSON. Mr. Chairman and the nominee, I will just take literally less than 5 minutes and I promise to do that.

I think that Senator Hatch and I have a unique working relationship with Senator Kennedy. We are the ranking members of our party on two committees or subcommittees with the Senator. His viewpoint is a very passionately held one—very honest, very real—and we have disagreements and that is what politics is about and that is what legislating is about, and I understand it and he described it. I think he used the word “frustration.” I think he handled that all very well and I need not comment on it. It was done in a very civil way and I appreciate that.

But these issues, this allusion to discrimination, that somehow you would be prone to discriminate or prone to decide cases in the U.S. Supreme Court that would discriminate I think are totally laid to rest now, or should be.

I would just say that it was frustrating to me, too, to watch *Grove City* and *Ward's Cove*, because the reason *Grove City* took 4 years to do, as Senator Hatch has so well said, is because all we were told is we just want to correct it, put the statute back to where it was. Then we saw a 4-year exercise of overreaching by the overzealous to drag out every old agenda item that they had ever been beaten on. They had been beaten on every one of those issues, but they were trying to drag out these old objectives, old laundry lists, and put them into the legislation. Sadly enough, if you do not agree with that and it is called civil rights, you are then given a few very polite brush strokes that are hoped to indicate that somehow you are a racist, or not quite as sensitive as others in that area. That is a very unfortunate turn, and that is why we had a lot of trouble with *Grove City*. We were ready to put it back where it was, and that is why we had trouble with *Ward's Cove*. And soon you will be there on the bench speaking with the Justices, and many of them will simply scratch their heads, when they see the congressional reaction to *Ward's Cove* and the other civil rights cases, because all they were doing was just some very valid correcting of some imprecise language.

But it is going to be a new era and it should not have anything to do with discrimination and racism and who is better at that than others or more sensitive, and I think that I see simply the reason you are going to be approved and serve beautifully on this Court is because you are a very decent man. You are decent man who has given every indication that, in each and every case, you will do a tremendously sincere job with the task that we are going to give you.

I believe you properly declined, where you should have, and in doing that you have gained the respect of the American people.

I wish I had a question, another question, and I know you would be very complete and full in your answer to questions on both sides. I think you have been exceedingly responsive to our chairman.

I do thank him for his extraordinary fairness and that is his singular trait that I have never seen him deviate from, and I appreciate that, and I appreciate the civility of my colleagues in a very helpful exchange, and I thank you.

The CHAIRMAN. Thank you very much, Senator, personally, and I thank you for your questions.

The Senator from Alabama.

Senator HEFLIN. A part of your duties in the Supreme Court, in the event you are confirmed, you will be receiving reports from the Judicial Conference of the United States relative to various recommendations that they might make pertaining to the administration of justice, changes in various rules, such as the Rules of Civil Procedure, and the Rules of Criminal Procedure, and the issue, of course, as a member of the Court in which you can express yourself on the problems that confront the administration of justice as a whole, including all of the Federal courts.

While your experience has been as a member of a court at the State level, nevertheless, you practiced extensively in Federal courts, and so the issue which I am getting at is the administration of justice and the improvement of the structure, as well as the administration of the courts.

Have you had an opportunity in your experience to look at the administration of courts, needed reform, changes that should take place to improve the operation and functioning of the justice system?

Judge SOUTER. Senator, I have been so short of time on the Federal bench that I really have not, although I have made one observation and I think it may be much more specific than you had in mind, but I will pass it on for what it is worth.

I know that I have been living in temporary chambers since I went on the court of appeals, the temporary chambers are in the U.S. District Courthouse in Concord, NH. I was talking one day with the clerk of that court, who told me that his criminal caseload had increased I think threefold or fourfold in the past, oh, 12 to 18 months. I said why is that, and he said as a result of the drug prosecutions. He said what I have been telling counsel is that you are coming down in volume, you are coming down a 4-lane highway and then you are going to get to the U.S. district courtroom and it is not a 4-lane highway, because there are not enough judges here to absorb that kind of increase, as a result of the prosecutorial ac-

tivity, and the expectation is that there is going to be a very serious administrative problem in handling the volume of cases.

What I hope will not happen is what I have been seeing happen on the State level, and I alluded to it the other day, and that is that the demand, the constitutional imperative for the trial of criminal cases in a speedy fashion is squeezing the civil caseload off the dockets of those courts. And if they stay off the dockets long enough, we are going to see, and we are in fact seeing now, the development of an alternative and private system of civil justice in this country.

And while there may be some people—there are undoubtedly are some people who will say fine, if that can simply be passed on to the private sector, let the private sector pick it up and operate it on an entrepreneurial basis, but the price that will be paid for that is that, in my judgment, part of the glue that holds us together as well as we do as a society is the fact of a common system of justice, criminal and civil, and if that common system is lost, then I believe part of the coherence of American society will be lost, too, and I hope that is not what we are going to see down the road.

Senator HEFLIN. Well, it may be, and I am not advocating this, but in order to meet that problem, which I am delighted to see you recognize, that you may well have to divide courts into criminal and civil divisions and you may well have to alternate judges, because you do not want them to get into just a field of specialization alone. I think the general approach of the Federal judiciary at the district court level of being generalist has been very helpful.

Of course, all of those criminal cases and most of the civil cases are determined by jury trials and, of course, that means I think that the generalists, because of that, can function exceptionally well.

We have authorized and the Chief Justice had a Federal Court Study Committee which has just recently made its report. It did a 15-month study. It did not cover nearly all of the aspects that should be and should be on a much longer basis of study. But I foresee that we are going to have major problems in the administration of justice, if we continue the path that we are on, and it is a serious one. We have got to have speedy criminal trials. I do not want to take away from that concept whatsoever.

Nevertheless, overall administration of justice has to be looked at, civil as well as criminal, in that aspect. I hope that you will give some study, and I think you bring a unique background to the Court that maybe some of the other members of the Court do not have, and I hope that you will look at that very carefully.

Judge SOUTER. I will, sir.

Senator HEFLIN. I asked you previously, and I suppose you have now looked at it and I understand you have seen it, case of *Richard v. McCaskell*—

Judge SOUTER. Yes.

Judge HEFLIN [continuing]. It was a case where a person was being tried for the fraudulent use of a credit card and entered a nolo contendere plea, and later it was challenged by habeas corpus proceedings and, as a result, the issue came as to whether or not there had been a waiver. Would you explain that case and your reasoning in reaching the decision?

Judge SOUTER. Yes. Thank you, Senator, I did refresh my recollection of that during the break.

*Richard v. McCaskell* was a State habeas corpus case. The facts were that the defendant or the petitioner, actually, had been convicted of fraudulent use of a credit card or shoplifting, on a previous occasion had entered a plea of nolo contendere and had been given a suspended sentence.

She had then been arrested and charged against, and when she was found guilty of a second offense, the district court brought forward the first conviction and the suspended sentence and moved to impose that sentence. She then challenged the validity of the sentence in the first case by filing a petition for writ of habeas corpus, and her claim was that she had not entered a valid waiver of her rights to trial at the time she entered the nolo contendere plea in the first case.

What her request for relief turned on was the need for courts to make a record of the waivers of rights which are implicated by a plea of guilty or nolo contendere. In the absence of a record of such a waiver, the burden is on the State to prove affirmatively that the waiver in the first case was, in fact, a voluntary waiver. Whereas, conversely, if there is an adequate record that the defendant did waive the rights knowingly and intelligently, the burden would be on the petitioner to prove that, in fact, the plea in the first instance was not a voluntary one.

In this case, there was no such record indicating that the court had canvassed the defendant and had obtained from her a personal knowing and intelligent waiver of rights, and, therefore, the court held, in the opinion that I wrote, that it had been error for the trial court in this case to dismiss the petition for the writ.

Now, the State claimed that it could present evidence that there had been, in fact, a voluntary and knowing waiver, but we held that there was no evidence on the record before us from which the trial court could have found that, and we therefore vacated the trial court's order dismissing the writ and remanded it.

So, to sum it up, it was as case that recognized that when there is not an adequate record of a waiver of these very fundamental and personal rights which must precede the entry of anything but a plea of not guilty, the burden is on the State to prove that there was such a waiver and, without such proof, the defendant would be entitled to withdraw the plea.

Senator HEFLIN. One other case that you have written about is a case of *State v. Colbath*, which was a New Hampshire Supreme Court case having two aspects that were I think interesting, from a viewpoint of the Constitution and individual rights. One dealt with a speedy trial and the other the rape shield. Would you explain that case and your position relative to the issues raised by that?

JUDGE SOUTER. Well, the issue that was raised in that case about the rape shield law went to the point of the rape shield law, which is to bar the introduction of evidence of voluntary sexual activity by the complainant in a rape case, by the victim in a rape case, with anyone other than the defendant.

What the case illustrated was the fact that there can come a time when the rape shield law, which is enacted for good and sufficient reason, to prevent rape victims from being victimized and, in

effect, deterred from complaining and testifying, from fear that their private lives are going to be needlessly spread in front of the public, will nonetheless come into collision with a defendant's right to cross-examine and to present proof favorable to himself.

The general rule had been and has been in New Hampshire, and I think is in most States that have considered it, that when the activity about which a defendant wishes to present evidence is substantially close in time to the time at which the crime itself was charged, that that activity probably does have a sufficient degree of relevance, so that even in the face of a rape shield law, the due process clause requires that the defendant have an opportunity to present such evidence.

In this particular case, the evidence involved the activity of the complainant in a public bar with a number of men, including the defendant, at a time within the hour or two before she and the defendant admittedly left together.

The issue in the case was not whether a sexual act had taken place, but whether it had taken place with consent.

The court was unanimous in holding that the evidence was sufficiently related in time, so that it was probably so relevant or potentially relevant that the rape shield law could not prevail against the due process clause, and we so held in reversing a conviction which had rested on a jury instruction which included the jury from considering such evidence.

Senator HEFLIN. How about the speedy trial aspect of that case?

Judge SOUTER. I only remember that there was a speedy trial issue in that case and that we found that the speedy trial right had not been infringed, but, quite frankly, I do not remember the facts in sufficient detail to know exactly how we analyzed it.

Senator HEFLIN. Well, I think basically that a defendant is supposed to have 9 months; the speedy trial rule is that the defendant has a constitutional right to have a trial within 9 months between arrest and trial, and a full year lapsed in the case. Basically, however, the decision of the court was that the defendant never initiated a speedy trial request and he was out on bail and he suffered no prejudice from it, at least that was the reasons that I remember why the case was determined—

Judge SOUTER. Yes.

Senator HEFLIN. Which brings into issue the Speedy Trial Acts. They are twofold. It is for the advantage of the defendant, but it is also for the advantage of the public, and I do not think we ought to lose sight of that fact.

I have cited in my questioning of your several cases which indicate that you have a respect for individual rights and there are numerous cases that have previously been brought up in which you show a law and order approach, so I think that you have shown a regard for both in the decisions that you have written.

Judge SOUTER. I hope they will never be regarded as mutually exclusive.

Senator HEFLIN. I believe that is all that I have.

The CHAIRMAN. Thank you.

Before I yield to my colleague from Pennsylvania, let me ask: In the rape shield case, you said sufficiently relevant in time. I think I know what you mean by that.

Judge SOUTER. Close in time, yes.

The CHAIRMAN. That is the action or activity, the alleged action or activity of the plaintiff, the woman in this case, the woman who was allegedly raped, took place within a time frame that made that action relevant to the defense of the defendant, is that what was meant?

Judge SOUTER. Yes, sir.

The CHAIRMAN. OK. Thank you.

Judge, would you like a short break? I think we are going to be finished, but it will probably be another half hour or more. Would you—

Judge SOUTER. I would be willing to go on testifying. Thank you very much.

The CHAIRMAN. OK.

My colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, I would start at this point with the cases on stare decisis, which is the phrase meaning to follow established principle. This is important in terms of your overall judicial approach, and it may have some special application on the very controversial subject of the abortion case, in terms of how much impact there would be from *Roe v. Wade*. I do not intend to ask you about that issue, because, as I said before, I respect your position that you cannot comment on that, because it is likely to come before the Court.

But as you have outlined your analysis of liberty interests and countervailing interests, then you added to that whatever impact there would be on the precedents of stare decisis, and you do have a number of cases from your tenure on the New Hampshire State Supreme Court which bear on this subject.

In the case of the *Petition of Robert Coryea*, you commented that, "Once the statute has been construed, stare decisis calls for a reasonable degree of certainty in applying that construction to future cases, subject always to the legislature's power to modify the statute itself." And while the statute is a little different from a constitutional provision, I think that is a significant case. I will not go into the facts there, but will deal with the facts of two other cases on this issue, because I think they have significance.

In a case by the name of *Cacavas v. Main Bonding and Casualty Co.*, you followed a precedent which you said you disagreed with. That was as case which does not involve facts of very great consequences for this proceeding, but the principle is a very important one, because you followed a precedent which you disagreed with.

In that case, you referred to other cases. One was as decision in a case called *Grimes*, where there was a stacking of insurance policies, one policy and two cars, and the *Grimes* case said that stacking of the policies was not permitted. That means stacking is to add the limits of both policies together.

Then, 4 years later, in a case called *Descoteaux*, the court permitted the stacking of insurance policies, and in that case there were slightly different factual situations, there were two policies. And then came the case of *Cacavas*, and you specifically said that you believed in the principle of *Grimes*, but you were following *Descoteaux*, because of stare decisis, not to overrule a precedent.

Now, it is interesting that, in a matter of this sort, where the Supreme Court of New Hampshire in 1984 had overruled a decision of the Supreme Court of New Hampshire from 1980, and the case came up again in 1986, just 2 years later, and the court had seemed perfectly willing to change back and forth, that you found it important to maintain the decision. Why?

Judge SOUTER. Because that case struck me as a classic example of the kind of case in which there has got to be an opportunity for reliance upon what the court does. We were dealing in that case with the issuance of insurance policies. We have obligations to both parties to those policies to come up with a coherent body of law which can be understood and which those parties can rely upon in making their business arrangements.

We simply cannot go back and forth in cases of that sort every couple of years, and, therefore, I believed we were in a situation in which the demand for a reasonable reliance certainly outweighed my concern to go back and sort of rewrite the history of New Hampshire precedent in the way that I would have done, if I had been able to do that in the first place.

Senator SPECTER. Well, as a general proposition, Judge Souter, would you say that reliance on not going back every couple of years would be a principle of general application which would apply even to a case like *Roe v. Wade*?

Judge SOUTER. With respect, Senator, I am going to ask not to answer the application to *Roe v. Wade*, but I can certainly tell you that the issue of reliance is not an issue which is limited to commercial cases.

Senator SPECTER. There was another very interesting case captioned *State v. Meister*, where again the facts are not of overwhelming importance for this proceeding, but it was a petition to annul a record, and the Supreme Court of New Hampshire reversed a lower court, saying that the court had not taken into account all of the factors of rehabilitation.

It was an especially interesting case, because you had written an opinion, as a Superior Court judge, and even though you had been on record as having taken a position which was inconsistent with the court's ruling, you went along with the ruling of the Supreme Court in this *Meister* case. You said at the conclusion of the case: "The consequences of what I believe was an unsound conclusion in that case, are not serious enough to outweigh the value of stare decisis."

So, here articulate a view that it is an unsound conclusion, but follow the precedent, even though it was at variance with what you decided before.

Judge SOUTER. Yes, sir.

Senator SPECTER. What principles of following precedent and stare decisis were involved there which you felt that warranted to uphold the prior case, even though you disagreed with the principles, had you had a chance to look at it from a fresh position?

Judge SOUTER. Well, of course, the most prominent feature of that case was that it was a statutory construction case and I believed that if, in fact, the legislature had disagreed with the statutory construction that the court placed on it, as erroneous as I thought it was—of course, any judge who ever gets overruled is

likely to think that the case that overrules him is erroneous, but I really thought it was in that case—I believe that if the legislature had any disagreement with the court's construction, it would have amended the statute. It had not done so.

I also believed, as I said there, that the consequences of the erroneous ruling were not of cosmic significance, so that it was perhaps an easy case in which to follow *stare decisis*.

Senator SPECTER. Judge Souter, the research which I have seen says that there has never been a reversal, an overruling of a Supreme Court decision, where an earlier Supreme Court decision had established a fundamental right. My question to you do you know of any occasion where the Supreme Court of the United States has overruled a prior Supreme Court decision which had established what was categorized as a fundamental right?

Judge SOUTER. I do not. I have never done the research, but I do not.

Senator SPECTER. The issue of supremacy of the Federal Government has come up in a couple of contexts, and I believe that there was some earlier testimony about States having different rules on the abortion issue. Senator Leahy asked you a question about, in the wiretap case, whether there was an obligation on the part of the State of New Hampshire to follow the Federal rule, and you said no, there was not, there could be a more restrictive rule, which the New Hampshire Supreme Court would uphold the New Hampshire Constitution on, than a Federal rule.

Is it not similarly true, if a State, say, illustratively, California, which has upheld the right of abortion and has passed a special right of privacy in a constitutional provision could maintain those rights of privacy and right to an abortion, notwithstanding any contrary rule which might be established by the Supreme Court of the United States?

Judge SOUTER. So far as the issue raised in *Roe v. Wade* is concerned, the answer to that is correct. Whether there is any basis that could be raised in different litigation, a different claim, based on the rights of the fetus, rather than on the rights of the mother, that, of course, is a totally undecided issue.

Senator SPECTER. Yes, but a State could have a rule which gives greater rights under that State constitution and State law, as, for example, California or any other State, than is required by the Supreme Court of the United States of general applicability?

Judge SOUTER. Yes, if we assume that the subject matter of the rights are the same in each case, whichever gives the greater protection is the one that will prevail.

Senator SPECTER. Would a variation among the various States be a factor for consideration in *Roe v. Wade*, if you would are to comment on that?

Judge SOUTER. I would prefer not to comment on it, sir.

Senator SPECTER. Judge Souter, there was a reference which you made earlier to the decision, your dissent in *Smith v. Coat*—no, it is a concurring opinion in *Smith v. Coat*—

Judge SOUTER. Yes.

Senator SPECTER [continuing]. Where you took up the issue that a physician did not have an obligation, under the wrongful life or wrongful birth cases, without getting into the details there, so long

as there was a timely referral, and I believe that you had commented that you felt that was an aspect of the case which was involved in what had been raised and had to be decided.

The majority opinion said this: "We do not reach the issue raised in the special concurrence of Judge Souter, because it had not been raised, briefed or argued in the record before us."

There have been a number of cases in the New Hampshire court where, in accordance with the general rule that an issue may be considered and decided by the court, only if it has been appropriately raised, and I would ask for your construction as to why, in the *Smith v. Coat* case, you took up the issue and decided it, in light of what the majority in the court said, that it was not properly before the court.

Judge SOUTER. The reason I took the position that I did was that I felt the way the majority opinion had been written, that it was inevitable that this question was raised, and my position was to note that, in fact, the possibility that I pointed out was indeed not foreclosed by the court's decision.

It seemed to me that if we said absolutely nothing on the subject, we had, as a court, raised a moral dilemma and that it was a moral dilemma that was inherent in the effect of our decision and that we should at least point out that there was nothing in our decision which foreclosed the particular course of action that I mentioned in my concurrence as a means of responding to that moral dilemma.

So, I guess the answer boils down to this: It is not that it was an issue that was expressly raised, but it was an issue which seemed to me inherent in the way the court had decided the case and we ought at least to say something about it.

Senator SPECTER. Judge Souter, as you put it, even if it is inevitable that an issue is to come before the court, is it not the customary judicial form to await the arrival of that issue before the court, before deciding it?

Judge SOUTER. Well, there is really an—I will not say an alternative, there is a complimentary principle that we frequently point out, issues which we are reserving or not deciding, for the very reason that we do not want our decisions to be read too broadly and we do not want them to mislead, and I think that is what I was doing in my concurrence there.

Senator SPECTER. There has been a series of very important cases narrowly decided, most recently *Metro Broadcasting v. Federal Communications Commission*, where the Supreme Court of the United States, in a 5-to-4 decision, decided that a minority interest was a factor in the decision, in order to have diversification of programming. The case is an important one, because there has been a pitched argument as to whether race ever should be a factor to be decided, contrasted with the generalization that the Constitution is color blind and that race ought not to be a factor.

The *Metro Broadcasting* case decided this year, 5 to 4, looks in the other direction from a case decided last year, *City of Richmond v. Croson*, where a 30-percent set-aside was stricken, as an unconstitutional rule, where the city of Richmond had said that 30 percent of the jobs would be available for minorities.

Going back to an earlier case, and perhaps a leader in the field, the *Regents of University of California v. Bakke*, the Supreme

Court, speaking through Justice Powell, had stricken a separate admissions policy for minorities, but had said that it is appropriate that race may be one of the factors to be considered.

My question for you is, as a generalization, do you believe that it is appropriate in some circumstances that race is a factor to be considered by the court, in deciding this category of cases?

Judge SOUTER. Well, I think it is inevitable, to this extent: What we are dealing, as you know, in the *Metro*—let us take the contrast between *Metro* and *Croson*—we are dealing there with a contrast between the treatment to be given the congressional power, whether it be under section 5 of the 14th amendment or under its article I power in the case of *Metro*, and in *Croson* the court was dealing with the authority of a lower unit of government, in that case a city council, to take rate into consideration.

The proposition which *Metro* stands for is that the congressional power to engage in this kind of limited remedial action, which does indeed take some account of race, is to be judged under the middle-tier standard of scrutiny, whereas, the power of a lesser unit of government, State, local, county, is to be judged under the higher standard of strict scrutiny.

Therefore *Metro* is one step in what I assume will be a long line of cases that is going to result in the definition of the scope of congressional power over remedial and race conscious with—of remedial legislation with race conscious references.

*Bakke* of course was a case which struck down the use by the State of California of a strict quota but recognized, at least through Justice Powell's swing opinion, recognized the possibility of taking race into account solely for the purposes of creating diversity.

So, I think for present purposes the most instructive contrast right now is the *Metro v. Croson* contrast.

Senator SPECTER. Well, I think that is an illustrative distinction that, where you have a quota system, that is not permissible. But there are some circumstances, as you articulate your answer, as a matter of general principle obviously depending upon what the facts are in a case to come before the court, where it would be appropriate to consider race as one of many factors in coming to a decision.

Judge SOUTER. Yes, sir.

Senator SPECTER. When I had asked you about the war powers resolution on Friday, I asked you to consider that question and would like to renew that discussion at this point. The question which I had asked, as I am sure you will recall, was whether you thought it was unconstitutional or illegal for the Korean war to be pursued in the absence of a congressional declaration of war. And I asked that in the context of getting some idea as to your views of the relative authority of the Congress under its sole prerogative to declare war, contrasted with the President's power as the Commander in Chief.

And of course, this is not an academic subject, because in the events of the day perhaps the most important world event of the day involves what is happening in the Middle East, what is happening in Saudi Arabia. And we all know that the President has ordered U.S. military forces into that area.

There are some complicated questions under the war powers resolution which requires notification to Congress, and the President has given some notice to Congress. But as the President has acted on so many events in the past, has done so without recognizing the constitutionality of the War Powers Resolution. That is an issue which is very difficult to get a Supreme Court decision on because of the issue of case and controversy and the issue of standing. We talked about the fact that in one of the cases, even though 110 Congressmen had brought a case into the U.S. District Court here in Washington, DC, the court had said that there was no standing.

In asking you a question not related to the War Powers Resolution and not related to Vietnam because of the Gulf of Tonkin Resolution, which might arguably be construed to give congressional authorization like a declaration of war, but in going back historically 40 years to June 25 of 1950, the day the Korean war started, it seems to me that that is a fair question in an historical context, test your own thinking on the judicial philosophy behind those two important constitutional provisions.

So I renew the question.

Judge SOUTER. Senator, I have thought about it. I will be candid to say that I did not try to do special research on it, because I did not think that was the point of your question. I am going to give you an answer. I have thought of this carefully, and I am going to give you an answer which is different from any other answer that I have given here; but it is the only honest one I can give you: I do not know. I could go on at great length about where I reach the point of not knowing, but the truth is I do not know. There is no law on the subject that I am aware of that is helpful to me to work from, and I do not know the answer.

Senator SPECTER. That is a very good answer, probably one of the best answers around and few people use. And it has taken a long time in these proceedings in the twilight to have you give an "I don't know" answer. So, I will accept that, because I do not think it would do me much good not to.

Returning to the subject of the supremacy of the judiciary, and there has been one aspect which has not been covered; early on, Senator Thurmond asked you about *Marbury v. Madison*. You said that you did not think it was too brash in this day and age to uphold *Marbury v. Madison*. That is, for those who do not know it, the 1803 case where it was decided by the Supreme Court that the Supreme Court had the last word on what the Constitution meant. But there are some today who dispute that.

One recent nominee coming before this committee would not answer a question about whether he would uphold *Marbury v. Madison*. When the question came to taking away the jurisdiction of the court, you were not definitive; and I think that is a very, very important question. I think that is a rockbed question as well. And when we talked earlier about the taxation case, as much as the taxation case may be disliked, if the Congress has the authority by passing a statute to divest the Supreme Court of jurisdiction, even if, and I will get into the remedy versus the right issue, that we have a constitutional question, it seems to me that *Marbury v. Madison* does not have any real substance nor does the ultimate

authority of the Supreme Court of the United States have any real substance.

I think it is very fundamental. We can pass a constitutional amendment on the taxation case, and I think we may do that. There is such a fundamental dichotomy between judicial authority and legislative authority; but we can handle it. But I do ask you whether you think the Congress has the authority to limit the jurisdiction of the Supreme Court.

Judge SOUTER. Senator, the problem which your question raises is what article III means when it speaks of not only regulation but exception by Congress to the appellate jurisdiction of the Supreme Court. As you know, there have been two cases on the subject really, and they do not answer our question for us. One seems to go one way, and one seems to go the other way.

The most that I can say, and perhaps this is saying a lot, is that we do not have to argue about the—we have been using the word fundamental, and I will use it here—the fundamental importance of *Marbury v. Madison* as establishing basically the structure of the Government of the United States. And the consequences of assuming that the power to except from the jurisdiction is a power which Congress in effect can exercise in any way it sees fit is basically to deny the possibility of national unity in constitutional interpretation.

I do not—I can only say this, that I do not at this point understand how such a result could be justified.

Senator SPECTER. Judge Souter, that leans in the right direction, but it does not really foreclose it. I pressed Chief Justice Rehnquist hard on this issue, which I infer you know about because of the care of your preparation, and he would answer the question about the lack of congressional authority to take away the jurisdiction of the Supreme Court on first amendment matters. He would not go beyond the fourth amendment or the fifth amendment, inexplicably to me, but I would ask you, as my final question on the subject, would you at least go as far as Chief Justice Rehnquist did in his confirmation hearing, to say that Congress does not have the authority to take away the jurisdiction of the Supreme Court on first amendment issues?

Judge SOUTER. I do not think I can put it that way, because I do not know what distinction I would then draw in refusing to go down the rest of the amendments.

Senator SPECTER. Well, may you will not draw a distinction.

Judge SOUTER. But, no, I think I have gone as far as I can go on an issue which is always theoretically lurking and is perhaps lurking with more than theory at times, when Supreme Court decisions are subject to vigorous challenge. But the significance of the issue is one which I hope you will leave these hearings realizing that I do not underestimate.

Senator SPECTER. Well, I will not pursue that one any further either.

Let me come back to my final area of questioning, which is really the big question. I would have started with this one on my round, but I did not because it would have consumed the entire round. Senator Biden is going to come back to this question. That is really the central question in this entire hearing, and that is your view

on how you decide constitutional questions. And I believe that there is a fair amount more which needs to be considered here.

The trouble that I have with your approach so far, Judge Souter, is that you start from a position of interpretivism, which means interpreting the Constitution. Then on the issue of original intent you move away from that to original meaning. But on original meaning you then have an interpretation which is at variance with what the drafters said. The issue of capital punishment has arisen, and I think it would be accurate to say, or perhaps I should ask you the question: Do you think it would be a permissible interpretation of the eighth amendment prohibition against cruel and unusual punishment to say that the provision precludes the death penalty?

Judge SOUTER. I do not think that as a per se kind of rule we can make that assumption, simply because of the recognition within the document itself that capital punishment exists and a recognition which implies the assumption that the drafters accepted it as legitimate.

Senator SPECTER. Yes, capital punishment was in effect at the time that the eighth amendment prohibition against cruel and unusual punishment was drafted.

Now, we have gotten extensively into the reapportionment cases. The difficulty that I have with the reapportionment case is that, even though you take a principle which you say is different in the sixties, when *Baker v. Carr* was decided, and when the *Sims* case was decided, that it is at variance with what the intent was at the time that it was drafted, or *Brown v. Board of Education*. There is no question that the drafters of the equal protection clause of the 14th amendment were opposed to the idea of desegregated schools. So that, while you may say that the drafters articulated a principle which has a different application in 1954, when the *Brown v. Board* case was decided, contrasted with *Plessy v. Ferguson* in 1896, and different from the time the 14th amendment was adopted, can you say fairly that under original intent, which you translate to original meaning, and to a principle, that you can fairly decide the case under that philosophical approach when it is directly at variance or inconsistent with the original intent or original meaning of the drafters?

Judge SOUTER. The answer is yes, for this reason. And I think this reason indicates the point at which you and I have sometimes parted company in the discussion of the consistency of my views. When you are speaking of original intent, as I understand it, and as I understand what you have just said, you are referring to 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. And I do not believe that that kind of specific intentionalism is a valid interpretative canon.

I believe, that is why, as I have said, that is why I have used the terms original meaning or understanding to get away from that sense of specific intentionalism. And once that is done, then I think I have a perfectly consistent position.

Senator SPECTER. My time is up, but if I may just ask one final question, Mr. Chairman, it is this. I can understand your position on original intent and your shift over to original meaning.

Judge SOUTER. Excuse me. I just do not mean to shift. I mean, I start with a sense of original meaning. It is not a retreat from something.

Senator SPECTER. Well, it would take quite a time to go through the interpretivism school, but the interpretivism school really begins with original intent. Now, there has been a dichotomy over to original meaning, and that has been the traditional way that there has been an explanation given for *Brown v. Board of Education*, which you have come back to repeatedly.

But the difficulty I see with your philosophical approach here is that you can say they have established a principle of equal protection and it means more than they had specifically in mind, their meaning or their words at that time; and you apply it more broadly to different facts in a different era. But can you apply it in direct contradiction to what the meaning was of the drafters if you are really talking about original meaning and interpretivism?

Judge SOUTER. Not if you have established a meaning which is different or which establishes a different principle from the one that you are applying. But I think once again the reason that there is some perplexity in our exchange is that you say, as you did a moment ago, Senator, you are accepting the view that the equal protection guarantee means more—I think that was your phrase—than it meant at the time it was adopted, than it was intended to mean by the drafters. And what I am saying is not that it in some sense means more. I am saying that its application was not restricted and cannot be restricted to just those specific instances that the drafters intended to deal with at the time they drafted it.

I do not think the principle means more. It is simply that its application is not restricted to the immediate problems that they had in mind to deal with when they adopted that and when they drafted it.

Senator SPECTER. Judge Souter, I can understand the philosophy which says that the principle is applied differently at a later date depending on different facts. But I cannot understand an application of a principle of original meaning which is directly contradictory to what the drafters had in mind. Those who drafted the equal protection clause specifically said that they did not want to desegregate the schools. They had desegregated schools in the District of Columbia, desegregated schools across the country. The Senate Gallery was desegregated. And I think the decision is correct, but where it will lead at the end of perhaps another round or more that your philosophical approach is much closer to Chief Justice Hughes in the *Blyesdale* case, which was the first major Supreme Court decision which said we are going to take up changing circumstances. And that as you have articulated a judicial philosophy, you are really outside of interpretivism, which is fine with me, but it is important to know where you are on a scale of values. When Senator Grassley questioned you at length and pressed you on a number of occasions for one Warren Court decision that you disagreed with, you did not find one.

The worst one was *Miranda*, which you said we have learned to live with.

Now, I am prepared to accept you, interpretivism or noninterpretivism, but I think it is an important point to know where you stand, because your testimony, in my opinion, puts you way outside of the interpretivism school. Your decisions that I have read are much closer to the interpretivism school. There is *Richardson*, in which you find the liberty interest. But most of your cases are consistent with interpretivism and a restrictive construction of the Constitution, but that is not what I hear your testimony to mean.

Judge SOUTER. Senator, it depresses me that you may think that I am in this inconsistency. I think, in the narrowest compass, the reason that you are sort of reading me out of interpretivism is that you are making the assumption that the only brand of originalism, if you will, that is a genuinely interpretist brand is the brand of specific intent. And with respect, I think that is not, I think that is not so.

I think the brand of original meaning or original understanding is in fact a valid interpretivist position. And the only point at which that comes in in any way in conflict, if it is in conflict, with what you describe as the intentions of the framers of the amendment is at the point at which we say, when they drafted a provision which was broader than necessary to perform the specific functions they had in mind, they really meant what they said and we have a broader principle.

Senator SPECTER. My time is past due, so I will yield at this point. Perhaps Senator Biden will reopen the door, and perhaps we can pursue it somewhat further.

The CHAIRMAN. If I may say before I yield, I quite frankly thought that the Judge answered my questions, that the spectrum of interpretivism is very broad—it encompasses Black to Bork, to Ely, to others who are out there. It is a broad spectrum.

With that, let me yield now. Senator Simon is next, but I would like to yield for a moment to the ranking member, Senator Thurmond, who has a couple of things he would like to say. And then I will yield to the Senator from Illinois.

Senator THURMOND. I did not take my last round.

The CHAIRMAN. I understand.

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Chairman, we are almost through the hearing today. I am going to leave in a few minutes. I wanted to make a few remarks.

First I want, as ranking member, I want to express my appreciation to all the members of this committee, Democrat and Republican, for the courtesies they have shown to Judge Souter. I think they have all been courteous and respectful, and we deeply appreciate that.

I especially wish to commend Chairman Biden. I have worked with Chairman Biden for a number of years now. When I was chairman, he was ranking member; now he is chairman and I am ranking member. We have always had a fine relationship. I have found him to be courteous and helpful, considerate. I just want to express my appreciation to you for the way in which you have handled this hearing.

The CHAIRMAN. Thank you very much, Senator.

Senator THURMOND. We deeply appreciate it.

Now, Judge Souter, I want to commend you for your demeanor in this hearing. You have appeared humble, and you have appeared courteous and, I think, tried to explain the answers to any questions that were propounded to you.

You have brought out the fact that you will listen on the Supreme Court. I do not know whether I have ever heard a Supreme Court Justice say that before, but I like that expression: I will listen. You will listen. And that is important. People cannot listen when they are talking. They learn by listening.

The very fact that you will be a good listener, I think, is a very fine symbol here of what you stand for.

Your experience in public life and in the Attorney General's office and on the State courts of New Hampshire, the trial court and the appellate court and then on the Federal circuit have certainly served you well and will be very helpful to you, I am sure, here.

I have been impressed, too, with your common sense. After all, I think that probably counts as much or more than anything else. A man can have all the education in the world, he can have all the experience; but it is common sense that counts. And I think because of your common sense you will make a fine Justice on the Supreme Court.

Now, we all were pleased with the outstanding rating that the ABA gave. They are going to testify after a while, but I just want to say this. One sentence here said: Judge Souter is highly competent and possesses a scholarly, analytical and writing skills necessary to serve successfully on the Supreme Court of the United States. And they conclude by saying: Based upon all the information available to it, this committee concludes that Judge Souter is entitled to its highest rating for a nominee to the Supreme Court of the United States.

They have not given all the judges the highest rating. Again, I compliment you. I am sure they have cited you up right.

I want to say further that the points I mention that I felt were important for a Supreme Court Justice were—and the ABA, I believe, bases these three: integrity, professional competency, and judicial temperament. In addition I added to that: courage, compassion, and understanding of the majesty of our system of government. And I feel that you possess all those qualities.

I have been very pleased with your testimony. I am just not exactly sure about this vacuum you talked about. I am of the opinion that, if there is a vacuum, it ought to be filled by the proper agency of the Government. If it is a legislative function, a legislative function; if it is an executive function, an executive function. I do not think there has to be any vacuum necessarily. I may disagree with you a little on that. But since you are right on everything else, it seems to me I can overlook that.

Judicial usurpation, sometimes when decisions are handed down, people feel the judges have taken over where they should not have done so. In other words, the judges should not usurp the authority of the Congress or the executive branch. Now, a few years ago Mr. Truman seized the steel mills, and the Court struck it down and

said you cannot take private property without due process of law. Well, he usurped there but the Court corrected him.

The Congress may usurp at times; the Court can correct it. But it is very difficult for anybody or any agency to correct the Supreme Court. I would just urge you to give it as much consideration as you can when it comes to this matter of judicial usurpation. I think that is extremely important. Some of us may feel, some judges may feel we need certain social reforms. And if the Congress does not make them, well then, we as judges will do it. I do not think that is right.

I think the people, if they are needed that bad, the people will bring pressure on the Congress to do it, that that is the Congress' duty. In other words, I think the three branches ought to stay in their respective spheres as provided under the Constitution, no matter how worthy the goals are. And a lot of the goals are worthy.

I tell my people back home, why did you not do so and so? I said, that is not a Federal responsibility; that is a State responsibility. Education is not mentioned in the Constitution. That is mainly a State responsibility.

I think we should make progress, but make it at the level of government as provided in the Constitution. And in that way we do not usurp.

This was a government established of limited powers. If any agency does not have the power it should have, executive, legislative, or judicial, we can amend the Constitution. We have amended it 26 different times. It can be amended again. But I do not think the judges ought to fill in if they feel there is a vacuum.

Now I want to mention this on habeas corpus. We had a man who came down from another State and killed a friend of mine, Turner, who worked at the Navy yard in Charleston, a coin collector. He came down and robbed him and, robbing him, he killed him. He killed three other people, four people, and thought he killed a fifth one, a woman. I am sure you remember that woman who came with a disfigured face; she is ruined for life. That case went to the Supreme Court four different times over 10 or 12 years. That is inexcusable. People lose respect for the law when such as that happens.

That is the reason we passed a crime bill this year to limit the Federal jurisdiction to 1 year. The Senator from Pennsylvania had a big part in that. He worked with me very closely on that habeas corpus provision.

Senator Hatch says in his State one case went for 16 years. In other words, I think we have got to respect as much as we can the rights of the States. I am sure that people in the States are just as interested in protecting and providing for law and order as the Supreme Court is. As much as we can, I think we ought to expedite the litigation, especially the criminal litigation.

We have got to remember the victims as well as the criminals. Too much sympathy, I think, sometimes goes to a criminal.

Now, those are just a few points I want to make to you. Again I want to say that I think you have done a fine job here. You have handled yourself well. I think you will make an excellent Supreme Court judge, and I wish you well.

Judge SOUTER. Thank you, Senator.

May I just say before you leave that I am very proud to have been a part of a process in which you participated.

The CHAIRMAN. Thank you, Senator.

Judge, as you obviously are aware of, you just heard from one of the few men who could say, a few years ago when Truman took the steel mills, and was here when that happened.

And also, you are giving us all some mind reassurance, as my more conservative friends begin to doubt how intrusive you may be, many of us begin to think that, wow, maybe we have got the right nominee.

I am going to yield now to Senator Simon and stop trying to make humor at this time of the night.

Senator SIMON. Thank you, Mr. Chairman. Let me thank you also, Mr. Chairman, for your patience with all of us. You have conducted things very, very well.

Judge Souter, you have also been patient. This is the longest birthday party you have ever had or probably ever will have.

I have only one question, and you will be pleased that I have only one question. I wish that your life on the Court were along the line that my colleague and friend, Senator Hatch, said; that all you have to do is look and see what Congress intended and what the constitutional principles are and then you follow those. And that, you agree, and we all agree, should happen. But unfortunately there are also times when things are gray. That is why we have 5-4 decisions by the Court.

You are being called upon to be, in a very special way, a champion for freedom. What I want on that Court, what I want in that Supreme Court Justice is someone who, when it is gray and you are not real sure how to go, will err on the side of freedom. It is always easy to give up freedom. It is much more difficult to protect it.

I guess my question, my final question is, Do we have a nominee who is going to err on the side of freedom?

Judge SOUTER. I would like to rephrase my statement of objective just slightly. I think you will appreciate it. I wish I knew whom I am quoting; I should know but I do not. But I would like to say that—

The CHAIRMAN. Go ahead and guess.

Senator HEFLIN. No; be judicial.

The CHAIRMAN. Believe me, it is safer.

Judge SOUTER. If there is a direction to err in, it is the direction that is summed up in the phrase that looks to our law for what was described as the just restraints that make people free. That is the direction that I should like to err in. That is what I shall seek.

Senator SIMON. I thank you.

I thank you, Mr. Chairman.

The CHAIRMAN. Let me now ask, I have a few closing questions, but before I do, I want to find out if anybody else in the panel has anything they would like to say. Senator Specter would like to make a brief concluding statement. Would anybody else have anything to say of the witness prior to—we need not have eulogies; I am not encouraging them. Does anybody have any questions that

they have remaining before I conclude with three questions that I have?

Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, at the conclusion of my last round just a few moments ago, I had expressed some concern on where you fit in and how you would interpret the Constitution. I have devoted a fair amount of the time allotted to me to that subject. It is now 7:21, and I think that I will forgo any further questioning, to the chairman, we have other witnesses yet to go this evening, people who have traveled and want to finish up.

I would just make a very brief concluding statement. The subject of where you are on judicial philosophy is a very, very important subject because you very correctly have declined to answer questions about future cases which are likely to come before the Court because of the process that you ought to have a specific case, hear the argument, confer, et cetera, before you make your decision. So it is important, and we have gone into this issue at some substantial length to try to make a determination as to how you would approach the problems. After reading your opinions, I had a view that you were going to be very restrictive in your application of constitutional law.

As I have listened to you testify, I see expansive responses in terms of not only the vacuum but the scope of the liberty clause and the Court on certain political matters. We got into the tax case. It has been my conclusion after hearing your testimony that you are a fair distance from original meaning, for reasons which I have said before. But I do not think that it would serve any useful purpose at this time to protract the matter. I will, therefore, conclude within 2 minutes from starting with my congratulations to you, Judge Souter, on a really outstanding, not performance, outstanding responses.

You are obviously a thorough jurist. You come really well prepared. You have been, I think, as forthcoming as you could be, although I would have preferred a few more specific answers to a few more specific cases, a few more specific questions that I think involve matters not likely to come before your Court, but I—or the Court that you may be confirmed to, without prejudging it.

I compliment you for what you have done here. I say finally, my thanks and congratulations to the chairman for his usual outstanding job.

The CHAIRMAN. Thank you very much, Senator.

By the way, the chairman committed a faux pas this morning, among many I have committed. One was that, while congratulating you on your birthday, I failed to point out that it is also Senator Grassley's birthday. So I would say happy birthday to you, Senator. I apologize for—

Senator GRASSLEY. Can I suggest that it is also the birthday of our U.S. Constitution?

The CHAIRMAN. Yes, you can.

Senator GRASSLEY. The signing of it, that is.

The CHAIRMAN. I will celebrate all three this evening.

Happy birthday, Senator.

Let me conclude, as I said, with three questions; and this will be the end.

Judge, when deciding—and I want to go back to methodology for a minute; slightly different than your overall judicial philosophy. When deciding if there is a fundamental unenumerated right, applying your methodology, you say, in quote: There should be a quest not for evidence, which is a matter of definition or a matter of absolute necessity, has either got to be of narrow compass or of general compass. Rather, it has got to be a quest for reliable evidence, and there may be reliable evidence of great generality. End of quote.

That was in response to my question yesterday about footnote six in the *Michael H.* case.

Judge SOUTER. Yes.

The CHAIRMAN. Now, I have two key questions. How old does this tradition that you are seeking to determine whether or not it has been established have to be before it is considered a tradition worthy of protecting under the Constitution?

And just so this is not viewed by some as some crazy idea, what happens when there is a mixed tradition of a practice having been lawful for some time and then unlawful at a later time in that continuum? Or unlawful and then lawful? How far back do you go to look? And how far forward is it relevant in establishing the tradition?

I am not looking for an exact number of years. But do you look at the whole continuum? Give me a sense of what you look at.

Judge SOUTER. Well, I think it is fair to say that you look at the whole continuum for whatever the evidence may be worth. The whole continuum may tell you something about what you can extrapolate from it as a principle which either is or is not continuous through our history.

I do not think there is a point at which you can say, well, I draw the line and I will consider no evidence after this point or no evidence before this point. But the point is, at whatever historical period the evidence may come into existence, what we are really looking for is a principle of liberty which can reasonably be said to have been assumed in the Constitution.

The CHAIRMAN. The reason I ask the question is we are in the midst of such phenomenal technological change. In this country we are considering items that will be on your agenda in the year 2020, if confirmed, God willing, you are living out the expected, your life expectancy, that relate to everything from genetic engineering to potentially cloning, to surrogate parenthood, all of which by the time you are making decisions in the year 2020 may be very much established traditions. There may be 30 years of it being an accepted and protected practice in the 50 States and territories for surrogate parenthood, something that, although you may find a principle to be protected, clearly was not something that anyone considered not only at the birth of our Constitution but in 1970, let alone 1950. And that is why I asked the question.

So, it will, there could be 30 years of an established practice that could make the tradition, assuming there were a principle found within that tradition, make that a sufficient amount of time to find a protection of such an asserted liberty right. Is that correct?

Judge SOUTER. Well, I guess my only cavil is, I do not, I do not think it is, it is probably right to phrase it by saying that is a sufficient amount of time. That is certainly indicative of the acceptance of a principle during that time, and that is good evidence. The question is, is there any other evidence? Is there evidence to the contrary? Is the evidence of whatever principle may be behind the 30 year or the 50 year or whatever year tradition, a sufficiently reliable indication of an enduring principle of liberty.

The CHAIRMAN. Well, were there more time, I would like to pursue that.

Let me conclude by suggesting, Judge, that during the several days of your testimony—and I, too, have been impressed with your knowledge. I have been impressed with your ability to articulate your position. I have been impressed with the ease with which you were able to make clear the purpose behind, the rationale behind a number of decisions, including even referring to the sense within those opinions that most would spend time in a law library having to look up. And you have done it off the top of your head. I have been truly impressed.

I must also admit I have not changed my mind, but I have, during the period of your testimony, gone from leaning against voting for you, to leaning for voting for you, to leaning against voting for you. And I was being a bit facetious a moment ago when I suggested that the fact that you have those who view themselves—and there is no such animal—as being literalist, those who look only to the text, and if they do not find it there—there are some, but not many who think they are, because they find it very difficult to live with the results that would have been wrought and that methodology been employed—the more you have raised questions in their mind, I acknowledge, the more you settled mine.

I appreciate your willingness to go into the detail you have in terms of your methodology.

I am still, as you know, disappointed that you were willing to go into a good deal of greater detail on matters that related to issues other than procreation than you were with regard to procreation, even though in my view they are unsettled areas as well as the whole question of, that is, the most in dispute.

But for me, the judgment that I am going to have to make is whether or not after rereading your testimony, and this is one of those few cases where I can assure you I will, not all of it, but the parts that relate to the areas of greatest concern to me; whether or not I am convinced that you are a man of open mind with the judicial philosophy, methodology and principled way of approaching how to make these judgments that is consistent with, to paraphrase the Senator from Pennsylvania, an expansive reading of the Constitution that would have allowed you to reach the decisions that I think the vast, vast, vast majority of Americans believe were appropriate for the court to reach.

And I realize that is not your problem; that is mine. I have to make that judgment, and I obviously will. But again, I think it has been a tour de force on your part. I have been impressed and not merely with your recall but also with your willingness as the day has gone on, to, in my view, be more open and expansive in your response relative to your philosophy and to your methodology.

So I thank you very, very much. I know of no reason at this juncture why you would be asked to come back. But I will tell you, since it is a practice of this committee, as you know, to invite witnesses who wish to testify for and against your nomination, and that is historically the way in which it functions, that if anyone, whether they are testifying for you or against you, during the period of the next several days makes assertions, statements or characterizations relative to your philosophy or anything else that you feel you would like to clarify, that I guarantee you that the witness stand is yours again if you wish to take it. And it is not our intention and is not likely that we would ask you to resume any questioning prior to us making a judgment to vote for or against you in the committee.

I would invite you, Judge, if you have any closing comment you wish to make, we would be delighted to hear it.

Judge SOUTER. I promise you, Mr. Chairman, I really will be brief in what I have to say. There are two things that I do want to say.

The first I will address to you, but I will address to you as the chairman of this entire committee. It is one of those things that goes without saying, it would go without saying, but it must be said. And that is you have treated me with such consummate fairness, and the whole committee has, that in whatever court I may sit I hope I will always be able to do as well when I am presiding.

The second thing is to thank you and the committee for something broader than that even. That is, I realize there are many alternatives that you may have or some alternatives that you may have in considering a nomination like this. What I am most grateful for is that you have not only, and you are now not only considering my nomination, but you have made me a part of that great process. I am very proud to have been here. I am very grateful to you for having me, every one of you. Thank you.

The CHAIRMAN. Thank you very much, Judge.

As they say, you will be hearing from us shortly. Thank you very, very much.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Now we will recess for 1 minute here.

[Recess.]

The CHAIRMAN. The hearing will come back to order.

One of my colleagues asked the question, is it possible, under the committee rules, to vote for Souter and against Rudman, and the answer is we will take that under advisement. I am not sure. [Laughter.]

I want to thank Senator Rudman, by the way, for spending as much time as he has here and for being available to answer my questions, as we have tried to work out the mechanics of this hearing. I thank him very much.

Now, our panel who has been waiting here a long, long, long time, as a matter of fact, I suspect the entire day, is the American Bar Association panel: Ralph I. Lancaster, Jr., is the chairperson of the Standing Committee on the Federal Judiciary; and Alice E. Richmond is the first circuit representative of the Standing Committee on the Federal Judiciary, and Jorge Rangel is the fifth circuit representative of the Standing Committee on the Federal Judi-

ciary—it would be a heck of a thing to leave you off at this point. I apologize.

Now I will yield to Senator Kennedy for a moment.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to join in welcoming the panel and pay a special welcome to Alice Richmond, who has been representing the first circuit and who has had a very distinguished career in her own right, and I want to add my welcome to her.

I want all of our panel to give our best wishes to the president of the American Bar Association, Jack Curtain, who is a resident of Massachusetts, has been a long-time friend, and just got out of the hospital today from successful surgery, and I think all of us look forward to his early return to his practice of law and also leadership in the ABA, and I wish you would extend to him my very warm regards and wishes, and extend my appreciation to the time that you spent, Ms. Richmond.

Thank you.

Ms. RICHMOND. Thank you, Senator.

The CHAIRMAN. Let me say to the entire panel, I appreciate your waiting until this hour, and the reason why I asked you to is I consider the testimony of the ABA to be very, very important. I know there is some controversy and has been over the last several years, but I for one and, as chairperson of this committee, have in fact always thought and continue to think that your participation in this process is essential and that is why you are, to your chagrin, I suspect, awarded what we consider to be the position of honor as the first public witness. You probably at this hour wish that maybe you had not been awarded that position.

With that, let me invite you, Mr. Lancaster, to make any comment you would like, any opening statement on behalf of the committee, and then we will ask you some questions, if we may, or if your colleagues would like to make a statement, that is fine.

**PANEL CONSISTING OF RALPH I. LANCASTER, JR., CHAIRPERSON, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION; ALICE E. RICHMOND, FIRST CIRCUIT REPRESENTATIVE, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION; AND JORGE RANGEL, FIFTH CIRCUIT REPRESENTATIVE, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION**

#### **STATEMENT OF RALPH I. LANCASTER**

Mr. LANCASTER. Thank you, Senator. Our introductory remarks will be very brief.

Mr. Chairman, as you indicated, I am Ralph Lancaster. I practice law in Portland, ME, and I have the privilege of chairing the ABA's Standing Committee on the Judiciary, and as you also indicated, with me tonight are Alice Richmond, who practices law in Boston, MA, and is the first circuit representative on the committee, and Jorge Rangel, of Corpus Christi, TX, who is the fifth circuit representative on the committee.

We appear to present the views of the committee on the nomination of the Honorable David H. Souter, to be an Associate Justice of the Supreme Court of the United States.

At the request of the Attorney General, our committee evaluated the professional competence, the judicial temperament and integrity of Judge Souter. Our work included discussions with Federal and State judges, practicing lawyers and law school deans and professors and faculty members, some of whom are specialists in constitutional law and experts on the Supreme Court practice.

The committee reviewed many of Judge Souter's opinions and, in addition, as our report reflects, Judge Souter's New Hampshire Supreme Court opinions were reviewed by three reading committees, one chaired by Rex Lee, the former Solicitor General of the United States, who now is the president of Brigham Young, one chaired by Ronald Allen, of Northwestern University, who is a professor there, and one chaired by Dean Paul Brest, of Stanford.

In addition, the three members who appear here before you tonight interviewed Judge Souter and, based upon our evaluation, the committee has reported to the Attorney General and to this committee that it is unanimously of the opinion that Judge Souter is entitled to the committee's highest evaluation for a nominee to the Supreme Court of the United States, well qualified.

I have filed with this committee a letter describing the results of our investigation and shall not repeat those results in detail here, but I do request that that letter be included in the record of these proceedings.

The CHAIRMAN. It will be placed in the record.

[The letter referred to follows:]



**AMERICAN BAR ASSOCIATION** **Standing Committee on Federal Judiciary**

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Hon. Joseph R. Biden, Jr., Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6275

September 14, 1990

Dear Mr. Chairman:

This letter is submitted in response to your Committee's invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion regarding the nomination of the Honorable David H. Souter to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Souter is based on its investigation of his professional competence, integrity, and judicial temperament.

THE PROCESS

The Committee investigation began on July 24, 1990 and ended on September 4, 1990.

Committee members contacted judges throughout the United States. Those contacted included members of the United States Supreme Court, members of the Federal Courts of Appeals, members of the Federal District Courts and members of State Courts, including Judge Souter's colleagues from the New Hampshire state courts.

Committee members contacted practicing lawyers throughout the United States with particular emphasis on those who had occasion to appear before Judge Souter and colleagues of Judge Souter during his tenure in the office of the Attorney General of the State of New Hampshire.

Committee members contacted deans and faculty members of law schools throughout the United States, including professors at the law school which Judge Souter attended, and constitutional and Supreme Court scholars.

Because of the nature of Judge Souter's experience, most of those interviewed who were able to contribute to the Committee's evaluation were those who had worked with him, served with him on the New Hampshire courts or

appeared before him either at the Superior Court or Supreme Court level.

Judge Souter was interviewed by three members of this Committee.

At the request of this Committee, all of Judge Souter's more than 200 New Hampshire Supreme Court opinions were reviewed by:

1. A Reading Committee chaired by Rex E. Lee, former Solicitor General of the United States and presently President of Brigham Young University;
2. A Reading Committee chaired by Professor Ronald Allen of the Northwestern School of Law in Chicago; and
3. A Reading Committee chaired by Dean Paul Brest of the Stanford Law School.\*

The results of the reviews by those three Reading Committees were independently analyzed and evaluated by each member of the Committee. In addition, each member of the Committee independently read and analyzed selected New Hampshire Supreme Court opinions authored by Judge Souter. All of Judge Souter's opinions as Attorney General and many of his Superior Court opinions were also reviewed, analyzed and evaluated.

This Committee also had the benefit of a very thorough and most recent investigation of Judge Souter for appointment to the First Circuit Court of Appeals. While the same factors considered with respect to the lower federal courts are relevant to an appointment to the United States Supreme Court, this Committee's Supreme Court investigations are based upon the premise that the Supreme Court requires a person with exceptional professional qualifications. For that reason, a Supreme Court investigation by this Committee, while directed to the same professional qualifications of integrity, professional competence and judicial temperament, requires a new and expanded investigation. In this instance, because of the recency of our investigation for Judge Souter's appointment to the First Circuit Court of Appeals, much of the preliminary work had already been accomplished. Building upon that base, each member of the Committee conducted an investigation within his or her own circuit which, as noted above, included calls to federal and state judges, practicing lawyers, law school professors and deans and those who had known Judge Souter as a Rhodes Scholar, in law school, during his tenure in the Office of the Attorney General of New Hampshire and while on the Superior and Supreme Courts of New Hampshire, with special emphasis on interviews of those who had appeared before him, or served with him, during his 12-year tenure as a judge.

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\* Members of these three Reading Committees who participated are listed in Exhibit A to this letter.

EVALUATIONIntegrity

Judge Souter's integrity, character and general reputation appear to be of the highest order and without blemish.

Judicial Temperament

Judge Souter's judicial temperament appears to meet the high standards of this Committee's definition.

Comments such as "no biases, very fair," "very honorable and fair," "dignified demeanor," and "very honest, decent, kind" were made repeatedly throughout the interviews.

A small number of those interviewed expressed concern about Judge Souter's method of aggressively questioning appellate lawyers. After exhaustive interviews, the Committee is satisfied that Judge Souter is always very well prepared and that his questioning is in fact searching but generally regarded as not unpleasant. As one lawyer phrased it, Judge Souter:

. . . is always prepared and has an incredible ability to cut through and ask terrifying questions and is fun to appear before because he always challenges your presentation.

A very few of those interviewed questioned Judge Souter's evenhandedness in his treatment of parties and issues. Concerns that Judge Souter is "too deferential to the Legislature" or "biased in favor of government action" or "brings his personal predilections to his opinions" were thoroughly investigated by this Committee. Each of these concerns was discussed with Judge Souter and examined in detail by the Committee in light of all the other information we had gathered. We concluded that Judge Souter's opinions are shaped by his conception of the role of an appellate judge and not by any lack of evenhandedness.

Professional Competence

Judge Souter's professional competence appears to meet the high standards of the Committee.

Professional Background. The Committee was favorably impressed with Judge Souter's professional training and experience. His undergraduate and law school education at Harvard, his selection as a Rhodes Scholar, his experiences in the Office of the Attorney General of New Hampshire, and his judicial service provide a solid background for service on the Supreme Court of the United States.

Interviews. Those interviewed who had direct knowledge of Judge Souter's professional work spoke in very positive terms about

his intellectual capacity, writing and analytical ability, knowledge of the law, industry, and diligence.

Phrases such as "very scholarly," "a sharp mind," "absolutely brilliant," "intellectually gifted," "very industrious," "a significant intellect" were repeatedly used. No one questioned Judge Souter's intellectual capacity, analytical ability, industry or diligence.

Writings. This Committee's independent evaluation of Judge Souter's writing satisfied it that his opinions are on the whole technically and persuasively crafted, fair and evenhanded and generally do not go beyond points at issue. Based upon its independent evaluation, this Committee satisfied itself that Judge Souter has the ability to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases.

As noted above, three Reading Committees were asked to review Judge Souter's New Hampshire Supreme Court opinions and to furnish to this Committee their opinions of Judge Souter's analytical ability and writing skills in the context of his professional competency. There was remarkable consistency among the three Reading Committees in their independent evaluations of his writings. They described his writing as well organized and comprehensive and concluded that he is an exceedingly intelligent and capable jurist. One commentator noted that he is an extremely able state appellate court judge in the classic mold of a common law jurist." Another noted that "there is . . . no question that he possesses highly sophisticated legal skills that are not daunted by the intricacies of complex cases."

An occasional reviewer described Judge Souter's prose as "relatively dry" or "somewhat discursive." This Committee concluded that such stylistic criticisms did not substantially affect its opinion as to his overall qualifications.

A very few members of the Reading Committee questioned whether Judge Souter's opinions reflect the capacity to deal ably with complex constitutional matters, suggesting that matters before the courts on which he sat generally did not involve such issues. Others were satisfied that he does possess the intellectual and analytical skills to deal with issues presented to the United States Supreme Court.

In the course of their responses to their charge, the Reading Committees made numerous references to concurrences or dissents authored by Judge Souter as examples of the quality of his work. It was clear from their comments, and from the independent analyses of Judge Souter's writing by this Committee, that the best examples of Judge Souter's writing and intellectual abilities were found in his dissents and concurrences. By way of example only, reference was

made to his dissent in Keeton v. Hustler Magazine, Inc., 549 A.2d 1187 (N.H. 1988) where Judge Souter engaged in a careful interests analysis which was characterized as demonstrating ". . . a clear ability to pierce traditional formulas in the course of forging coherent law." Similarly, reference was made to his dissenting opinion in State v. Koppel, 499 A.2d 977 (N.H. 1985) which prefigured the analysis adopted by the majority when the United States Supreme Court upheld the constitutionality of sobriety checkpoints in Michigan State Police v. Sitz, 496 U.S. \_\_\_, 110 L.Ed.2d 412 (1990). It was also pointed out that in his concurrence in Petition of Chapman, 509 A.2d 753 (N.H. 1986) Judge Souter anticipated by four years the Supreme Court's decision in Keller v. State Bar of California, 495 U.S. \_\_\_, 110 L.Ed.2d 1 (1990) (prohibiting use of mandatory Bar dues for certain lobbying activities).

Based upon its own independent evaluation of the opinions authored by Judge Souter and the responses of the Reading Committees, and based upon the results of the rest of its investigation, including extensive interviews with Judge Souter, this Committee is satisfied that whether one agrees or disagrees with the court's holdings, the opinions are carefully crafted, analytically sound and clearly professionally competent.

It is the opinion of the Committee that Judge Souter is highly competent and possesses the scholarly, analytical and writing skills necessary to serve successfully on the Supreme Court of the United States.

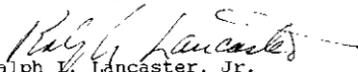
#### CONCLUSION

Based upon all of the information available to it, this Committee concluded that Judge Souter is entitled to its highest rating for a nominee to the Supreme Court of the United States.

Accordingly, this Committee unanimously found Judge Souter "Well Qualified" for appointment to the Supreme Court of the United States.

The Committee will review its report at the conclusion of the hearings and notify you if any circumstances have developed that dictate modification of these views.

Respectfully submitted,

  
Ralph V. Lancaster, Jr.  
Chair

714-RIL

EXHIBIT AREADING COMMITTEESREX E. LEE, CHAIR

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Professor Drew S. Days  
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Professor Robert Weisberg

Mr. LANCASTER. With that, Mr. Chairman, I will simply say that we are very pleased to have had the opportunity to appear here tonight and we are very grateful to you, even though the hour is late, for giving us the opportunity to appear here and not having to return tomorrow.

The CHAIRMAN. Let me begin, if I may, by asking you, Mr. Lancaster or either of your colleagues, if they wish to answer: You have testified in your statement that your committee used three criteria to evaluate Judge Souter's nomination, his competence, his integrity, and his judicial temperament.

Did the committee, in any way, evaluate Judge Souter's constitutional philosophy?

Mr. LANCASTER. Only to the extent that it would in any way impact on the three criteria which we investigated, professional competence, judicial temperament, and integrity.

The CHAIRMAN. Having listened to Judge Souter testify here for several days, I have no doubt that he is a man of great integrity and competence, and I have no doubt that he has a reasonable judicial temperament. He has demonstrated that, in my view, over the period of the questioning.

To the extent that there are serious and debatable issues involving his nomination, I believe they involve Judge Souter's views on his constitutional philosophy. Would you agree, then, that the ABA's evaluation of Judge Souter does not and should not address or relate to these concerns?

Mr. LANCASTER. Clearly, I would agree that the ABA's investigation should not include any investigation into or consideration of his ideology or his political philosophy. To the extent that his judicial philosophy were to be shown to affect either his predilections toward or his bias or his commitment to equal justice, I think they are proper within the scope of our investigation.

The CHAIRMAN. Running the risk of opening a Pandora's box, if Judge Souter had said to you his judicial philosophy dictates that the vast majority of cases that have been decided relating to equal justice were wrongly decided, beginning with *Brown*, and if he were on the Court he would be compelled to seek to reopen those cases and overrule them, would your committee still have, notwithstanding he was a man of intelligence, competence and—what was the other criteria that was used—competence, integrity, and judicial temperament, would they still have supported him?

Mr. LANCASTER. Judge Souter's responses to our interviews and if his record showed that he had a closed mind and that he was approaching issues, not as an independent jurist, but as a man who, either because of bias or because of personal judgments or personal moral positions, was totally closed, would not listen to arguments and would not bring his obviously superior intellect to a judgment which would show that he was an independent jurist, yes, the answer would be yes.

The CHAIRMAN. If Judge Souter were to have volunteered to you that which he did not and it is not his view, would have volunteered to you that the equal protection clause of the 14th amendment does not apply to women, would you have been willing, sir—well, I am going to ask all three of you that—to have voted to sup-

port his nomination, notwithstanding fact that he is a man of competence, integrity and judicial temperament? Ms. Richmond?

Ms. RICHMOND. I would not.

Mr. RANGEL. I would not, either.

The CHAIRMAN. Thank you. I will not ask the chairman, because occasionally the chairman has to do a lot of things, and since there are two of the three people answered on the panel, I will not press the chairman.

Let me yield to my colleague from Iowa.

Mr. GRASSLEY. Mr. Chairman, I am going to waive any questions that might be asked, but I do have an observation, and I am sure, Mr. Chairman, you would not be surprised if the observation I make about the ABA is 180 degrees different from yours, but I would like to raise that issue.

I start by saying to you, Mr. Lancaster, that I appreciate your efforts to try to restore the ABA committee to its legitimate and very modest role, and I appreciate the time that you spent with me in my office when you first took on the role as chairman.

What I have to say is somewhat different than what the chairman had to say, when he introduced you as the ABA committee. I mean no personal disrespect when I say that especially when it comes to Supreme Court nominees, the ABA is at best an irrelevancy.

This nominee, Mr. Souter, proves it better than anything I could say. Everybody on this planet Earth recognizes that Judge Souter is a very skilled lawyer. We all know he writes sound opinions and we all know that he is a man of impeccable integrity. Not surprisingly, that is your conclusion, as well.

You say that you read all of his opinions and had outside experts do the same. So did we. Our chairman even employed his own outside law professors as experts.

You say you talked to people who know him and appeared before him, and so did we. You said you had an extensive interview with him. Well, I doubt that you have spent more than the 15 hours or so that we as a committee have, asking him questions like we did. And because you cannot do any more than we can, you cannot tell us anything that we do not already know and have known for several weeks.

In fact, someone more cynical than I might suggest that the only time the ABA has a meaningful role in Supreme Court nominations is when you smuggle illicit political considerations into the evaluation. On the other hand, when the ABA sticks to objective criteria, the result is just what we would expect. So, then, my question: Why do we need the ABA?

Now, perhaps you hope that your ratification of what we already know about Judge Souter will rehabilitate the committee in its relationship with the Attorney General, and I do not know if this strategy is working. Maybe the Attorney General is simply easier to please than some of us on this committee are.

Mr. Chairman, I know that you have heard me say this before, but it bears repeating, that I honestly think the time has come to give the ABA a gold watch for their years of service and retire them and let it go at that.

The CHAIRMAN. I thank the Senator. I would only ask who would pay for the gold watch.

Senator GRASSLEY. Do you want me to buy it? [Laughter.]

The CHAIRMAN. I thank the Senator. As he indicated, we do have a very different point of view.

Now my colleague from Alabama, Senator Heflin. Judge, do you have any questions?

Senator HEFLIN. I wanted to tell you that I think you have done a good job. I think over the years the ABA has done an outstanding job and has been of great assistance to the committee. We do not always agree. I know that I differed on a couple at one time. Nevertheless, I think that the present policy that you follow is commendable and it certainly supplements. The American people I think are entitled to know that a careful outside body selected three panels of truly experts who reviewed all of his writings and expressed an opinion concerning them.

I am a little interested in just one or two things. I noticed that one of your members is William J. Brennan, III, of New Jersey. Is that the grandson of the Justice who just left the Court?

Mr. LANCASTER. He is the son.

Senator HEFLIN. He is the son. That is sort of unusual.

The methodology that was used with your reading panels, you had an interview in which all members of your committee were present and interviewed, or were they separate? How was the interview or interviews with Judge Souter conducted?

Mr. LANCASTER. First, Senator Heflin, you will recall that we investigated Judge Souter for the first circuit earlier this year. That investigation was conducted, as are all our investigations for district and court of appeals judges, by the circuit member who has the responsibility for that jurisdiction. In this case, that was Alice Richmond.

In the course of that investigation, Ms. Richmond spent a substantial amount of time with Judge Souter in an interview with him and the results of that interview were then, as they always are, shared with the other members of the committee.

In this instance, the investigation for the appointment to the Supreme Court, the three people appearing before you tonight traveled to New Hampshire and visited with Judge Souter for an extended interview, and then there were additional telephonic interviews. Over the course of that entire period, I would estimate that we spent some 10 to 15 hours in discussions with Judge Souter.

Senator HEFLIN. Ms. Richmond, in your investigation for the first circuit and again in regards to this, I assume you followed the methodology of contacting lawyers and judges who had practiced before Judge Souter and got their opinion. Were lay citizens also contacted?

Ms. RICHMOND. No, sir. I spoke with lawyers and judges in New Hampshire and throughout the first circuit, I think probably in excess of 100 or 125.

Mr. LANCASTER. There were, however, Senator, some lay people contacted throughout the rest of the country.

Senator HEFLIN. In your investigation, Ms. Richmond, other than perhaps what we might say derogatory, and that may be too tough of a word, pertaining to judicial philosophy that undoubtedly was

expressed as you interviewed various people, were there complaints from any person pertaining to personal temperament or were there complaints that were made about him in that regard?

Ms. RICHMOND. Well, as you know, Senator, your committee promises confidentiality, and so I would be very hesitant to answer the question in a way that would indicate that anyone made negative comments about Judge Souter, particularly if those comments could be traced.

I think it fair to say that the vast, vast majority of the people with whom I spoke had nothing but praise for Judge Souter's temperament.

Senator HEFLIN. I believe that is all.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Very briefly, I join in the thanks to the American Bar Association for the work which you have done. You certainly could not be an irrelevancy, to draw Senator Grassley's comment to that extent. I think you have had a very profound effect, as evidenced by my good friend's comments.

When you do not find anything differently from what we have found, that does not suggest an irrelevancy, it buttresses what we have done. But you might well have found something that would be different, and I think on other occasions the American Bar Association has found matters which are different.

When the American Bar Association undertook to look at philosophy, we were well-qualified to ascribe the appropriate weight to your findings. We were not obligated to pay any undue deference to your philosophy, when that was expressed, but we had a very useful hearing and I think the parameters have been established as to what the Judiciary Committee would like to hear, in terms of professional competency and I think you have performed a very valuable service.

I would like to add that it is not only Supreme Court nominees that your committee functions, and in that area, we do a considerable amount of work. But when you report that you have read all 220 opinions, that is something I did not do. I read several dozens of them, but I did not read all 220. My staff did and selected the ones for me to read. But when you have done that, that is a very considerable undertaking and I thank you for it.

But I think it ought to be comment that, on a Supreme Court nominee, which is high profile and widely noted, which is not an irrelevancy in the close attention given by the members of the Judiciary Committee, although some are absent now, that you evaluate all of the Federal judges, the district judges and the court of appeals judges, and if you attend the Judiciary Committee hearings on those judges, two is the maximum customarily, and sometimes only one.

When a fellow named David H. Souter appeared before the Judiciary Committee for the first circuit a few months ago, two members were present and one was present accidentally, because he had a member of his own State there and that was me. Only Senator Kennedy was there presiding and I happened to be there, because there were Pennsylvania nominees there.

And I know that you have done mammoth work on many, many judges with long files and interviewed a great many people, so that the American Bar Association has performed a great public service, and if you do exceed the bounds of relevancy, we will be able to figure that out and give it appropriate weight.

I thank you for that, and I thank you especially for staying so late.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I just want to join in commending you, and I am pleased that one of the members of the reading committees was from Northwestern University School of Law in the State of Illinois. My wife is an alumna of that school.

Let me just ask one very, very minor question. As I look at the reading committees, two of the three are entirely made up of law school professors. The third has a majority of law school professors. Not that having practicing attorneys as, say, a fourth reading committee would make a difference, but was that considered at all, or is it just not practical because of the enormous volume of reading there?

Mr. LANCASTER. Historically, the practice had been to have reading committees from law schools and then to have a reading committee usually of associates from the office of the chair of the committee.

We followed the practice of having two reading committees in this instance from two respected law schools. It was a suggestion of some of the members of our committee, particularly one from the ninth circuit, that instead of using associates from the law firm of the chair of the committee, that we ought to go outside that arena and obtain someone who had national prominence and national respect, and enlist that individual in the selection of others who had particular expertise with the Supreme Court, either as professors or as practitioners.

I called Rex Lee, in whom I have great confidence. I think he has a national reputation, not only for great expertise as a lawyer, but also as an individual, great respect from the community, and I told him exactly what our function is, that our role is solely to investigate professional competence, judicial temperament and integrity, and I asked him to put together this list, to select the members on his committee, and I left the selection to him, so that there could not be any suggestion that somehow I had influenced that selection, and that is how it came about, Senator.

Senator SIMON. OK. And generally you have found this worked satisfactorily?

Mr. LANCASTER. This is the first time that we have used it, but we have been very pleased with it. As our report reflects, there was remarkable consistency in the reports that we received from these three committees working independently to investigate through the reading of Judge Souter's opinions.

Senator SIMON. I did not remember this from the previous nominations, and the reason I did not remember it is we had not done it before.

Mr. LANCASTER. Exactly.

Senator SIMON. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

You all are very good to be here. I assume you did not think this was going to be a referendum on the ABA. I hope we are beyond this, because I do think it is relevant, that if someone is out of the mainstream of interpretation of the Constitution and application of constitutional law, that is different than the last 70 years of precedent and the last 70 years of members on the bench, that I hope you would say, hey, wait a minute, at least point that out to us, if we did not already know it.

I agree with Senator Specter, the job that you do for this committee—I might briefly, with you sitting here, and I mean briefly, explain the process.

I have just proposed and introduced legislation calling for the establishment of another 70 judges, 77, if I am not mistaken. Over the period of this year, I will probably have this committee decide on somewhere in excess of 100 judges. There are as many as 175 in 1 year, counting vacancies in one Congress and new appointees, and your input is extremely valuable.

No one Senator could sit and do all of those hearings. We have a five-person investigative staff that is augmented, not directly but indirectly, by the work that your committee does, and it is always first rate and you have always been involved, and as long as I am chairman and I have anything to do with it, you will continue to be, because you are of great assistance to the committee.

As I indicated, Mr. Lancaster, and as the Senator from Pennsylvania indicated, we know enough to know whether or not we want to accept your recommendation. All it is is a recommendation. It is not chiseled in stone. It is a recommendation, but one that I value greatly and I value your time and your effort that you put into this a great deal.

Is there anything any one of you would like to make as a closing comment?

Mr. LANCASTER. I think, Senator, on behalf of the committee, I will thank those members who spoke so glowingly of our work. I will tell you, from my own personal experience in now my seventh year on this committee, that I have never served on a committee which has given me greater satisfaction. I think it makes an enormous contribution to the judicial system of this country and I am very proud of the way it works.

I can only say, finally—and I regret that Senator Grassley is not here to hear this—that there was an extended discussion this afternoon of what is meant by congressional silence, and I would not want the record to reflect that, by my silence and my refusal or inability to respond to Senator Grassley, that I in any way agreed or disagreed with his comments. I think everyone here knows how I would have responded, had I responded.

Finally, my term eventually, and perhaps sooner than later, will come to an end, and if Senator Grassley wants to give me a gold watch, I would be happy to take it. [Laughter.]

The CHAIRMAN. Well said.

Mr. RANGEL. I just want to add one thing. I have been on the committee now for a year and I have been impressed with the amount of time that all the committee members have put in the work of the committee.

Also, I would like to thank the chairman for giving us the opportunity and giving me the opportunity to be here today.

The CHAIRMAN. Well, I have never seen a time when you have not—as a matter of fact, the only time the criticism has been forthcoming is usually because you take so much time, that is, you put so much effort into it. I expect people just thought you to be a rubber stamp and you have not been that.

With that, I thank you. It passes. I have been here 18 years. The first 7 or 8 years, the liberals are always mad at you, and the then for about 4 years nobody is angry at you, and now the conservatives are angry with you. You must be doing something right, because everyone has been angry with you at one time or another.

I thank you very much for your time. Thank you, Ms. Richmond, for participating. And I am glad to see that there is a Texan there to balance off New England in this process. [Laughter.]

Mr. RANGEL. Thank you, Senator.

Mr. LANCASTER. Thank you.

The CHAIRMAN. Thanks again. We appreciate it.

Now, this is a very unusual circumstance for anyone to keep a Governor waiting at all. Governor, you have been extremely gracious. Would you please come forward.

I want to note, as you are taking the stand, that your senior Senator implored me to put you on ahead of time and, as I indicated—and I had discussion with the White House, as well—that the tradition has always been to put the ABA on first, for as long as I am aware. It is a little bit like the President asking the first question to—I guess it is the AP, is it—the AP reporter, and I hope you understand.

I noticed that you have a beautiful young woman with you.

Governor GREGG. She is my staff.

The CHAIRMAN. She is your staff. Is that your daughter?

Governor GREGG. My daughter, yes.

The CHAIRMAN. Molly, is it?

Governor GREGG. Molly, 12 years old and got out of school today to see the deliberative process, which she has never seen.

The CHAIRMAN. Thank you very, very much for being so gracious today. It is probably the most boring thing you have ever done, although having three children myself, having a daddy in politics, she probably can think of things that are even more boring in your experience. Thank you, honey, for being here today.

Senator SIMON. Mr. Chairman, we ought to note that Molly is skipping school today, let the record show that here.

The CHAIRMAN. No, she—

Governor GREGG. But learning much. This had definitely been a schooling experience for her.

The CHAIRMAN. Well, I think it is worth it and I would not be surprised, the Governor may very well have cancelled school today, so Molly could come, I do not know. I thank you.

Would you like to make an opening comment at all, Senator Humphrey?

Senator HUMPHREY. Well, I thank Governor Gregg for his patience and for waiting all day. I do think that we ought to consider changing precedent, that Governors are more important and out-rank even the ABA, as high and mighty as the ABA thinks it is. In all seriousness, I do think we ought not to keep Governors waiting. ABA can wait, but Governors ought to go first, it seems to me. I hope we can consider that in the future.

The CHAIRMAN. I thank the Senator.

As you know, Governor Gregg, it is not even the practice to have a Governor testify alone. Usually, you would be put on a panel with other important people like Senators who wish to testify, like tomorrow. So, we have made an exception in having you testify alone, Governor, which was your request, to not be part of a panel, and I hope you are in no way offended. I think Governors are important and I thank you for being here.

With that, Governor, we would welcome any comment you have to make.

#### STATEMENT OF HON. JUDD GREGG, GOVERNOR, STATE OF NEW HAMPSHIRE

Governor GREGG. Thank you, Mr. Chairman.

Let me begin by stating that, as the ABA, I did not want to be the center of controversy over being a Governor testifying.

I would like to congratulate the chairman. I have been extraordinarily impressed with the way these hearings have been managed. I have watched them, as everyone in New Hampshire is watching them, with intense interest, and have been very impressed with your fairness as the Chair, and with the manner in which you have allowed the questioning by your members. I served in the House for 8 years and we did not have the sort of generosity of time that you have here, and I think this hearing has been run in a way that everyone who has participated in it can take great pride in having participated in it, and you, Mr. Chairman, deserve a lot of respect for having put the hearing together in this manner.

The CHAIRMAN. Thank you, Governor.

Governor GREGG. And as Governor, quite honestly, it has been nice to be here all day. As you may know, we come from a small State, as yourself, and most of the folks from New Hampshire are now in Washington, so it is a great place to campaign. Most of my constituents are already down here. [Laughter.]

I do have a written statement and, because of the lateness of the hour and because of the fact that the Chair has been so courteous in allowing me to go forward at this time, I would just like to summarize it.

The CHAIRMAN. Take your time, seriously. I have all the time you would like to take.

Governor GREGG. Thank you very much.

I would like to begin, obviously, by thanking Senator Humphrey for his welcoming remarks, but also thanking both Senator Humphrey and Senator Rudman for their efforts to put me on the panel here today and to allow me to testify.

I come here today as Governor of New Hampshire, obviously, and I believe I speak for the people of the State of New Hampshire

when I say that we, as a State, are extraordinarily proud of the achievements of Justice Souter, and believe that he will be an exceptionally talented, thoughtful, concerned and effective addition to the membership of the Supreme Court of the United States.

That, obviously, has to be clear to you folks, after having listened to him now for approximately 30 hours.

I am a member of the New Hampshire bar, having joined the bar a few years after Justice Souter, therefore, our lives, both professionally and privately, have sort of paralleled each other, and, thus, I have gotten to know him quite well, because we have a small bar and in our State everyone knows everyone else.

It would be hard, therefore, for me to think of anyone, after having reviewed Justice Souter's experience from the standpoint of personal knowledge, to think of anyone with a higher level of personal integrity, wit, caring, quite honestly, and just plain Yankee common sense.

He is an extraordinary individual and I would not have higher recommendation for anyone that would come before this committee.

I do not want to spend any time on the issues which you have been discussing in the area of expertise and jurisprudence, because those are your areas of responsibility. I would like to address, however, two areas that I think, as Governor, I can speak to which have been uniquely raised.

The first is the editorial comment to the effect that Judge Souter is not a national figure, whose face is not readily known and writings not readily seen in our urban media centers. And for this reason, because he is not a national figure, I have seen editorial comment, and I am sure you have seen it, which implies that maybe he should not be moved up to the Supreme Court of the United States.

Having served 8 years in Washington, I put this down to "there ain't no smart people outside of Washington" syndrome, to which all of us have been exposed.

However, the history of the Supreme Court is that it has had members, who have been enumerable, quite honestly, who have turned into quite extraordinary jurists who had no prior national experience. Everyone on this committee, of course, represents some place other than the city of Washington, and there is no doubt that you can think back to your States, and do often, and I am sure return to your States, as I know you all do in a fairly regular manner, think back to your home towns and think of individuals who are extraordinary people within your States and communities, but who have no national recognition.

But if those individuals were brought to Washington—and I remember when I was in Congress, I used to think of such individuals quite often, depending on the area of responsibility that I was addressing as a Member of Congress—if those individuals were brought to Washington, whatever area of expertise they happened to have as their own—and I am not just talking about the jurists, I am talking about people in other areas of expertise—you know and I know that those individuals would excel and would dominate, quite honestly, here in Washington, as members of our National

Government, and would be tremendous contributors to our National Government.

So, I think the concept that you have to be from Washington or have to hold some sort of national recognition, in order to be moved to the position of the Supreme Court, belies the fact which we are all very much familiar with, as politicians from home States—I having returned home—that there is an awful lot of talent out there amongst our citizenry, and that this Nation has traditionally turned to that talent for 200 years and that talent has produced and produced consistently and extraordinarily, especially on the Supreme Court.

There is no question that David Souter does not step forward, therefore, as an acclaimed national figure, prior to his identification as a nominee for this job. But in the minds of the people with whom he serves in New Hampshire, there is also no question, that you will find no one who is more talented, capable, able or fairer and more better positioned to assume the Supreme Court membership.

The second issue I would like to address is one which I address to you, as politicians and as a politician. You must be as concerned as I am with single-issue politics. All of us have been through a variety of campaigns, or else we would not have assumed the position we now have.

We understand the debilitating effect that single-issue politics is having on our political system. Whether or not I can govern the State of New Hampshire well and whether or not you folks can be effective as Members of the Senate, in the most extraordinary and significant legislative body ever put on the face of the Earth, does not come down to your views on one single issue.

How many times, however, have we seen certain groups within our political spectrum demanding that, as their litmus test of good government, only one view will be acknowledged? This approach ignores the basic art of governance, which is the resolving of a variety of issues confronted in a constant flow of ever-changing events.

The next Justice appointed to the Supreme Court is not going to serve you a year or two. He will serve for a generation. He will be Molly's Justice. Within that generation, the variety of issues which will be faced by this Court cannot even be guessed at, much less specifically listed. Issues of significance will arise that go far beyond any single issue which may be the current topic of the day.

It is, therefore, ironic that those of us who should most understand the debilitating nature of single-issue politics should allow this forum to be dominated by the editorial writers of this country, by single-issue evaluation.

I do not know nor do I really seek to know the position of Justice Souter on the issue of *Roe v. Wade*, and I guess, as a Governor, I have been on the point of this issue as much as any other Governor in the country, being put in the position of vetoing, quite honestly without any regret, but with a strong and firm belief, a bill which would have given New Hampshire the most broad, liberal abortion rights in the country. I am unabashedly a pro-life proponent.

What I do know is that Justice Souter is one of the most thoughtful and intelligent, capable, considerable, witty and reasonable per-

sons that I have had the chance to serve with, as a fellow attorney and State officeholder and Member of Congress.

This is what I believe should be evaluated: The character of the individual and his basic sense of the structure of our Government and the direction and terms of our Constitution.

Let us not make the same mistakes of a single-minded emphasis that we so often see in our daily political lives. Let us not go down the path of single-issue politics when we are addressing a nomination for a generation. We, of all people, should be most sensitive to the detriment of such a course.

Again, I wish to thank you very much for the opportunity to be here today to speak on behalf of my friend, Justice Souter. Clearly, the citizens of New Hampshire take great pride in his nomination. We hope that you, the members of the Senate Judiciary Committee, agree with us that, in Justice Souter, you have the opportunity to confirm to the Supreme Court someone who will continue the dreams and reality that make up our freedoms, as guaranteed by the Constitution of the United States.

Thank you very much. I appreciate your courtesy.

The CHAIRMAN. Thank you, Governor.

Questions, Senator?

Senator HUMPHREY. Thank you, Governor Gregg. As you noted, New Hampshire is not one of the largest States. Have you ever heard a negative word within the legal profession or without about Judge Souter?

Governor GREGG. No, other than the fact that his mailbox leans to the left, if you look at it from the road. [Laughter.]

Senator HUMPHREY. Well, we have been through the grass and the mailbox and the black and white TV and all of that, his peculiarities, if you will. But I do find it remarkable that there has not been a negative note expressed by anyone in our State, neither Republican nor Democrat nor conservative nor liberal, no one that I am aware of has raised one negative note in connection with this nomination. I think that is pretty extraordinary.

Governor GREGG. Well, it is extraordinary, it is especially extraordinary for New Hampshire, which is intensely political as a result of our quadrennial events, and we have here today members of the political spectrum on both sides strongly endorsing Judge Souter's nomination, people who are very much the leadership of both parties, and reflects I think the fact that Judge Souter is considered to be, above everything else, a fair individual.

Senator HUMPHREY. Thank you for coming, Governor. I am sorry you have had to wait. You have been here since what time this morning?

Governor GREGG. Oh, we arrived reasonably early. We wanted to see the entire day's activities.

Senator HUMPHREY. I know that you and your daughter and staff have been here since this morning, so it has been a long day and it is going to be an even longer day before you get home tonight, but we appreciate your coming and your participation and your patience.

Governor GREGG. Thank you, Senator.

The CHAIRMAN. Governor, from Judge Souter's perspective inside the house, the mailbox leans to the right.

Senator HUMPHREY. We hope so.

The CHAIRMAN. And it is nice having your own plane, isn't it?

Senator HUMPHREY. It is unusual. [Laughter.]

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. You mentioned you have been a lawyer for 30 years. Have you ever tried a case with or against Judge Souter, when you were a lawyer?

Governor GREGG. I have not quite been an attorney for 30 years.

Senator HEFLIN. I thought you said—

Governor GREGG. If I did, I misstated. I have been an attorney since 1973 or 1974, I have forgotten which date when I became a member of the bar, maybe it was 1972, and I have not practiced since going into politics and being elected to Congress, so I had a window of practice of about 8 years, during which time I did practice, at least in one instance that I recall, before Justice Souter.

Senator HEFLIN. You practiced before him as a judge?

Governor GREGG. Yes.

Senator HEFLIN. Not as a lawyer in a case, where you were with him or against him?

Governor GREGG. No, I never had—well, I obviously had dealings with the attorney general's office when he was attorney general, but the attorney general in New Hampshire does not try cases.

Senator HEFLIN. I believe that is all.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I had the privilege of serving briefly on a committee in the House with the Governor when he was there. Totally apart from what is pending, I understand that you anticipate the State senate is going to take a downhill turn starting next year in New Hampshire.

Governor GREGG. Well, we look at it as a tremendous expression of the acknowledgment of the value of State government, that a U.S. Senator would return to the State of New Hampshire and participate in State government. We see that as an expression of where the action is.

Senator SIMON. OK. I simply want to join in expressing our appreciation for your being here and for being so patient for so long. We appreciate it.

Governor GREGG. Thank you, Senator. I certainly enjoyed having the opportunity to serve with you on the Science Committee.

Senator SIMON. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Molly, let me say to you, honey, that if you have not had a chance to have dinner yet, dessert is on me, unless daddy is taking you straight home, because you deserve something special today for being here all this time.

Is there any closing comment you would like to make, Governor?

Governor GREGG. I appreciate your courtesy, Senator. Thank you very much.

The CHAIRMAN. Thank you for taking the time. The fact that the Governor of a State would take such a large amount of time out of his schedule to testify on behalf of a nominee for the Supreme Court testifies very well to the caliber of the man that you are tes-

tifying on behalf of. We appreciate it very much and we thank you very much.

Governor GREGG. Thank you.

The CHAIRMAN. With that, the hearing is adjourned until 10 o'clock tomorrow morning.

[Whereupon, at 8:24 p.m., the hearing was adjourned, to reconvene on Tuesday, September 18, 1990, at 10 a.m.]

# NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 18, 1990

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:05 a.m., in room 216, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. The committee will please come to order.

We begin this morning with our panels of public witnesses, who have asked to come before the panel to suggest why they are for or against the nomination of Judge Souter. Many who will be testifying today, such as our first two witnesses, represent not only themselves but a significant coalition of people that belong to their organizations. We will have a number of organizations represented by their leadership here today and I expect tomorrow.

We have not an inordinately large number of people, although I must admit it is shifting in terms of those who are seeking to testify and those who are deciding they may not want to testify. But we have roughly 10 different panels of people, in varying sizes from 2 to 6 on a panel.

I am going to respectfully request that my colleagues and the witnesses move by a slightly different set of rules than we did when questioning the nominee. That is, rather than having half-hour question periods, we will only have 10-minute questioning periods by each of the Senators. We would ask our witnesses, if it is possible—and it is very difficult to do this—to try to limit their opening statement in the range of 5 minutes. And those who can't do that, sort of nod to me, and I will ask you 5 minutes' worth of additional questions that will allow you to finish your statement.

But if we can, try, all kidding aside, to keep it to roughly 5 minutes. Otherwise, we are going to be here for a long time. But, if necessary, we will be here for a long time because this is a very, very important hearing. And although we are in all probability totally finished with any testimony we will hear from the nominee, the testimony from public witnesses is a very important element here, and the committee very much wants to hear what they have to say.

We start off with, in my view, two very important witnesses representing large organizations who have a keen interest in some of the subject matter that was discussed here. We are very fortunate to have with us today Ms. Kate Michelman, executive director of National Abortion Rights Action League, and Ms. Faye Wattleton, president of Planned Parenthood Federation of America.

I welcome you both, and I suggest that unless you all have decided who should go first, we should start with Ms. Michelman, if that is appropriate. And if that is, then without further ado, welcome, Ms. Michelman. It is a pleasure to have you here. Please begin with your statement.

Senator SIMON. Mr. Chairman, if I can just mention this, Senator Metzenbaum would be here, but he is on the floor with one of his bills, and he asked me to mention that. Otherwise, he would be here to hear both of you.

The CHAIRMAN. I am confident that is true, and I am sure the same is true with Senator Kennedy as well as, I expect, Senators on the other side as well.

Again, welcome. Thank you for being here.

**PANEL CONSISTING OF KATE MICHELMAN, EXECUTIVE DIRECTOR, NATIONAL ABORTION RIGHTS ACTION LEAGUE; AND FAY WATTLETON, PRESIDENT, PLANNED PARENTHOOD FEDERATION OF AMERICA**

**STATEMENT OF KATE MICHELMAN**

Ms. MICHELMAN. Thank you, Senator Simon, Mr. Chairman, and members of the Judiciary Committee. On behalf of the 450,000 members of the National Abortion Rights Action League, thank you very much for the opportunity to testify.

Our opposition to this nomination was not arrived at lightly. We examined the selection process by which President Bush nominated Judge Souter. We conducted a thorough and searching examination of his record and considered the impact this nominee could have on the Supreme Court at this very critical historic juncture. Like most of you, we have been impressed by Judge Souter's intellect, knowledge, and wit. But Judge Souter's personal qualifications are not the issue. The issue is whether or not the Supreme Court will continue to uphold the fundamental constitutional right to privacy, including the right to choose.

Mr. Chairman, I know that the Judiciary Committee has many important considerations, but the health and the lives of millions of American women are at stake. This nomination process is not about arcane legal theory or dry historical precedent. Before *Roe v. Wade*, millions of American women had to face the horrors of illegal back-alley abortions. I know from very personal experience the shame and the degradation endured by women who were forced to disclose the most intimate details of their lives to panels of strangers who had absolute power over their lives.

Those shameful days could represent our future as well as our past. For the very first time in our Nation's history, the Supreme Court is on the very brink of taking away an established fundamental constitutional right. At best, we are just one vote away from losing our right to choose. This results directly from the 10-

year legacy of administrations using the judicial appointment process to attain the goal of depriving women of the right that is absolutely central to every aspect of their entire lives. Under these extraordinary circumstances, we urge you to withhold your consent to the nomination of Judge Souter to the Supreme Court unless you are absolutely certain—absolutely certain—that he will respect and protect our fundamental right to privacy, including the right to choose.

Nothing in Judge Souter's record or his testimony has convinced us that he, indeed, recognizes a fundamental right to privacy, including the right to choose. After listening to the testimony, we remain intensely concerned that, if confirmed, Judge Souter would destroy 17 years of precedent and cast the deciding vote to overrule *Roe v. Wade*. And we cannot overlook Judge Souter's suggestion yesterday that unmarried people may not even have a fundamental right to use contraception, which indicates an unacceptably narrow view of our constitutional protections.

Judge Souter has refused to even discuss his general approach to discerning whether there is a fundamental right to choose. And I must say that if there were any question, any question at all, about whether Judge Souter supported the principles upheld in *Brown v. Board of Education*, surely he would not be confirmed without offering clear assurances that he supports the constitutional principle of equality. *Roe v. Wade* was the single most important decision affecting the lives and health of American women. It should be considered as clearly settled as *Brown v. Board of Education*.

Judge Souter has indicated that he believes the right to choose is open for reevaluation. *Roe v. Wade* has become an integral part of the fabric of the lives of women and families. It is the foundation for layers of rulings that grant us medical options and protect our most personal decisions.

We understand that abortion is a complex issue that involves serious moral, religious, ethical, and philosophical questions. Some of us may differ on what circumstances for terminating a crisis pregnancy are consistent with our own moral views. But the fundamental principle established in *Roe v. Wade* was that the decision must be left in the hands of the individual and not the State.

Mr. Chairman, the life, the health, the future of millions of American women rest in the Senate's hands. You are the conscience of the U.S. Constitution. Confirming a new Supreme Court Justice is a momentous task that will affect generations to come. We recognize that you face pressure to fill this vacancy on the Court, and we also recognize that Judge Souter has won considerable support. But I would suggest that there is a time for politics, and there is a time for principle. The politics may be difficult, but the principle is clear.

At stake in this confirmation process is nothing less than the future of the constitutional protection of a woman's fundamental right to make her own reproductive decisions. But the right to choose does not exist in a vacuum. It is entwined with all the fundamental liberties that comprise our Bill of Rights. No woman—no woman—can be truly free and self-determining if the Government has the power to compel her to continue a pregnancy and undergo childbirth against her will.

We consider placing Judge Souter on the Supreme Court to be too great a risk. We urge you to put the health and lives of American women above every other consideration and withhold your consent to this nominee.

Mr. Chairman, I have with me some supplementary materials relevant to Judge Souter's record which I would like to make part of the official record at this time.

The CHAIRMAN. Without objection, it will be made part of the record.

Ms. MICHELMAN. Thank you very much. I appreciate it.  
[The information of Ms. Michelman follows:]



**THE CONFIRMATION HEARINGS OF JUDGE DAVID SOUTER:  
THE LEGAL AND POLITICAL CONTEXT**

The circumstances surrounding Judge Souter's nomination are exceptional. For the first time in the history of the United States, the Supreme Court is poised to take away a fundamental constitutional right. This is a direct result of an unprecedented, decade-long effort on the part of the Reagan and Bush Administrations to appoint judges and Justices who would use their positions on the federal bench to dismantle the fundamental right to choose. Judge Souter's nomination may be the final component of this strategy, which to date has been frighteningly successful: the Court is at best one vote away from overturning Roe v. Wade. The Senate has a responsibility not to acquiesce in the Bush Administration's anti-choice agenda, but to use its "advice and consent" role to ensure that Justices are not appointed on the basis of their willingness to deprive Americans of their fundamental rights. Unless Judge Souter openly recognizes the fundamental right to privacy, including the right to choose abortion, the Senate should not confirm his nomination.

**Abortion: Fundamental Right or Ordinary Liberty Interest**

An acknowledgement by Judge Souter that privacy is an ordinary liberty interest or a generalized value or right protected by the United States Constitution would provide absolutely no reassurance that as a Supreme Court Justice he would protect the fundamental right to choose. Virtually all -- including those who would overrule Roe -- acknowledge that the right to privacy is constitutionally protected.

- Chief Justice Rehnquist and Justices White and Kennedy voted to overrule Roe in Webster v. Reproductive Health Services, while at the same time stating that the right to choose abortion is a "liberty interest" protected by the due process clause of the 14th amendment.
- During his confirmation hearings Justice Kennedy, who voted in Webster to overrule Roe, stated that the Constitution protects the right to privacy: "I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage."
- Justice White and then-Justice Rehnquist in a dissent in Thornburgh v. American College of Obstetricians and Gynecologists calling for the overruling of Roe, stated that they "certainly agree with the proposition . . . that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." Justices White and Rehnquist were the original dissenters in Roe v. Wade and have been calling for its reversal ever since.

The critical question is whether the right to choose abortion is protected as a fundamental right. Only fundamental rights, such as the right to free speech and the right to privacy, including the right to use contraception and to choose abortion, receive strict scrutiny from the courts -- the highest level of constitutional protection afforded any right. Under the strict scrutiny standard, a law that infringes a fundamental right is unconstitutional unless it is necessary to further a compelling state interest.

Ordinary liberty interests are protected by the lowest level of constitutional protection available. Under the rational relation test, a law that infringes on a liberty interest is constitutional as long as the law furthers a reasonable state interest. Whereas the strict scrutiny standard provides strong protection for the



rights of individuals, the rational relation test is extremely deferential to the power of government to interfere with ordinary liberty interests.

**Judicial Appointments and the Reagan/Bush Anti-Choice Agenda**

The Souter nomination must be recognized for what it is: part of a decade-long legacy under which Presidents Reagan and Bush have appointed judges based on their hostility toward the fundamental right to choose abortion.

- \* The Republican Party Platforms of 1980, 1984 and 1988 include a commitment to appoint only those judges and Justices who do not support a woman's fundamental right to decide whether to have an abortion.
- \* Judge Souter was on the list of potential Supreme Court nominees passed on from President Reagan to President Bush.
- \* White House Chief of Staff John Sununu offered personal reassurances to ease the fears of conservatives who were concerned that Judge Souter might not vote to overturn Roe. Sununu indicated that for conservatives the nomination is "a home run -- and the ball is still ascending. In fact, it's just about to leave earth orbit."
- \* "Strict construction", "judicial restraint" and other key phrases used by the Bush Administration to describe Judge Souter's judicial philosophy are recognized by anti-choice leaders as code words for a predisposition to overrule decisions protecting the fundamental right to privacy, in particular: the right to choose abortion.

**Judge Souter's Record on Privacy and Abortion**

A careful review of Judge Souter's record reveals that he has not recognized privacy as a fundamental constitutional right and that, given the opportunity, he is likely to join those on the Supreme Court who have voted to overturn Roe v. Wade.

- \* In a case that Judge Souter lists among his "ten most significant opinions," he applied the doctrine of "original intent." Original intent is the extremely restrictive judicial philosophy employed to argue not only against constitutional protection for the fundamental right to privacy and to choose abortion, but also against any heightened constitutional protection for women from sex discrimination.
- \* As Attorney General, Judge Souter opposed the repeal of New Hampshire's 1848 law criminalizing virtually all abortions, citing as his reason his unfounded fear that repeal would make New Hampshire the "abortion mill" of the United States.
- \* Also as Attorney General for New Hampshire, Judge Souter submitted a brief that describes abortion using biased and inflammatory language that is inappropriate to a legal brief. The brief refers to the exercise of the constitutionally protected right to choose as the "killing of unborn children."
- \* A fundamental responsibility of our independent judiciary is to protect the rights of individuals against unwarranted governmental interference. As a New Hampshire Supreme Court Judge, David Souter time and time again embraced the power of the state over the rights of individuals.



## JUDGE SOUTER'S RECORD ON THE RIGHT TO PRIVACY AND ABORTION

President George Bush's nomination of Judge David Souter follows a decade of appointments of Federal judges by Presidents Bush and Reagan under an anti-choice litmus test. The Republican Party Platforms of 1980, 1984 and 1988 called for "the appointment of judges at all levels of the judiciary who respect . . . the sanctity of innocent human life." With the appointments during that time of Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy, the Supreme Court now stands on the brink of depriving Americans of a recognized fundamental constitutional right for the first time in our Nation's history.

In order to allay the concerns of conservatives who feared that Souter might not vote to overturn Roe, conservative activist Pat McGuigan circulated a memo detailing a private meeting in which John Sununu indicated that the Bush Administration has a clear sense of where Judge Souter stands and that conservatives should be pleased with the nomination. Sununu described the choice of Souter as follows: "This is a home run -- and the ball is still ascending. In fact, it's just about to leave earth orbit."

### Characterizations of Judge Souter's Judicial Philosophy: 1990

President Bush has made Judge Souter's judicial philosophy a key issue in the confirmation process by citing it as the basis for his nomination. The Bush Administration's descriptions of Judge Souter's judicial philosophy -- "original intent," "strict construction" and "judicial restraint" -- are recognized by leaders of groups that oppose legal abortion as code words for a predisposition to overrule decisions protecting the fundamental right to privacy, including the right to choose abortion.

### Dissent in *In re Estate of Dionne*: 1986

Judge Souter's most revealing -- and alarming -- opinion while on the New Hampshire Supreme Court is one that he has listed among his "ten most significant opinions." In a dissent interpreting a provision of the New Hampshire Constitution in *In re Estate of Dionne*, 518 A.2d 178 (1986), Judge Souter used the extremely restrictive judicial philosophy of "original intent." This doctrine would limit the meaning of a constitutional provision to the specific practices and beliefs that were prevalent at the time the provision was adopted, freezing the Constitution in the past and allowing for no adaptation to current times. If the U.S. Supreme Court were to apply this approach, the Court would overrule not only *Roe v. Wade*, but also other cases involving the fundamental right to privacy, including the right to use contraception. Under a strict application of this reasoning, *Brown v. Board of Education* could not have put a halt to the racial segregation of our Nation's schools, and women would be afforded no constitutional protection from sex discrimination.

### Concurrence in *Smith v. Cote*: 1986

Judge Souter concurred in a decision allowing a woman to sue her doctor for negligence for failing to warn her of the possibility of birth defects and the option of abortion. In a separate opinion, however, Judge Souter went beyond the issue before the court and expressed concern that the court would be misunderstood as instructing anti-choice physicians to render tests and counseling despite their personal opposition to abortion. Judge Souter concluded that timely disclosure of the physician's moral scruples and referral to another physician would suffice. Significantly, Judge Souter refers to abortion as "necessarily permitted under *Roe v. Wade*," rather than describing abortion as a fundamental right protected under the Constitution. This calls into question whether



Judge Souter would uphold the right to choose if he were not bound to follow Supreme Court precedent.

**Letter to the Legislature about "Parental Consent" Bill: 1981**

Judge Souter, as a New Hampshire Superior Court judge, wrote a letter in 1981 to the state Legislature on behalf of the Superior Court concerning a pending bill that required teenagers to obtain the consent of their parents or a judge before obtaining an abortion. Judge Souter's letter objected to the proposed judicial involvement, on the ground that the bypass procedure would force judges to engage in "acts of unfettered personal choice" and to make "fundamental moral decisions." The letter took no position on the underlying question of whether young women should be required to obtain parental consent. The letter was used by pro-choice activists to defeat the parental consent bill then before the legislature, because the U.S. Supreme Court had at the time declared that a judicial bypass must be part of any law requiring parental consent. Yet the letter suggests that, because of his opposition to the judicial bypass, Judge Souter might vote with the Justices who would allow states to mandate parental consent in every case, without any judicial escape valve even for teenagers who are the victims of family violence. The letter is also disturbing in that it advocates the principle of "judicial restraint," which is often used as a code word by those who seek to overrule Roe.

**Opposition to Repeal of Criminal Abortion Law: 1977**

While Attorney General of New Hampshire, Judge Souter successfully opposed the repeal of a law enacted in 1848 which imposed criminal penalties for the performance of an abortion. Only abortions necessary to save the life of the pregnant woman were excepted; the law contained no exception for rape, incest or health endangerment. Although the law was clearly unconstitutional and unenforceable under Roe v. Wade, it remained on the books (and still does). In an attempt to justify his opposition to the repeal of this extreme law, Judge Souter used the specious threat of large numbers of women pouring into New Hampshire for post-viability abortions: "Quite apart from the fact that I don't think 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." In fact, few women choose to have post-viability abortions -- only .01 percent of abortions currently are performed after 24 weeks -- and those who do have very compelling reasons, including serious risks posed to their health by pregnancy and severe fetal abnormalities detected late in pregnancy.

**Brief Submitted in Coe v. Hooker: 1976**

A 1976 brief, submitted by Judge Souter as Attorney General on behalf of the state, refers to the constitutionally protected choice of abortion as "the killing of unborn children." This language is the same rhetoric commonly used by extreme opponents of the right to choose and is inappropriate for a state attorney general to use in a legal brief. The brief argued against state funding of abortions for poor women, a position which in no way required the use of language and reasoning that evidenced strong hostility to the fundamental right to choose.

**Vote while Member on Hospital Board: 1973**

Judge Souter was a board member of Concord Hospital and an overseer for the Dartmouth Medical School, which is affiliated with the Dartmouth Hitchcock Medical Center; both hospitals perform abortions. A month after the Roe v. Wade decision, Judge Souter participated in a vote of the Concord Hospital's board to allow doctors to perform abortions there. The minutes of the meeting reflect no discussion or dissent on the part of Judge Souter or other board members.



### JUDGE DAVID SOUTER'S JUDICIAL PHILOSOPHY

In reviewing Judge David Souter's record, NARAL's Legal Department has come across an opinion that is, thus far, the most significant in providing insight into his judicial philosophy and how he might rule on critical issues of individual rights, including the right to privacy. In interpreting the New Hampshire Constitution in a dissenting opinion in In re Estate of Dionne, 518 A.2d 178 (1986), Judge Souter used the extremely restrictive judicial philosophy of "original intent," which limits the meaning of a constitutional provision to the specific practices and beliefs that were prevalent at the time the provision was adopted. If the U.S. Supreme Court were to apply this approach, the Court would overrule not only Roe v. Wade, but also other cases involving the fundamental right to privacy, including the right to use contraception. In fact, this is the very approach that was used at the time of Brown v. Board of Education to argue that states should be permitted to continue segregating schools by race.

Judge Souter's opinions do not reveal to what extent he would apply his reasoning in Dionne when interpreting federal constitutional provisions protecting individual rights. Yet this opinion cannot be dismissed as atypical. In response to a Senate Judiciary Committee questionnaire following his recent nomination to the U.S. Court of Appeals for the First Circuit, Judge Souter listed his dissent in Dionne as one of his "ten most significant opinions." Given the profound implications if he were to use an originalist approach as a Supreme Court Justice, Judge Souter must be closely questioned during his Senate confirmation hearings about the Dionne case and his judicial philosophy concerning interpretation of the U.S. Constitution.

#### Judge Souter's Use of "Original Intent"

In Dionne, the Supreme Court of New Hampshire held that a statute requiring citizens to pay a fee to a judge in exchange for a special court session violated the state constitution, which guaranteed to citizens the right "to obtain justice freely, without being obliged to purchase it." Although this mandatory payment to a judge clearly contradicted the plain language of the constitution and -- in the words of the four justices in the majority -- "smacks of the purchase of justice," Judge Souter alone dissented. He stated that in interpreting the state constitution, the court could look only to the precise practices the framers intended to prohibit in 1784, and he used as his principal evidence of that intent the way in which a similar clause of the Magna Carta of 1215 had been interpreted.

Judge Souter's dogmatic approach to original intent in Dionne is cause for alarm. If Judge Souter's originalist approach were used to interpret the equal protection clause of the Fourteenth Amendment, the relevant evidence would be the prevailing practices at the time of the Amendment's adoption in 1868. Brown v. Board of Education could not have put a halt to the racial segregation of our nation's schools, and women would be afforded no constitutional protection from sex discrimination. In Brown, Chief Justice Earl Warren -- writing for a unanimous Supreme Court -- explicitly rejected an originalist approach, stating, "[w]e cannot turn back the clock to 1868 when the amendment was adopted."

If confirmed, Judge Souter would replace Justice William Brennan, who believed that the true intent of the Framers was for the Constitution to provide broad principles capable of adapting over time to new and unforeseeable circumstances. In Justice Brennan's view,



"the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

#### Implications for Roe v. Wade

The doctrine of original intent has been used by ideologically conservative judges, such as Judge Robert Bork and Justice Antonin Scalia, to deny the existence of the fundamental right to privacy and call for the overruling of Roe v. Wade. As Judge Bork stated, "I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended." Accordingly, Bork stated that "Roe, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned."

President Bush has made Judge Souter's judicial philosophy a key issue in the confirmation process by citing it as the basis for his nomination. The phrases being used to describe Judge Souter's judicial philosophy -- "original intent," "strict construction" and "judicial restraint" -- are recognized by the most vehement opponents of legal abortion as code words for a predisposition by Judge Souter to overrule decisions protecting the fundamental right to privacy, including the right to choose abortion:

Pro-Life Action League leader Joe Scheidler: "[A]ny judge who truly seeks to follow the original intent of the framers of the Constitution in applying the law will be hard-pressed to find anything in the Constitution to support a right to abortion. Since the care of human life is the first object of good government, David Souter or any other strict constructionist must seek to overturn Roe."

Susan Smith, Associate Legislative Director of the National Right to Life Committee: "President Bush has said that this is a man who is committed to interpreting the Constitution, not legislating from the bench and since Roe v. Wade is really the zenith of judicial activism, I think it's reasonable to assume that a Justice like Judge Souter would continue the erosion of a tragic constitutional error that is Roe v. Wade."

#### Conclusion

Judge Souter's strict adherence to the doctrine of original intent in the Dionne case, and the Bush Administration's repeated characterization of his judicial philosophy as one of judicial restraint, place in serious question whether Judge Souter, if confirmed, would continue to protect Americans' fundamental right to privacy. It is therefore essential for the Senate Judiciary Committee to question Judge Souter regarding his precise judicial philosophy. Americans must know if Judge Souter will limit our constitutional guarantees to those of centuries past, leaving us without protection from unwarranted governmental intrusion into our most personal decisions.



## PRESIDENT GEORGE BUSH'S RECORD ON REPRODUCTIVE RIGHTS

President George Bush's nomination of David Souter to the U.S. Supreme Court must be considered in the context of Bush's overall record of catering to the anti-choice minority. For the last decade, Bush has been part of administrations that again and again have gone to great lengths to deprive women of their fundamental right to choose abortion. At the heart of the assault on the right to choose is a strategy to overrule Roe v. Wade by changing the make-up of the federal judiciary -- and in particular the U.S. Supreme Court -- by appointing only judges who pass an anti-choice litmus test. With this vacancy on the Supreme Court, following the appointments since 1980 of three Supreme Court Justices, a new Chief Justice and over half the federal judiciary, President Bush is now on the brink of achieving that objective.

### Republican Party Platforms of 1980, 1984 and 1988

President Bush -- like President Ronald Reagan before him -- ran on a Republican Party platform committed to creating a federal judiciary that would be hostile to the right to choose and ultimately overrule Roe v. Wade and its progeny.

The 1980 Republican Party Platform states:

We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.<sup>1</sup>

The 1984 and 1988 Republican Party Platforms state:

We applaud President Reagan's fine record of judicial appointments, and we reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.<sup>2</sup>

### Judicial Appointments

Judge David Souter was included among what White House Counsel C. Boyden Gray described as the "files and institutional memory" on potential Supreme Court nominees passed on from President Reagan to President Bush.<sup>3</sup>

When asked if President Bush uses the same "screening apparatus" that President Reagan used to "insure that judicial candidates were sympathetic to . . . conservative jurisprudence," White House Counsel C. Boyden Gray replied, "It's structured a little bit differently, but the result is very much the same." He added that the Administration's aim "is to shift the courts in a more conservative direction."<sup>4</sup>

Ethan Bronner, in his book Battle for Justice, states, "During Reagan's first term . . . [a] nine-member Presidential Committee on Federal Judicial Selection sifted through the [Court] nominees' writings and speeches in search of genuine conservative ideology. Those present at interviews said potential nominees were asked about their views on abortion and on the rights of criminal defendants."<sup>5</sup>

Herman Schwartz, in his book Packing the Courts, states, "White House Counsel Fred

Fielding . . . admitted that the Reagan Administration tries to choose only 'people of a certain philosophy' and that someone 'actively prochoice' or 'for defendants' rights' would not make 'the final cut.'<sup>6</sup>

Attorney General Edwin Meese conceded that "we do discuss the law with judicial candidates . . . In discussing the law with lawyers there is really no way not to bring up cases -- past cases -- and engage in a dialogue over the reasoning and merits of particular decisions."<sup>7</sup>

Bruce Fein, who worked on judicial selection in the Justice Department during Reagan's first term, told Newsweek: "It became evident after the first term that there was no way to make legislative gains in many areas of social and civil rights. The President has to do it by changing the jurisprudence."<sup>8</sup>

#### Other Appointments

When Bush's selection for HHS Secretary, Louis Sullivan, said in an interview that he favored a woman's right to choose abortion, anti-choice groups pledged to fight the nomination. To appease the anti-choice extremists, the White House worked to silence Sullivan and put together a "package" of approved anti-choice appointees for top staff at HHS, including Kay James, a former National Right to Life Committee official.<sup>9</sup>

Prior to her nomination as Surgeon General, Antonia Novello was questioned to satisfy the Bush Administration that her abortion views were consistent with President Bush's opposition to the right to choose.<sup>10</sup>

Dr. William Danforth, a candidate for director of the National Institutes of Health, withdrew his name from consideration because of his disagreements with the White House on abortion-related issues. Only two questions were asked of him by a White House personnel officer: "What are your views on abortion? And what are your views on fetal research?" Similarly, the White House physician, Dr. Burton Lee, withdrew his name from consideration for the Surgeon General post because he did not share President Bush's opposition to the right to choose.<sup>11</sup>

A candidate to be chair of the Legal Services Corporation, Caldwell Butler, was eliminated from consideration for indicating to interrogators that he thought a pregnant woman should have access to information on her legal right to choose abortion.<sup>12</sup>

#### Other Anti-Choice Policies

Under both President Bush and President Reagan, the U.S. Justice Department urged the Supreme Court to overrule Roe v. Wade and deprive women of the fundamental right to choose. Most recently, the Bush Administration argued in Hodson v. Minnesota, decided June 1990, that the Court should reach out and overrule Roe, even though the parties had not raised the issue and the case involved the narrower issue of the constitutionality of legislation requiring teenagers to notify their parents before obtaining abortions.<sup>13</sup>

In 1990, an interagency group convened by the White House proposed funding school-based clinics. Although the White House acknowledged that the plan would be effective in reducing teen pregnancies and the number of single-parent families, it rejected the proposal, fearing "political problems among groups that are opposed to

birth control.<sup>14</sup>

In 1989, Congress voted to restore the availability of Medicaid funds for abortions in cases of rape and incest, but President Bush vetoed the bill. He also twice vetoed a bill that would have allowed the people of Washington, D.C. to use their own locally generated tax dollars to pay for the abortions of poor women.<sup>15</sup>

In 1989, the Bush Administration extended a ban on federally funded research involving fetal tissue transplants, ignoring the recommendations of an advisory panel convened by the National Institutes of Health and elevating the absolutist views of anti-choice extremists over the well-being of millions of Americans who suffer from Alzheimer's disease, Parkinson's disease, Huntington's disease, radiation sickness, diabetes and other serious illnesses.<sup>16</sup>

The Reagan-Bush Administration severely restricted Title X of the Public Health Service Act, which provides reproductive health care services for low-income women and is the largest single source of federal support for family planning in the United States. Through regulations -- which are currently being defended by the Bush Administration in a legal challenge before the U.S. Supreme Court -- federal funding is denied to any family planning clinic that uses even entirely private funds to advise its clients that abortion is a legal option or to refer clients elsewhere for abortion services, unless this information is provided in physically and financially separate facilities.<sup>17</sup>

The Reagan-Bush Administration sponsored and administered the Adolescent Family Life Act, which gives federal funds to anti-choice religious groups to teach adolescents about sexuality. Under this program, religious groups have discouraged teens from using contraception by teaching them that it is a sin and by providing teens with entirely false information about the health risks associated with the various methods of contraception.<sup>18</sup>

The "Mexico City Policy" supported by President Bush denies funds to overseas family planning programs that provide privately funded abortion services or counseling. Bush vetoed a bill containing funds for "cherished" foreign policy programs because it contained family planning funds for the United Nations Family Planning Fund. The Reagan-Bush Administration withdrew all federal funding (\$17 million) from the International Planned Parenthood Federation because the Federation used some of its money (less than one percent, and all private funds) for abortion-related activities. The Federation estimated that the loss of federal funding would result in an additional 776,000 unwanted pregnancies and 100,880 abortions in more than 100 countries.<sup>19</sup>

#### Notes

1. Congressional Record, vol. 28, daily edition, July 31, 1980.
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3. Ann Devroy, "In the End, Souter Fit Politically," Washington Post, July 25, 1990, p. A1.
4. Neil Lewis, "Bush Travels Reagan's Course in Naming Judges," New York Times, Apr. 10, 1990, p. A1.

5. Ethan Bronner, Battle for Justice: How the Bork Nomination Shook America, (New York: W.W. Norton and Co., 1989): 120.
6. Herman Schwartz, Packing the Court: The Conservative Campaign to Rewrite the Constitution, (New York: Charles Scribner's Sons, 1988): 86.
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11. Julie Rovner, "Abortion: Litmus Test for Nominees?" Congressional Quarterly, Oct. 21, 1989, p. 2791.
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17. Title X, Public Health Service Act, 42 U.S.C. sec. 592, 300 et seq.
18. Adolescent Family Life Act, Title XX, Public Health Service Act, 42 U.S.C. sec 300z et seq.; Patricia Donovan, "The Adolescent Family Act and the Promotion of Religious Doctrine," Family Planning Perspectives, vol. 16, (New York: AGI, Sept./Oct. 1984): 224.
19. Jeannie I. Rosoff, "The Politics of Birth Control," Family Planning Perspectives, vol. 20, (New York: AGI, Nov./Dec. 1988): 312, 317. People for the American Way, Government by Litmus Test, p. 24. Russell W. Peterson, "How Reagan Promotes Abortions," New York Times, Mar 26, 1985, p. A27.



## THE ROLE OF THE SENATE IN SUPREME COURT APPOINTMENTS

There is a long, distinguished and bi-partisan history of Senators questioning nominees to the U.S. Supreme Court about their judicial philosophy and their views with regard to the "great issues of the day." President Bush has explicitly and repeatedly stated that judicial philosophy was one of the key reasons he selected Judge David Souter. It is hypocritical and without constitutional foundation for the President to suggest that the Senate has no right even to inquire about the very judicial philosophy that was the basis for his nomination of Souter. Certainly no one suggests that the President's reasons for exercising his veto power should be constrained because it is the Congress's prerogative to legislate.

For the last decade, the Bush and Reagan Administrations have appointed federal judges -- amounting to over half of the federal judiciary -- according to an anti-choice litmus test. The 1988 Republican Party Platform -- upon which President Bush was elected -- echoed the platforms of 1980 and 1984: "we reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." President Bush's deliberate selection of a nominee with no public record only intensifies the Senate's obligation to ask critical questions.

No one is suggesting that Judge Souter is required to state how he would decide a specific fact-contingent case prior to reviewing the record and reading the briefs. At issue are questions concerning the constitutional standards and legal reasoning that would be generally applied to all cases dealing with Americans' right to privacy and reproductive autonomy. As is made clear by the following quotations from various Senators, as well as excerpts from the writings of Chief Justice William Rehnquist, such questions are entirely appropriate, indeed essential.

The Supreme Court is now on the brink of depriving Americans of a fundamental constitutional right for the first time in our Nation's history. In 1958 nominee Potter Stewart was asked for his views of the Court's recent and controversial decision in Brown v. Board of Education. Americans today have a right to know where a nominee stands on the fundamental right to privacy in making decisions concerning reproduction.

### I. Quotations from United States Senators Concerning the Role of the Senate in Confirming Supreme Court Nominees

Sen. Arlen Specter (R-PA) (re: nomination of Anthony Kennedy):

"There is widespread misunderstanding about the Senate's role . . . . These proceedings constitute really the apex of the separation of powers under our Constitution. All three branches are involved. The President makes the nomination; it is up to the Senate to consent or not; and then the nominee who is successful goes to the court and has the final word over both the executive branch and the legislative branch. So there are really very important issues involved." (1987)



- Sen. Samuel Ervin (D-NC) (re: nomination of Thurgood Marshall):  
 "I believe that the duty which . . . the Constitution imposes upon a Senator requires him to ascertain as far as he humanly can the constitutional philosophy of any nominee to the Supreme Court." (1967)
- Sen. Strom Thurmond (R-SC) (re: nomination of Abe Fortas):  
 "It is my contention that the Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of prospective Justices or Chief Justices as it relates to broad issues confronting the American people and the role of the Court in dealing with these issues." (1968)
- Sen. William Borah (R-ID) (re: nomination of John J. Parker):  
 "Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental politics are involved." (1930)
- Sen. George Norris (R-NE) (re: nomination of John Parker):  
 "When we are passing on a judge, . . . we ought not only to know whether he is a good lawyer, not only whether he is honest -- and I admit that this nominee possesses both of those qualifications -- but we ought to know how he approaches these great questions of human liberty." (1930)
- Sen. John McClellan (D-AR) (re: nomination of Abe Fortas):  
 "I think we have greater responsibility than to determine that the nominee is honest and has the required legal ability because today, particularly in these troubled times, it is the philosophy and the approach that a judge may make in arriving at decisions, that can be even more dangerous than lack of ability or lack of complete integrity. If we should be ruled by a dangerous philosophy, we can surely come to a tragic end." (1968)
- Sen. Harry Byrd, Jr. (D-VA) (re: nomination of Abe Fortas):  
 "[I]f we do not examine their philosophy, if we do not determine where they stand on the great issues of the day, then . . . it seems to me we might as well go back to our hometowns and practice law, run a newspaper, or do whatever we want to do, and cease being a part of the processes of the U.S. Senate." (1968)
- In a Senate Executive Report Sens. Birch Bayh (D-IN), Philip Hart (D-MI), Edward Kennedy (D-MA), and John Tunney (D-CA) wrote (re: nomination of Rehnquist):  
 "The Executive has the . . . burden of proof when it comes forward with a Supreme Court nominee. . . . [I]t must run the risk that the Senate will act on the basis of the only substantive record available and, on this "best evidence," reject the President's choice." (1971)
- II. Quotations from now-Chief Justice William Rehnquist, Harvard Law Record, "The Making of a Supreme Court Justice," Oct. 8, 1959.
- "The Court in Brown v. Board of Education held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what 'due process' and 'equal protection' meant . . . . Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal

protection and due process? . . . The only way for the Senate to learn of these sympathies is to 'inquire of men on their way to the Supreme Court something of their views on these questions.'" p. 10.

"Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process." p. 7.

On the confirmation of Charles Evans Whittaker: "Examination of the Congressional Record for debate relating to his confirmation reveals a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation." p. 7.

"Given . . . the fact that Mr. Justice Whittaker had been an eminently successful courtroom lawyer, the fact that he had been a leader in the activities of the organized bar, and the fact that he had been very highly regarded as a judge of the lower federal courts -- all of which he was -- the Senators could still have no indication of what Mr. Justice Whittaker thought about the Supreme Court and segregation or about the Supreme Court and Communism." p. 8.

### III. Sample Questions and Answers Concerning the Reasoning in Specific Cases from Senate Confirmation Hearings

#### Confirmation hearings of Justice Kennedy:

##### Sen. Edward Kennedy (D-MA):

How do you respond to the concern that your opinion reflects a narrow approach to the civil rights laws as the Supreme Court has interpreted those laws?

##### Judge Kennedy responded:

"It is entirely proper, of course, for you to seek assurance that a nominee to the Supreme Court of the United States is sensitive to civil rights."

##### Sen. Arlen Specter (R-PA):

"I would like to begin with Brown v. Board of Education, the desegregation case. In examining the issue of the framers' intent . . . Congressman Wilson, the sponsor in the House of the 14th Amendment, stated, 'Civil rights do not mean that all citizens shall sit on juries or that their children shall attend the same schools.' . . . Now my question is: Is it ever appropriate for the Supreme Court to decide a case at variance with the framers' intent?"

##### Judge Kennedy responded:

". . . . In my view, the 14th amendment was intended to eliminate discrimination in public facilities on the day that it was passed. . . . I think Brown v. Board of Education was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think Plessy v. Ferguson was wrong on the day it was decided."

##### Sen. Strom Thurmond (R-SC):

"Judge Kennedy, 20 years have passed since the Miranda v. Arizona decision which defined the parameters of police conduct for interrogating suspects in custody. Since this decision the Supreme Court has limited the scope of Miranda violations in some cases. Do you feel that the efforts and comments of top law-enforcement officers throughout the country have had any effect on the Court's views, and what is your general view concerning the warnings this decision

requires?"

Judge Kennedy responded:

"The Court must recognize that these rules are preventative rules imposed by the Court in order to enforce constitutional guarantees; and that they have a pragmatic purpose; and if the rules are not working they should be changed."

**Confirmation hearings of Justice O'Connor:**

Sen. Charles Grassley (R-IA):

"Unlike the other nominees, Judge O'Connor, you do not have a strong record on major judicial issues for us to review. That is not your fault; that is because you served on State courts as opposed to Federal courts. . . . I hope that you will understand that in light of your lack of written record on major issues, it is our obligation in this hearing to attempt to insure that you do not prove as great a surprise to President Reagan as Earl Warren was to President Eisenhower."

Sen. Patrick Leahy (D-VT):

"Senator Biden asked you a question about Brown v. The Board of Education. It was on the subject of judicial activism, a term that I guess means many things to many people. You said that it did not create new social policy by the Court but was simply the Court reversing a previous holding based on new research, but that new research was not any new research into the Constitution or into the law was it? Was not that new research rather the effects of segregation on minorities? It certainly was not into congressional debates over the 14th amendment."

Judge O'Connor responded:

"Senator, I think there was an element indeed of the examination of the intent of the drafters of the amendment. I am sure that particular case was impacted also by perceptions of the social impacts in that particular instance."

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"Senator, I consider it as an accepted holding of the Court."

In response to a question concerning Miranda v. Arizona, Judge O'Connor stated:

"I think the exclusionary rule . . . has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police."

**1986 Confirmation hearings of Chief Justice Rehnquist:**

Sen. Joseph Biden (D-DE):

"Do you think that the decision ultimately reached in Brown was the incorrect decision?"

Justice Rehnquist responded:

"When Brown came down?"

Sen. Biden:

"When Brown came down."

Justice Rehnquist:

"No, I do not think I did, because when the Court went on record saying that, the stare decisis problem was gone."



ANALYSIS OF SUPREME COURT DECISIONS  
CONCERNING THE RIGHT TO PRIVACY

**PRIOR TO ROE V. WADE (prior to 1973)**

The origins of the fundamental right to privacy are deeply rooted in our nation's legal tradition, as the Supreme Court recognized in Roe v. Wade, 410 U.S. 113 (1973). Over the past century, the Court has held that profoundly personal decisions are protected against unwarranted governmental interference by the right to privacy. See Loving v. Virginia, 388 U.S. 1 (1967) (right to privacy protects the decision when and whether to marry); Pierce v. Society of Sisters, 268 U.S. 510 (1925) & Meyer v. Nebraska, 262 U.S. 390 (1923) (right to privacy protects decisions on how to raise one's children).

The Court has long recognized that decisions concerning procreation are at the core of the right to privacy. Laws that interfere with an individual's procreative freedom are to be "strictly scrutinized" and are unconstitutional if not necessary to further a "compelling" state interest. Thus, in 1942 the Court invalidated a law that provided for the sterilization of "habitual criminals," Skinner v. Oklahoma, 316 U.S. 535. In 1965 and 1972, the Court invalidated laws that prohibited the use of contraceptives, Griswold v. Connecticut, 381 U.S. 479; Eisenstadt v. Baird, 405 U.S. 438. The Court has described the right of the individual to decide when and whether to conceive or bear a child as being "at the very heart" of the fundamental right to privacy. See Carey v. Population Services, 431 U.S. 678, 685 (1977).

**ROE V. WADE AND DOE V. BOLTON (1973)**

The Supreme Court declared in Roe v. Wade that the fundamental right to privacy, protected by the Fourteenth Amendment's guarantee of liberty, includes the right of a woman to decide whether or not to have an abortion. The Court invalidated a century-old Texas law prohibiting abortions not necessary to save the woman's life. This decision followed directly from the Court's 1965 ruling in Griswold, 381 U.S. 479, protecting the right to use contraception. Thus, the government may not interfere with a woman's abortion decision without demonstrating that a restriction is necessary to further a compelling state interest.

The Court in Roe recognized two state interests sufficiently compelling to justify restrictions on a woman's right to choose. After fetal viability -- a point that varies with every pregnancy, but usually falls between 24 and 28 weeks -- a state may prohibit abortion to protect the potentiality of life of the fetus, but only in cases in which the woman's health or life is not endangered by the pregnancy. A state may also regulate the abortion procedure after the first trimester -- 12 weeks -- if the regulations are necessary to further the state's interest in protecting the woman's own health.

The day the Court decided Roe, it also decided a second case concerning the right to choose abortion, Doe v. Bolton, 410 U.S. 179 (1973), which helps to clarify the Court's ruling; the Court stated in Roe, "that opinion and this one, of course, are to be read together." 410 U.S. at 165. In Doe, the Court struck down as unconstitutional a more recently enacted Georgia law that required that all abortions be performed in hospitals and that women secure the approval of a hospital committee and three doctors before obtaining an abortion. Thus, the Court recognized that the Constitution prohibits not



only laws that would directly outlaw abortion, but also any restriction that may undermine the right to choose through unwarranted governmental interference with women's abortion decisions.

**AFTER ROE V. WADE AND BEFORE WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1973 to 1989)**

The Supreme Court most recently reaffirmed its holding in Roe in 1986 in Thornburgh v. American College Obstetricians and Gynecologists, stating that "few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision . . . whether to end her pregnancy." 476 U.S. 747, 772. In the thirteen years between Roe and Thornburgh, the Court invalidated a wide variety of restrictive abortion laws, including laws that required women to obtain their husbands' consent prior to having an abortion, Planned Parenthood v. Danforth, 428 U.S. 52 (1976), forced women to wait a specified period of time before obtaining abortions, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), and imposed biased, lengthy and inflexible "informed consent" requirements, Thornburgh, 476 U.S. 747; Akron, 462 U.S. 416. Although the Court repeatedly reaffirmed Roe during this period, the margin by which it did so steadily narrowed: Roe was decided by a decisive 7-2 margin, but by the 1986 Thornburgh decision, the vote to uphold Roe was 5-4.

Even during this time period in which the Court continued to reaffirm Roe, the Court upheld restrictive abortion laws in two important areas. Contrary to the reproductive freedom of young women and poor women, the Court upheld parental involvement requirements and restrictions on public funding of abortions. Nevertheless, even in its decisions upholding these restrictions, the Court expressly reaffirmed the basic principle that the government may not interfere with an adult woman's fundamental right to decide whether or not to end a pregnancy. The Court ruled that a state may require some "immature" minors to obtain parental consent prior to having abortions. This decision was based on the erroneous assumption that government-mandated parental involvement is beneficial to some minors who are too immature to make decisions about abortion on their own. In the public funding cases, while the Court reaffirmed that the Constitution prohibits the government from imposing obstacles in the path of a woman's choice of abortion, it found that the government may refuse to remove obstacles to abortion that the government did not itself create, such as a woman's indigence.

**WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989)**

In Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), the Supreme Court upheld the constitutionality of challenged provisions of a restrictive Missouri abortion law, including a prohibition on the use of public facilities (broadly defined) and public employees to perform abortions and a requirement that doctors perform tests to determine fetal gestational age, weight and lung maturity before performing an abortion on a woman believed to be more than nineteen weeks pregnant.

The Webster case was the first time in the sixteen years since Roe that only a minority of the Justices (four Justices) recognized the fundamental right to choose and voted to reaffirm Roe. Four other Justices voted in effect to overrule Roe: Justice Scalia did so explicitly and another three Justices did so implicitly, by reducing the fundamental right to choose to a "liberty interest," not entitled to the same high level of constitutional protection, and describing the state's interest in the fetus as "compelling" even in the earliest stages of pregnancy.

Justice O'Connor provided the fifth, essential vote to uphold the Missouri law, but she did so on narrow grounds, stating that it was unnecessary to reconsider Roe because the law passed the "strict scrutiny" standard of review. Thus, Webster did not overrule Roe. Justice O'Connor indicated, however, that she favors adopting a different standard of review for abortion laws -- an "undue burden" standard -- which would provide less protection than is afforded fundamental rights and would, if adopted, amount to an overruling of Roe.

#### SINCE WEBSTER (1989 to present)

On June 25, 1990 the Supreme Court decided two cases -- in a complicated series of separate opinions -- that involved the constitutionality of state statutes that placed restrictions on the ability of minors to obtain legal abortions. In Hodgson v. Minnesota, \_\_\_\_ U.S. \_\_\_\_, 58 U.S.L.W. 4957 (U.S. June 25, 1990), the Court essentially upheld the constitutionality of a Minnesota statute requiring 48-hour advance notification of both parents with a judicial bypass option, but ruled that a state must provide a judicial bypass as an alternative to a two-parent notice requirement. In Ohio v. Akron Center for Reproductive Health, \_\_\_\_ U.S. \_\_\_\_, 58 U.S.L.W. 4979 (U.S. June 25, 1990), the Court upheld an Ohio statute requiring 24-hour advance notification of one parent with a judicial bypass that was challenged as deficient. Although the Court had in prior cases allowed states to restrict teenagers' access to abortion services, these decisions allow for even greater state interference.

In terms of the continued vitality of Roe v. Wade, as in Webster, only a minority of the Justices reaffirmed Roe. In fact, the Hodgson decision undermined Roe even further. For the first time, Justice O'Connor -- who, prior to Justice Brennan's retirement, was clearly the critical vote on the right to privacy -- applied her "undue burden" standard of review in voting with the majority to uphold a restrictive abortion statute. Moreover, she applied this new standard in a manner that affords little constitutional protection: she found no "undue burden" in requiring minor women to notify both parents without any judicial bypass option, even in cases of divorce or desertion and over the objections of the custodial parent, although she did find that this requirement was irrational. Although Justice O'Connor will likely apply this "undue burden" standard in future abortion cases, including those involving adult women, Roe v. Wade remains the law of the land. Lower courts must continue to apply strict scrutiny in reviewing abortion restrictions until such time as the Supreme Court may actually overrule Roe and adopt a new standard of review.

#### FUTURE CASES

With Justice Brennan's recent resignation, only three remaining Justices on the Supreme Court recognize the fundamental right to privacy, including a woman's right to decide whether or not to have an abortion. Even if Justice O'Connor refrains from casting her vote to overrule Roe, there is no longer a majority on the Supreme Court to reaffirm Roe. If Justice Brennan is replaced with a Justice who will not protect a woman's fundamental right to decide whether or not to have an abortion, there will be a clear majority on the Court who will vote to overrule Roe v. Wade.

The CHAIRMAN. Ms. Wattleton.

#### STATEMENT OF FAY WATTLETON

Ms. WATTLETON. Thank you, Mr. Chairman, and to the committee. It is also my pleasure to speak before you this morning.

I speak as the president of the Planned Parenthood Action Fund, which is the political advocacy arm of the Planned Parenthood Federation of America [PPFA]. PPFA is the Nation's oldest and largest nonprofit, private provider of reproductive health care in this country. For 75 years, we have given men and women access to the information and medical care that enable them to decide when and if they will be parents. Every year, nearly 2 million Americans—many of them young and poor—come to our 879 medical centers. We are not a special interest group, as some have implied. Our views represent those of millions of Americans—as a matter of fact, the majority of Americans—who want to preserve their right to make their most fundamental private reproductive decisions.

Last week, David Souter told us that the responsibility of a Supreme Court Justice, and I quote, "is to make the promises of the Constitution a reality for our time and to preserve that Constitution for generations that will follow us." We agree completely. We also believe that one of the promises of our Constitution is the protection of our fundamental right of privacy and reproductive freedom.

Until these hearings, Judge Souter's views on these constitutional promises were virtually unknown, and Planned Parenthood did not oppose his nomination. Instead, supported by 87 percent of the electorate, we asserted that Americans have the right to know Judge Souter's views on fundamental issues such as the rights of privacy and reproductive freedom.

But after days of evasive answers and filibusters, we know little more about his views on these issues than we did before the hearings began, and what we do know is profoundly disturbing. It is clear that Judge Souter sees reproductive freedom as an unsettled issue. He does not accept reproductive rights as an established constitutionally protected right, one of the promises of our Constitution.

Judge Souter acknowledged the existence of a right to marital privacy but would not acknowledge the right of married people to use contraception as outlined in *Griswold*. He also refused to comment on the later *Eisenstadt* decision that extended this right to unmarried people.

In fact, he said in regard to *Griswold*, and I quote, "If there were a successful attack on *Roe*, that would call into question prior privacy cases." This is a contention that Planned Parenthood has made all along.

In other words, Americans may not have the fundamental right to prevent unwanted pregnancy, much less the safety to terminate a problem pregnancy.

Judge Souter steadfastly refused to answer questions about a woman's right to abortion, saying that it would be inappropriate for him to comment because it is likely that *Roe v. Wade* would be coming back to the Supreme Court. And yet he was willing to com-

ment extensively on the appropriate standard of review for cases including gender discrimination, the free exercise clause, racial discrimination, all of which are likely, like *Roe*, to come before the Court.

He refused to tell Senator Kennedy if he considered abortion moral or immoral, even in cases of rape or incest, saying it would, and I quote again, "dispel the promise of impartiality in approaching this issue" if it came before him. Yet Judge Souter has no qualms about expressing his own moral views about the death penalty and white-collar crime, issues on which the Supreme Court is repeatedly asked to rule.

The resignation of Justice Brennan has left the Supreme Court precariously balanced. Last year, and again this year, the Court issued decisions that seriously weakened *Roe* and unleashed wholesale assaults on reproductive rights in State legislatures nationwide. Indeed, when asked what the practical consequences of overturning *Roe* would be, Judge Souter reduced the issue to a Federal-State squabble.

Twenty-four years ago, when David Souter was counseling a young woman in Boston facing an unwanted pregnancy, Planned Parenthood was doing similar work, working with trained counselors, nurses and volunteers all over the United States. The one experience that Judge Souter claims as his sole source of sensitivity on this critical issue of private life is an experience that Planned Parenthood clinics cope with every day. We know, as do most Americans, that *Roe v. Wade* liberated American women and saved our lives like no other recent Supreme Court decision. Its real life consequences have been matched by few judicial acts in the history of our republic.

For women and their families, the right to reproductive choice creates a foundation for exercising many of the other constitutional privileges we enjoy as Americans. Clearly, the health and well-being of American women and of future generations that David Souter expressed concern about will rest in the hands of the next Supreme Court Justice. What choices will my daughter, your daughters, our granddaughters have? Will the promises of our Constitution remain a reality for them? It depends largely on the views of the next Supreme Court Justice on privacy and reproductive freedom.

Any Supreme Court nominee who rejects the fundamental nature of these privacy rights in a democracy must likewise be rejected by the citizens of that democracy. American women, quite frankly, are quite tired of having our rights placed up for grabs. We urge you to keep the faith of the American people and American women, women who will not forget who nominated the next Justice and who confirmed him. We urge you to reject the nomination of David Hackett Souter to the U.S. Supreme Court, and thereby send a message that the period of tolerance for political gamesmanship around our fundamental reproductive rights has ended.

[The prepared statement of Ms. Wattleton follows:]

DRAFT

Statement of Faye Wattleton  
President  
Planned Parenthood Federation of America  
before the  
Senate Judiciary Committee  
on the nomination of David H. Souter  
to the U.S. Supreme Court

September 18, 1990

Mr. Chairman:

Planned Parenthood Federation of America is the nation's oldest and largest non-profit, private provider of reproductive health care. For 75 years we have given women and men access to the information and medical care that enable them to decide when and whether to have children. Every year nearly two million Americans -- most of them young and many of them poor -- find their way into our 879 medical centers. We help Americans plan their families, enhance their lives, and assure that children are born wanted and loved.

For some in politics, the debate over Roe v. Wade boils down to concerns about polls and votes and constituency pressure. For many trained in the law, Roe is an interesting debating point. But for most Americans, the Roe v. Wade decision was a liberating and life-saving pronouncement. Its real-life consequences have been matched by only a few judicial acts in the history of our republic. For women and their families, the right to reproductive choice creates a foundation for exercising many of the other constitutional privileges we enjoy as Americans.

But last year and again this year, the court that produced Roe issued decisions that seriously weakened Roe and unleashed wholesale assaults on reproductive rights in state legislatures nationwide. Now, the judge nominated to fill a vacancy on that court is in a position to turn back the clock even further on reproductive rights, to an era when providing or obtaining an abortion was a criminal act.

Until these hearings, Mr. Bush's nominee was a virtual unknown. Rather than oppose his nomination, Planned Parenthood asserted Americans' right to know Judge Souter's views on fundamental rights

of privacy and reproductive freedom, which are taken for granted by the vast majority of Americans.

Today, however, after days of evasive answers and filibusters, we know nothing more about Judge Souter's views on reproductive rights than we did before the hearings began.

Judge Souter has acknowledged the existence of a constitutional right to marital privacy and a right to procreate, but would not acknowledge the right of married people to use contraception as outlined in Griswold. He also refused to comment on the later Rianstadt decision that extended this right to unmarried people.

Judge Souter steadfastly refused to answer questions about a woman's right to abortion, saying it would be inappropriate for him to comment, because of the likelihood of Roe coming back to the Supreme Court. Yet, as Senator Biden pointed out, Judge Souter was willing to comment quite extensively on his views on the appropriate standard of review for cases involving gender discrimination, the free exercise clause and racial discrimination, all of which -- like Roe -- are likely to come back to the Supreme Court.

Mr. Souter refused to answer Senator Kennedy's question about whether he considers abortion moral or immoral, even in cases of rape or incest, saying it would "dispel the promise of impartiality in approaching this issue" if it came before him. Yet, Mr. Souter had no qualms about expressing his own moral beliefs about the death penalty and white collar crime.

Judge Souter's story of having "counselled" a pregnant young woman who planned to self-abort before abortion was legal in Massachusetts clearly was meant to assure pro-choice Americans that

he recognized the pain and desperation of women who face unwanted pregnancies. The story, however, only reveals that Mr. Souter advised the young woman not to attempt a self-abortion; it gives us no clue as to his views on the issue of legality.

Judge Souter also refused to address the countervailing interest the state has that weighs against the woman's "liberty" interest in terminating a pregnancy. Nor would he say whether he believes in the concept of constitutional "personhood" from the moment of conception.

Justice Brandeis once said, "If we would guide by the light of reason, we must let our minds be bold." Judge Souter has displayed no boldness whatsoever during these hearings. The general opinion is that he has acquitted himself very well. That may be true in the sense that he made no mistakes and no commitments that would hurt him.

But the health and lives of millions of American women, for generations to come, may depend on where David Souter stands on fundamental rights of privacy and reproductive freedom. The American people will not tolerate a Supreme Court justice who refuses to acknowledge these rights -- openly and unequivocally. Any Supreme Court nominee who rejects the fundamental nature of such rights in a democracy must likewise be rejected by the citizens of that democracy.

We urge you to reject the nomination of David Hackett Souter to the U.S. Supreme Court, and thereby send a message that the period of tolerance for political gamesmanship around our fundamental reproductive rights has ended.

The CHAIRMAN. I thank you both for your testimony. Obviously, it is testimony you both not only gave but feel very strongly and deeply.

Let me probe a couple things, if I may. It is obvious that you did not make your decision immediately. I expect that you were both hoping you wouldn't come to testify. But let me be the devil's advocate with you for a moment.

Where do you think, based on his testimony, Judge Souter, if confirmed, will sit on the spectrum of the Court on which he will sit? Will he be a Scalia on your issues? Will he be a Kennedy? Will he be an O'Connor? Will he be a Marshall? Clearly, you do not think he will be a Marshall.

Ms. MICHELMAN. No.

The CHAIRMAN. All kidding aside, I am very serious. Based on his testimony, do you have any clear sense of how antagonistic from your perspective to your views he will be? Because clearly, if we said to you you can have another O'Connor on the bench or another Scalia, I don't have any doubt which you would pick if you had to take one of the two. Where do you think he will fit on the spectrum of reproductive rights as guaranteed by the Constitution based upon how the Court is now configured?

Ms. MICHELMAN. Well, Senator Biden, you have to remember that Justice O'Connor has indicated most recently in the *Hodgson* case her willingness to join the others in overturning *Roe v. Wade*. So even if I were to say that I think Judge Souter—

The CHAIRMAN. Well, I am not suggesting you would like either. I just am trying to get a sense of where, based on—since I only have 10 minutes, I don't have the time to go in and probe each of the statements. For example, I'd like to ask—well, I will. I will ask you, Ms. Wattleton. You indicated that Judge Souter's assertion toward the end of his testimony in response to a question—I think by me, but I am not certain who it came from—he made the comment that if, in fact, *Roe* were overruled, it would undo the fabric of privacy cases all the way back to and through *Griswold*. I am paraphrasing. Whereas, the Solicitor General, Mr. Freed, argued it was just one thread that could be pulled out.

It has always been your assertion that if *Roe* goes, the whole progeny of cases that preceded it, the whole line of cases that preceded it would go. And I drew, quite frankly, some comfort from that answer. You obviously were distressed by the answer. Tell me why you found that distressful since he had gone on record as saying he strongly recognizes the right of marital privacy, and the core of that right is reproductive freedom or, specifically, the right to use contraceptives, to choose whether or not to procreate.

Now, you found the answer disturbing. I found it encouraging. Here the guy says the anchor to *Roe* I agree with, and if you pull out *Roe*, then that anchor may go. I read that as leaning toward, well, maybe the fellow won't go that way. But I don't know any more than I guess anyone knows. Tell me why it disturbed you.

Ms. WATTLETON. Well, it disturbed me, Senator Biden, for several reasons. One, Mr. Souter did not say that he believed that there was a constitutional foundation for *Griswold*. He said that he felt that there were privacy protections for marital procreation. And

when taken to *Griswold*, as I listened to him in the Senate hearing room that day, he was reluctant to comment on it.

It further disturbs us because, while Mr. Fried and *Webster* chose only to take a threat out of privacy in the *Hodgson* and *Ohio* cases, the Bush administration called the whole question of privacy into—felt that the Supreme Court should call the whole question of privacy as a constitutional protection. And so we felt that that was quite disturbing. But, more, we believe that *Roe* is built on a foundation of constitutionally protected rights of privacy. And if you can find no right in the Constitution to protect privacy with respect to *Roe*, then clearly it calls into question other reproductive rights cases from which *Roe* emanated.

It was an evolution of cases—*Eisenstadt* being one that the judge chose not to comment on—leading up to the *Roe* decision in 1973.

The CHAIRMAN. Well, we will go back and check the record. Obviously, none of us—I shouldn't say none of us. I know I don't know how he is going to rule. I know you don't know for certain. Maybe somebody over here knows, but I don't.

My recollection was that he said he didn't want to comment on specific cases, but he was pressed hard by me and others—by Senator Kennedy and others—on the principles, and he did firmly subscribe to the principles.

Ms. WATTLETON. Well, I think that there was a question that was asked about whether, if he support privacy for procreation—and I believe that was your question—whether he saw the constitutional protection extended to the right not to procreate. And he declined to answer that question, and that was very disturbing to us.

I think another aspect of it that I think places him out on the wing with Scalia and Justice O'Connor was the question of strict scrutiny and his tier evaluation of various State-imposed restrictions, which is quite disturbing to us because, before the most recent Supreme Court decisions, the standard had been strict scrutiny, not whether the States could show that their restrictions were unduly burdensome, or were not unduly burdensome.

The CHAIRMAN. Again, I will not press that, not because you are not fully capable of responding to it, but because I don't have the time. But I will look into the record. My recollection was he refused to comment at all on what tier he would use relative to that issue. And he did acknowledge—which isn't telling us much, I acknowledge. He did acknowledge that there was a liberty interest that prevailed after pregnancy.

Now, that doesn't tell us much at all because Justice Scalia acknowledges there is a liberty interest that prevails.

Ms. MICHELMAN. Right.

The CHAIRMAN. Did you want to say something, Ms. Michelman?

Ms. MICHELMAN. Yes; I just wanted to add to what Faye has said; that Judge Souter, also in discussing the area of privacy, suggested that this area is absolutely open for reevaluation; and, in fact, he said that it will be many years before this area of law is, in fact, settled—which raises tremendous concern.

The CHAIRMAN. But isn't that just stating the obvious?

Ms. MICHELMAN. Well, no. It shouldn't be because it is our belief and contention that this is a 17-, 18-year-old law that is based on a

body of law that should, in fact, be as settled as *Brown v. Board* is. And it disturbs us that there is a suggestion that it is up for grabs.

The CHAIRMAN. When I pressed that issue in another context, I made the comparison to *Brown*. As a matter of fact, I went back when I first met with the judge and with people who were with him from the White House, and I asked him, I said:

If you were up for nomination immediately before the Civil War and immediately after the decision saying that black people could be viewed as property under the Constitution, would you vote for any Justice before you knew whether or not that Justice agreed or disagreed with that landmark case, the *Dred Scott* case?

And everyone in the room said:

No, I wouldn't do that.

And I tried to make the point that a number of people feel equally as strongly as about reproductive freedom.

But let me go back to the assertion by the judge, because I may have misunderstood him. And I am not being solicitous when I say I will go back and reread this portion of the testimony. When he said that this whole area is still open, my impression was he was attempting to make a clear distinction between whether or not he thought it should or should not be open, and whether or not, as a matter of fact, it was open; and that unlike *Brown*, there were no intervening cases between the time of the core decision—in this case, *Roe*—was decided and the time he had to testify, as there have been in *Roe*; i.e., *Webster*; and that he was merely stating the landscape of the law as it is today.

Your impression was, as I understand it, that he wasn't giving us a professorial analysis of the landscape of the law. He was giving us his opinion as to whether or not it should or should not. Am I correct?

Ms. MICHELMAN. I think he was saying he is open, he is open to listening rather than recognizing that there is a fundamental right to privacy, including the right to choose. And, you know, it is not just *Webster* that has happened. There is a whole line of cases—*Thornburgh*, *Aakron*—there is a whole line of cases where the Court reaffirmed strongly the principles established in *Roe* that a woman's right to privacy includes her right to choose. And he didn't acknowledge those. He just said this whole area is open.

I think the risk here is very great.

Ms. WATTLETON. I would further submit, Senator, that there have been cases that relate to *Brown* since *Brown*. The whole question of busing and how to effectively implement desegregation in our Nation's schools is by no means a settled issue. And yet this judge was willing to comment on the appropriateness of it, and we take no issue with that.

The concern that we have is that these are broad areas of concern—that is, privacy, reproduction—major areas that affect the lives of every single American. And to elevate a candidate to the position of Justice of the Supreme Court without knowing his judicial philosophy in these areas or with a vague or foggy idea of his thinking on this is very dangerous, in our opinion.

Senator METZENBAUM. Mr. Chairman, I apologize for interrupting. I just wanted to make a short statement, that I haven't been here and I won't be here, because I am handling a bill on the floor

and I don't want the witnesses, either these or others who preceded them or will follow them, I don't want them or others who will follow them to feel that it's a lack of interest, but if there's a bill of yours on the floor you must be there. I am saying to them as well as the other witnesses who will be here today that I'm absent, but not intentionally. It's just because of another responsibility.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Metzenbaum.

Ms. MICHELMAN. Thank you, Senator, we appreciate that.

The CHAIRMAN. My time is up. Let me conclude by saying this and you may not be able to answer this. Is the basis of your testimony here today that we know this man will overrule *Roe v. Wade*, therefore, we're against him, or because we don't know that he won't overrule *Roe v. Wade*, we are against him?

Ms. MICHELMAN. All the evidence points to the fact that he will overrule *Roe* and he has said nothing to allay our concerns.

Ms. WATTLETON. We're opposed to him because he has refused to answer the question straightforwardly and it is our fear that he would vote not to continue the constitutional protections of privacy that extend to the right to abortion.

The CHAIRMAN. Well, I have a number of other questions, but my time is up. Let me yield to my colleague from South Carolina.

Thank you, very much.

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome you ladies here.

Ms. WATTLETON. Thank you, Senator.

Ms. MICHELMAN. Thank you, Senator.

Senator THURMOND. A member of the Supreme Court must make decisions about hundreds, even thousands, of issues. Now, Judge Souter has been a judge for some 14 years. The American Bar Association has held him well qualified. They have given him the highest rating they can give any candidate for a judgeship.

Now, without regard to your specific concern on the abortion question, do you believe Judge Souter has the professional qualifications to serve on the Supreme Court?

Ms. MICHELMAN. Well, I certainly wouldn't quibble with the evaluation of the American Bar Association about his professional qualifications. We might note that the American Bar does not evaluate judicial philosophy. I mean that qualification does not concern itself with judicial philosophy which I think is very much at issue here, and judicial approach.

Senator THURMOND. Now, either one of you can answer these questions.

Do you feel he has the integrity to be on the Supreme Court?

Ms. WATTLETON. There is no evidence that there is any reason to besmirch this particular candidate's integrity.

Senator THURMOND. Do you feel he has the judicial temperament to be on the Supreme Court?

Ms. WATTLETON. The judicial what?

Senator THURMOND. Temperament?

Ms. WATTLETON. I find his judicial temperament very disturbing, both in the cases that—

Senator THURMOND. Disturbing, you say?

Ms. WATTLETON. Disturbing, yes. Both—

Senator THURMOND. Would you explain why?

Ms. WATTLETON. Yes; I am about to. Both in the cases that we read prior to these hearings as well as in the discussions that he had with you, during the proceedings.

Senator THURMOND. Do you feel he has had the professional qualifications, the professional competence to be on the Supreme Court, regardless of his views on abortion?

Ms. WATTLETON. Well, I don't believe that we can really judge beyond what has been evaluated by professional groups that he has the professional qualifications to sit on the Court, but that does not mean that everyone who is professionally qualified to sit on the Court should sit on the Court.

Senator THURMOND. Now, again, I want to ask you without regard to your specific concern on the abortion question, do you believe Judge Souter has the professional qualifications to serve on the Supreme Court?

Ms. MICHELMAN. I think we both have said, Senator, that we have left that evaluation to the professional organizations and we have no reason to dispute it. But as Ms. Wattleton just said, professional qualifications alone do not make a Supreme Court Justice.

Senator THURMOND. If he doesn't favor the position that you favor on abortion would you favor turning him down?

Ms. MICHELMAN. We have established that unless Judge Souter openly recognized a fundamental constitutional right to privacy, including the right to choose, he should not be confirmed.

Senator THURMOND. In other words, if his position on abortion is not the same as yours, you would oppose him?

Ms. WATTLETON. Senator Thurmond—

Senator THURMOND. That's a very plain question, I think.

Ms. WATTLETON. That is a question that I think we have to make clear that we are representing specific groups and constituencies. Now, what our views may be as Americans are one thing in terms of the broader context of his nomination. But, here today, we are speaking on this specific area of our concern. And, yes, we would oppose him if he does not and as he has not taken a position on reproductive rights.

Senator THURMOND. In other words, if he opposes your position on abortion you would be against him?

Ms. MICHELMAN. If he does not acknowledge the right to privacy to include the right to choose. It is not his personal view on abortion—

Senator THURMOND. That is what I'm asking. That is the very question I'm asking you.

Ms. MICHELMAN. The issue before us is whether there is a right, a right, a fundamental right to choose and that is what is at issue. I'm not really interested in his personal views. We all have different views on abortion. It's really what, how he views the Constitution's role in protecting the individual's right to make this decision. And he has not satisfied our concerns in that area.

Senator THURMOND. Even though he has other qualifications to be on the Supreme Court, if he doesn't take your view on abortion, then you would be opposed to him.

Ms. WATTLETON. Well, Senator, I think that I would put that in a context of most Americans who see these issues as fundamental

rights and are not interested in giving away any of our rights. If this was a justice, or a judge that was totally qualified professionally to sit on the Supreme Court and could find little protection or questionable protections for my freedom of speech, he would not be qualified to sit on the Court.

So I see these questions as fundamental and if a justice does not find constitutional protections for what Americans believe are their fundamental rights, then, no, he should not sit on the Court.

Senator THURMOND. What evidence do you have that he is against your position, anyway?

Ms. WATTLETON. Well, the evidence is as Mr. Biden asked him to remember that the burden of proof is on him to present to the committee his views, to convince this committee that it should confirm him. With respect to privacy and reproductive rights, he steadfastly declined to do so.

Senator THURMOND. Well this question will be coming before the Supreme Court again probably—

Ms. WATTLETON. So will a myriad of other questions.

Ms. MICHELMAN. So will many other questions in areas of law that he was much more, I should say somewhat more forthcoming. I'm not sure—

Senator THURMOND. Well, he declined to answer on a lot of questions there—

Ms. MICHELMAN [continuing]. He was much more, but somewhat more.

Senator THURMOND [continuing]. Questions that may come before the Supreme Court.

Ms. WATTLETON. He certainly didn't decline to answer on questions of capital punishment. He certainly didn't decline to answer on questions of—

Senator THURMOND. Do you remember what he said, that I will listen, do you remember him saying that?

Ms. WATTLETON. I hope he will listen.

Senator THURMOND. I will listen, I will listen and if he listens and formed his own honest opinion about it what more can you ask of a person?

Ms. MICHELMAN. But, Senator, in our view, this law and this body of law is old. He should have a view, and we have a right, the American people have a right to know what his view is. He singled this area of law out to avoid discussing, and as we have said over and over other areas he was more open and more forthcoming, and singled this one out. So I think that suggests some real concern.

Ms. WATTLETON. I think also that we ought to expect any judge who sits on the bench to have the capacity to listen, but from what perspective will he listen is the question that is before us. So that we were not comforted by his claims that he would listen. I think that's a remedial requirement for any judge.

Senator THURMOND. Well, people change their minds. Prior to this decision, *Roe v. Wade*, the matters was with the States. The judges change their minds and they took it to the Federal level and now some of them would like to take it back; they changed their minds.

In the *Plessy v. Ferguson* decision of 1896 which required separate but equal facilities, the judges changed their minds in 1954.

This man is openminded he says. He will listen and he impressed me as the kind of man who would change his mind if he felt that something in the past had gone wrong or conditions warranted changing his mind.

In fact, if I recollect correctly, he said he hadn't made up his mind on the abortion question. Didn't he say that?

Ms. WATTLETON. Well, he did say that and that is very disturbing—

Senator THURMOND. Well, if he said that, wouldn't you accept his words on that?

Ms. WATTLETON. Could I just finish? He did say that but after 18 years we find it enormously disturbing that an area of major constitutional law is such that this person, who wants to sit on the Supreme Court, doesn't have a view on it and has not made up his mind on it. Yes, there is no question that courts do change their minds, but I believe this would be the first time that we would see a Supreme Court position in which it has established a right, take it away.

I'm not interested as an African-American and as a woman seeing the rights that I have come to expect as an American be reversed because a court changes its mind, and I believe we have to speak out against any such development.

Senator THURMOND. Well, my time is up. I just want to say, if he is a man of integrity and character and says he hasn't made up his mind, and he will listen, what more could you ask?

That's all. Thank you. My time is up, Mr. Chairman.

Senator LEAHY. Mr. Chairman, if Senator Kennedy could withhold just a moment, I would also like to note something similar to Senator Metzenbaum. We are in the process of putting together the conference committee on the 5-year farm bill and while I was here for all but 4 or 5 minutes of Judge Souter's testimony, I am going to have to miss much of the testimony over the next couple of days. I will follow it fully and my staff is going to brief me on it fully. I do apologize to the witnesses, especially the two here, but that is the reason why I'm not going to be here.

The CHAIRMAN. Thank you, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you.

I want to join in welcoming our witness and our panel this morning. In just listening to the exchange and the presentation to date, I imagine that point you are making, and correct me if I'm wrong, that you believe that this kind of a right is as basic and as fundamental to the Constitution as other rights, which are regularly accepted: the free speech, separation of church and State, the ability to assemble, the basic guarantees of the 14th amendment in terms of the protections of minorities in our country.

As I understand you believe that those are basic and fundamental and the right that you speak of is as basic and fundamental as that.

Ms. MICHELMAN. Absolutely.

Senator KENNEDY. And that if we were at another period in our history we would not be being asked to confirm someone who did not accept those basic and fundamental rights?

Ms. MICHELMAN. That's right.

Senator KENNEDY. Am I correct in understanding your position?

Ms. MICHELMAN. Yes. In fact, it would be like asking African-American people in this country to if *Brown v. Board* were at issue, to consider that they might have to go back and win their rights State by State, legislature by legislature, year after year, they would have to go back and work through all of that to attain their right to equal education and equal protection. That's what we're talking about for women. That we're suggesting that women should go back and win their fundamental rights. Yes, this right should be considered like any other fundamental right.

Senator KENNEDY. And, I think all of us are familiar with what are considered to be special interests. As I understand this is not like whether you are for gun control or not gun control—

Ms. MICHELMAN. No, no.

Senator KENNEDY [continuing]. Single-issue kind of litmus test; it's really basically and fundamentally from your point of view, and I think from millions of Americans' point of view that this is so basic and fundamental as the other established rights?

Ms. WATTLETON. That's correct.

Senator KENNEDY. So, second, as I gather from your testimony, it would be really inconceivable I imagine that if we were here in the post-*Brown v. Board of Education* that we would be considering a nominee who might go back to the separate but equal doctrine?

And, as I understand you believe, just so I do understand, that the decisions that have been made with regards to the rights in the *Roe* are about as basic and fundamental as the decisions on the guarantees and the constitutional protections that were reached under *Brown*?

Ms. MICHELMAN. Absolutely.

Senator KENNEDY. And other, *Marbury v. Madison*, and other major constitutional decisions?

Ms. MICHELMAN. That is correct.

Senator KENNEDY. And as we, as a country, would not consider going back to a separate but equal, you are pressing us to apply a similar kind of a standard with regards to this particular issue, am I correct?

Ms. MICHELMAN. I think you have said our position very, very well.

Senator KENNEDY. I just have a final question. What was your reaction to the question about, to Judge Souter's comments about what the world would be like for women if *Roe* was overturned?

Ms. WATTLETON. I was truly stunned that the Judge immediately reduced it to a Federal/State question, and did not react either immediately or in process to the reality of what it would mean which is that women would suffer the consequences of illegal abortion.

Ms. MICHELMAN. What he did was he completely missed the human, the human element here, and moved right to very—

Senator KENNEDY [continuing]. What is the human element?

Ms. MICHELMAN [continuing]. Well, the fact is that a world without *Roe* would mean death, degradation, shame, injury to women. It would mean women would be robbed of the most vital, important right that they have that affects every aspect. You said it, Senator, it isn't a single issue. This is an issue that literally permeates the entire fabric of a woman and her family's and the community's

life. So it was interesting to me and I share Faye's response, that he immediately focused very technically on what it would mean rather than on the huge dimension of social and human problems that would result.

Ms. WATTLETON. And I think it reflected our worry about his general judicial temperament, if I may, with respect to seeing the impact of the law in people's lives, and seeing the law in a narrow intellectual context and not in a living context. If there is any inspiration that we can gain from constitutional protections it is that it has been enduring, and that in the context of contemporary life it has extended protections to greater numbers and segments of American society.

So to reduce those protections to the simple equation of whether there would be tension between Federal and State jurisdictions, or for that matter, whether illiterate voters would dilute literate voters as a mathematical problem was very distressing to us.

Senator KENNEDY. I have no further questions, Mr. Chairman.

Thank you, very much.

Ms. MICHELMAN. Thank you.

The CHAIRMAN. Thank you, very much, Senator.

Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

How do you do, ladies? Nice to see you today.

I want both of you to know and I think you are aware of my position on this terribly anguishing matter. I think you know that I am in favor of a woman's right to choose. I have held that view, formed within 2 years after *Roe v. Wade* through a legislative debate.

I am also very supportive of most of the objectives of Planned Parenthood. I have stated those things and have provided some of my own personal funds for dues over the years to some of those groups.

But I really believe you are making a big mistake on this one. That's too bad. You know, it's perfectly all right, but I think these things are going to come up again. There are going to be other Supreme Court choices when you are really going to need to be in the trenches. This is not one of those cases. This is my view.

I believe you are seriously in error in demanding that Judge Souter answer specific questions on this issue, because he is a sitting judge. And since we have heard a remarkable array of extremely technical discussions over the last few days, which are like going to law school again, let's not forget Canon 3(a)(6) of the ABA Code of Judicial Ethics. It prohibits a sitting judge, and that is Judge Souter, from comment on a "pending or impending matter" likely to come before the Court. He is prohibited from doing that, absolutely prohibited under the ethics of the ABA, who have given him a rating that is the highest they can give.

Nearly everyone has conceded that abortion will be before the Supreme Court again, and thus, that subject is covered by the ABA Code. You are really asking Judge Souter to violate the rule of judicial ethics in order that your organizations, both of them, can have advance knowledge of his position on the particular issue of abortion.

Why are you asking of Judge Souter that which he is forbidden to answer by the Code of Judicial Conduct?

Ms. WATTLETON. Well, Senator Simpson, I would seriously object to your characterization of our asking Judge Souter to comment on the constitutional protection of reproductive privacy for the basis of our organization's foreknowledge of how he might rule.

As I spoke earlier in my comments, our views represent the overwhelming majority of the American people and I sit here, not only as head of an organization but also as an American, the American people have a right to know.

Yes, there are judicial ethics. As a matter of fact, I think that there is a law that forbids the judge to answer questions about specific cases, but virtually every aspect of American life at some time comes into question and must be adjudicated. We believe that this is an important aspect of American constitutional law that deserves to be probed very thoroughly. Perhaps it should be seen as something that is integrally important to the integrity of women in this country. We do not consider it an issue that we want to take a chance on. We may have a difference of opinion, but such is the democratic process. It is our opinion without a clear understanding of his judicial philosophy in this area, not how he will rule on *Roe v. Wade*, that Mr. Souter should not sit on the Supreme Court.

Ms. MICHELMAN. I would like to share that. I don't think any member of this committee asked Judge Souter specific questions about specific cases, or specific facts that may come before a case, or may be involved in a case.

What the attempt was to get at how he would, what kind of legal reasoning, legal approach he would use to evaluating whether there is a fundamental constitutional right to privacy. He did, as I said earlier and as Faye has said, he was more forthcoming in other areas of law where, in fact, the Court will have to rule in the future. He singled this one out and we think it is not acceptable that he should be able to single this out and raises too great a risk.

Senator SIMPSON. I see. You know, we talked about the issue of gender discrimination, first amendment free exercise, and those issues, critical issues. Those are much broader in scope than the question, do you support a constitutional basis for abortion rights?

You know that and I know that. Judge Souter was granted latitude on those broader issues, but he simply is not granted this kind of latitude on this specific issue of abortion.

Ms. WATTLETON. I might point out that Mr. Souter chose not to answer the question do you believe that the Constitution protects the right not to procreate. He declined to answer that after having established that he believed that it protected marital privacy.

Senator SIMPSON. I know that. I guess I can only judge that you wish Judge Souter to advise all political litigants that he is not impartial and not using the tools of a judge if he were to hear an abortion case. I think that is what you are asking him to do.

Ms. WATTLETON. I believe what we are asking him to do is to demonstrate his commitment and that he will champion our constitutionally protected rights. Just as I would not want to see him openminded about whether I have the right to a symbol in this room today or whether there will be an enshrinement of a particu-

lar religious doctrine in the Constitution of the United States, these constitutional rights must be protected as well.

Senator SIMPSON. I'm on your side, but I think you're hurting your cause. If Judge Souter's personal qualifications are not the single most important issue here, then we're wasting our time and that was your testimony—

Ms. MICHELMAN. Wait—

Senator SIMPSON [continuing]. Please, I only have 10 minutes. That is the issue. Are you really saying the only issue in this process is whether or not the nominee will do what you want him to do on one issue? Now, you know, you can talk about single issue all you want, but that's where we are. I remember the cries and the shrieks of "unfair, improper crude," and such when the Reagan administration was supposedly making the abortion issue a litmus test in selecting judges during Ronald Reagan's time. I remember that.

Family values, you know, was an issue of sinister import at one time with regard to that. The moral majority and all that stuff were being hacked to shreds, the litmus test deluxe. Now, you are asking the committee, this committee, the Senate, to apply that very test. And you specifically request this, to overlook the personal qualifications of this splendid man that you have all seen. The country knows exactly who he is now, and you ask us to overlook that, plus his intellect and his knowledge and decide this on a single issue.

He did not single this issue out. He did not single this issue out.

Ms. MICHELMAN. We didn't, by the way, also create the litmus test. We have lived through 10 years of an administration that has, indeed, used the judicial appointment process to further a goal of taking away a fundamental right to choose. In fact, for the first time in our Nation's history we are on the brink of the Court reversing, taking away a fundamental right and I think it is appropriate for Judge Souter to talk about that issue. It is not, as we said, just about legal theory. These are millions of women's lives.

Senator SIMPSON. I know.

Ms. WATTLETON. I would like to also say that we have not asked you to overlook this candidate's qualifications. If a candidate came before you and said that he or she believed that the Constitution protected reproductive rights and was otherwise unqualified, that would not result in our support for that nominee. So I think it is important not to trivialize the significance of the position that we are taking here today.

Just as I doubt that you would confirm this individual if he said that public education should be separate but equal in this country, American women do not believe that this individual should be confirmed declining to say that he believes that the Constitution protects our reproductive choices.

Senator SIMPSON. As I say, I only know what I read in your statement and I know what it says. We have been impressed by Judge Souter's intellect and knowledge but Judge Souter's personal qualifications are not the issue. That is your quote not mine.

Ms. MICHELMAN. That's my quote.

Ms. WATTLETON. That's precisely what I've just said.

Ms. MICHELMAN. That is not the issue, his personal qualifications.

Senator SIMPSON. Fine, but I can say to you that Judge Souter will be confirmed. It is my thoughtful hope that will happen. He will be one of nine on the Supreme Court. He will not be the Supreme Court. How in the world have we gotten into this situation where on each case suddenly this is supposedly the key person? Even if he should be, I don't know where he is on the issue, but I know he has done the absolutely right thing in answering with regard to it that even if he should be antiabortion—I hope he is not, as you seem to be so sure he is. I don't understand how you got to that point. But even the overruling of *Roe v. Wade* will never prohibit abortion. It will come up again and again and again and it will come up in the States. It will never be put away ever, ever be put away.

Ms. MICHELMAN. Oh, Senator——

Senator SIMPSON. Just a moment, please. The issue is going to come up for ever and ever and ever. I hope it will be done in the Supreme Court and I hope it will be done correctly so that women will have that choice.

But you talk about the majority of Americans who support the woman's right to choose and I'm one of those. So why this great inordinate fear of a single nominee to the Supreme Court who you really don't know where he stands on the issue? What is the basis of that inordinate, obsessive fear?

Ms. MICHELMAN. Because the Court is on the brink, for the first time in history, of taking away an established, fundamental right. And that has been accomplished year after year by administrations committed to using the judicial appointment process to attain that goal. That's how we got Scalia, and we have O'Connor, Kennedy. That is why we are understandably a trifle nervous about Judge Souter.

He has said nothing in his testimony to convince us that he, in fact, recognizes a constitutional right to privacy. Senator, I must comment, I can't let go your comment, well, if *Roe* is overturned women will have the right to choose. You know what it was like before 1973, some women died because in one State abortion was illegal.

Women shouldn't have to win their rights or their rights shouldn't be dependent upon their place of residence any more than an African-American should have equal protection based on his or her place of residence.

I don't think we can trivialize this issue that way and that is why we have taken this strong statement. The last thing I want to say is this is politically not an easy thing to do. As I said also in my statement, that the politics are difficult but the principle is what counts here.

Ms. WATTLETON. Senator Simpson, I would also like to say that the reason that we are deeply concerned about this is because we believe in the concept of the Bill of Rights that separates and takes apart from certain political processes, certain basic rights that Americans enjoy and can expect to enjoy as Americans. While you may say that if *Roe v. Wade* is overturned it has very little effect——

Senator SIMPSON. I don't know whether that will happen.

Ms. WATTLETON. Or that, for that matter, it will turn back to the States as the representative of an organization that provides services to millions of women each year, we know the practical application of that, the poor and the young.

That most often means minority women will be the first to be injured and the first to die and that is not what we want to see.

Senator SIMPSON. I know, but you see you have effectively diverted it again and again and again. We are back to the issue of a man that you have watched and heard. A man who is bright, intelligent, studious, caring, chivalrous, patient, probative, civilized, and a great listener and if that ain't enough for you, I think you are making a real mistake.

Ms. WATTLETON. I think we have a difference of opinion and we believe in the process.

The CHAIRMAN. I think that is clear, you do have a difference of opinion. [Laughter.]

Ms. MICHELMAN. We do have a difference of opinion.

The CHAIRMAN. Let me ask you one question, because I did not understand one thing you said. Had Judge Souter said, "I believe that the right to determine whether or not to remain pregnant is a fundamental right of privacy," even though that would not have told you how he would rule on any case relating to abortion, because it would not tell you what burden of proof he would think is necessary to interpose the State's will between an individual's exercise of that right and the State's requirement that they put up, if he had merely said it is a fundamental right that continues after pregnancy, would you be here this morning?

Ms. WATTLETON. If he had said that it was a fundamental right that continued throughout procreation and throughout pregnancy, he would have said that the State must show—in essence, he would have been affirming *Roe*, which is to say that the State must show a compelling interest in order for it to be a fundamental right to intercede and to prevent the exercise of that right.

The CHAIRMAN. I am not asking you what it means. I am asking you whether or not you would be here.

Ms. WATTLETON. That is the way we interpret it.

Ms. MICHELMAN. Probably not.

Ms. WATTLETON. We probably would not be.

The CHAIRMAN. OK. I thank you.

Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

You equate the *Brown v. Board of Education* cases with the issue and the problem that your organizations and those you represent face and it seems to me there is no reconsidering of *Brown v. Board of Education* before us or the Court. There are no organizations that I know of, there is no split in society of any significant numbers, where there is a great split in our society regarding reproductive rights and the right to choose.

I think you would agree that there is as tremendous split in our society as it relates to your position versus the right to life?

Ms. WATTLETON. There is virtually little disagreement, and that is not to say there is no disagreement, on the question of whether the Government should be the one to decide or to intervene. There

is broad consensus that the Government should stay out of it, regardless of the individuals' moral views on abortion.

Senator DECONCINI. You do not quite answer my question, or maybe I do not quite make it clear. Do you agree that there is a great number of people, including women, who take a different position than your organizations on the issue of *Roe v. Wade* and, specifically, abortion?

Ms. MICHELMAN. The majority of Americans—

Senator DECONCINI. I am not talking about the majority, I am saying there are a number of Americans who disagree with your position on this issue.

Ms. MICHELMAN. There are people who differ on the moral questions about abortion, but—

Senator DECONCINI. Right.

Ms. WATTLETON. In fact, there is—

Ms. MICHELMAN. But as they said, the question before the Court in 1973 was who should decide, and the majority of Americans agreed with the Court that it should be the individual who decides, so there is a difference in the moral aspects—

Senator DECONCINI. But as you—

Ms. MICHELMAN [continuing]. But there is not much of a difference in—there is great support.

Senator DECONCINI. As you have indicated, if a moral position is a principle, you ought not sacrifice that principle, and many in this country believe that there is a principle regarding the life that is there. In the judgment of some of us that decision should be left to the individual—and I understand that you may disagree with that, and rightfully so.

Ms. WATTLETON. To the individual.

Ms. MICHELMAN. To the individual, that's right.

Senator DECONCINI [continuing]. To make that determination—

Ms. MICHELMAN. That is right.

Senator DECONCINI [continuing]. Where many of us do not believe that is a proper decision to be left to someone, because of the fact of the moral principle that life is there.

Ms. MICHELMAN. Well, the Government should no more, be able to compel a woman to have an abortion than governments should be able to compel a woman to continue a pregnancy against her will. It is just not a realm for the State, for politicians, for Government, and that is what the issue was in 1973.

Senator DECONCINI. Why do you think, then, that there were 48—

Ms. WATTLETON. Well, the reason that we—

Senator DECONCINI. Wait, just a minute.

Ms. WATTLETON. I am sorry.

Senator DECONCINI. Why do you think there were 48 or 49 votes for a constitutional amendment to reverse *Roe v. Wade* on the Senate floor? Although not enough to pass an amendment, close to a majority felt *Roe v. Wade* should be reversed. It seems to me that there is a great distinction here regarding this issue before the Court, the abortion order, *Roe v. Wade*, than there is between *Brown v. Board of Education*. I do not see any amendments to re-

verse *Brown v. Board of Education* or any movement in society that differs with that longstanding decision.

My point is that we have a tremendous split, and you have narrowed it down to who may tell the woman whether or not she may or may not make a choice; I have narrowed it down to the moral decision of life. That is your right and I think that is my right to look at it.

So, my point is, it seems to me proper that the Court would consider and continue to consider this issue, when there is a great divergency in our society as to the moral issue or as to the issue that you point out as to who, if anyone, should restrict a woman's right.

Ms. WATTLETON. Well, the Court in 1973 pointed out the moral diversity in our society, and it was for that reason it felt that it should be left to the individual to decide. We think that was properly decided—

Senator DECONCINI. I understand.

Ms. WATTLETON [continuing]. And that it continues to be properly decided. That is not to say that when we have established rights, that there will not be continuing public debate or, for that matter, political debate, although we think that is inappropriate, and that is what we are arguing here today.

Senator DECONCINI. I understand.

Ms. WATTLETON. Now, the comment with respect to why there may have been so many votes in the Senate with respect to a constitutional amendment, I think that was a very different time and I think that there were many politicians and Senators who were very concerned about the politics of the issue, not that they may have felt that it was right to, in fact, support a constitutional amendment.

So, while I respectfully submit that we can acknowledge your view on this, Senator, we also recognize, and I think we all have an obligation in public life to recognize, that there is wide-ranging diversity on this from a religious perspective, from a moral perspective, from an economic perspective, that really simply cannot be resolved in the political process—

Senator DECONCINI. Well, that may be—

Ms. WATTLETON [continuing]. And that is why we believe that the Court's wisdom to remove it from that process was correct.

Senator DECONCINI. You may be correct that you cannot resolve it, but the politics is not going to end attempting to resolve it, in my opinion, neither the political process nor the judicial process is going to end, because of that difference of moral conviction or legal conviction or personal conviction, whatever you care to call it. It is going to continue, which gets me to the point of why Judge Souter would make such a statement regarding racial discrimination as it relates to school and the *Brown* case, and would not want to at least satisfy you in the area of abortion, even though you said he did not have to state his position on *Roe v. Wade*. It seems to me quite a distinction, and it is foolish for us not to think and understand that this is going to continue for a long time.

Mr. MICHELMAN. But, Senator, we are really concerned about the principles that underlie *Brown* and the principles that underlie *Roe v. Wade* and the whole area of privacy, that we were concerned to hear Judge Souter discuss, and he refused, after I thought very

thoughtful questioning by Senators Biden and Kennedy and Metz-enbaum and Simon and others, he refused to discuss that area. It is the principles that we are concerned about—

Senator DECONCINI. And my point—

Ms. MICHELMAN [continuing]. And I think it is appropriate, without getting into how he would rule on a specific case before the Court, to discuss the principles involved, and I—

Senator DECONCINI. I heard him a little differently, he did discuss the principles, but he did not go far enough for you to be comfortable that he would satisfy your position. That is how I heard it.

Quite frankly, as someone who differs with you on that view, on that principle, it seems to me that he left an impression here that his mind was not made up. I do not think he sat there under oath and would deliberately lie to us, if his mind was made up. Second—

Ms. WATTLETON. But I—

Ms. MICHELMAN. But the point—

Senator DECONCINI. Excuse me, and then I will let you respond. Second, he left me with the impression that he is very cognizant of the importance of the decision, as well as its history. He also recognizes what the law was, by virtue of his experience sitting on a hospital board. He did not indicate his personal view, but he showed a willingness to stand by the law. This leaves me with some impression that his experience is going to be part of his thinking process.

If you do not get Souter from this President, who, since he has been Vice President, I might add, has taken a very different view on the issue of reproductive right to choose, who better can you get?

I find that this man is quite qualified and quite open, more open, quite frankly, than Scalia, based on what I knew about Scalia—but for other reasons we did not go into Scalia—and certainly different than Judge Bork.

Mr. WATTLETON. What Mr. Souter did not say troubles us, as much as what he said, Senator, and the fact that he was prepared to comment on the morality of the death penalty and white collar crime, and not prepared to comment even on whether the Constitution protected the right not to procreate was eminently disturbing.

We were not comforted by his vote on the hospital board, because he made it clear that his vote emanated from his recognition that abortion was the law of the land and, as such, the hospital, as a provider of services to the community, should permit its facilities to be used for abortions.

Senator DECONCINI. Yes, I understand that distinction. The only—

Ms. WATTLETON. That in no way, in the face of declining to comment on whether he felt the Constitution extended to the protection not to procreate comforted us.

I think that it also, from our view, is analogous to—there are some parallels that can be drawn between this issue and other questions that may or may not come before the Court.

Senator DECONCINI. Including *Brown v. Board of Education*?

Ms. WATTLETON. Racial discrimination is very much still before the Court, on many issues, on many aspects. Certainly, the *Grove City*—

Senator DECONCINI. Certainly not school discrimination or integration—

Ms. WATTLETON. School discrimination in the form of busing—  
Senator DECONCINI. School integration, excuse me.

Ms. WATTLETON [continuing]. In the form of busing is a question, I know, because I have a personal family member who is integrally involved, and desegregation and implementation even to this point.

Senator DECONCINI. You think school integration is still an issue, in this country—

Mr. WATTLETON. I think that school integration is still an issue.

Senator DECONCINI [continuing]. Whether or not separate but equal is still before us?

Mr. WATTLETON. I think that there is no question that it is still an issue in this country.

Senator DECONCINI. I disagree with you.

Ms. WATTLETON. It may not be expressed in the direct ways that perhaps we saw before the end of Jim Crow laws, but it is still a major issue in this country.

Senator DECONCINI. Do you know any organizations that promote separate but equal schools today, or any resolutions that have been introduced in the Congress—

Ms. WATTLETON. We have a State legislator who is running for this great august body who promotes such an ideal.

Senator DECONCINI. And do you think he has a great following behind him, that he is—

Ms. WATTLETON. He has managed to get himself elected to a State legislature, and I think that it does not matter whether he has as great following or not.

Senator DECONCINI. You think—

Ms. WATTLETON. We do not have a great following in this country to end legal abortion, but still it is a matter of the political process that we must be concerned and worried about—

Senator DECONCINI. So, you think—

Ms. WATTLETON [continuing]. That a narrow minority can, in fact, wreak tyranny on the majority.

Senator DECONCINI. Do you think Mr. Duke in Louisiana symbolizes a great movement similar to the right to life movement and those that disagree with your position on abortion, do you think there is a great similarity there?

Ms. WATTLETON. The point that I made was that I believe that a small group of people or a small segment of our society can, in fact, have an impact on the process and that the segment of our society who would like to see legal abortion become, once again, illegal is such a small segment. It is not the great majority of the American people who want to see that.

Ms. MICHELMAN. Senator, I would agree with you, that the majority of Americans absolutely—a majority, I would say, you know, Americans are committed to the principle of equal education. I mean there are some like David Duke.

Senator DECONCINI. I think so, too.

Ms. MICHELMAN. What we are saying is that *Roe v. Wade* and the principles involved in *Roe*, the dignity, the integrity of the right of the individual to make this very personal and important

decision should be as well accepted in area of law as *Brown v. Board of Education*.

Senator DECONCINI. Well, that is—

Ms. MICHELMAN. And if there were any question about Judge Souter's views in *Brown*, I think, without giving us assurances, he would have much more difficulty being confirmed and that is what we—

Senator DECONCINI. I guess that is where I disagree with you, I think there is a great distinction here, because, quite frankly, I think the majority of Americans, are opposed to abortion, even though the polls show that a majority feel that choice should be left to the individual. So, to me you have a great weight of authority and great following here in opposition to the moral issue, maybe not the *Roe v. Wade* decision in and of itself, far different than *Brown v. Board of Education*, but that may be just a difference of opinion.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

The Senator from Iowa, Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Thank you, both of you, for being good witnesses and for your testimony. I have a different view than you do and I hope you can respect my view, as I respect your view.

Let me start by saying that I have no more insight into this question I am going to ask you than anyone else. I am worried, too, but for different reasons, as you can imagine.

What if the nominee, Mr. Souter, would have said that he thought that *Roe v. Wade* was wrongly decided, but that he would uphold it, as a matter of precedent, as a matter of settled law? Would that have been good enough for you and your organization?

Ms. MICHELMAN. It certainly would have been a much stronger statement and it would have reassured us more than we have now. If he categorically made the statement that he would uphold *Roe v. Wade*, we would feel much differently about his position on the Court.

Senator GRASSLEY. What is the history of both of your organizations, when it comes to Supreme Court nominees? I do not know the answer to this, either, but my supposition, I have a supposition—has either of the groups you represent ever supported a nominee to the Supreme Court?

Ms. WATTLETON. We have not actively supported a nominee to the Supreme Court. This is the second or, I should say, the third nominee that we have opposed.

Ms. MICHELMAN. We have—I think we have in the past, but I have not been with NARAL more than 5 years. We have been concerned over the last 10 years with an administration's deliberate use of the judicial process, judicial appointment process to explicitly reach the goal of overturning this right, of taking away this right, so we have been very careful in scrutinizing the nominees to come before the Court in the last 10 years.

Senator GRASSLEY. So, in the case of Kennedy, Scalia, O'Connor, Rehnquist, you did not support them. Do you—

Ms. MICHELMAN. We did not take a position on Justice Kennedy. I am not sure that I would say that was the best decision NARAL ever made, given what we know about Justice Kennedy right now.

Ms. WATTLETON. We opposed his confirmation, but did not launch an active campaign against him.

Senator GRASSLEY. Do either of you remember whether your organizations supported Judge Stevens in 1976, when he was before—

Ms. MICHELMAN. I do not remember.

Ms. WATTLETON. I was not head of Planned Parenthood.

Senator GRASSLEY. Mr. Chairman, I have no further questions.

The CHAIRMAN. Thank you very much.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. The issue of *Roe v. Wade* is a national issue and certainly on our minds. In the future, the question of whether it will or will not be reversed will bring into consideration two major elements for the Court to look at. One is the issue of prochoice/prolife, and the other issue is stare decisis, the precedent which Senator Grassley referred to. There may be other elements that would enter into it.

Would you give us your evaluation of what you have read and heard relative to Judge Souter's writings and statements pertaining to stare decisis?

Ms. MICHELMAN. Well, before I get to that point, Senator, I would just like to say that the issue really is not prolife/prochoice, it is who decides, it is who decides what is the right thing to do, the individual or the State.

As far as stare decisis, he did not indicate how he would rule, how he would use the issue of precedent as it relates to *Roe v. Wade*. He did not discuss—

Senator HEFLIN. He spoke generally pertaining to—

Ms. MICHELMAN. He spoke generally.

Senator HEFLIN. Well, give us your evaluation of his general statements and writings relative to stare decisis.

Ms. MICHELMAN. Well, his general statement, he said that he has respect for precedent.

Ms. WATTLETON. I believe in his statement he also said that stare decisis was but one element that should be considered—

Ms. MICHELMAN. Right.

Ms. WATTLETON [continuing]. In whether the earlier decision had been right or wrong in its impact on the American or the people and that he would evaluate what impact it would have on the people, before making a decision to overturn it.

Ms. MICHELMAN. And he also went further in the area of privacy, to say that this whole area is open for reevaluation and, in fact, it would be years before it would be settled. So, there is a mixed review on the precedent view, his view of precedent as it relates to *Roe v. Wade*.

Senator HEFLIN. That is all. Those are all the questions I have.

The CHAIRMAN. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I would start with the very basic question as to whether you think that President Bush will submit a nomination more to your

liking. He has taken a position of prolife, against abortion. He has submitted a nominee who leaves the question open. The evidence is compelling, if not conclusive, that President Bush did not look for a litmus test. Do you think that it is realistic, if we turn down Judge Souter, to find President Bush submitting to the Senate who will give you a flat commitment to uphold *Roe v. Wade*?

Ms. WATTLETON. Well, I hope that President Bush will, in future nominees or nominations, rather, recognize that he was elected by the American people, that his personal views on these questions are those, his private views. And we have every hope to believe that this nominee and future nominees will uphold the protections of the Constitution and to suggest that the President would make a nomination of someone who believes that our constitutional protections should be eroded seems to me to be a very troubling development in the direction that this country might take.

I have come of age in a period of time in which the Court has made it possible for me to realize the American dream, as a member of a minority race, as a woman, as a poor child growing up in this country, and so I understand the meaning in a very personal way of the enlargement and enfranchisement of groups of people in this country. And to disenfranchise women and for a nominee not to make clear his position with respect to the enfranchisement of women in this country is indeed a very disturbing development.

Ms. MICHELMAN. I think, Senator, President Bush is part of the legacy that I was talking about, the 10-year legacy of using the judicial process—in fact, he ran on a platform very strongly committed to using this process to take away this right, and he never repudiated that when he made this nomination.

I think it is possible for President Bush to say that he is not standing on his platform commitment and that he is not submitting a nomination that is not litmus tested and the litmus test was generated by the Reagan-Bush administration, not by us. I think it is possible, and we cannot allow our views about this important right to go undiscussed, because we might think we might get someone worse, as everyone keeps saying. The issue is what is before us now and what is at stake in this.

Senator SPECTER. Those are very interesting comments, but they do not answer my question. I am very sympathetic, Ms. Wattleton, to everything you say about women's rights and about the rights of Afro-Americans.

And as I listen to you, Ms. Michelman, I hear the word "hope," I hear the word "litmus test," but it is totally unrealistic to expect President Bush, on this state of the record, to submit to the Senate a nominee who is committed to reverse *Roe v. Wade*. That would just fly in the face of everything that President Bush has said and done.

In submitting a nominee like Judge Souter, where the judge has stated that he was not asked the question, and there is no evidence that he was asked the question, and he has withstood repeated questioning and has come here with an open mind and not taken a position, I just think it is not realistic to expect that, if Judge Souter is turned down, we will find a nominee who will pass your test that is a commitment to uphold *Roe v. Wade*.

Ms. WATTLETON. Well, you may think it is unrealistic. The answer to your question is would we expect that, and the answer was—the question was would we expect it, and the answer is that, yes, we do expect a nominee to the Supreme Court to uphold our constitutional protections in procreative matters.

Senator SPECTER. Ms. Wattleton, that is too high a level of generalization. When you come down to saying you expect President Bush to submit a nominee who will commit in advance to upholding *Roe v. Wade*, I for one just have to say that is not realistic.

Mr. WATTLETON. But, Senator Specter, I think it was realistic for this committee to ask Mr. Souter whether he believed that the Constitution extended to the protection of individuals or women not to be pregnant. I think that this is a question that was not asked by us, but by this committee, and that particular candidate or Judge Souter chose not to answer that question, and so that is the reason that we are here before you today, because we think that implicit in that question is the question of whether there are constitutional protections for the use of contraception, as well as the constitutional protections to terminate an unwanted pregnancy.

Senator SPECTER. When you testify that there is not a great following in this country to end legal abortion, my own sense is that Senator DeConcini has raised a very good point when he says—I think in his terms, and I do not necessarily agree with his characterization—that a majority of Americans are against abortion, but it is a complex question.

The polls come out in favor of a right to choose, if there is an absolute prohibition that anyone can choose under any circumstance, the right to life of the mother or the incest or the rape questions, and then you have the further gradation about the right to choose over the husband's objection.

Many people think women ought to have the right to choose, but you say, well, suppose they have been married 15 years and it is the first pregnancy and the husband objects, and then you get to a 15-year-old girl living at home and the question of whether her parents have input. When you get down to these levels, there are many gradations as to what public opinion says on this question.

As I think both of you women know, I have supported choice and have supported public funding, because I do not think that there is any way for government to get into this complex question. I do not like abortion, but if the Government is going to try to put a road map on this, it is just impossible to do, with all of the variations, so I have taken the position that I have.

But coming from a State which has passed a very restrictive abortion law and facing large groups of prolife constituents of mine every January 23, and going to Pennsylvania's 67 counties, it is a dominant issue. An interest against abortion—I have told Ms. Michelman, when she asked for a chance to talk with me, and we did not get together, Ms. Wattleton—but the people on your side are not nearly as active politically, not that that is the end-all, but we have a responsibility above and beyond those whom we hear from.

But there are other very vital issues here. The right to die issue is one comparable to the right of a woman to choose. Senator Humphrey is not here and maybe he will come, but he would talk about

the right of the fetus, potential life. He would not say potential, he would call it a life in being, but I would say the right of a fetus or potential life. If you think that our constituents are on your side, I think you misjudge the tone of the people.

Senator Kennedy gave a statement about separation of church and state, while Judge Souter did not make a statement on the separation of church and state that Jefferson talked about or that Justice Black talked about. Should I vote against Judge Souter because I didn't get a flat assurance on that important issue?

Ms. MICHELMAN. Well, Senator, I would like to speak to your characterization of the polls. First of all—

Senator SPECTER. Well, do that after you answer—

Ms. MICHELMAN [continuing]. I think you should vote against—

Senator SPECTER [continuing]. The pending question, if you would.

Ms. MICHELMAN. I think you should vote against Judge Souter because he has not established a recognition of this fundamental right to privacy to include the right to choose. That is my first answer. I think you would be in good conscience in voting against him because so much is at stake. The American public does have differing views on which circumstances personally they think are acceptable for having abortions, but they don't differ largely on who should make that decision. The majority of people do believe that Government cannot answer these questions, and they are also feeling very strongly, mind you, that this Government does not do nearly enough to help to reduce the need for abortion by advancing a very aggressive prevention program in this country. That is where the American public believes the effort around reducing the need for abortion should be, not in the area of taking away the right of a woman to decide once she faces a crisis pregnancy. But I think you would be absolutely right in withholding your consent to this nominee based on what is at stake in this process.

Senator SPECTER. Ms. Wattleton, may I ask you a question?

Ms. WATTLETON. Sure.

Senator SPECTER. This may seem arcane, the jurisdiction of the Court, but I think the most fundamental right that we talked about in this country on a nominee is the right of judicial review. If you don't have judicial review, you can't get *Roe v. Wade*. Judge Souter did not satisfy me when I asked him about the authority of Congress to take away the power of the Court to decide first amendment issues. If the Court doesn't have the power to decide a woman's constitutional right, then there can be no constitutional right.

Do you think it appropriate for me to vote against him—I am asking you, Ms. Wattleton—because he didn't answer the question as to Court jurisdiction to my satisfaction?

Ms. WATTLETON. I believe that if you have satisfied in your mind that this is not a candidate who will uphold the Constitution of the United States and the protections therein, then you should vote against him.

I might point out that I believe that one of the reasons that you are feeling the political churning around the abortion issue is because the Court, as it is now composed, has created an enormous potential for political turmoil on this issue by undermining *Roe* in

the *Webster* decision. When it upheld the Missouri law that granted State restrictions on abortion, that undermined the earlier rulings on *Roe* and its progeny.

So I think that, yes, it is unfortunate that we find ourselves in 1990 once again debating this issue politically, something that is settled in the minds of the American people but now is politically in a state of upheaval again.

Senator SPECTER. Well, my time is up, so I would like to conclude with this very brief comment. I understand your position, but the focus is very much on a single issue. I did not have an opportunity to ask you if you would vote against a Senator on a single issue. As a person who has to decide a lot of questions, I very strongly feel that a Senator ought to be judged on his entire record.

When I asked Ms. Michelman the question about should I vote against Judge Souter because he doesn't satisfy me on the separation, the wall, between church and state, I didn't get an answer to that. It comes right back to the abortion issue. When I asked Ms. Wattleton if I should vote against Judge Souter because he doesn't satisfy me on the vital issue of judicial review, I get a generalized answer that if he doesn't uphold constitutional rights I should vote against him and we come back to the abortion issue.

The abortion issue is a very, very vital one, but it is one issue of many which are before the Court and have to be considered by the Senate. I do not have a fixed opinion on Judge Souter at this point, and I am very interested in your testimony. But I do have to say to you that as sympathetic as I have been, there is a big constituency out there opposed flatly to your point of view, which has to be weighed politically, although I voted, as I have said, prochoice because I don't think Government can deal with this issue. But there is much more in America besides any one issue, however important any one issue may be.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Let me conclude with a comment and a question. I may or may not agree with your final recommendation. For me it rests upon my reading, literally rereading—I don't say that lightly. We sometimes hear Senators say I am going to go back and reread the record, and you look at them like—the press just smiled and everybody went, yes, they understand that one. But literally I will reread the record in about 15 to 18 places that I think are key in helping me determine whether or not Judge Souter's assertions recognize a right to privacy in this area.

Now, let me make sure. I am going to characterize your position as I have heard it here today, and I want you to correct me if I am wrong rather than take the time to go back and ask you a number of probative questions and try to get all the pieces of this. I don't expect you to agree with me if I in any way misrepresent what I understand to be your position.

It seems to me that what you are saying here today is that your opposition to Judge Souter is grounded on his unwillingness to acknowledge the existence of a fundamental right to privacy relating to a woman's decision whether or not to remain pregnant. His failure to recognize that as a fundamental right, you are arguing, puts him in a category and the issue in a category totally different than

as it was characterized by the Senator from Pennsylvania and others.

On the separation of church and State issues, it is a matter of degree. No one is arguing, no one has put forward the proposition, no one has suggested that the first amendment—either in the establishment clause or the free exercise clause—does not set up a dilemma on the one hand, and the exercise of the existence of a fundamental right State action on the other hand. It is a fundamental right. The first part of the equation is clearly set out in the Constitution. There is a fundamental right against establishment, if you will, and for the free exercise. The only issue is what degree of evidence, of rationale, of proof, does the State have to show in order to interfere with that fundamental right.

The right of procreation, the decision to procreate is a fundamental right. There is no debate about that. The only debate is whether or not and under what circumstances the State can interfere with that fundamental right. The right of assembly is a fundamental right. The only question is how much evidence the State has to bring forward to interfere with that fundamental right. The right of association is an unenumerated fundamental right. No one argues about it. The only debate is gradation. How much proof or evidence or rationale has to be put forward to interfere with that right of association?

A parent's right to determine the education of their child is a fundamental right, going back to *Pierce*, and the only question is how much evidence the State, how much proof the State, how much rationale the State, has to bring forward to interfere with that fundamental right.

The right of an African-American to go to school anywhere they want to go is a fundamental right. Arguably, theoretically, like all fundamental rights, it could be overruled by, it could be interfered with by, some State rationale that no one has ever thought of and no one is ever going to be able to think of. But theoretically there is no fundamental right that is absolute in the Constitution. Free speech is a fundamental right, but the State can say we are going to interfere with that fundamental right if you are yelling "Fire" in a crowded movie theater. We can interfere with that fundamental right.

Now, what you are saying, as I understand it, is that you would insist from your perspective that the nominee say this is a fundamental right—like the right to travel, unenumerated; like the right of parents to determine the education of their child, unenumerated; like the right of procreation, the decision to procreate—that what you wanted him to say was that is fundamental.

Ms. MICHELMAN. Right.

The CHAIRMAN. And notwithstanding what all my colleagues have said here, none of it makes much sense, with all due respect, because all the examples they have used have been examples about the second part of the equation, which is how much proof, how much evidence, how much rationale, the degree of the rationale required to interfere with these rights. That is what the debate is. It is over on this side on all the issues my colleagues have mentioned.

And what you are saying is, hey, look, gentlemen, we want you to prove to us, we think you have a minimum obligation to say we are positive this guy knows this is a fundamental right.

Ms. MICHELMAN. That is right.

The CHAIRMAN. We are not asking you to say, Chairman Biden, we are not asking you to say, Senator Specter, we are not asking you to say, Senator DeConcini, that you can then guarantee us how he is likely to rule on the requirement of parental consent, all the gradations. Am I correct?

Ms. WATTLETON. That is correct, and our deep concern was his reticence to respond to this with respect to the Court evaluating this on the basis of compelling State interest as opposed to undue burden.

The CHAIRMAN. Now, let me tell you, in conclusion, where I may disagree with you. It is not in the burden you think the nominee must carry, which in my view is a legitimate request. For none of us would be sitting here if he said, "I don't think the right of association is a fundamentally guaranteed right," and say, "OK, Judge, you are a wonderful guy, we like you, and we think you are brilliant, and it has been a tour de force, and, therefore, even though we disagree on that little one, we are going to go ahead and vote for you." None of us would sit here, I suspect, and say, "Judge, you don't think it is a fundamental right for people to travel. But notwithstanding that little problem, we are still going to go ahead and vote for you."

So I think you are right in asking about that fundamental right. My dilemma relative to this Justice is as follows—and I know both of you, and you are both very bright women obviously, very compelling, but also very practical. The politics of the situation are this man was between a rock and a hard spot. If he said there was a fundamental right, he would satisfy Biden, and Grassley would go in orbit. If he said there wasn't a fundamental right, he would satisfy Grassley, and Biden would go in orbit. And he would guarantee that a nomination that might not be in trouble would surely be in trouble, from one side or the other.

And there is some rationale, it seems to me, for him to avoid that political briar patch. But I am not sure I read his statements—many that were in response to questions from me in particular because, obviously, I was focusing on this issue—I want to know what he said to me—as well as to others, the way you read it. And that is that he does not recognize the fundamental right.

It seems to me there is almost equally compelling evidence to conclude that he believes there is a fundamental right, but that is a decision I am going to have to make based on the record. I just want to get it clear here; that had he said—this is important because we are going to be at this exercise, I am afraid, God willing, all of our collective health prevailing, we are going to be at this exercise probably several more times in the near term.

I do not believe—and this is my concluding question. I do not believe that the nominee should have to answer how he would rule on *Roe*. I do not believe he should have to do that because I think that sets a precedent that may very well come back and bite everything I believe in, even though I would like to know how he would rule on *Roe*. Quite frankly, I am not sure what it would tell us

even if he told us he would sustain *Roe*. He might sustain *Roe* and vote for *Webster*. He might sustain *Roe* and say, yes, you can have an abortion in any facility that doesn't have hallways 14 feet wide. He might sustain *Roe* and say—you know, and so on. So I don't think it would tell us much.

My question to you is: The next nominee, are you going to insist that that nominee say anything beyond whether or not they regard the right of a woman to make a judgment with regard to the termination of a pregnancy as fundamental, a fundamental right? Are you going to ask anything beyond that? Are you going to insist that that nominee tell you how they would rule on *Roe*, on *Webster*, and on God knows how many other cases may have come between the time of the last case and the case that may be in question for that nominee? Do you want a specific answer to a specific case ruling?

Ms. WATTLETON. I believe that we are as mindful of the codes and the law as you are here today. We have not in this proceeding nor would we in the future insist upon such an assurance, although parenthetically I might point out that a variety of cases have come up in this discussion and this process. And if we look back at Justice Rehnquist's proceedings, he discussed it and has not recused himself in subsequent cases.

The CHAIRMAN. Excuse me, let me interrupt you there for a moment. I think Senator Simpson, God bless him, notwithstanding reading the Canons of Ethics, if he applied the Canons of Ethics to what was said here, clearly the judge had breached them because he went out of his way and he answered very specifically in a whole number of areas. I am not asking you on technical grounds because of the Canon.

Ms. WATTLETON. Yes, that is parenthetical.

The CHAIRMAN. So please try not to be a lawyer's lawyer with me, even though you are not a lawyer.

Ms. WATTLETON. No, I am not.

The CHAIRMAN. But you know a lot more than most lawyers that I know.

Ms. WATTLETON. I have studied very faithfully at the feet of many wonderful lawyers.

The CHAIRMAN. But, tell me, are you going to ask—

Ms. WATTLETON. But the point that I made, before I added the parentheses, was that we did not ask you to ask such a question in this proceeding, and we would not at future proceedings. I believe that the question that you asked and did not get an answer is an appropriate question to ask, and that is whether the Constitution protects the right not to be pregnant.

Ms. MICHELMAN. And you did not get an answer, and I think that is the question. And I agree, we should not expect the nominee to talk about specific cases. And I do hope, Senator, as you are reading the testimony, that we remember it isn't just about legal theory. This is about real women's and real Americans' lives. This is a fundamental right that is about to be overturned.

The CHAIRMAN. Well, you have never asked me—as a matter of fact, I didn't speak with you prior to this hearing—about any of this, nor do I know that you have asked any other member of the committee to ask. This is one of our opportunities to find out why you—not why you feel the way you do. It is clear why. But to find

out what burden of proof must be met in order for you to be willing to take a chance. And no matter what is said, ultimately all of America is doing nothing more than taking a chance because we are putting on the bench, at some point in this process, someone who could be there for decades, deciding the fate of Americans in a whole range of areas. And as one of my colleagues said earlier, why one man? Well, the reason one man or one woman will make a difference now is that one vote will decide almost a half a dozen critical issues. One vote. That is why it is so important.

I appreciate your testimony, and I hope I didn't in any way misstate it. But I think this issue is so complicated—the issue of the fundamental distinction between an ordinary and a fundamental right and the burden of proof that raises for the State. That is all a lot of legal gobbledygook.

Ms. MICHELMAN. Right.

The CHAIRMAN. I thank you both very, very much for your testimony and for being so clear in stating how you felt about this issue.

Ms. WATTLETON. Thank you for having us.

Ms. MICHELMAN. Thank you.

The CHAIRMAN. Our next panel is a panel of very distinguished Americans who are here to testify on behalf of the nominee: Hon. Griffin Bell, former Attorney General of the United States; Hon. Slade Gorton, the distinguished Senator from the State of Washington, who has served more than a decade as attorney general of the State of Washington; Hon. Gerald Baliles, former Governor and former attorney general of the State of Virginia; and Hon. Jerome Diamond, former attorney general for Judge Souter's neighboring State of Vermont.

The committee welcomes you. Senator Gorton is over on the floor. He is on his way. Mr. Diamond is not just on his way, he is here.

Welcome, gentlemen. Let me say for the record, I was asked to point out that Senator Simon wanted very much to ask questions of the last panel and this panel, but he, too, is involved with the legislation that is on the floor of the Senate at this moment. That is why he was unable to be here to ask the questions.

Gentlemen, it is good to see you. Good to see you, General Bell. It seems the only time I see you these days is when there is a nominee. But it is good to see you here, and I must tell you I long for the days when you were appointing nominees to the bench. Maybe some day in the next century we may have the chance to do that again.

I shouldn't say it that way because last time I used a phrase "Justice Souter," and all the papers said "Biden declares the matter over." I am only kidding. I believe it may well be before the year 2000 that we have a Democratic President. I shouldn't say that. I am only joking. I should stop joking. I am getting myself further in trouble, and that old adage, "When in a hole, stop digging." So I will stop.

Mr. BELL. You can't lose your sense of humor, though.

The CHAIRMAN. It is a necessary requirement.

Unless you gentlemen have another way in which to proceed, I would like to suggest that we begin in the order in which the wit-

nesses were called, if that is appropriate, if no one objects. That means if you would be willing to begin, General Bell, I would appreciate it very much.

**PANEL CONSISTING OF HON. GRIFFIN BELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES; HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON; HON. GERALD BALILES, FORMER GOVERNOR AND FORMER ATTORNEY GENERAL, STATE OF VIRGINIA; AND HON. JEROME DIAMOND, FORMER ATTORNEY GENERAL, STATE OF VERMONT**

**STATEMENT OF GRIFFIN BELL**

Mr. BELL. Thank you, Mr. Chairman, other members of the committee.

I would like to begin by thanking the committee as an American citizen for the good job you have done in these hearings. I have seen a lot of these hearings, and I think this is a classic. It will be a model for the future, and I want to congratulate you.

The CHAIRMAN. Thank you.

Mr. BELL. The duty under the Constitution to advise and consent fits in very well with the idea that the Founding Fathers had that they would not have judges stand for election, but they would insulate them by having the President select the judges and the Senate would advise and consent. That has worked very well in the history of our Republic, and it seems to be working well in this case.

I tried to fashion a formula that you would use in a court of law, and my idea would be that the President send a nominee to the Senate with a rebuttable presumption that the person ought to be confirmed; whereupon, the Senators would put the nominee through vigorous and searching cross-examination, and if they don't find something of serious importance, they usually vote to confirm. That is exactly what has happened in this case.

I went back and found Chairman Biden's test, and he used this in the case of Justice O'Connor, where you said that the record showed that she was a woman of competence, intellect, and high moral standing, and has a record of 25 years or more of public service that reflects a judicial bearing and a judicial temperament. And you thought that was a sufficient basis to confirm Justice O'Connor.

I would adopt that test, and I would add two other things. One is I would want a person to serve on our court that would seem to me to be a decent person, a person of innate decency. I think Judge Souter reflects that, reflects all of these qualifications. And I would ask myself two questions. Has he demonstrated a vision of our country and of our Constitution and our body of law and how it fits together? I think he had done that. I watched a good deal of his testimony on C-SPAN, and I think it has been remarkable. I think he does have the right vision for our country and for the law of our country.

The last thing I would ask, before I voted for him, is would I trust him with the office that he is about to assume and with the responsibilities of that office or with our rights as American citizens would I trust him. Having read some of his opinions and watched him testify—I have only met him once in my life, until

this morning. When I was serving as Attorney General of our country, he was the attorney general of New Hampshire, and I met him at a meeting that we had with a number of the State attorneys general.

I believe that based on the record he ought to be confirmed. With that, I will close and stand for questions at the appropriate time.

The CHAIRMAN. Thank you very much, General.

Senator Gorton, welcome.

#### STATEMENT OF SENATOR GORTON

Senator GORTON. Thank you very much, Mr. Chairman.

By coincidence, my first meeting with David Souter, the nominee, took place very close to the time at which Judge Bell first met him. During Judge Bell's first year as Attorney General of the United States, I was president of the National Association of Attorneys General, and Warren Rudman was finishing his distinguished term as attorney general of New Hampshire. I may tell you, Mr. Chairman, that I was disappointed that Warren left that position and turned it over to an individual whom I had not previously known and about whom I knew nothing.

My wife and I had the good fortune to spend a long, 2- or 3-hour lunch hour with Warren Rudman in which he introduced me to David Souter in the first 2 or 3 months in which he was attorney general of New Hampshire. I found him to be witty, delightful, thoughtful, and intelligent during the course of that lunchtime, and I did pay more attention to him than normally one State attorney general from the far end of the country would from someone from New England, for two reasons. The first was that he was the successor of now Senator Rudman, who was then, as he is today, a close friend of mine; and the second was that I was the president of the national association and felt it important to make new members welcome and to get some insight into their character and their intelligence.

If I may, I will share one story which shows something about his wit, of which I was reminded very recently. During the week after Judge Souter was nominated for this position and was here in Washington, DC, going from office to office to meet the members of this committee and of the leadership, he asked Senator Rudman that I be added to that list at the end of the week, in spite of the fact that I was not a member of the committee. After we had talked in private for a while, he smiled and said, "Well, however controversial my nomination is, Slade, you may remember that you do have a legitimate reason for voting against my confirmation." As I looked at him with a blank expression on my face, and he said, "Well, you remember when we first met that summer when I became attorney general, and it turned out that you and your predecessors had finally persuaded the attorney general of Hawaii to invite you for your national winter meeting in Honolulu. And the New Hampshire press came to me and said, "Are you going to attend that boondoggle in Honolulu?" And I said, "I'll never waste the taxpayers' money of New Hampshire on such a frolic as that." And he said, "It got on the AP wire, and close to a dozen other attorneys general felt they had to cancel out on your meeting at the

same time because of it. So if you hold that against me, I will understand it perfectly.”

I think that it shows both the sense of humor—

The CHAIRMAN. Did he go?

Senator GORTON. Oh, no, he didn't go, and neither did the other dozen. I had a rather small meeting there, Mr. Chairman.

But even in the relatively short period of time that David Souter was attorney general of New Hampshire, he showed to me—under circumstances in which I had never thought that I would be in this position with him—a thoughtful and an inquiring mind and a willingness to learn from experience which I found notable among the group of people with whom I dealt then. And I can think of no qualities which are more important for a position on the Supreme Court of the United States than that constant ability to learn, to grow from the kind of experiences one has, and an inquiring mind and the dedication to the ideals which made this country great.

I think none of us, Mr. Chairman, even those of us who are Members of the Senate of the United States, can quite or fully understand the awesome and lonesome responsibilities of being a member of the Supreme Court of the United States and having the Constitution of this great country in our hands. I feel that David Souter can take on that responsibility thoughtfully, responsibly, with an open mind, and that he can contribute greatly to the development of legal institutions in this country.

The CHAIRMAN. Thank you very much, Senator.  
Governor Baliles.

#### STATEMENT OF GOVERNOR BALILES

Mr. BALILES. Mr. Chairman, members of the committee, I am here in support of David H. Souter's nomination by the President to become an Associate Justice of the United States Supreme Court. In my judgment, Judge Souter is an individual who brings objective intellect, integrity, and a centered view of judicial procedure to the Nation's highest Court, an individual who shuns ideological leanings or prejudices in favor of a considered context of legal principles and constitutional premise. In short, Judge Souter is an individual who, in my view, is capable of addressing the entire spectrum of issues required in a government of laws.

I base my opinion upon the friendship struck nearly two decades ago when he served as deputy attorney general of New Hampshire, and I held the position of deputy attorney general of Virginia. I worked closely with him for several years on matters relating to the administration of the offices in which we served and on legal issues which were of interest to the National Association of Attorneys General. We also worked closely together in the gathering of evidence and in the writing of legal memoranda and briefs filed before a special master in an original jurisdiction case then pending before the U.S. Supreme Court.

During that time, we became good friends. We discussed the issues of the day. We shared an interest in reading and protection of the environment. During that period of 3 or 4 years of working closely together, I do not ever recall him taking positions on major political issues or promoting any ideological framework from which

to approach issues. Simply stated, I knew him as an intellectually gifted, analytical lawyer, a synthesizer of problems, empathetic, not a populist but a rationalist, one who is moderate in tone and expression.

I especially recall forming an early impression that here was someone with impeccable integrity and honesty, who possessed a wry sense of humor which would flash at unexpected points during conversation.

In 1976, I began serving in the Virginia General Assembly, and Judge Souter was appointed attorney general of New Hampshire. In 1981, I was elected attorney general of Virginia, and Judge Souter was then serving as a member of the Superior Court in New Hampshire. In 1985, I was elected Governor of Virginia, and Judge Souter was serving on the supreme court of his native State.

Today, I am partner in charge of international trade at the law firm of Hunton and Williams. You may recall that this is the same firm from which Justice Powell came, and I am struck by the similarities in the personal qualities of these two men.

My contact with Judge Souter understandably has not been as frequent in recent years, but I have no reason to change my impressions or qualify my friendship. Senator Rudman has kept me apprised of Judge Souter's progress in New Hampshire, and the judge and I have exchanged an occasional note or call. I count him as a friend and believe that he will serve with distinction as a member of the U.S. Supreme Court, and I urge his confirmation.

Senator KENNEDY [presiding]. General Diamond, we are glad to hear from you.

#### STATEMENT OF JEROME DIAMOND

Mr. DIAMOND. Members of the committee, I guess I know David Souter better than anyone else on this panel. He cost me my trip to Hawaii because I was in the neighboring State of Vermont, and as soon as he announced that he wasn't going, the press wanted to know whether I was going.

I served three terms as attorney general of Vermont, and the middle term of 1976 to 1978 I had the pleasure of having David Souter as a colleague and, as it developed, a friend in the next State of New Hampshire. And I want to share with you some observations not only from those years but from some recent years; because while he left politics and became a judge, we maintained a relationship that was more particularly focused in the last 4 years as the result of an annual dinner that is shared—and I guess we are going to have to give it a new name. It started in 1986 as the "Annual Frank Bellotti Retirement Dinner," but hopefully today he will be coming back out of retirement in the Massachusetts primary.

The purpose was to bring together all the attorneys general from the Eastern States, present and former, who had served during the 12 years that Frank Bellotti served as attorney general of Massachusetts. It is a dinner once a year, and for me it was an opportunity to drive to Concord, NH, and meet up with David and our mutual friend, Tom Rath, and spend the next 1½ hours going to Boston that evening, and then 1½ hours in the car coming back,

and to do that on an annual basis. It is from those evenings and from the 2 years that we spent together that I would like to offer a few comments.

First, he ran a very, very efficient and effective office. We cooperated extensively on issues of law enforcement, antitrust, consumer protection, and the environment. He did so with a handicap, and the handicap was his method of selection as attorney general. I think that that method of selection is very important and should not be overlooked by this committee.

He was not an elected attorney general. He was not even, like in the State of New Jersey, an appointed attorney general who had the right not to be removed from office by the same appointing authority during the term of his office. He had the full extent of the handicap. He was appointed by Governor and executive council, and he could be removed by that same Governor and executive council within his 2-year term. That by necessity made him more of an attorney for the Governor and the executive agencies than for the people themselves.

We even debated this subject once on Rex Marshall's radio program at the Hanover Inn. But I mention this because he made a decision that could have cost him his job from which I gained a tremendous respect for him. He appealed the Seabrook siting decision on the basis of safety and environmental concerns. He did that in the face of strong opposition from the Governor that had appointed him and came close to losing his position. I found that that courage, that commitment to issues, particularly in the tenuousness of his position, was extremely admirable and something worthy of tremendous respect.

I had an opportunity to attend a law enforcement meeting back at the time of the Seabrook protests. They had not begun at that time, and it was a meeting of law enforcement officers from Vermont and New Hampshire, State troopers, municipal officers, and David Souter was in charge of the pre-planning meeting. Lots of people have an opportunity to be treated with dignity if they are dealing with peers.

One attorney general to another attorney general, an attorney general to his staff, you might be expected to see a real dignity extended towards other individuals. What I saw that day in a situation where few law enforcement officers ever have an opportunity to have a one-on-one relationship with the attorney general of their State was his treating each officer with the same type of dignity that he extended to his fellow attorneys general and to members of his staff. And it was something of a personal attribute that I was extremely impressed with.

I have to tell you, if it hasn't been brought out so far, that David Souter does take a drink on occasion; he does smoke a cigar on occasion. But in all the time that we have spent together, the issues that have been discussed have been issues of politics and economics and judicial misconduct and the environment—hours of discussion in which I have to draw two conclusions. First, there is an honesty and an integrity to him and to his thought processes that is a rare commodity today. And, second, he is an individual that is about as prejudice-free as any person I have ever met in my life.

I can only really say that about two people, and, strangely enough, by irony, both of them are from small towns in New Hampshire. One is David Souter, and the other is my wife.

Lastly, I want to talk about an issue—

The CHAIRMAN. We all have to think that of our wives. Otherwise, they wouldn't have married us. [Laughter.]

Mr. DIAMOND. Last, Senator Biden, I want an opportunity to address an issue that really is, to me, the most important issue involving his nomination.

The CHAIRMAN. General, I don't want to push you too far, but I don't want to get myself in trouble the rest of the day. You are way over your 5 minutes. So if you could summarize, we would appreciate it.

Mr. DIAMOND. I will, indeed.

To me the issue of civil rights and a commitment to the guarantee and protection of civil rights is the most important issue facing this committee and its decision on a nominee to the U.S. Supreme Court. When I had an opportunity to work with Pat Leahy for 6 years as a State's attorney in Vermont, we came to know that our grandparents as immigrants to this country—his Catholic, mine Jewish—made us extremely aware that the guarantee of those civil rights was the difference between this country and all others and what made this country great.

I am coming to this committee to say to you that I believe there could be no fairer person than David Souter to sit on the Supreme Court and to judge and to guarantee the civil rights to me and to all my fellow citizens in this country. And, without reservation, I hope that this committee will ultimately unanimously endorse his nomination to the Court.

The CHAIRMAN. Thank you very much, General.

Senator THURMOND.

Senator THURMOND. Thank you, Mr. Chairman.

I am impressed. I don't know when we have had four more impressive witnesses before this committee sitting at one time: a former U.S. circuit judge and former U.S. Attorney General, able former attorney general and able Senator from Washington State, able former attorney general and able Governor of Virginia, and able attorney general of Vermont. We thank you for coming here and testifying. We appreciate your taking the time to do so.

I am just going to ask you one question. I will ask it, and then each one of you can answer it. Is it your opinion that Judge Souter has the competency, the dedication, the courage, the integrity, and the fairness to be a Justice of the Supreme Court of the United States? We will start with you.

Mr. BELL. That is my opinion.

Senator GORTON. Yes, sir.

Mr. BALILES. Yes.

Mr. DIAMOND. Yes, sir.

Senator THURMOND. That is all. Thank you very much.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. Judge Bell, we are delighted to see you back here again. You add an element of trust to these proceedings. Knowing your background on the fifth circuit in dealing with judges and dealing with the Constitution while serving in the fifth

circuit when it was at the forefront of the civil rights controversies, how do you really develop a trust in a person? In other words, what do you look at in order to determine whether we should entrust the Constitution to Judge Souter if he were to serve on the Supreme Court?

Mr. BELL. Well, you just have to make that judgment based on all of the facts. But that is why I mentioned the vision. If he doesn't have a vision of the Constitution and of the Bill of Rights and its subsequent amendments, particularly the 14th amendment, and how that operates in our system with so many diverse people, I don't think we could entrust the Constitution and our rights to him. But I thought from what I have heard him say and from the questions that were asked of him and what I read about him that he does have that vision. He seems to be a person of—you know, you can be intelligent, but you have got to put it all together some way or another. He seems to understand the system. And he understands the role that the Federal Government plays and the role that the State governments play.

I think that the federalizing influence, I call it, if you don't understand the federalizing influence in our Nation, it is difficult to administer the Constitution. I think all those things added together, I have the feeling that we can trust him. And that is all you can do in the end. All judges in a sense are trustees of the Constitution and all the laws, the precedents, even. That is why you would have to have a decent respect for precedents. What harm would it do? What harm is there in leaving the precedent as it is?

Somebody brought up this morning whether Congress could take away the jurisdiction of the Supreme Court. Well, that has been held by a decision shortly after the Civil War that the Congress could take away the jurisdiction of the courts. That is a case called *Ex Parte McCordle*. That case will have to be overruled, if that ever arose again. I don't look forward in my lifetime to seeing the Congress take the jurisdiction away from the Federal courts to administer the Constitution or some constitutional right. So I don't think it will ever come up.

All those things together give me the feeling that I could trust him.

Senator HEFLIN. He has written over 200 opinions. With you serving on the fifth circuit with judges who wrote a similar number of decisions, not restricted to Federal issues, do Mr. Souter's writings, looked at both collectively and separately, give you some guidelines as to whether or not he can be a trustee of the Constitution and the precedents?

Mr. BELL. Well, I think I read about five of his opinions. I was struck with one where he dissented, and he dissented on the basis of history. He cited Justice Holmes who said a page of history is sometimes worth a volume of logic in his dissent. That shows some vision. You have to understand history.

I couldn't get a whole lot out of his opinions because most of them deal with State issues, not with constitutional law. The one opinion I didn't read but I read about it in the paper or I guess I heard it on C-SPAN in the hearing, where he put the burden of proof to show that someone ought to be confined in a mental institution as beyond a reasonable doubt, the same as you have in

criminal law. That is a civil rights holding. That is in favor of rights there. That gives you a clue.

On the exclusionary rule under the New Hampshire Constitution, what you could call the exclusionary rule, he seemed to me to come to the position in one case that the Supreme Court has now come to, and that is a good-faith exception to some defect on a warrant in a search. Although he was not talking about the Federal Constitution, he was talking about the New Hampshire Constitution.

I have got a good feel for the way he approaches. He is a very good writer, incidentally, and that will help a lot. If you can write an opinion or another Law Review article, it will help the lawyers of the country understand what the law is.

That is a long answer to your question.

Senator HEFLIN. Mr. Diamond, you mentioned something that I think is very important, that Mr. Souter was an appointed attorney general and was appointed by the Governor and the executive council. How is that council made up? Do you know?

Mr. DIAMOND. I stand to be corrected, but I think there are five members of the council, and they are elected from districts in the State. I am not from New Hampshire.

The CHAIRMAN. That is correct. I am not either, but I know that one.

Senator HEFLIN. And it is a 2-year term that he would serve at the pleasure of the Governor and that executive council?

Mr. DIAMOND. That is correct. I think it is a 2-year term, but it is the appointment.

Senator HEFLIN. That is all.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Would you please go to Senator Specter and then come back to me?

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I join in thanking you gentlemen for coming here today. You make a very distinguished group of ex-attorneys general who have held some other positions as well. While I never got to that lofty ran, I served as a district attorney, so a number of our paths crossed over.

I don't want to take a great deal of time because we have so many witnesses, but I would like to ask just one question so that you do get some questions here.

Judge Souter was very cautious in his responses, understandably so. On quite a number of occasions, he responded in a way to avoid making any enemies, again, an understandable position. I found one of his answers just a little bit different, a little curious, when he was asked and pressed—not by me but by another Senator—as to some opinion from the Warren court with which he disagreed.

Now, you men were attorneys general at a time when the Warren court was handing down opinions which made life somewhat complicated, and the question that I would ask you relates to any opinion with which you disagreed. While you think about that, let me tell you one which came readily to my mind when the question was posed, but I didn't have a chance to discuss it with Judge Souter because of the shortness of time.

I recall very well the day *Miranda v. Arizona* came down. It was a long opinion, and I remember the day, June 13, requiring warnings be given. I was district attorney of Philadelphia and went to work and got out a warning card by that Friday. It came down on a Monday, as opinions do, and I was really worried about what that case was going to do because it required that police officers give five detailed warnings and extract detailed waivers, as I know you men remember.

Then the following Monday, a decision came down from the Supreme Court. I think it was *Johnson v. New Jersey*, but I haven't reviewed it recently. But the importance of the case was that any case that went to trial after the date of *Miranda* had to have had those warnings. I had hundreds of serious cases, some involving murder with powerful evidence, where the police officers had followed the rules, in effect, the *Escobedo* warnings, substantially lesser than the *Miranda* warnings. And a great many very, very serious cases had to be dismissed because of what I thought was a rule that simply couldn't be complied with, to extract a standard on questioning a defendant on warnings, which no one could have known about because they hadn't been articulated by the Supreme Court when the cases were investigated.

We had one case in May of that year, a robbery murder case. A man confessed, was given the *Escobedo* warnings, traced his apartment, found the gun, and then a month later the *Miranda* warnings came down, and that man couldn't be tried before the *Miranda* warnings came down. So I would ask each of you distinguished lawyers who have had in part your law enforcement responsibility to name, if you would, a decision from the Warren court that you thought was unduly restrictive on law enforcement.

The CHAIRMAN. As your attorney, before you answer, be careful because one of you may be up for confirmation some day, at which time you may have to reconsider the answer you gave.

Senator SPECTER. It also bears on the credibility of your prior testimony.

Mr. BELL. I will go first. I never had the trouble with *Miranda* except the retroactivity feature. *Miranda* has made law enforcement better. It has also protected the rights of the individual in the country. It turned out to be a very good decision. The retroactive question is different. It is hard to sit on a court and find a constitutional right and then say, well, we won't apply that to anyone who has engaged in wrongdoing before the date of this opinion. So you are trying hundreds of people who have been denied a constitutional right. The question is whether it applied to them. You are driven almost to the position that it has to be made retroactive. That was the problem you are speaking of.

The only other opinion that the Warren court handed down in criminal law that I had any trouble with—and I still do have some trouble with—is the exclusionary rule, but that has been adjusted now by a good-faith exception.

Senator SPECTER. Attorney General Gorton.

Senator GORTON. I guess that, while great problems were created for you and your career by the *Miranda* decision, Senator Specter, it is rather difficult to imagine that a decision would reverse a conviction, as it did in the *Miranda* case, and apply to that individual

only. It does not seem logical that it would not apply to other individuals who had not yet been tried, as great as the difficulties as it may have created for law enforcement at the point.

Now, I have a disadvantage in answering your question, not shared by Judge Bell, certainly not shared by Judge Souter—I am not certain about these other two Attorneys General. I had a wonderful job, as attorney general, but in the State of Washington the attorney general has absolutely nothing to do with criminal justice, either in initial prosecutions or in appeals or any other stage of a process that is entirely localized.

So, reactions which I would have had to the judgments of the Warren Court, which, of course, started well before I was attorney general and ended shortly after I took that position, would have been academic.

You put me at a great disadvantage. I would have to tell you that, if we went through case by case, I am sure I could give you a number of cases with which I disagreed, both in criminal procedure, in the abstract sense, and the impact that they may have had on the job which I did at the time.

I also think it is important to say something else, and your question leads to this. I suspect, like Griffin Bell would be, I would rather imagine that I would criticize *Miranda* and felt that it was wrong at the time that it was handed down. I have come to a different view since then, simply by reason of experience and by what I do think, although there have been some difficulties, there have been improvements in law enforcement.

I would be surprised and a little bit suspicious, if you had a nominee for the Supreme Court of the United States before you who was willing to tell you how he would rule on some case that would take place in the future. We give these jobs for life and in a fairly isolated and insulated position, so that they will be free from the strictures of politics to which we are properly subjected, so that they can be scholars, so that they can learn, and they can develop.

As you know, many of us have had occasions to change our minds on political issues and on legal issues, as well. Most of the controversy, not all of them, but most of the controversial decisions of the Warren court were not unanimous. Many of them were 5 to 4. Very frequently at the time, I found the reasoning of the dissenters to be better than the reasoning of the majority, and on some of those I have changed my mind and on some of those I have not. But we can only go through it case-by-case, in order for me to answer your question intelligently at this stage, since I am ten years now from having been an attorney general.

Senator SPECTER. Governor Baliles.

Mr. BALILES. Senator, by the time I became attorney general, at the time I worked with Judge Souter, the Warren court rulings were already on the books. But whether it was a Warren court decision or a subsequent Court decision, I really did not place a lot of stock in what my own personal opinion might be about the decision itself, because, just as the Members of the Senate and many other people in this country, I accept the proposition that when the Supreme Court rules on an issue of law, that is determinative, unless the Constitution is amended or, where appropriate, where Congress has the authority to change the ruling.

So, when the Court decision came down, whether I agreed with it or not, my focus was primarily one of determining what did the Court say, to whom did the decision apply, were there any exceptions, what advice should I give the Governor, the General Assembly, law enforcement officials or State agency administrators. Then I would, on occasion, confer with other attorneys general around the country, with staff, make a determination and give my advice.

My personal feelings really did not have very much to do with the advice I gave, because this was a matter involving the law and not necessarily a personal feeling about the correctness of a Court decision.

Senator SPECTER. General Diamond.

Mr. DIAMOND. Senator, I think that, like Judge Bell, the retroactivity was more of an issue than *Miranda*, but it turned out to be, in our experience, not a significant problem, because most of the cases that were pending at that time, by chance, did not rely upon confessions for the central focus of the prosecution, and so we were not dealing with that particular issue.

The exclusionary rule was probably, from my standpoint, the most difficult—and I think I still feel that way—with regard to the Warren court decisions, and I was very pleased to see a good-faith exception carved by a later Supreme Court, but still have to deal with the issue that in the State of Vermont that good-faith exception is not recognized by our own State law, where Federal issues are not involved.

Senator SPECTER. Thank you very much, gentlemen. My time is up. I think that the answers are really significant, for this reason: When we have gone through these proceedings, we have probed very hard to find where Judge Souter stands on the line of interpretivism versus judicial activism. There has been an enormous amount of criticism of judicial activism, and I have been critical of it in a number of aspects, and there has been a tremendous generalization of criticism about the activist Warren court.

But when Judge Souter was asked about any opinion that he disagreed with, not limited only to law enforcement, but one-man/one-vote and many other lines, he did not cite any case, did not feel comfortable, for a variety of reasons or whatever reason, in not citing a case. And now we have four very experienced and distinguished lawyers, public officials, ex-prosecutors and asked about the expanse of the activist Warren court, and nothing readily leads to mind.

I realize that it is not easy to go back and pick up specific cases, and the one that is mentioned is the exclusionary, and even in Vermont the exclusionary rule is maintained rigidly, without the good-faith exception. So, perhaps this question tells us something about how bad the activist Warren court was, or perhaps how it was not so bad.

Thank you very much.

The CHAIRMAN. Every day, in my view, the wisdom of the Warren court becomes more apparent.

The Senator from Vermont.

Senator LEAHY. Mr. Chairman, I apologize again for being out because of the farm bill conference, but I see four good friends here—Griffin Bell, Slade Gorton, Gerry Baliles and Jerry Diamond. I

would just note that, in Vermont, we have been blessed with good leaders in the law enforcement field.

To be totally bipartisan about this, Senator Thurmond, I would mention first a Republican attorney general, who is now Chief Judge of the second circuit, Jim Oakes, whom I had the pleasure of serving with when I was State's attorney, and ever since then a very, very close friend. Jerry Diamond was State's attorney of Windham County down near the New Hampshire border when I was State's attorney of Chittenden County. Jerry went on, however, to a higher position in law enforcement and became attorney general, while I disappeared into the obscurity of the U.S. Senate.

I have listened to the testimony of these four witnesses, as I have been trying to get back from another meeting on an entirely different issue. I have no questions, but I did want to welcome all four of them. The other three I have worked with and know well and they are all good friends of mine, who will excuse me if I make a special welcome to Jerry Diamond, a neighbor and a close friend. We began our careers together as prosecutors, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Senator Grassley.

Senator GRASSLEY. Judge Bell, you said that there is a rebuttable presumption that the President's choice ought to be confirmed, and I agree with you. Many others—I should not say many others on this committee, a few others, including Chairman Biden, on the other hand, have spoken in terms of the burden of proof being on Judge Souter.

Now, that is quite a different standard from what you enunciated, Judge Bell, at least that is the way it seems to me, and it seems that we are, in a sense, ratcheting up quite a bit here, you know, is it the burden of production, is it a burden of persuasion, is it by a preponderance of evidence, or is it beyond a reasonable doubt.

It seems to me that, once you start using this burden of proof metaphor, that you set up criteria that fails to set a clear, objective standard. Of course, any Senator can adopt whatever personal standard that he or she chooses. But I would like to ask you, Judge Bell, why do you think that a presumption of approval is a better way?

Mr. BELL. Well, I think it is a better way, because I do not agree with the burden of proof being put on the nominee. The President has already investigated him before he sent his name over here, I would assume, in all cases, and the Senate then undertakes to cross-examine him and bring out anything wrong with him. That has been done. As I said in the beginning, this is a classic hearing. It is one of the best I ever remember. This man has been vigorously cross-examined.

If you put the burden of proof on him, what will the next candidate do? He will come over and he will try to get a poll to find out what everyone is thinking, and maybe he will come over and make a great statement, taking solid positions on four or five big issues which have to do directly with what he is going to be called upon to decide. I do not know where that would take us.

I am saying that putting the burden of proof on the nominee would seem to me to be a dangerous approach, and it probably

would be better not to get into these standards that you are using, burden of persuasion, burden of going forwards, and those sorts of things. Those are highly technical theorems that are used in a trial and sometimes even the lawyers do not understand them. It is hard for me to understand what the burden of going forward is, for example. That gets too technical.

Just to let the President send somebody over here, he seems to have sent a good man here, and then the Senate needs to make certain that he is good and follow the Biden test, and you have done that. That is the way I would leave it.

The reason I use that rebuttable presumption is that is an easy way to decide something.

Senator GRASSLEY. I thank you very much. I would like to go on to another point I would like to make.

Every one of us, and many Court watchers, as well, since we have heard Judge Souter now for 3 days, are engaged in the games of guessing where he will fit into this Court spectrum. I would like to ask each of you to compare, assuming that Justice Marshall is on one end and Justice Scalia is on the other end, where you might feel, after listening to Judge Souter for these 2½ days, you think he might come down.

Senator GORTON. Somewhere between the two. [Laughter.]

Senator SPECTER. Judge Bell.

Mr. BELL. I have the feeling that he is rather moderate in his views, somewhere around the middle. The thing about a court is there has to be a middle. It would be a tough country, if we did not have a middle. We would turn it into a nation of extremists. We have got 10 percent on each end, but somebody has to be in the middle, and I have a feeling that is the way he would turn out.

Senator GRASSLEY. Mr. Baliles.

Mr. BALILES. Senator, based on my own personal knowledge and working experience with Judge Souter, I would categorize him, as I stated or suggested in my remarks, that he is moderate in tone and in expression, and for the reason I stated, the personal qualities that he possesses remind me a great deal of Justice Powell, who I think also fits into that category of being moderate in tone and in expression.

Mr. DIAMOND. Senator, I think that central to Judge Souter's philosophy is the dignity and freedom of the individual. I think that will, rather than put it on a continuum, will probably lead him to be a strong supporter and guarantor of civil liberties, I think he will take a strong stand on law enforcement issues, for antitrust enforcement. I think that those are things he has demonstrated in the past.

I do not know how that fits on a continuum between the two Justices that you named, but I think that that is a very central philosophy to his life, to him as a judge, and that will probably be prevalent for him as a Justice.

Senator GRASSLEY. I would not argue with your characterization of how you suggest he might come down, but that leads me, then, to my final question, and I would ask this just of the three Democrat partisans on the panel. Is this the best that you can hope for, in terms of judicial philosophy?

Mr. BELL. Well, I am not a partisan Democrat. I am a Democrat, but I am not a partisan Democrat and I have rather conservative views about things.

Senator GRASSLEY. Well, I will let you describe your—

Mr. BELL. Just because you are a Democrat does not mean you cannot have conservative views about matters.

I think the President has sent somebody over here who is moderate in tone, as somebody on the panel said. I do not know where he will come out. I think that much is being made over the abortion issue. We seem to overlook the fact that there are two parts of the abortion opinion, one that receives more criticism is the trimester system, which was set up by the Supreme Court. Many people think that the Supreme Court passed a law, a court of law, by setting up the trimester system. That can be totally separated from the rest of the opinion.

In addition to that, one of the big things that has happened here is Judge Souter said that he had no trouble finding the right of privacy in the 14th amendment. If privacy is a constitutional right, as the Supreme Court has held in other cases, and five Justices think it is a constitutional right, then the Congress can deal with the entire problem under section 5 of the 14th amendment. There is no danger of anybody losing a right, if it is a constitutional right, because Congress has got the duty to enforce the 14th amendment. So you might end up having to deal with the trimester system, and if so, that would be the end of the matter, you would just simply pass a code of law.

That is one of the big complaints that I have heard over the years about the abortion decision, and it is unfortunate that the issue of privacy, and a woman's right to control her own body is one of the most sensitive things that there is in the society, and we get it totally mixed up by criticizing an opinion which can be straightened out, if necessary, if that is the way they come out. It is not necessary that it just be totally overruled. I think out of the hearing that is the one thing that has gotten almost out of hand, I think, is that one issue.

Senator GRASSLEY. Could I hear from Mr. Diamond and Mr. Baliles on my question about how you see it, from the standpoint of being a Democrat?

Mr. BALILES. Senator, the fact is that there is a vacancy on the Court and the President has sent the U.S. Senate a nominee. I think, if you are asking my opinion, Judge Souter is qualified to serve on the U.S. Supreme Court. I may not agree with all of his decisions in the future, but I am satisfied that his approach to legal issues, the process by which he examines legal questions will serve this country well.

In a time in which many things are going on in our society, the complexity, the mobility, the transient nature of our country, the issues that will face the Court for many years to come, I think requires someone who has a sense of history, as well as a sense of humor, someone who has an understanding of the Government structure in this Nation and the principles upon which our Constitution are based.

I am satisfied that he possesses the qualifications to serve on the Court, and I think ultimately that is your decision that you are going to have to make.

Mr. DIAMOND. Senator, first of all, I adopt Governor Baliles' statement. I think what he said is very accurate, very true, and I would just like to offer one addition to that.

I would consider myself far more liberal on issues than David Souter. I know of at least three other Democratic attorneys general that served with him in the New England area that wanted very much to come to testify on his behalf today, all of them far more liberal than David Souter, but all of us have something in common.

The CHAIRMAN. Let us make it clear, so you do not leave the wrong impression, none of them were prevented from coming today?

Mr. DIAMOND. Not by this committee.

The CHAIRMAN. Anyone that wanted to come was able to come, let us make sure we have got that straight.

Mr. DIAMOND. They were certainly not prevented by this committee, no.

The CHAIRMAN. Sometimes, statements like that, unintended, get blown out of proportion in these debates.

Mr. DIAMOND. I think the thing that all of us share with Judge Souter, at least we believe we do, is his basic philosophy with regard to the dignity and freedom of the individual, as being a central judicial philosophy.

Now, as far as I am concerned, that is central to a liberal philosophy, as well as a conservative philosophy and is rooted in both. So, I do not know if that answers your question about whether it is the best President Bush could have sent up, but he is certainly someone with whom we felt quite comfortable, from a philosophic standpoint.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Gentlemen, thank you all very much. We appreciate you taking the time and making the effort.

The CHAIRMAN. Now, let me ask—we have each of our caucuses, the caucuses meaning that the Democrats are caucusing and discussing important issues that are coming before the Senate, that started at 12:30, as well as the Republicans doing that. I am trying to make a judgment here and I will yield to my colleagues for a moment.

We have the next panel, a very important panel, as well, made of three people. Let us see if we can get it finished in half an hour, because I know myself, and I suspect that others have to be at our caucus before it closes out, so let us attempt to do one more panel between now and 1:30.

Ms. Antonia Hernandez, president and general counsel of the Mexican-American Legal Defense and Education Fund; Joseph L. Rauh, Jr., general counsel, Leadership Conference on Civil Rights; and Joan Bronk, president of the National Council of Jewish Women.

Would you please come forward. Ms. Hernandez, why don't we begin with you and your testimony. Keep in mind our 5-minute rule, if you would, please.

**PANEL CONSISTING OF ANTONIA HERNANDEZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND; JOSEPH L. RAUH, JR., GENERAL COUNSEL, LEADERSHIP CONFERENCE ON CIVIL RIGHTS; AND JOAN BRONK, PRESIDENT, NATIONAL COUNCIL OF JEWISH WOMEN**

**STATEMENT OF ANTONIA HERNANDEZ**

Ms. HERNANDEZ. Thank you, and I will try to do that.

I have submitted extensive written testimony and I will not try to at this point in time read it—

The CHAIRMAN. The entire statement will be entered in the record.

Ms. HERNANDEZ [continuing]. But I will try to consolidate the concerns that we have in my statement.

I am Antonia Hernandez, I am the president and general counsel of the Mexican-American Legal Defense and Education Fund. This statement is submitted on behalf of MALDEF in opposition to Senate confirmation of David Souter as an Associate Justice of the U.S. Supreme Court.

In this statement, I address three primary matters: The background of MALDEF's concerns about David Souter; second, Judge Souter's record antagonistic to civil rights and constitutional provisions which protect the rights of Hispanics; and, three, Judge Souter's refusal to disavow personally those antagonistic positions during his first 2 days of testimony before this committee.

Because of the Nation's history of invidious discrimination against Hispanics, and because of the U.S. Supreme Court's unique role for more than 30 years in beginning to vindicate the civil and constitutional rights of Hispanics, we Hispanics have placed particular reliance on the Supreme Court in assuring our civil and constitutional rights, and it is in light of our concern that we have serious fears and concerns.

We firmly believe that in 1990, no individual should be confirmed, unless he or she has demonstrated an understanding and a commitment to equal justice and views the Court as an appropriate vehicle to redress these rights and understands these commitments should be based on past records.

Our organization withheld opposition until we heard Judge Souter's testimony, and we take this position not lightly. But in listening to his 2 days of testimony—and I must confess that I did not listen to all of it yesterday, I was in flight between Los Angeles and Washington, DC, but in listening to the last 2 days of his testimony, we remain seriously concerned that Judge Souter has no understanding nor limited understanding or commitment to issues of concern to Hispanics.

Because of the fact that the incidents antagonistic to civil rights occurred when Judge Souter was acting in his official capacity as a lawyer, advocating the New Hampshire Office of Attorney General, and even aside from his oath of office and the manner in which he excessively pursued his position hostile to civil rights, we withheld judgment. Our hope was that maybe, just maybe his personal positions had been different from and more compassionate than the hostile position he had advanced in his official capacity on behalf of the State of New Hampshire, and that he had been misquoted by

the media in his sound bite characterization of affirmative action as affirmative discrimination. Our hope, however, was quickly dashed by Judge Souter's own testimony in his first 2 days before this committee.

In summary, he repeatedly declined to offer any personal views at the time contrary to the hostile positions to civil rights, in general, and to Congress' power under section 5 of the 14th amendment, in particular. He had aggressively pursued, on behalf of the State of New Hampshire, and, maybe even worse, Judge Souter failed to demonstrate any capacity for fairness to and, much less, compassion for the individuals who would be forever affected by his rulings and votes as Associate Justice of the Supreme Court.

This is not to deny and certainly not degrade the testimony he gave, finally recognizing that, still today, there is enormous need to remedy the wrongs done by our Nation and within our Nation through the history of invidious discrimination.

Although his testimony constitutes a fairly accurate summary of the constitutionality and legally permissible scope of affirmative action allowed under current Supreme Court rulings, nowhere in his testimony did Judge Souter deny the characterizations reported in his 1976 speech. In fact, almost nowhere did Judge Souter refer to his own views of affirmative action, either as a constitutional matter or as a matter of statutory construction or of congressional power.

All that Judge Souter has left with us, with any certainty, is that there are matters "which will be played out in constitutional litigation for some time ahead of us." But for those of us who are Hispanic and female, this is not just an intellectual game "to be played out."

Moreover troublesome, indeed, determinative for MALDEF, has been Judge Souter's repeated refusal, after repeated opportunities to discuss his personal views as possibly compassion on civil rights and more deferential to congressional power under section 5 of the 14th amendment. From the extreme and cold position he advanced as an assistant attorney general, as an attorney general, challenging Congress' pan on the literacy tests for voting as unconstitutional, and challenging Congress' title VII recordkeeping requirement as unconstitutional.

In Judge Souter's opening statement before this committee, he has said nothing about civil rights and nothing at all concerning the power of Congress under section 5 of the 14th amendment.

Judge Souter, on the other hand, did readily concede that one of the lessons learned by him as a trial judge, a lesson that is readily apparent to anyone who has ever been before a trial judge, was that, at the end of our judicial test, some human being is going to be affected.

Judge Souter's personal views on civil rights were inquired into thereafter by several Senators, but Judge Souter refused to disclose his personal beliefs or positions.

Apart from Judge Souter's overall nonresponsiveness in his 2 days of testimony, much less his apparently continuing hostility to the Supreme Court's recognition of Congress' power under section 5 of the 14th amendment and under section 2 of the 15th amendment, the fact of the matter is that, although provided with

plentiful opportunity to do so, Judge Souter has not demonstrated fairness for and any compassion about those of us, particularly Hispanics who for so long have been denied not just the promise of the American dream, but, more basically, the equal opportunity of the law. In addition to Judge Souter's nonresponsiveness, his evident lack of feeling and of compassion and his continued hostility to this committee on the issues that we care about should be a consideration. This fact pertains to Judge Souter's admiration for, among all Supreme Court Justices, of not the first Justice Harlan but the second Justice Harlan. Please remember that their philosophies are leagues apart.

The first Justice Harlan, now often remembered only for one historical dissenting opinion, provided the Supreme Court's sole dissent in *Plessy v. Ferguson*. This is not the Justice Harlan who Judge Souter admires. Instead, Judge Souter admires most, among all Supreme Court Justices, the second Justice Harlan, who wrote the dissenting opinion in *Katzenbach v. Morgan*, expressing the view that Congress essentially has no power whatsoever to legislate under section 5 of the 14th amendment from or beyond that already deemed to be unconstitutional by the judiciary.

I must add that in listening to former Attorney General Griffin Bell in his explanation of the issue of choice, that Congress definitely has the power under section 5 of the 14th amendment to deal with the *Roe v. Wade* issue, we are concerned that there is a question as to Judge Souter's belief that Congress does, in fact, have this power.

Judge Souter has not demonstrated fairness or even compassion for racial minorities, particularly with regard to our trying to win nondiscriminatory opportunities to equal employment, and to our most fundamental right under the Constitution and the laws of our country, the right to vote.

Therefore, accordingly, MALDEF opposes the confirmation of Souter as an Associate Justice of the Supreme Court. Thank you.  
[The prepared statement of Ms. Hernandez follows:]

**STATEMENT**

**On Behalf Of The**

**MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND  
("MALDEF")**

**By**

**ANTONIA HERNANDEZ  
PRESIDENT AND GENERAL COUNSEL**

**Before The**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**IN OPPOSITION TO THE  
CONFIRMATION OF DAVID H. SOUTER  
AS AN ASSOCIATE JUSTICE OF THE  
UNITED STATES SUPREME COURT**

**101st CONGRESS  
2d SESSION  
September 18, 1990**

**STATEMENT OF ANTONIA HERNANDEZ**

I am Antonia Hernandez, the President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). This Statement is submitted on behalf of MALDEF in opposition to Senate confirmation of David H. Souter as an Associate Justice of the United States Supreme Court.

In this Statement, I address hereafter three primary matters: (1) the background of MALDEF's concern about David H. Souter; (2) Judge Souter's record antagonistic to civil rights laws and constitutional provisions which protect the rights of Hispanics; and (3) Judge Souter's refusal to disavow personally these antagonistic positions during his testimony before this Committee.

**I. The Background of MALDEF's Opposition to Judge Souter**

Because of our nation's history of invidious discrimination against Hispanics, and because of the United States Supreme Court's unique role for more than thirty years (1954-1988) in beginning to vindicate the civil and constitutional rights of Hispanics, we Hispanics have placed particular reliance on the Supreme Court in assuring our civil and constitutional rights.

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the

mid-Nineteenth Century to date,<sup>1</sup> has been not unlike that suffered by African Americans. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied employment, and often treated badly when employed. We have been denied the opportunity to serve on juries. And we have even been denied the most fundamental of rights, the right to vote.

But we Hispanics, like African Americans in our country, were finally given hope in 1954 by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously decided that Mexican Americans were protected by the Fourteenth Amendment, and unanimously held that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

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1. This nation's discrimination against Hispanics dates back at least to the period following the 1848 Treaty of Guadalupe-Hidalgo, through which Mexico ceded to the United States territory which would become the states of Arizona, California, Colorado, New Mexico, and Texas, and which would become parts of Nevada and Utah. Article IX of that Treaty guaranteed all persons of Mexican origin continuing to reside in that territory not only United States citizenship but also "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution," including of course "free enjoyment of their liberty and property." Despite these guarantees, what the once-Mexican population received instead was more than a century of subjugation.

This fight to establish our basic civil and constitutional rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the multimember district diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single-member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the 1980s -- we faced a divided Supreme Court, a Court which in fact often was very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent

underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justice Lewis Powell joining the majority decision written by Justice William Brennan.

Following the resignation of Justice Powell and his replacement by Justice Anthony Kennedy, the Supreme Court -- within a matter of weeks in June, 1989 -- rendered usually on five-to-four votes a series of decisions devastating to the rights of Hispanics, other minorities, and women to a discrimination-free workplace. These decisions<sup>2</sup> are, of course,

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2. These decisions, listed roughly in chronological order, include the following: Wards Cove Packing Co. v. Atonio, 490 U.S. \_\_\_, 109 S.Ct. 2115, 104 L.Ed.2d 733 (June 5, 1989) (reallocating burdens of proof, among other things, in Title VII disparate impact cases); Martin v. Wilks, 490 U.S. \_\_\_, 109 S.Ct. 2180, 104 L.Ed.2d 835 (June 12, 1989) (permitting "reverse discrimination" collateral attacks on consent decrees at any time); Lorance v. AT&T Technologies, Inc., 490 U.S. \_\_\_, 109 S.Ct. 2261, 104 L.Ed.2d 961 (June 12, 1989) (striking down EEOC charges as untimely under Title VII when filed shortly after the discrimination affected the female charging parties); Patterson v. McLean Credit Union, 491 U.S. \_\_\_, 109 S.Ct. 2363, 105 L.Ed.2d 132 (June 15, 1989) (eviscerating § 1981 by limiting it to intentional discrimination only in the formation of contracts); Jett v. Dallas Independent School District, 491 U.S. \_\_\_, 109 S.Ct. 2702, 105 L.Ed.2d 598 (June 22, 1989) (further eviscerating § 1981 in the public sector by subjecting it to the "policymaker" constraints governing § 1983 lawsuits); Independent Federation of Flight Attendants v. Zipes, 491 U.S. \_\_\_, 109 S. Ct. 2732, 105 L.Ed.2d 639 (June 22, 1989) (disallowing statutory attorneys fees to successful Title VII plaintiffs who had to litigate for years against an intervening defendant's attack on their back pay and seniority remedies); cf. Public Employees Retirement System of Ohio v. Betts, 492 U.S. \_\_\_, 109 S.Ct. 2854, 106 L.Ed.2d 134 (June 23, 1989) (insulating discriminatory benefit plans from age discrimination challenges under the ADEA).

well known to the United States Senate given the vast amount of time that the Senate has had to expend to try to restore prior law through the Civil Rights Act of 1990 (S. 2104), legislation initially passed two months ago by the Senate on a lopsided 65-34 vote.<sup>3</sup> In the meantime, the effect upon Hispanics of these recent Supreme Court decisions has been particularly devastating in view of the increased discrimination against Hispanics, as revealed by recent documentation showing that as many as 19% of all employers are now engaging in discrimination against "foreign-looking" or "foreign-sounding" employees and job applicants.<sup>4</sup>

Whether last year's Supreme Court decisions hostile to the civil and constitutional rights of Hispanics actually signal a Supreme Court retrenchment or turning-back-of-the-clock on civil rights, I have little doubt that the next person confirmed as an Associate Justice on the Supreme Court will in fact have a major impact upon the future course of Supreme Court adjudication: either at least occasionally respecting and vindicating the civil and constitutional rights of Hispanics, or denying our rights altogether.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will not this time be

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3. Virtually identical legislation, H.R. 4000, was passed by the House last month by a similarly lopsided vote of 272-154.

4. United States General Accounting Office, GAO Report to the Congress: Employer Sanctions and the Question of Discrimination, 5-7, 37-79 (March, 1990).

replacing Justice Powell, who had been a swing-vote moderate on the Court. Instead, the next nominee will be replacing Justice Brennan, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

With Justice Brennan no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the capacity for fairness and compassion of the person nominated to succeed Justice Brennan.

**II. Judge Souter's Record Reflects Antagonism to Civil Rights Laws and Constitutional Provisions which Protect the Rights of Hispanics**

Judge Souter did not come to his confirmation hearing before this Committee with an extensive record on matters of national origin and racial discrimination barred by federal civil rights laws and by the equal protection clause of the Fourteenth Amendment.

On the other hand, Judge Souter does have a limited written and oral record on these matters, a record which is noteworthy for the singular fact that in every instance in which he expressed himself his actions and expressions were hostile not only to civil rights laws but also to constitutional provisions essential to protect the rights of Hispanics. Equally troubling to me is the fact that several of these hostile actions and expressions were taken by Judge Souter at a time when, as an

Attorney General or an Assistant Attorney General, he was under an oath of office requiring him to uphold the Constitution of the United States.

The hostile incidents to which I am referring, as the Members of this Committee are aware, involve Judge Souter's actions and expressions in the areas of employment discrimination law, voting rights, and affirmative action. I briefly review hereafter Judge Souter's past actions and expressions in each of these three areas of particular importance to Hispanics.

A. Employment Discrimination Law

Two of the most troublesome parts of Judge Souter's record are both the arguments he made and the extent he went to make those arguments in his constitutional challenge to Title VII's recordkeeping requirements in the case of United States v. New Hampshire, 539 F.2d 277 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976). In order to understand both aspects, it may be useful first to set forth the factors relevant to both the factual and constitutional context of this litigation.

1. Our nation's basic law barring employment discrimination, Title VII of the Civil Rights Act of 1964, initially barred discrimination only in the private sector. Based thereafter on a record of discrimination in the public sector and of a need for effective remedies therefor, Congress through the Equal Employment Opportunity Act of 1972 extended

Title VII to the public sector.<sup>5</sup> It is thus at this time that Title VII became applicable to New Hampshire.

2. At the time of Congress' extension of Title VII to the states under its enforcement power in Section 5 of the Fourteenth Amendment, it had been hornbook Supreme Court law for nearly one hundred years that "Congress is authorized to enforce the prohibitions [of the Fourteenth Amendment] by appropriate legislation." Ex Parte Virginia, 100 U.S. 339, 345 (1880) (emphasis by the Court, brackets added). And it is pursuant to Section 5 of the Fourteenth Amendment that the Supreme Court upheld the constitutionality of the arguably more intrusive Voting Rights Act of 1965.<sup>6</sup>

3. A section of Title VII crucial to its effective enforcement expressly requires every employer covered by Title VII to maintain and to preserve "records relevant to the determination of whether unlawful employment practices have been or are being committed," and to make "such reports therefrom" as requested by the EEOC.<sup>7</sup> Despite the clarity of this statutory

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5. Public Law No. 92-261 (March 24, 1972), 86 Stat. 103, amending Public Law No. 88-352 (July 2, 1964), Title VII, § 701, 78 Stat. 253, codified at 42 U.S.C. §§ 2000e et seq.

6. Katzenbach v. Morgan, 384 U.S. 641 (1966); cf. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (similar result under § 2 of the Fifteenth Amendment). The Supreme Court had earlier upheld under the commerce clause the constitutionality of the Civil Rights Act of 1964 as applied in the private sector. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

7. See Section 709(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c), which states in pertinent part:

Every employer ... subject to this title

requirement, and despite the routine provision by employers to the EEOC annually of employer workforce data by national origin, race, and gender, New Hampshire refused to provide the EEOC with national origin and race data for 1973 and refused to provide any data whatsoever for 1974. New Hampshire, in fact, was the only state to refuse compliance.

Against this backdrop, the United States had to file suit against New Hampshire in mid-1975 to compel compliance with our nation's most fundamental employment discrimination law. New Hampshire's answer to this lawsuit was that the information required by the statute was irrelevant and that Title VII in any event was unconstitutional. On cross motions for summary judgment, the United States District Court entered a one-page order ruling against New Hampshire and thus compelling compliance. United States v. New Hampshire, No. 75-197 (D.N.H. Dec. 22, 1975).

The extent of Assistant Attorney General Souter's involvement in formulating this "states' rights" policy of resistance and in initially defending the policy remains unclear.

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shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder.

See also the accompanying EEOC regulations, 29 C.F.R. Part 1602.

Undisputed, on the other hand, is his direct involvement in the appeals he zealously pursued after being sworn in as Attorney General in January, 1976.

The appellate brief he filed in the United States Court of Appeals for the First Circuit reflects a profound misunderstanding (or a hoped-for refutation) both of evidentiary proof in civil rights cases and of established congressional power under Section 5 of the Fourteenth Amendment. The essence of both misunderstandings (or hoped-for changes in the law) is reflected in Attorney General Souter's summary contention that the statutorily required recordkeeping "adds nothing essential to the program against unlawful employment practices; it only creates a gratuitous layer of accountability to the federal government, contrary to constitutional principles limiting federal power." Brief for Appellant at 7. This summary contention, like his subsidiary claims, was unanimously rejected by the Court of Appeals. United States v. New Hampshire, 539 F.2d 277 (1st Cir. 1976).

As to the probative value of statistical evidence, Attorney General Souter incredibly claimed: "For a determination of an individual's charge of an unlawful employment practice, group statistics are not 'relevant.'" Brief at 14. Rejecting this claim, the Court of Appeals observed that, to the contrary, statistical workforce data in fact are "highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular

factual context," 539 F.2d at 280; and the Court of Appeals cited four other Courts of Appeals' decisions all standing for the still-extant evidentiary rule that in cases of alleged "racial discrimination, statistics often tell much, and Courts listen," *id.* (citations omitted).<sup>8</sup> Equally compelling if not more so at this time -- except to Attorney General Souter -- were nearly half-a-dozen Supreme Court decisions referencing the relevance of statistical data in Title VII cases.<sup>9</sup>

Having constructed his factual claim on a foundation of sand, Attorney General Souter subsequently advanced as one of his legal claims that Title VII's recordkeeping requirements could only lead to the use of "quotas," making Title VII's recordkeeping requirements themselves unconstitutional and hence beyond congressional power under Section 5 of the Fourteenth Amendment. Brief at 24, 37-45. The Court of Appeals dismissed Attorney General Souter's foundation-of-sand "quotas" claim in two cursory footnotes, 539 F.2d at 280 nn. 4 & 5; and easily dismissed his lack-of-congressional-power assertion under Section 5 of the Fourteenth Amendment, 539 F.2d at 280-81, through

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8. Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962), quoted in Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305 (5th Cir. 1973); see also Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).

9. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

reliance on solid supreme Court precedents commencing with Ex Parte Virginia, 100 U.S. 339, 345 (1880), running through Katzenbach v. Morgan, 384 U.S. 641, 648-51 (1966) (upholding the constitutionality under § 5 of the Fourteenth Amendment of Congress' limited ban on literacy tests in the Voting Rights Act of 1965), and most recently in Fitzpatrick v. Bitzer, 427 U.S. 455 (1976) (unanimously upholding Congress' power under § 5 of the Fourteenth Amendment to make the states liable for monetary remedies under Title VII).

Apparently not content with arguing Title VII's unconstitutionality only under Section 5 of the Fourteenth Amendment, Attorney General Souter also challenged at length the constitutionality of Title VII under the Constitution's commerce clause, as unauthorized "evidence of unchecked centralized government." Brief at 29. This claim was rejected by the Court of Appeals with little discussion in view of Title VII's obvious constitutionality under Section 5 of the Fourteenth Amendment. 539 F.2d at 281-82.<sup>10</sup>

Apparently so as to leave no stone unturned in his crusade to defeat proof of discrimination on grounds of national origin, race, and gender, Attorney General Souter also asserted that Title VII's recordkeeping requirements somehow also violated the Tenth Amendment's reservation of power to the states, the

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10. As stated by the Court of Appeals, Attorney General Souter's claim of unconstitutionality under the commerce clause was entirely "beside the point, however, because Congress principally relied on the fourteenth amendment when in 1972 it included states within the purview of Title VII." 539 F.2d at 281.

Thirteenth Amendment's ban on slavery, and the constitutional rights of the state's employees to liberty, privacy, and due process. Brief at 45-59. The Court of Appeals in a footnote dismissed these claims as not even "deserving of discussion". 539 F.2d at 282 n. 6.

Having been soundly trounced on appeal, Attorney General Souter nevertheless zealously continued his attack on Title VII and on congressional power under § 5 of the Fourteenth Amendment by filing with the Supreme Court a Petition for a Writ of Certiorari. A mere three-page Memorandum in Opposition was filed by Solicitor General Robert Bork. The Supreme Court denied certiorari. New Hampshire v. United States, 429 U.S. 1023 (1976).

#### B. Voting Rights

Attorney General Souter's misunderstanding of -- or his disagreement with -- congressional power under Section 5 of the Fourteenth Amendment in his challenge to the constitutionality of Title VII is even more profound in view of the sound judicial rejection of his virtually identical challenge to congressional power six years earlier in United States v. New Hampshire, No. 3191 (D.N.H. Oct. 27, 1970) (three-judge court).

This is the case -- listed in his Senate Questionnaire at 29 as one of the most significant cases he had ever handled -- in which Assistant Attorney General Souter unsuccessfully challenged Congress' power under Section 5 of the Fourteenth Amendment to

ban literacy tests, as a prerequisite to voting, through Title II of the Voting Rights Act Amendments of 1970.<sup>11</sup>

At the time that Assistant Attorney General Souter in the fall of 1970 defended New Hampshire's literacy tests in this case by challenging Congress' power, four significant developments affecting the right to vote had occurred in the previous decade, significant developments which fundamentally changed this nation's approach to suffrage. One such development was Congress' recognition of historical and continuing denials of the right to vote on grounds of race and national origin, coupled with Congress' enactment of highly creative remedies therefor through the Voting Rights Act of 1965. The other three developments were judicial, involving the Supreme Court's reiteration of congressional power under Section 2 of the Fifteenth Amendment to remedy racial and national origin discrimination in voting; the Supreme Court's reiteration of congressional power under Section 5 of the Fourteenth Amendment to break down barriers to equality in general; and the Supreme Court's entry into the political thicket of legislative reapportionment to curtail vote dilution through the Court's application of the one-person-one-vote principal under the equal protection clause of the Fourteenth Amendment, coupled with the Supreme Court's declaring unconstitutional various restrictions on the right to vote. Because of the fact that all of these

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11. Public Law No. 91-285 (June 22, 1970), Title II, § 201, 84 Stat. 315, amending Public Law No. 89-110 (Aug. 6, 1965), Title I, 79 Stat. 437, codified at 42 U.S.C. §§ 1973 et seq.

developments in combination should have affected the approach taken by any reasonable attorney to New Hampshire's literacy tests and to congressional power in the fall of 1970 -- but did not at all appear to affect the position taken that fall by Assistant Attorney General Souter -- it may be useful here to summarize initially each of these four developments which together so substantially altered and improved our nation's new commitment to the constitutional promise of equal protection under law.

1. Denial of the right to vote through practices such as literacy tests, and dilution of a vote through myriad other practices, not only have limited the franchise in our democracy but also have historically disenfranchised Hispanics, African Americans, and other minorities altogether. Based on an extensive record of disenfranchisement, and based upon Congress' intent to provide new and effective remedies therefor, Congress initially enacted the Voting Rights Act of 1965, and subsequently extended and strengthened the Act in 1970, 1975, and 1982. As to the initial 1965 Act, one section of the Act barred the use of literacy tests in jurisdictions where Congress deemed the effects of past discrimination to have been most severe; another section of the 1965 Act barred the use of literacy tests in New York without regard to any past discrimination whatsoever. Both sections of the 1965 Act were challenged thereafter as an unconstitutional exercise of congressional power.

2. In South Carolina v. Katzenbach, 383 U.S. 301 (1966),

the Supreme Court reviewed the constitutionality of various sections of the Voting Rights of 1965, including Section 4(a) which temporarily suspended literacy tests in seven southern states, in Alaska, and in various counties in Arizona, Hawaii, and Idaho where such tests had been recently used and where voter registration was low. Rejecting the contention that only the judiciary could strike down state statutes and procedures, the Supreme Court unanimously upheld Section 4(a) of the Act as an appropriate exercise of Congress' power under Section 2 of the Fifteenth Amendment (which states that "Congress shall have power to enforce this article by appropriate legislation").

3. Several months later, in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court reviewed the constitutionality of Section 4(e) of the Act, through which Congress had suspended English literacy tests for all persons educated through the sixth grade in a language other than other English in American-flag schools. Although Congress in enacting Section 4(e) had not relied on the racially discriminatory effect of English literacy tests, and although the use of such tests was not then forbidden by the Fourteenth Amendment's equal protection clause itself, the Court in seven-to-two decision authored by Justice Brennan ruled that Congress' enactment of section 4(e) was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment [which states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"]." 384 U.S. at 646 (footnote omitted, brackets added).

In reaching this result, the Court relied on its holding in Ex Parte Virginia, 100 U.S. 339, 345 (1880):

It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.

Katzenbach, 384 U.S. at 648, quoting Ex Parte Virginia, 100 U.S. at 345 (emphasis in original). The Court also noted that its fairly recent "decision in Lassiter v. Northhampton Election Board, 360 U.S. 45 (1959), sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments is inapposite" because Lassiter "did not present the question [of congressional power] before us here." Katzenbach, 384 U.S. at 649. In other words, the recently sustained constitutionality of literacy tests is irrelevant to congressional power under Section 5 of the Fourteenth Amendment.

4. The final and arguably most profound development during the decade was the Supreme Court's guarantee against unconstitutional vote dilution under the Fourteenth Amendment through application of the one-person-one-vote principle in Reynolds v. Sims, 377 U.S. 533 (1964) (per Justice Brennan). Additionally, and in part because of the Court's recognition in Reynolds that the right to vote "is of the essence in a democratic society, and any restrictions on that right strike at

the heart of representative government," 377 U.S. at 555, the Supreme Court thereafter began striking down as unconstitutional under the Fourteenth Amendment numerous restrictions on the right to vote. See, e.g., Carrington v. Rash, 380 U.S. 89 (1965) (state could not deny the right to vote to persons solely because they were members of the armed services); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (persons unable to pay poll fees could not be denied the right to vote); Kramer v. Union School District, 395 U.S. 621 (1969) (bachelors cannot be barred from voting in school board elections).

Against this backdrop, Assistant Attorney General Souter, in United States v. New Hampshire, No. 3191 (D.N.H. Oct. 27, 1970), defended New Hampshire's literacy tests, which had been suspended by Congress through Congress' nationwide suspension of literacy tests in Title II of the Voting Rights Act Amendments of 1970. Important here is not so much the fact of his defense, but the manner of it, as is set forth in his Memorandum of Law filed on October 2 in opposition to the United States' motion for a preliminary injunction.

On the law, as noted, Assistant Attorney General Souter challenged Congress' suspension of literacy tests as beyond Congress' power. Although he cited Katzenbach v. Morgan, 384 U.S. 641 (1966), nowhere in his Memorandum did he describe it, much less analyze it. Instead, he claimed that New Hampshire's literacy tests were constitutional on their face under Lassiter v. Northampton Election Board, 360 U.S. 45 (1959) -- a case which

the Supreme Court had held to be "inapposite" in Katzbach, 384 U.S. at 649 -- and he incorrectly argued in the face of Katzbach that "authority is wanting for the proposition that a blanket suspension of all literacy tests may be compelled by Congressional legislation, absent the showing of correlation between areas in which suspension is effected and areas in which the tests have been used for ultimately unconstitutional purposes." Memorandum at 4-6.

Ignoring the constitutional dimensions of every adult citizen's right to vote, Assistant Attorney General Souter actually asserted that the "individuals [denied the right to vote] can claim, therefore, no more than that they are the fortuitous and incidental beneficiaries of a legal, rather than a constitutional, right to vote"; that their right to vote is "of a merely legal nature"; and that the right is "of a wholly incidental legal nature." Memorandum at 8-9 (brackets added). He also asserted, even more shockingly, that "allowing illiterates [persons not literate in reading and writing English] to make a choice in such matters is tantamount to authorizing them to vote at random, utterly without comprehension," and that "detriment to the state and its citizens will occur in watering the value of every literate citizen's vote." Memorandum at 7-8 (brackets added).

Assistant Attorney General Souter's narrow view of congressional power was unanimously rejected by the three-judge federal court. United States v. New Hampshire, No. 3191 (D.N.H.

Oct. 27, 1970). Less than two months later, in an original-jurisdiction action, the Supreme Court unanimously rejected better formulated arguments and upheld Congress' ban on English literacy tests under either or both of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Oregon v. Mitchell, 400 U.S. 112 (1970).

### C. Affirmative Action

Following his 1976 argument to the United States Court of Appeals for the First Circuit that Title VII's recordkeeping requirements would lead to the unconstitutional imposition of quotas, Attorney General Souter gave a commencement speech on May 30, 1976. Under a banner headline stating "Souter Raps Ethnic Preferment" in the Manchester Union Leader the following day, Attorney General Souter was quoted as characterizing affirmative action as "affirmative discrimination," and stating that government "should not be involved in this." "There are some things government cannot do," he was reported to have said, "and our whole Constitutional history is a history of restraining power."

In the years subsequent to his delivery of this speech, the Supreme Court upheld as constitutional or otherwise as lawful race-conscious affirmative action admissions to obtain diversity in higher education, University of California v. Bakke, 438 U.S. 265 (1978); voluntarily adopted affirmative action goals and timetables in employment to overcome minority

underrepresentation, United Steelworkers of America v. Weber, 443 U.S. 193 (1979); see also Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); strict goals and timetables ordered by courts to remedy past discrimination, United States v. Paradise, 480 U.S. 149 (1987); and minority set-aside programs authorized by Congress to alleviate underrepresentation, Fullilove v. Klutznick, 448 U.S. 448 (1980).

**III. Judge Souter, in His Testimony Before This Committee, Did Not Reveal Personal Positions Sufficient to Rebut His Record of Antagonism to Civil Rights**

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Because of the fact that the first two of the three foregoing incidents antagonistic to civil rights occurred when Judge Souter was acting in his official capacity as lawyer-advocate in the New Hampshire Office of Attorney General -- and even aside from his oath of office and the excessive manner in which he excessively pursued his positions hostile to civil rights -- MALDEF withheld final judgment pending his testimony before this Senate Committee on the Judiciary.

Our hope was that maybe, just maybe, his personal positions had been different from and more compassionate than the hostile positions he had advanced in his official capacity on behalf of the State of New Hampshire; and that he had been misquoted by the media in his sound-bite characterization of affirmative action as "affirmative discrimination." Our hope, however, was quickly dashed by Judge Souter's own testimony in his first two days

before this Committee. In summary, he repeatedly declined to offer any personal views at the time contrary to the hostile positions -- to civil rights in general, and to Congress' power under Section 5 of the Fourteenth Amendment in particular -- he had aggressively pursued on behalf of the State of New Hampshire. And, maybe even worse, Judge Souter failed to demonstrate any capacity for fairness to, much less compassion for, the individuals who would be forever affected by his rulings and votes as an Associate Justice of the Supreme Court.

This is not to deny and certainly not to degrade the testimony he gave finally recognizing that still today there is an enormous need to remedy the wrongs done by our nation and within our nation through a history of invidious discrimination. For example, under questioning by Senator Ted Kennedy, Judge Souter to his credit testified:

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 and in the matters of invidious discrimination which we are unfortunately too familiar with.

That, I hope, when these hearings are over, will be taken as given with respect to my set of values.

Hearing Transcript at 150 (Sept. 13, 1990). And, during his testimony the following day in response to questioning by Senator Paul Simon about Attorney General Souter's reported characterization of affirmative action as "affirmative discrimination," Judge Souter testified that he hoped he hadn't been quoted exactly:

I think that -- I hope that was not the exact quote because I don't believe that. The kind of discrimination that I was talking about in the speech was discrimination, as I described it and as I recall being quoted in the paper about it, a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, have nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution.

Hearing Transcript at 111 (Sept. 14, 1990). Judge Souter continued:

That is to be contrasted in two absolutely essential respects, from on the one hand affirmative action and on the other hand the kind of distributive remedy which it

is appropriate for courts and, to a degree yet to be fully developed, appropriate for Congress to consider.

I would suppose it would go without saying today that if we are in the United States to have the kind of society which I described yesterday as the society which I knew or found reflected in my home, there will be a need -- and I am afraid for a longer time that we would like to say -- a need for the affirmative action which seeks out qualified people who have been discouraged by generations of societal discrimination from taking their place in the mainstream and in all of America and in all the distribution of its benefits and its burdens. That is an obligation of individuals, and it is an obligation of government.

I think it also goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say undo it. That is a

judicial obligation to make good on the Fourteenth Amendment.

And as I said a moment ago, one of the developments in American constitutional law which is at the stage, I would say, of exploration now is to the development about the particular power of Congress to address a general societal discrimination as opposed to a specific remedy for a specific discrimination. That is a concern which will be played out in constitutional litigation for some time ahead of us.

Hearing Transcript at 111-13 (Sept. 14, 1990).

Although the foregoing testimony constitutes a fairly accurate summary of the constitutionally and legally permissible scope of affirmative action allowed under current Supreme Court rulings, nowhere in his testimony did Judge Souter deny the characterizations reported in his 1976 speech, and in fact almost nowhere did Judge Souter refer to his own views of affirmative action either as a constitutional matter, or as a matter of statutory construction or of congressional power. All that Judge Souter has left with us with any certainty is that these are matters "which will be played out in constitutional litigation for some time ahead of us." Hearing Transcript at 113. But for those of "us" who are Hispanic and female, this is not just an intellectual game to be "played out."

More troublesome, indeed determinative for MALDEF, has been Judge Souter's repeated refusals -- after repeated opportunities -- to distance his personal views, as possibly compassionate on civil rights and as more deferential to Congress' power under Section 5 of the Fourteenth Amendment, from the extreme and cold positions he advanced as an Assistant Attorney General and as Attorney General challenging Congress' ban on literacy tests for voting as unconstitutional, and challenging Congress's Title VII recordkeeping requirements as unconstitutional.

In Judge Souter's opening statement before this Committee, he said nothing at all about civil rights, and nothing at all concerning the powers of Congress under Section 5 of the Fourteenth Amendment. Hearing Transcript at 93-100 (Sept. 13, 1990).

Judge Souter, on the other hand, did readily concede that one of the lessons learned by him as a trial judge -- a lesson that is readily apparent to anyone who has ever been before a trial judge -- was that "at the end of our [judicial] task some human being is going to be affected." Hearing Transcript at 99 (Sept. 13, 1990).

Judge Souter's personal views on civil rights were inquired into thereafter by several Senators, but Judge Souter refused to disclose his personal beliefs or positions. For example, Senator Kennedy pointedly asked Judge Souter:

Did you agree with the position of the  
State of New Hampshire that it is

unconstitutional for Congress to require employers to provide statistics about racial composition of the workforce?

Hearing Transcript at 141-42 (Sept. 13, 1990). Judge Souter declined to state his personal position, stating instead only: "I did not know whether it was unconstitutional or not." Hearing Transcript at 142 (Sept. 13, 1990). As to Judge Souter's personal views about Congress' power under Section 5 of the Fourteenth Amendment, Judge Souter again provided no such personal views but instead -- despite the Supreme Court's seemingly definitive ruling in Katzenbach v. Morgan, 384 U.S. 641 (1966) -- stated that to him there was "probably no question that there will be further years of litigation before the exact limits of that power are defined." Hearing Transcript at 142 (Sept. 13, 1990).

Pursuing a follow-up question to try to learn about Judge Souter's personal views, Senator Kennedy again quite pointedly asked:

So, did you at the time formulate any personal view about the legitimacy of the Congress in attempting to root out discrimination in the workplace?

Hearing Transcript at 143 (Sept. 13, 1990). Despite the opportunity again provided to Judge Souter to distinguish his possibly compassionate personal views from those he over-zealously had advocated on behalf of the State of New Hampshire,

Judge Souter instead coldly replied that he had come "to no comprehensive view of Section 5 at that time." Hearing Transcript at 143 (Sept. 13, 1990).<sup>12</sup>

With regard to Judge Souter's arguments defending the literacy tests and again challenging Congress' power under Section 5 of the Fourteenth Amendment, Judge Souter in his testimony again refused to give his personal views, and also declined to recognize the practical effect of maintaining literacy tests. Hearing Transcript at 147-51 (Sept. 13, 1990). As to the practical effect, the most compassionate response that Judge Souter could summon was that: "There is some question as to what its practical effect was in those days." Hearing Transcript at 151 (Sept. 13, 1990). As to the governing law applicable at the time flowing from the Supreme Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), which validated Congress' power under Section 5 of the Fourteenth Amendment, Judge Souter most inappropriately and misleadingly stated in his

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12. Interestingly, although Judge Souter refused to distance his personal view from the legal position he had advanced in 1976 to strip Congress of its powers under Section 5 of the Fourteenth Amendment, he indicated a lack of knowledge about the relevant facts of the case even at that time. For example, Senator Kennedy asked:

Tell me, why did you file information with regard to gender in employment ... but not with regards to race?

Hearing Transcript at 146 (Sept. 13, 1990). To this question, Judge Souter responded, id. at 147:

If you were to ask me cold whether the State was filing gender information at that time, I could not have told you.

testimony, id:

There was one thing that we did know very clearly about the law in those days, and that was that the use of a literacy test for a non-discriminatory purpose was constitutional under the Fourteenth Amendment.

Judge Souter, in his second day of testimony and again under questioning by Senator Kennedy, showed himself to be even more hostile to civil rights than he had previously proved. Hearing Transcript at 182-208 (Sept. 14, 1990). For example, with regard to Judge Souter's aggressive litigation attacks challenging the unconstitutionality of Title VII's recordkeeping requirements and of the Voting Rights Act Amendments' nationwide ban on the use of literacy tests for voting, Senator Kennedy asked:

What I would like to ask you is whether you formed any personal view when you were preparing those cases. Did you form any personal view about the rightfulness or wrongfulness?

Hearing Transcript at 190-91 (Sept. 14, 1990). Judge Souter dodged this question yet again. In fact, eschewing any personal views, opinions, or even responsibilities, Judge Souter ducked behind his often-asserted advocacy mantle, stating in part: "Our responsibility in those circumstances is the responsibility to be

the best advocates that we can." Hearing Transcript at 191 (Sept. 14, 1990).

Desiring at least a semblance of a personal response, Senator Kennedy pressed the point. He reminded Judge Souter of the testimony the day before in which Judge Souter had stated that in judicial decision making, "at the end of our task some human being is going to be affected," Hearing Transcript at 99 (Sept. 13, 1990); and Senator Kennedy thereupon asked whether Judge Souter had ever weighed the negative impact upon Hispanics, African Americans, and women in his personal views while challenging the constitutionality of Title VII's recordkeeping requirements and of the Voting Right Act Amendments' suspension of literacy tests, Hearing Transcript at 191-92 (Sept. 14, 1990). The best -- any yet worst -- answer that Judge Souter could master was to deny any different personal views: "Senator, I doubtless formed an opinion, but the opinion was related to the case that I was arguing," whereupon Judge Souter again lapsed into another defense of his them-and-now-meritless challenges to congressional power. Hearing Transcript at 192 (Sept. 14, 1990).

Pressed yet again by Senator Kennedy -- this time as to whether Judge Souter's unsuccessful arguments had been wrong, and whether the judiciary's rejections of his arguments had meant that "the right result was achieved" -- Judge Souter finally conceded that "the right result for the Nation was, indeed, achieved." Hearing Transcript at 192-92 (Sept. 14, 1990). But he refused to say that he "agreed" with any of the court

decisions rejecting his challenges to congressional power under Section 5 of the Fourteenth Amendment. Hearing Transcript at 193 (Sept. 14, 1990).

Finally, under even more questioning, Judge Souter at last made the minor concession that under today's Supreme Court precedents recognizing Congress' power under Section 5 of the Fourteenth Amendment, "I think today the outcome [in each case] is right." Hearing Transcript at 194 (emphasis and brackets added). But what about tomorrow? Indeed, what about tomorrow if Justice Souter is recommended by this Committee for confirmation by the Senate as the next Associate Justice of the Supreme Court?

Apart from Judge Souter's overall nonresponsiveness in his two days of testimony -- much less his apparently continuing hostility to the Supreme Court's for-now recognition of Congress' power under Section 5 of the Fourteenth Amendment and under Section 2 of the Fifteenth Amendment -- the fact of the matter is that, although provided with plentiful opportunities to do so, Judge Souter has not demonstrated fairness for or any compassion about those of us (particularly Hispanics, African Americans, and women) who for so long have been denied not just the promise of the American dream, but more basically the equal protection of the laws.

In addition to Judge Souter's nonresponsiveness, his evident lack of feeling and of compassion, and his continued hostility to Congress' current power under Section 5 of the Fourteenth Amendment, there is yet another fact that this Committee and the

full Senate need to bear in mind. This fact pertains to Judge Souter's admiration, from among all Supreme Justices, of not the first Justice Harlan but of the second Justice Harlan. Please, please remember that the philosophies of these two jurists were leagues apart.

The first Justice Harlan, now often remembered only for one historical dissenting opinion, provided the Supreme Court's sole dissent in Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896). This, alas, is not the Justice Harlan who Judge Souter admires. Instead, Judge Souter admires most among all Supreme Court Justices the second Justice Harlan, who wrote the dissenting opinion in Katzenbach v. Morgan, 384 U.S. 641, 659-71 (1966), expressing the view that Congress essentially has no power whatsoever to legislate under Section 5 of the Fourteenth Amendment different from or beyond that already deemed to be unconstitutional by the judiciary.

#### CONCLUSION

Judge David H. Souter has not demonstrated fairness to or even compassion for racial minorities, particularly with regard to our trying to win nondiscriminatory opportunities to equal employment; and to our most fundamental right under the Constitution and the laws of our country, the right to vote.

MALDEF accordingly opposes the confirmation of David H. Souter as an Associate Justice of the Supreme Court.

The CHAIRMAN. Thank you very much, Ms. Hernandez. Mr. Rauh, welcome.

#### STATEMENT OF JOSEPH L. RAUH

Mr. RAUH. Thank you, sir.

The leadership conference organizations range from those formally opposed to Judge Souter's confirmation to those deeply troubled. The importance of this cannot be exaggerated. The Court has reached the stage where one more conservative or reactionary Justice will create a serious problem for the Bill of Rights.

We ask, the leadership conference is unanimous in this request, that the record be left open for a significant time and that Judge Souter be called back for further questioning. I will now in the short time available try to give you as much understanding of the new material that we have in this case.

On page 198 of the transcript, Judge Souter makes a remarkable statement that we definitely challenge. This is the statement: "The State of New Hampshire does not have racial problems." Let me say that again. What he said was, "The State of New Hampshire does not have racial problems."

Now, let me make perfectly clear to you that I am not blaming Judge Souter for the racial problems. It is a fact that judge of the Supreme Court ought not be one who cannot see what is right under his nose: the terrible racial problems in New Hampshire. It is not that it is worse than anything else. It is just as bad as anything else. It is not that—I am not saying that Judge Souter did it. I am saying that he has shown such an insensitivity to it. He has done nothing about it. He has over and over again tried to brush it under the rug. Indeed, it is even worse than that. He said that was his justification for refusing information on racial breakdown. It is connection with that that he said we do not have it. He repeated that.

Now, if you want that insensitive a man on that Court, why, I am only one citizen. But I tell you that the most frightening thing is to put people on that Court who have no sensitivity to the race problem in this country.

Let me just show you some of the things about New Hampshire. There are only two States in the Union that don't have a King holiday. One is Montana. One is New Hampshire, and they have had fights over and over again.

Mr. Chairman, I hope that the documents I am going to show you here can be put into the record, sir.

The CHAIRMAN. Yes, they will.

[Mr. Rauh submitted the following material for the record:]

EXCERPT OF ORIGINAL TRANSCRIPT, DAVID H. SOUTER  
CONFIRMATION HEARING, SEPTEMBER 13, 1990

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1 the question, David Souter, are you a racist?

2 Judge Souter. The answer is, no.

3 Senator Simpson. A crazy question to ask, is it not?

4 Judge Souter. Well, far be it for me to say that a  
5 question from you, Senator, is crazy.

6 [Laughter.]

7 Senator Simpson. No, do not. Just stop right there.

8 Senator Hatch. But we all agree.

9 Senator Simpson. Do not listen to them, just go ahead

10 Judge Souter. In a way, I think that answer might have  
11 been impressive to some people if I had grown up in a place  
12 with racial problems, and some people have pointed out that I  
13 did not. The State of New Hampshire does not have racial  
14 problems.

15 So you can ask, well, what indication is there, really,  
16 as to whether you mean it or not. And you did not provoke  
17 this thinking on my part by your question immediately because  
18 I thought of it before I came in here. I can think of two  
19 things to say.

20 The first is something very personal and very specific  
21 to my family. In a way, it surprises me when I look back on  
22 the years when I was growing up that never once, ever in my  
23 house that I can remember did I ever hear my mother or my  
24 father refer to any human being in terms of racial or ethnic  
25 identity. I have heard all the slang terms and I never heard

Proprietary to the United Press International 1983

December 31, 1983, Saturday, AM cycle

SECTION: Regional News

DISTRIBUTION: New Hampshire

LENGTH: 260 words

HEADLINE: Discrimination Charge Upheld

DATELINE: CONCORD, N.H.

KEYWORD: Nh- Discrimination

BODY:

The New Hampshire Supreme Court has upheld a state Commission on Human Rights' decision that a New Hampshire construction company discriminated against a worker because he was black.

In a three to one vote Friday the court ruled in favor of a suit filed by Leonard Briscoe. The court ordered E.D. Swett Inc. to pay Briscoe \$2,338.56 in back wages and \$750 in attorney's fees.

Briscoe had filed suit with the commission after he was passed over for work on a 1979 project in Lisbon. Briscoe said that he had worked for Swett before, and was qualified to do the work. The company instead hired three workers who they had not employed before, although the company had a policy of giving preference to former workers.

Officials of the commission said Friday they are pleased to have won one of the few discrimination cases to have come before the state's courts.

"The commission's general way of evaluating discrimination cases has been upheld here," said Merryll Gibbs, the commission's executive director.

The commission had originally awarded Briscoe \$1,000 in compensatory damages in addition to the money awarded by the court. The decision not to award the compensatory damages was the basis for the lone dissenting opinion.

Justice Charles Douglass wrote in his decision, "Pecuniary loss and mental anguish can be the effects of discrimination. The award of compensatory damages will serve to eliminate the effects of discrimination, prevent future discriminatory practices, and ensure that victims of unlawful discrimination are made whole."

Proprietary to the United Press International 1986

October 6, 1986, Monday, AM cycle

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

LENGTH: 408 words

HEADLINE: Thomson says South Africa making progress

BYLINE: By DEIRDRE WILSON

DATELINE: CONCORD, N.H.

KEYWORD: Nh-Thomson

## BODY:

Former Gov. Meldrim Thomson, just back from a trip to South Africa, said Monday Bishop Desmond Tutu is willing to embrace communism to end the white minority rule of his racially torn nation.

The ultra-conservative Thomson, who toured South Africa for 17 days last month, said he met with the Nobel Prize winner in Cape Town and Tutu said he was more interested in full political power for blacks rather than just eliminating apartheid.

"Tutu doesn't have any trouble socializing with communists and I think he rather likes it," Thomson said in a telephone interview from his home in Orford. He said the religious leader would risk civil war and communist intervention to bring full power to the nation's black majority.

Thomson returned from South Africa and went directly to Washington last week to lobby against U.S. economic sanctions. He said South African blacks oppose the sanctions, which survived a presidential veto.

"They know they will lose their jobs," Thomson said. "We're nuts. They have been our friends and allies since World War Two."

Thomson said the South African government had made "tremendous strides toward eliminating apartheid" since his visit in 1978, when he was serving his third term as governor.

Thomson, 74, who once ordered state flags lowered on Good Friday, stirred controversy during his first trip to South Africa when he described the black ghetto of Soweto as a "wonderful place" and proclaimed Prime Minister John Vorster a "great world statesman."

He said his latest tour found "marked improvement" in black housing. He also said blacks' rights and working conditions had improved.

Thomson said coal-to-oil converting plants and uranium mines offered "fabulous," high-paying jobs for black South Africans.

Services of Mead Data Control, Proprietary to the United Press International, October 6, 1986

He described the poverty-stricken Cross Roads section of Cape Town as "rather terrible," but said the government was working hard to provide food and medical services for black residents.

In his weekly Monday column in The Union Leader newspaper of Manchester, Thomson said South Africa needed patience and understanding, not the "dirty game" economic sanctions approved by Congress last week.

He described South Africa as a "peaceful, hard-working little nation of less than 30 million."

Thomson said he financed his own trip to South Africa. He represented the Conservative Caucus in his 1978 tour, which was financed by a group of South African businesses.

## The Associated Press

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February 19, 1978, AM cycle

LENGTH: 240 words

DATELINE: CONCORD, N.H.

KEYWORD:  
Thomson-Carter

## BODY:

Gov. Meldrim Thomson accused President Carter of making a "false statement" about Thomson's position on South Africa and demanded an apology Sunday.

In an open letter to the president, who visited New Hampshire on Saturday, the conservative Republican governor challenged the administration to a debate on U.S. policy concerning South Africa.

Carter, addressing high school pupils in Nashua on Saturday, had said Thomson is "the only American leader that I know who has endorsed, in effect, apartheid and condoned or approved the attitude of the South African government."

Thomson, national chairman of the Conservative Caucus, recently toured white-ruled South Africa. He praised the government of Prime Minister John Vorster and said South African blacks have more economic and political freedom than blacks in other African nations.

"I have never endorsed, condoned or approved apartheid, and no one in America can point to a word that I have ever written or said that would give that impression," Thomson said in his open letter to Carter. "In the American spirit of fair play and decency, I respectfully call on you to retract your false reference to me."

Rex Granum, deputy press secretary to Carter, said Sunday that the president "stands by what he said. I would further direct you to other comments the president made . . . when he said, 'There are very few matters upon which your governor and I agree.'"

Proprietary to the United Press International 1987

October 9, 1987, Friday, BC cycle

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

LENGTH: 384 words

HEADLINE: Jackson seeks meeting with ultra-conservative

DATELINE: WARNER, N.H.

KEYWORD: Nh-Jackson-newhamp

## BODY:

Jesse Jackson's supporters pressed Friday for a meeting between the Democratic presidential hopeful and a state senator who publicly told a racial joke about Jackson.

Sen. John H.P. Chandler, whose racial comments cost him his honorary position with the presidential campaign of Rep. Jack Kemp, R-N.Y., said he saw no need to meet Jackson Sunday night when the candidate comes to the state to formally announce his candidacy.

Chandler, who is white, described the proposed meeting as an attempt to draw news media attention to Jackson's campaign.

'We still are trying,' Steve Cancian, Jackson's New Hampshire coordinator, said of efforts to have the two men meet. He said the meeting idea originated with New Hampshire supporters and was accepted by Jackson.

'I think our true intent is a reconciliation,' Cancian said Friday from the campaign's Manchester headquarters.

'Jesse Jackson would not change 80 years of Jack Chandler's thoughts, but they can reach some understanding,' Cancian said. 'It's a sincere effort on the part of Jesse Jackson.'

'Part of Jesse Jackson's message is people can always talk to each other,' Cancian added.

Chandler, 76, who could not be reached Friday at his Warner home, told the Jackson joke at several public events during the summer. He later was quoted as saying that he almost 'threw up' when he saw Jackson kiss a young white girl.

In an interview Thursday, Chandler said of the kissing incident, 'I wasn't actually sick to my stomach.'

'I have got a very strong stomach, but I didn't like seeing him (Jackson) kiss a pretty young woman with blond hair and a peaches and cream complexion,' Chandler was quoted as saying by The Union Leader newspaper.

Services of Mead Data Central, Proprietary to the United Press International, October 9, 1987

Asked if he considered himself a racist, Chandler said, "I am loyal to the race I am a member of, like Indians and black men are loyal to their race."

Chandler, a Republican, has enraged his critics with his ultra-conservative views. He has led the fight in New Hampshire against a holiday for Martin Luther King Jr., calling the slain civil rights leader an "evil man."

The joke Chandler told about Jackson was: "Jesse Jackson has stopped running for president because it was found out that his grandmother had posed for the centerfold of National Geographic."

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September 6, 1987, Sunday, Final Edition

SECTION: FIRST SECTION; PAGE A11; POLITICS

LENGTH: 197 words

HEADLINE: No Apology Offered

BYLINE: Maralee Schwartz, Paul Taylor

## BODY:

The presidential campaign of Rep. Jack Kemp (R-N.Y.) last week removed New Hampshire state Sen. John Chandler Jr. as an honorary county chairman in the campaign when he refused to repudiate or apologize for what he said was a joke he told about Jesse L. Jackson.

"Not only wouldn't he apologize," said Kemp press secretary John Buckley, "he then wouldn't resign."

Chandler said he still will support Kemp, but added, "I'm not going to apologize for anything I said because this is a free country . . . I believe I have a right to express my opinion."

What Chandler said at various public events last month was that "Jesse Jackson has stopped running for president because it was found out that his grandmother had posed for the centerfold of National Geographic."

Chandler, who denies he is a racist, also has complained that "race mixing" is threatening the white race.

"We feel there's no room for that in our campaign," said Paul Young, director of Kemp's campaign in New Hampshire, although he did not disavow Chandler's support.

Young said Kemp, who earlier repudiated Chandler's remarks, demanded the apology last week after he was told Chandler had not made one.

TYPE:  
NATIONAL NEWSSUBJECT:  
PRESIDENTIAL CANDIDATES; RACIAL DISCRIMINATION; UNITED STATESNAMED-PERSONS:  
JACK KEMP; JOHN CHANDLER; JESSE L. JACKSON

Services of Mead Data Central 3RD STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1986

August 22, 1986, Friday, BC cycle

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

LENGTH: 258 words

HEADLINE: Rights nominee's company cited in past

DATELINE: CONCORD, N.H.

KEYWORD: Nn-Discriminate

BODY:

The construction company of a nominee to New Hampshire's human rights commission previously has been found guilty by the same panel of discriminating against a black construction worker.

Richard H. Cole, who is president of E.D. Swett Inc., was nominated Wednesday by Gov. John Sununu to the New Hampshire Commission for Human Rights.

In January 1983, the state Supreme Court upheld a decision by the human rights commission against E.D. Swett. The court ruled 3-1 that E.D. Swett was guilty of discriminating against Leonard Briscoe, who had been passed over for a job on a 1979 project in Lisbon.

Briscoe, who was awarded \$2,3338 in back pay and \$750 in attorney's fees, said the company hired three workers with no experience. He said he had worked for E.D. Swett before and was qualified to do the work.

E.D. Swett had a policy of giving preference to former workers.

Sununu said he had been informed of the past racial discrimination complaint and was investigating it.

"Obviously, I am concerned that both the reality and perception of the fairness of the human rights commission be maintained," Sununu said in a statement. "If the record is verified, then I will withdraw the nomination."

Swett could not immediately be reached at his home in Bow or at his construction company.

The Executive Council is scheduled to consider the nomination at its next meeting in early September.

The rights commission investigates complaints of sexual or racial discrimination. It was not clear when the panel ruled on the Briscoe complaint.

Services of Mead Data Central 2ND STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1986

August 27, 1986, Wednesday, AM cycle

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

LENGTH: 499 words

HEADLINE: Discrimination ruling forces withdrawal of rights nominee

BYLINE: By RICHARD MARCH

DATELINE: CONCORD, N.H.

KEYWORD: Nh-Sununu

BODY:

Admitting he made a mistake, Gov. John Sununu said Wednesday he will withdraw his human rights panel nominee whose construction firm was found guilty of discriminating against a black worker.

Sununu also said his nomination of state university system trustee Max Hugel is on hold pending the outcome of an attorney general's investigation into accusations that Hugel associated with a reputed organized crime figure.

Richard H. Cole, president of E.D. Swett Inc., was nominated last week by Sununu to the New Hampshire Commission for Human Rights.

The commission previously ruled that E.D. Swett was guilty of discriminating against Leonard Briscoe, who had been passed over for a job on a 1979 project in Lisbon. The state Supreme Court upheld the commission's decision in January 1983.

Sununu said his administration never "made the connection" between the discrimination ruling and his human rights nominee. He said Cole had been contacted and the nomination would be officially withdrawn Sept. 4. when Sununu meets with the Executive Council.

"We made a mistake there," Sununu told reporters. "In that particular case, we missed the lawsuit."

Sununu said Cole is a "good person" of "solid character," but "the perception of that commission is that it has to be fair."

In a letter to Sununu, former commission member Nancy Richard-Stower said Cole's nomination sent a message that "John Sununu cares not one iota about the enforcement of New Hampshire's laws against discrimination."

Sununu said Attorney General Stephen Merrill and state safety officials are conducting "an informal review" of charges that Hugel associated with George Kattar at a televised boxing match at Hugel's Rockingham Park in April 1985.

Services of Mead Data Central, Proprietary to the United Press International, August 27, 1986

Kattar, 67, who has homes in Massachusetts and New Hampshire, is awaiting trial on federal extortion charges. Kattar was convicted of tax evasion in 1970.

Four men, including Sen. Robert Stephen, D-Manchester, and state highway safety official Jay McDuffee, have said Hugel introduced them to Kattar. Hugel has denied that.

Sununu said one aspect of his administration's investigation will focus on whether federal authorities have a record of Kattar's whereabouts on the night the introductions allegedly occurred.

"I'm trying to get that," Sununu said.

Sununu said he had no idea when Merrill would finish his investigation into the incident and Hugel's nomination would remain "on hold" until Sununu has results. He said he would then decide whether to continue with Hugel's nomination.

"There's a man's lifetime reputation at stake there," Sununu said.

Asked whether the Hugel allegations were politically motivated, Sununu said the election year "makes people bring forward things. I don't know if that's the particular case in this instance," Sununu said.

Republican Executive Councilor and congressional candidate Louis Georgopoulos delayed Hugel's nomination vote last week because of the alleged Kattar-Hugel connection.

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USA TODAY

November 1, 1989, Wednesday, FINAL EDITION

SECTION: NEWS; Pg. 9A

LENGTH: 72 words

HEADLINE: NEW HAMPSHIRE

DATELINE: CONCORD

BODY:

Gov. Gregg will meet Friday with legislative leaders on projected \$ 30 million-\$ 50 million state budget shortfall. Gregg wouldn't rule out tax, fee hikes, says state department heads should expect more layoffs, spending cuts. ... MANCHESTER - Raphael Club members voted to apologize, offer membership to David Barnes, black man who was refused drink there last September. Club accepted president Richard Creeden's resignation.

TYPE: Across the USA

SUBJECT: BUDGET; BLACKS; DISCRIMINATION

Proprietary to the United Press International 1990

August 7, 1990, Tuesday, BC cycle

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

LENGTH: 315 words

HEADLINE: N.H. city to mark King holiday

DATELINE: PORTSMOUTH, N.H.

KEYWORD: NH-KINGDAY

## BODY:

An organizer of an effort to establish a Martin Luther King holiday in New Hampshire said Tuesday that a vote for a local King holiday in Portsmouth will encourage the Legislature to take similar action.

New Hampshire and Montana are the only two states that do not observe the third Monday in January as a holiday to honor the slain civil rights leader. Half-a-dozen attempts to pass a King holiday bill in the New Hampshire Legislature have failed and supporters have turned their attention to municipalities and school districts.

Portsmouth City Council approved the King holiday Monday night on an 8-1 vote.

"I think it's very helpful," said Arnie Alpert of the Martin Luther King Day Committee. "It will serve as a reminder to the state that the issue has not gone away and will be back in the next legislative session. There will be increasing national attention on New Hampshire."

Alpert cited a planned Ku Klux Klan rally in Exeter and the sale of Nazi paraphernalia at the Cheshire County Fair last week as examples to show that racism still exists.

"That makes King Day more important for us," he said.

King Day will be a paid holiday in the Portsmouth School District next year and for all Portsmouth city employees in 1992.

This year the King holiday was celebrated in 35 New Hampshire school districts and in the cities of Dover and Nashua. Alpert said more school districts will celebrate the holiday in 1991.

Monday night's vote prompted a standing ovation among the 100 City Hall spectators.

The measure to establish King Day as a city holiday was introduced by Assistant Mayor James Splaine, who introduced the first King holiday bill in the Legislature when he was a senator.

Services of Mead Data Central, Proprietary to the United Press International, August 7, 1990

"We are commemorating Martin Luther King for his ideals and principles," Splaine said. "Civil rights is vital to all minorities in our society."

Services of Mead Data Central 14TH STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1990

June 3, 1990, Sunday, BC cycle

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

LENGTH: 349 words

HEADLINE: Race unity day follows Klan activity

DATELINE: EXETER, N.H.

KEYWORD: NH-RACISM

BODY:

Organizers of an upcoming "Race Unity Day" have turned down the request of a Ku Klux Klansman who wanted to recruit town residents to his white supremacist group during the annual event.

"The sole purpose of Race Unity Day is to focus on proclaiming the oneness of humankind," said Jonathan Ring, secretary of the Exeter spiritual assembly of the Baha'i Faith, which is organizing the event next Sunday. The Baha'i Faith preaches the family of Man and world peace, Ring said.

State KKK leader, or "Grand Dragon," Thomas Herman, 29, ran unsuccessfully for selectman in Exeter's March election. He came in last among five candidates with 145 votes of 2,651 ballots cast.

"In Exeter, this is a particularly attractive issue," Ring said. "The Invisible Empire of the Knights of the Ku Klux Klan has forced the issue to attention in our community."

Herman has been seen trying to recruit Klan members in Exeter, a blue-collar town of about 13,000 people and home of the prestigious Phillips Exeter Academy.

About a week ago, Ring said, Herman asked to set up a display table on Race Unity Day next to presentations by groups such as the National Association for the Advancement of Colored People.

Ring turned him down. "Only tables which accentuate positive steps are permitted," Ring said.

Herman said he and other Klan members will show up anyway and distribute literature.

"They are discriminating against us," Herman said. "I am definitely going to be there."

Although Herman says he he will not start any trouble, a town official is worried about potential clashes.

Services of Mead Data Central, Proprietary to the United Press International, June 3, 1990

"If the KKK has got some ideas of coming in and disrupting (the event),... I am concerned. I am very concerned," said Paul Binette, chairman of the Board of Selectmen. "I would like to see the KKK stay out of it and let the organizations have their own day."

Binette said he is considering security measures for the event.

The festival at Swasey Park in the Seacoast community is set to include puppet shows, a picnic, music and story-telling, Ring said.

Services of Mead Data Central

2ND STORY of Level 1 printed in FULL format.

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USA TODAY

August 13, 1990, Monday, FINAL EDITION

SECTION: NEWS

LENGTH: 72 words

HEADLINE: NEW HAMPSHIRE

DATELINE: EXETER

BODY:

KKK organizer Thomas Herman said he will appeal denial of permit for Aug. 25 rally at privately funded park. Rules of trusteeship say racist groups cannot rally in Swazey Parkway, trustees said Friday.

... BRENTWOOD - Val D'Iserre Shopping Village - 24,800-sq.-ft., 7-building shopping center designed to resemble 300-year-old French village, ski resort - is bankrupt after 1 year, will be auctioned Sept. 13, official said.

TYPE: Across the USA

SUBJECT: KU KLUX KLAN; DEMONSTRATION; COURT; RETAIL STORE; BANKRUPTCY;  
SKIING

Services of Mead Data Central 13TH STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1984

June 28, 1984, Thursday, AM cycle

SECTION: Regional News

DISTRIBUTION: New Hampshire

LENGTH: 486 words

HEADLINE: News Focus: Rights commission faces complaint crunch

BYLINE: By JACQUELINE HUARD

DATELINE: CONCORD, N.H.

KEYWORD: Nh-Rights

BODY:

The New Hampshire Human Rights Commission is handling a record number of complaints, and a serious backlog will develop without a permanent third investigator, the executive director said Thursday.

Gov. John H. Sununu and the Executive Council last week approved a nearly \$62,000 Federal Housing and Urban Development grant for a two-year project to educate the public about housing discrimination.

The commission is using part of the money to hire a third investigator for one year. Director Meryll Gibbs said she will ask the Legislature to make the position permanent.

"Two investigators is simply not enough," she said. "Without a third investigator, we are going to be running into very serious backlogs."

The commission enforces all state laws prohibiting discrimination in employment, housing and public accommodation, and all federal laws prohibiting discrimination in employment and housing.

There were 197 formal complaints filed with the commission in fiscal 1981; 164 in fiscal 1982; and Ms. Gibbs expects 216 for fiscal 1983 -- a record number of discrimination complaints for the agency.

At the end of May, there were 247 complaints pending.

The high number of complaints can be attributed to an improvement in the economy, she said. The drop off in fiscal 1982 occurred when the economy was faltering.

"People were just not willing to rock the boat," Ms. Gibbs said.

A person filing a complaint with the commission will have the dispute assigned to an investigator within two days to two weeks. A fact finding conference for both parties will be scheduled within six weeks to be held at a future date.

Services of Mead Data Central, Proprietary to the United Press International, June 28, 1984

Although most complaints are settled within three to four months, a few rare and complicated cases could take two to three years, Ms. Gibbs said.

More than 50 percent of the complaints are settled through negotiation before a hearing is held. The person who filed the complaint usually will get what they consider is most important -- a job, back wages, a raise, promotion, or a policy change -- but generally not complete relief, she said.

'But, I will not agree to settlements which will allow the discriminatory practice to continue,' Ms. Gibbs said.

Sex discrimination complaints alleging unequal treatment in hiring, firing, layoffs, wages, promotions, working conditions, as well as claims of sexual harassment and discrimination against pregnant women continue to make up the bulk of complaints, she said.

Persons who believe they have been discriminated against because of age or physical handicap are filing more complaints. There also is a small increase in allegations of discrimination based on race and national origin, she said.

There are dangers in delaying investigations. Witnesses may move or die. Memories fail. Documents may become lost. Damages sought by the complainant pile up.

'And the burden on the staff can become tremendous,' Ms. Gibbs said.

Daniel Webster College  
University Drive  
Nashua, New Hampshire 03060  
March 2, 1970

E. D. Tynum  
15th Pineridge  
Coffstown, New Hampshire 03045

Dear Sir:

We the Minority Students at Daniel Webster College in Nashua, New Hampshire are terrified and fear for our safety and lives; by the threats, verbal abuses and harassments that are made on us daily by fellow students and members of the college's administration. (principally Fred Schatz, Dean of Students).

These harassments range from students dressing as members of the Klu Klux Klan, walking around the college yelling, "We don't want your kind around here," to the breaking, entering and destruction of our rooms and personal properties. The letters K.K.K. and NIG GUR SPICKS are frequently written on the walls of our rooms. We are calling on you as responsible authorities to investigate on behalf of us to help uphold our Constitutional Rights as citizens of the United States of America, and Foreign Students.

Thank you for your help in this matter

Sincerely Yours,

*Miss M. Johnson*

*Miss Lamer*

*Constance D. Johnson*

*Arthur Jackson*

*Thomas Logan*

*Chan K. Kim*

*James Johnson*

*John D. Hutton*

*John Glenn*

*Richard S. Taylor*

*Harry Ross*

*Edward Smith*

*James H. Houghton*

*Norwich*

*James H. Houghton*

*Miss Payne*

*John D. Hutton*

*James H. Houghton*

*Richard S. Taylor*

*John D. Hutton*

*John D. Hutton*

*William Dan*

*William Dan*

*John Hutton*

*John Hutton*

## RETYPE VERSION OF MR. BYNUM'S LETTER

Daniel Webster College  
University Drive  
Nashua, New Hampshire 03060  
March 2, 1979

E.B. Bynum  
15th Pineridge  
Goffstown, New Hampshire 03945

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Thank you for your help in this matter.

Sincerely Yours,

(25 signatures)

Lloyd I. H. Wafford  
 Daniel Webster College  
 Nashua, N.H. 03060

3 April 1979

To whom it may concern:

I am a student at Daniel Webster College who is concerned about the recurring incidents of racial discrimination. A number of black students have suffered verbal abuse from white students. The only two black women living on campus have suffered verbal abuse, vandalism, and burglary of their rooms. They have been humiliated in front of their fellow students. There is no reason why anyone should be subjected to such harassment.

The major concern (and I am sure many other minority students feel this way) is that if incidents such as these go untreated, then trouble makers will not think twice before causing disruptive incidents such as these in the future.

Respectfully,  
 Lloyd I. H. Wafford

TYPE-WRITTEN VERSION OF MR. WALFORD'S LETTER

Lloyd I.A. Walford  
Daniel Webster college  
Nashau, N.H. 03060

3 April 1979

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Respectfully,

Lloyd I.A. Walford

Thomson Visits South Africa'

## U.S. Nuclear Industry Backs Apartheid

by Robin Read

"...It is clear that the South African regime hopes to take advantage of its position as a major producer of uranium, and eventually of enriched uranium, to leverage the major industrialized countries over cheaply in the apartheid economy and thereby to strengthen their vested interest in support of the white quo in South Africa."

—United Nations Special Committee Against Apartheid

Report of subcommittee on the Implementation of UN Resolutions and Collaboration with South Africa 1975

Melvin Thomson's January trip to South Africa and his statements while there supporting that nation's apartheid system and nuclear energy program served to further discredit the already besieged ultra-conservative New Hampshire Governor at a time when his popularity is in rapid decline.

Evero many long-time Thomson supporters felt he went too far this time. Some of his more outrageous remarks during his tour, sponsored by a South African business group, included calling Swazilo, the desperately poor black urban township outside Johannesburg, "heavenly," saying that South Africa's Prime Minister John Vorster was a "great statesman," and declaring that South Africa had a "free press" and "free elections."

Thomson's stated purpose for making the trip was his desire to observe South Africa's energy policies, particularly its nuclear program. While there, he supported South Africa's "right" to develop nuclear weapons despite the fact that the country is one of the few in the world with the technology to produce nuclear weapons that has refused to sign the 1968 Nuclear Non-proliferation Treaty. The treaty, signed by over 90 nations, commits countries without nuclear weapons to forgo developing them. In return, nuclear powers are supposed to begin reducing their nuclear weapons stockpiles.

On the trip, Thomson was, in effect, acting as an ambassador for racist elements within the United States that support the Vorster regime, and as a lobbyist for the nuclear industry and energy companies who understand that access to South Africa's large uranium deposits is crucial to the

future of America's nuclear program.

South Africa today produces over 20 per cent of the world's uranium and is expected to have, according to disputed figures brought back by Thomson, 45 per cent of the Capitalist world's uranium reserves. South Africa, combined with the United States, Australia, and Canada produces over 75 per cent of the uranium in the capitalist world. Presently there is a ban on the export of uranium to Australia, due largely to the opposition to nuclear power and nuclear weapons on the part of Australian labor unions and the Australian people. The movement against nuclear power is growing in Canada, and the United States is expected to run out of uranium within 30 years, even at the current slow rate of construction of nuclear power plants.

This leaves South Africa as an indispensable "nuclear" source of future uranium supplies for the United States. The U.S. government, therefore, if it continues to push nuclear power as an energy source, will be forced, like it or not, to help South Africa as an ally, thus supporting a racist regime that is an outcast government to the eyes of most of the nations of the world and the source of oppression for over 18 million black people. Also, so much for the "energy independence" and nuclear power was supposed to bring us.

The United States and U. S. Corporations helped South Africa start its nuclear power program in 1957 by building a test reactor there, called Safari 1, and training South African scientists inside the United States. The U.S. also agreed to supply South Africa with enriched uranium fuel under a 30 year contract. In 1973 the Nixon Administration signed new contracts with South Africa to supply enriched uranium for the two South African reactors now under construction in Koeberg, near Cape Town. The Carter administration is currently involved in a half-hearted attempt to slow South Africa's development of nuclear weapons by negotiating to withhold shipments of the enriched uranium to the Pretoria Government unless it agrees to sign the Nuclear Non-proliferation Treaty. South Africa, though, is now building its own enrichment plant that will once again be dependent on the U.S. as a source of enriched uranium.

The facility will use a new enrichment

process developed by South Africa. On April 7, 1975, Prime Minister Vorster told the South African Parliament that the first part of the pilot enrichment plant had been successfully brought into operation. The London Daily Telegraph reported at the time that "South Africa's uranium mines have given rise to speculation as to whether she has discovered a short cut to producing an atomic bomb."

The Carter Administration will be unable to exert much pressure on South Africa without jeopardizing a future uranium source and incuring the wrath of the powerful nuclear industry and energy conglomerates. Five U.S. oil companies control 70 per cent of U.S. uranium reserves. U. S. Corporations assisted South Africa in the research and development of the technology needed to recover uranium from South African gold reserves. American companies with interests in South African uranium mines and reserves include Union Carbide, Utah Mining, and Norwest Mining. AIGs Chalmers built an early test reactor for South Africa. Westinghouse, (builders of the Seabrook reactor), Combustion Engineering (builders of the Seabrook reactor vessel), General Electric and Babcock-Wilcox were in competition with West German and French companies for the contracts to build South Africa's two new reactors. Public Service Company of New Hampshire is buying uranium from two corporations with mining interests in South Africa—Gentry Oil and Elmestable Mining.

The largest uranium mine in the world is located near Swazibombani, Namibia, also known as Southwest Africa. South Africa controls Namibia in spite of the 1976 United Nations resolution declaring the Southwest Africa Peoples Organization (SWAPO), as the legitimate representative of the people of Namibia.

Meanwhile, African uranium mine workers in Namibia and the rest of South Africa see paid slave wages, are separated from their families, work under brutal conditions, and are expected to dig some health hazards of uranium mining that have caused the death of uranium miners around the world, including Hiroko and Hopi Native Americans in the South of the U.S.

Thomson praised the construction of South Africa's new Koeberg reactor and

noted that they will be completed only five years after they were proposed without the delays caused by the limited organized opposition in the increasing process allowed in the United States but forbidden in South Africa. The South African press also asked Thomson about his handling of the April 30th Seabrook occupation. He replied, "We broke the back of that."

New Hampshire's Clamshell members joined other groups in organizing a "greening" for Thomson upon his return to the state. The Governor, though, avoided demonstrators at the Manchester airport by landing at Logan Airport in Boston. At Logan he dodged another group of protesters by seeking out a side exit. He then ducked a picket line in front of the Governor's Mansion in Concord and drove directly to his secluded farm in Oxford.



[Concord Monitor, January 1982]

## Parent Claims Racial Discrimination

By STEVEN MORRISON  
Associated Press Writer

PETERBOROUGH — A black parent says a Cootecook Valley School Board decision not to let his 9-year-old son skip a grade is "a sham" that he will appeal to the state Board of Education.

Robert Mallory, also pledged to keep his son Nigel out of school, refute a complaint with the U.S. Department of Education Civil Rights Office, and battle the school district in court if necessary.

Mallory pulled Nigel from the fourth grade on Dec. 22, saying the boy was not being intellectually challenged in his Hancock classroom. Superintendent Robert Reidy refused to move the youngster up a grade, saying Nigel's educational needs could be served without a move.

Mallory appealed to the school board, which unanimously voted last night to uphold Reidy's decision.

"I refuse to bring my child back to the public schools until a proper placement has been achieved," Mallory told the board after the vote.

"I feel this meeting was a sham," he said later.

State education officials said they have not decided whether to bring truancy charges against Mallory, a commercial artist from Andover.

Mallory told the board that Reidy's decision was "improper and biased." He said the issue was his son's intellectual qualifications, but he also raised the question of racial discrimination, claiming his son faced "racial ostracism" that caused him to break out in a nervous rash.

Wanda Mallory, Nigel's white stepmother and a Hancock native, said after the hearing that her community is "a bigoted area."

Mallory said he dropped his original complaint to the U.S. Department of Education in November, after school officials agreed to test Nigel independently, draft a plan to stop racial slurs and start a cultural awareness program.

Reidy said the Cootecook Valley School District, which includes 11 southwestern New Hampshire towns, has 3,000 students. Mallory said there are six minority children in the district, but Reidy said he could neither confirm nor deny that figure "without looking it up."

Since placing Nigel into the school system in the fall of 1980, Mallory has begged officials to get his son into either a higher

grade or an extended learning class.

In January 1981, school officials found Nigel's IQ to be about two years ahead of his age. Reidy defended the five-month delay in testing, saying it took that long for Nigel to show school officials that he had such talents.

Mallory said he thinks the delay was because Nigel is black.

In November, Reidy agreed to have Nigel tested by an independent clinical psychologist, a school psychologist and an educational consultant.

Reidy said he did not feel a grade promotion was required partly because the boy's math skills were deemed average for his age. No students have skipped a grade since Reidy became superintendent in May 1980, he said.

## Oui, The People May Decide On Official Language

By BEN STOCKING  
Monitor Staff Writer

As Rep. Mildred Ingram sees it, we need to make English the nation's official language because people too lazy to learn English but eager to collect welfare have come to America.

"The Pilgrims that came to this country and founded it were English to the core," Ingram said. "They spoke English and they never dreamed there'd be anything else spoken here."

But Reel Gilbert, president of Action for Franco-Americans of the Northeast, said the English language proposal springs from intolerance. "What we're dealing with today is prejudice, the most dangerous kind of prejudice because it is wrapped in patriotism," Gilbert said.

Ingram and Gilbert spoke yesterday at a legislative hearing on a resolution that asks the New Hampshire congressional delegation to support legislation designating English as the official language of the United States.

Rep. Roger Stewart of Lincoln, the sponsor of the resolution, said the measure would help reduce unemployment and protect the national security.

It is essential that all servicemen be able to communicate in English, he said. "I can't imagine anything worse than

(See ENGLISH — Page 18)



CHRISTOPHER GARDNER/Monitor Staff

Rep. Roger Stewart of Lincoln sponsors the language bill



CHRISTOPHER GARDNER/Walker Star

Edna Pearl Parr, chairwoman of the State-Federal Relations Committee, speaks in favor of the bill.

## ENGLISH

(Continued From Page 1)

being in a foxhole where one speaks English and another speaks another language."

Furthermore, he said, "If we are going to attack our unemployment problem by job training, people who are being retrained must be able to speak the English language."

Speaking on behalf of Stewart's proposal, Rep. Ingram suggested the framers of the Constitution must be "whispering in their graves" to know that such a resolution is necessary.

"Every immigrant that has come here for over 250 years has been glad to learn the language and help," she said. "It's a bunch of agitators lately who are too lazy to learn our language. They enjoy our economy . . . they enjoy our welfare system to the hilt. And if they're too lazy to learn our language, for that they can stay where they belong."

Opponents of the measure cautioned that it appeals to the worst in Americans and is just plain unnecessary.

"The proposed legislation is a throwback to the xenophobia and nativism of the late 19th century," said Arnold Alpert of the New Hampshire American Express Service Committee. "It should

have no place in the nation which last year celebrated the 100th birthday of the Statue of Liberty. It likewise should have no place in New Hampshire, a state which claims to value liberty and treasure the rights of the individual."

At one point, Rep. Edna Pearl Parr, chairwoman of the State-Federal Relations Committee that is studying the bill, asked foes of the measure why they thought voters in California passed a similar measure.

Rep. Theodore Cusson Sr. of Manchester offered his opinion: the measure was anti-Hispanic.

"I don't think we in New Hampshire should be drawn into those types of battles to be anti-anyone," Cusson said. "I think that we have a lot more class here in New Hampshire."

Claire Ebel, executive director of the New Hampshire Civil Liberties Union, said the resolution is "insidious and insulting."

"I think it is an affront to every one of us whose parents or grandparents or great grandparents came to this country and spoke another language."

Opponents of the measure said it is being supported by a national lobby called U.S. English. They said the group promotes a Constitutional amendment to make English the country's official language.

Ebel said that if such an amendment passes, election ballots won't include instructions in Spanish. Miranda rights will only be given in English and courts won't be required to provide attorneys who speak any language but English.

"We are going to make ourselves a laughing stock in every civilized country in the world," she said.

Ebel said the resolution would send this message to immigrants: "You cross these borders, you speak English. And if you don't, we don't want anything to do with you . . ."

"I think this resolution is a clear and present danger to the multi-lingual, multi-racial society that all of us are part of," Ebel said.

Paul Pare is the president of Voyagers, a Franco-American organization in the Dover-Rochester area. When Rep. Parr introduced him, she pronounced his name to rhyme with the fruit.

Pare corrected her pronunciation; the second syllable is accented and rhymes with hay.

Parr, who says she supports the resolution because she is a "super patriot," suggested the French experts like Pare would have to give her a lesson in French pronunciation.

"If you pass this resolution," Pare replied, "we may not be able to."

## State/Regi

# Foes attack language resolution

## Call the move 'modern racism'

By NORMA LOVE  
Associated Press Writer

CONCORD — Opponents of a legislative resolution supporting making English the nation's official language on Friday called it "modern racism."

"We are deeply troubled by what we perceive as a rising intolerance in the nation," said Arnold Albert of the New Hampshire American Exiles Service Committee.

The resolution urging New Hampshire's congressional delegation to support legislation to make English the official language "is the civilized side of modern American racism," Albert told the House State-Federal Relations Committee. He compared it to attempts by the Ku Klux Klan to stifle support for racial equality.

Those who indicated opposition — either by speaking or in writing — outnumbered supporters 4-1.

Supporters argued it is essential to national security and to ensure economic growth.

Rep. Mildred Ingram, R-Acworth, who supports the measure "50 percent," said immigrants who don't learn English "are a bunch of agitators too lazy to learn the language."

"One of the strengths of our country was that we had a common language," said resolution sponsor Rep. Roger Stewart, R-Lincoln. "I'm in no way saying I don't want these people to speak foreign languages. But if they're part of this country and want its benefits, they should speak English too."

Albert said he interpreted that to mean non-English speaking citizens shouldn't be allowed to vote.

Stewart also said English-speaking workers are necessary to economic growth and English must be a requirement for military service.

"I can't imagine anything worse than being in a foxhole where one speaker is English and the other speaks another language," he said.

But Rep. Theodore Cusson, D-Manchester, questioned why, after 200 years, the subject should arise.

"The Constitution of the United States makes no reference to language whatsoever. The Constitution and the courts have consistently ruled that language is a matter of personal choice and should not be legislated," he said.

Cusson said he resented the implication that non-English speaking residents "can't be productive members of society."

"To imply those people are not productive members of society is, I think, the peak of arrogance," Cusson said.

Cusson characterized California's adoption of English as its official language as an "anti-Hispanic movement."

"I don't think we in New Hampshire should be drawn into those types of battles to be anti-anyone," he said.

He said New Hampshire's highway welcome signs in English probably would be illegal if Congress made English the official language.

Cusson argued that "a patriotic spirit, love of country and a little sacrifice" promote national unity, not language.



Rep. Roger Stewart, R-Lincoln, on Friday discusses his resolution to make English the nation's official language. Supporters said such a move would ensure economic growth. called it "modern racism." (AP)

Albert urged the committee to distinguish between economic rights and political rights. Immigrants who want to succeed economically must learn English to survive, he said.

"The problem with literacy is a tremendous problem whose remedy is in education, not this type of legislation," he said.

Claire Ebel, executive director of the New Hampshire Civil Liberties Union, said the solution might be in requiring English competency from every high school graduate in the United States.

"This is such an invidious and insulting piece of legislation," she said. "It's an affront to everyone of us whose parents or grandparents came from another country."

Ebel and others warned the committee that the resolution gave the state's congressional delegation blind support since no federal proposal was before them.

A proposed amendment to the U.S. Constitution considered by the last Congress would have been so restrictive that it would "make us the laughingstock in every civilized country in the world," Ebel said.

When Rep. George Barker, D-Boston, said the national council of the American Legion supports the movement "and who do we owe our freedom to," committee member Rep. Richard Daschbach, D-Washington, reminded him that some American revolutionaries spoke languages other than English.

"What we're dealing with today is prejudice," said Neal Gilbert, president of the Action for Franco-Americans of the Northeast, "the most dangerous kind of prejudice because it's wrapped in patriotism."

AP story also appeared in  
PORTSMOUTH HERALD, page on  
LACANIA CITIZEN, page on

[Portsmouth Herald, Jan. 31, 1987, Page 1]

# Modern racism charged

CONCORD, N.H. (AP) — Opponents of a legislative resolution supporting making English the nation's official language on Friday called it "modern racism."

"We are deeply troubled by what we perceive as a rising intolerance in the nation," said Arnold Alpert of the New Hampshire American Friends Service Committee.

The resolution, urging New Hampshire's congressional delegation to support legislation to make English the official language "is the civilized side of modern American racism," Alpert told the House State-Federal Relations Committee. He compared it to attempts by the Ku Klux Klan to stifle support for racial equality.

Those who indicated opposition — either by speaking or in writing — outnumbered supporters 4-1.

Supporters argued it is essential to national security and to ensure economic growth.

Rep. Mildred Ingram, R-Acworth, who supports the measure "150 percent," said immigrants who don't learn English "are a bunch of agitators too lazy to learn the language."



Move to Nationalize English Labeled Intolerant

# Language Foes Vexed

By WARREN HASTINGS  
State House Bureau  
And Wire Services

CONCORD — A New Hampshire House resolution urging Congress to adopt English as the nation's official language drew sharp criticism yesterday with opponents calling the proposal "modern racism" and "intolerant."

"When you put my language in the trash can you are putting me in the trash can," said Paul

Pare of Somersworth, president of Voyageurs, a Franco-American ethnic cultural organization.

Pare was among opponents of the measure, who outnumbered supporters 4 to 1, during yesterday's hearing by the House Federal-State Relations Committee. The measure is House Concurrent Resolution 1.

"What we are dealing with today is prejudice. The most

dangerous kind of prejudice because it is wrapped in patriotism," said Real P. Gilbert, president of Action for Franco-Americans of the Northeast.

Civil libertarians and representatives of the state's 275,000 residents of French descent criticized the proposal as insulting to the nation's diverse ethnic heritage and a sign of what they called the nation's growing intolerance.

"This is such an insidious

and insulting piece of legislation," said Claire Ebel of the New Hampshire Civil Liberties Union.

"It is an affront to every one of us who came to this country and spoke a different language," she said.

One of the measure's strong supporters yesterday was Rep. Mildred Ingram, R-Acworth. She told the committee she was for the resolution 150 percent.

ENGLISH

Page 7

## ENGLISH

(Continued from Page One)

She labeled those complaining as "agitators, too lazy to learn the English language."

Ingram said she was appalled the resolution is even an issue because immigrants coming to this country for the last 250 years have been glad to learn English as part of their citizenship requirements.

"Many have been coming to this country and enjoying our welfare system to the hilt. If they are too lazy to learn English then let them stay where they are," Ingram said.

The resolution is sponsored by Rep. Roger Stewart, R-Lincoln. He said that our country was built on varied cultures, but one of our strengths has been our common language.

He said Maine established a school many years ago to teach English to French-speaking American citizens.

"In no way are we saying that we don't want these people to continue speaking the French language. It's part of

their culture and I hope they retain it," Stewart said.

But Stewart said that if such people are to enjoy the benefits of U.S. citizenship, they should also know English.

He stressed the need for a uniform language in such areas as the military and in legal documentation.

"I can't imagine anything worse than being in a foxhole with someone who speaks English and another who doesn't," he said.

Among those on the other side of the issue yesterday was Arnold Alpert of the New Hampshire American Friends Service Committee.

Alpert called the New Hampshire resolution a "civilized side of modern racism" and a "return to the xenophobia and nativism" of the turn of the century.

Alpert said the answer to language deficiency problems is to make it easier for foreigners to learn English.

"Why, after more than 200 years without any law designating English as the official language, do we need one now?" asked Gilbert of the Action for Franco-Americans of the Northeast.

He and other speakers said the U.S. Constitution is silent on language.

Gilbert said this was not an oversight by the founding fathers, but "planned political strategy that reflected the times and vision of the founding fathers."

Gilbert said a well-financed lobby called U.S. English is proposing a series of "protectionist and regressive" laws both in Congress and in state Legislatures.

Rep. George Baker Sr., D-Hudson, a supporter of the resolution, said that no fundamental freedoms are threatened by

the proposal.

"If the resolution said English is the only language that can be spoken, I would be against it myself," he said.

He told the committee that the American Legion, both state and national organizations, support the resolution.

Questions over the unclear impact of the resolution were lightly addressed in an exchange between Pare and Rep. Edna Pearl Parr, R-Hampton, who chaired the hearing.

"You French-speaking people are going to have to give us a lesson in French pronunciation," Parr said after struggling with several names.

"Well, if you pass this resolution, we may not be able to," Pare responded.

The committee is expected to vote on the resolution in early February.

# English-as-official-language bill called 'civilized...racism'

By CHEVE KINZAK  
United Press International

CONCORD — A N.H. resolution that would encourage Congress to make English the nation's official language was attacked Friday by the state's Franco-American community as bigoted and un-American.

"What we are dealing with today is prejudice. The most dangerous kind of prejudice because it is wrapped in patriotism," said Rolf P. Gilbert, president of Action For Franco-Americans of the Northeast.

Civil libertarians and representatives of the state's 775,000 residents of French descent criticized the proposal as insulting to the na-



## Legislature

tion's diverse ethnic heritage and a sign of what they called the nation's growing intolerance.

"It is such an insidious and insulting piece of legislation," said Claire Ebel of the N.H. Civil Liberties Union. "It is an affront to every one of us who came to this

country and spoke a different language."

Pointing to recent race-related incidents in Georgia and New York, activist Arnold Albert said the bill reflects a "rising tide of intolerance" across the nation. "The bill before you today . . . is the civilized side of American racism."

The resolution, which was heard by a House committee, urges the state's congressional delegation to support legislation to designate English as the official language of the United States. The proposal states an official language would encourage "uniformity (and) preserve national unity."

The proposal is similar to California's English language initiative,

approved last November, which requires that state government conduct its business in English.

Opponents far outnumbered supporters of the N.H. proposal.

Rep. Roger Stewart, R-Lincoln, sponsor of the non-binding proposal, said the resolution is not aimed at outlawing the use of foreign languages or bilingual education.

"In no way are we saying we don't want these people speaking the French language," Stewart said. "But I feel if they are going to enjoy the benefits of being a citizen, they should know English as well."

Stewart said it is in the country's national security interests to en-

courage English. "I can't imagine anything worse than being in a foxhole with someone who speaks English and another who doesn't."

Rep. Mildred Ingram, R-Acworth, said she had no quarrel with new citizens who learn the language, but complained about "a bunch of agitators who are too lazy to learn our language."

Rep. George Baker, D-Hudson, read a statement from the American Legion in support of efforts to designate English the official language. "Let's face it, it's to everyone's benefit to learn the English language."

However, Paul Pare of Rochester said recognition of English as the official language would ignore his cultural heritage. "You're tell-

ing me and my wife and my children that we are second-class citizens," he said.

Questions over the unclear impact of the resolution were lightly addressed in an exchange between Pare and Rep. Ednapearl Parr, R-Hampton, who chaired the hearing.

"You French-speaking people are going to have to give us a lesson in French pronunciation," Parr said after struggling with several names.

"Well, if you pass this resolution, we may not be able to," Pare responded.

The committee is expected to vote on the resolution in early February.

## Chandler Bill Would Ban Gays From Giving Blood

By MICHAEL MOKRZYCKI  
Associated Press Writer

A bill that would make it a felony for homosexuals to donate blood has been denounced by health and civil rights representatives as irrational, ignorant, unnecessary, unconstitutional and hateful.

The American Red Cross, a homosexual-rights group, the state Civil Liberties Union and state health officials urged the Senate Judiciary Committee to reject the bill at a hearing yesterday.

But Sen. John Chandler, the bill's sponsor, told the committee he wanted to ensure that New Hampshire's blood supply is not contaminated by the deadly disease AIDS, which is known to be spread by shared intravenous needles, blood transfusions and sexual contact.

Chandler, of Warner, acknowledged that determining whether a person is homosexual could be difficult, and said he would not oppose amending his bill so that only "avowed" homosexuals would be barred from donating blood.

"Another amendment might be to allow a homosexual to donate blood if he donates all of it," Chandler added. "If he wanted to give all his blood, boy, I'd be willing to let him."

Marcus Hurn of the New Hampshire Citizens' Alliance for Gay and Lesbian Rights said the bill is "part of a cycle of ignorance, hate and irrational legislation, followed by more ignorance, hate and irrational legislation."

"I think the hate speaks for itself, given Sen. Chandler's suggestion that we suspend the laws against suicide" for homosexuals, Hurn told the panel, whose vice chairman is Chandler.

The bill leaves out other groups at high risk of having AIDS, including hemophiliacs, intravenous drug users and heterosexuals who have had contact with prostitutes, Hurn said.

Dr. Miles McCue, associate medical director of the American Red Cross for New Hampshire and Vermont, noted that medical experts now agree that "anyone in this country who is sexually active is at risk."



Sen. John P.H. Chandler

"At least the gay man knows what's going on," Hurn said. "We have lots of people walking around who don't."

Hurn also complained that the bill would prohibit lesbians from donating blood, when "you will not find safer blood this side of the European continent" than from lesbians, and that it would bar homosexual men from donating blood.

(See BLOOD — Page B-12)

## BLOOD

(Continued From Page B-1)

ing blood solely for experiments and research on AIDS.

Claire Ebel of the New Hampshire Civil Liberties Union said the proposal is unconstitutional, and "banned all homosexuals simply because they are homosexuals and choose to be civil-minded and donate blood."

McCue said the bill simply is unnecessary.

The Red Cross has a long history of donating blood to the state, and the chance of contamination of the blood supply by AIDS is "less than one in a million," McCue said.

The Center for Disease Control has stated that the blood supply in the United States is safe from the virus, McCue said.

cial form that "allows them to save face, if need be," by indicating whether their blood should be used for transfusions, McCue said.

Finally, every unit of blood is checked, using a test with at least 98 percent sensitivity, for signs of the antibody to the AIDS virus, McCue said.

Richard Dipentima, assistant director of the state Office of Disease Prevention and Control, said barring homosexuals from giving blood would give a "false sense of security" to the blood supply.

Dipentima told the committee that as of Feb. 12, New Hampshire has 100 uninfected AIDS victims, 100 have been homosexuals, but 100 heterosexuals, and two individuals who contracted the disease from their blood.

"These are really just the tip of the iceberg," Dipentima said. "The state is not aware of the extent of the problem."



Staff photos by John Sprink

While the nearly all-white Legislature meets in Concord (above), United Parcel Service employee Rodney Prim delivers packages in Manchester. There are 4,665 blacks in New Hampshire, according to the latest census.



## The shadow of racism in New England

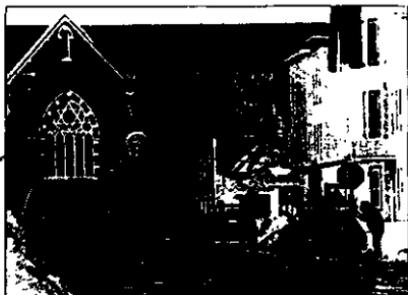
### Prejudice a subtle force in New Hampshire

The racist feeling expressed during recent events in Forsyth County had a Southern voice and reflection, shaped in part by the history and culture of that county. But racism is not a Southern or even a regional phenomenon. Today is the second of three articles, reported from Forsyth County, New Hampshire and also exploring the currents of white bias in America.

By Mike Christman  
Staff Writer

MANCHESTER, N.H. — By mid-afternoon, the temperature was sinking toward zero as a stiff breeze swept down the valley of the Merrimack River, where the city lay beneath. As masonry of snow inside a private club on treacherous Maple Street, a half-dozen third-year men sat in wooden chairs and watched a televised boxing match between a black man and a white. Both boxers were arm weary, but the white man threw a combination and the black went down heavily. "He's out! He's out!" the men in the chairs shouted, jolting the air and pounding each other on the shoulders.

At the edge of the bar, two middle-aged men in sweaters hunched over glasses of beer. Both were born and raised in New Hampshire. The younger of the two had a



Groceries in hand, a Manchester woman walks away from the St. Marie-Parish Catholic church. The land was settled by people of Scotch-Irish stock.

flat, good natured Irish face; the other had a Polish name but said he was not Polish and he called it a last, confidential name.

"There's nothing wrong with black people," the latter said, bringing an old joke. "I like everybody except you!"

The younger man remembered that sometime in the 1960s, a group of black people had settled in Manchester. "They heard

there was going to be an aid program here or something, but there wasn't.

"Then it got cold," he said, and they left.

From the northern reaches of Maine through the Green Mountains of Vermont to the seacoast of New England, a nominally all-white New England is essentially all-white. Three states have fewer than 10,000 black residents.



In New Hampshire, according to the last census estimates, there are 4,665 black people, the majority living along the brief seacoast and in the counties bordering Massachusetts. There are no black state troopers, but he recently quit. Private clubs, long the backbone of the state's social life, remain white. Many schoolchildren have never seen a black person on the street.

New Hampshire does not advertise itself as a place attractive to minorities, said Lucien Johnson, the 64-year-old president of Manchester's small NAACP chapter and himself an emigrant two decades ago from Louisiana.

Lying at the opposite end of the same mountain range, New Hampshire shares with North Georgia a common heritage and philosophy — a land settled by fiercely independent, frugal, conservative people of Scotch-Irish stock working on hard-earned farms or in textile mills.

See BIAS, Page 1-C

WHY? WAS IN AMERICA



The cost of housing is high in Manchester where cheapest apartment rent for month \$40 a month. Heating bills can run \$1,200 a year for an average home.



From left, John Kelly, Jack Boyle and Randy Burns share drinks after work at the Alvarado Tavern in Manchester.

Bias

From Page 1 C

I wish the South had won the war. I have dreamed about it in a major doctor in Chicago, a cardiologist, New Jersey. There isn't of course I don't believe in slavery. I don't believe in all the Southern States.

The Southern people are a much more varied people. I don't think they are all the same. I don't think they are all the same. I don't think they are all the same.

There is a tragedy (James Cox, Atlanta) that deeply moved in the last years of his life. He was a man of great vision. He was a man of great vision. He was a man of great vision.

What I was getting at there was not just the South. It was the South. It was the South. It was the South.

The people here are not the same. They are not the same. They are not the same.

But the population in Manchester County and Portsmouth has gone up 27 per cent.

Many New Hampshire voters draw a line across their noses at the capital of Concord 16 miles from the border and down the mountain to the south. But the line is changing now.

Some of the immigrants are black but their numbers are small and their arrival has aroused no hostility. Many who have settled in the north are Portsmouth are military reserve officers by that city is all Porto and naval high. None of the others are middle-class professionals — and some contractors Federal government employees.

A summary

There is no real racial mix in there as in London, and that is not the case in Manchester. The major reason for this is that there is no real racial mix in there as in London, and that is not the case in Manchester.

When we have been in a more active form of racism. It is not that you need not ever fight on it. In fact, most people don't think of it as a more active form of racism. It is not that you need not ever fight on it.

From that Boston moved from Boston to the town of London in 1948, to that the center of some activity — a black man with a Hampshire extreme vote living in a Hampshire residence in the middle of a town, all within New Hampshire community.

"The name thing was," Boston said, "and of the fact I got that name from the attorney but from a guy who had moved here from Long Island [N.Y.]".

Boston, 36, is a relatively known figure who followed the example of Benjamin Franklin, who also moved to a small town where he tried to outdo his neighbors to win jobs and build up his own business. He was a man of great vision. He was a man of great vision.



Murray Cahn, executive director of the state Human Rights Commission, has only five staff members to his office in the basement of a Concord building.

town where he tried to outdo his neighbors to win jobs and build up his own business. He was a man of great vision. He was a man of great vision.

I picked up some left and had been out as to the center and I had been out of my mind. I had been out of my mind. I had been out of my mind.

Boston was fairly established at the time when he moved in 1948 when the railroad system (Boston) had been bought from Manchester in 1948 and only some of the old right movement. Rightist groups in the South trying to get away from the spread of the government. The fact was that there had been a lot of people who were not in there now.

from one located from London looked in Concord, New England's home.

Live as 1860-Gay, Wesley Fung and the Hampshire, returned to get into the room, a black woman, one who had been in the Hampshire community. He had been in the Hampshire community. He had been in the Hampshire community.

By the following year, however, most of the men had left New England. The summer after they had returned in 1948, the summer after they had returned in 1948, the summer after they had returned in 1948.

It is not the product of New Hampshire's economy and that is not the case in Manchester. It is not the product of New Hampshire's economy and that is not the case in Manchester.

Repeal Republican country

When Manchester first set its course, it had been in the movement. It had been in the movement. It had been in the movement.

Now Hampshire is better Republican country. It is better Republican country. It is better Republican country.

It is better Republican country. It is better Republican country. It is better Republican country.

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It is better Republican country. It is better Republican country. It is better Republican country.

It is better Republican country. It is better Republican country. It is better Republican country.



Senator RALPH Franklin, Democrat, stands outside the Hampshire building, one of five structures in Manchester, and the 64-poolard Latham's residence.

during the winter. And the whole a lot of living in light.

The election appearance in Manchester was not for nearly 100 years. Many have since and, only one in 100 years for an average home.

It is better Republican country. It is better Republican country. It is better Republican country.

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It is better Republican country. It is better Republican country. It is better Republican country.

# Sen. Chandler Admits Racial Joke

By TIM SANDLER

**United Press International**  
**CONCORD** — A veteran Republican state legislator acknowledged yesterday that he had told a racial joke about Jesse Jackson at recent public functions but played down the remark as a mere "political joke."

Sen. John H.P. Chandler Jr., 76, said the joke about the likely 1988 Democratic Presidential candidate has drawn substantial laughter from his New Hampshire audiences. He defended his remarks, saying he was simply repeating a good

joke and denied the humor was racially motivated.

Chandler, who is white, was quick to repeat the joke:

"Jesse Jackson has stopped running for President because it was found out that his grandmother had posed for the centerfold of National Geographic."

Known as "Happy Jack," Chandler has called slain civil rights leader Martin Luther King Jr. an "evil man" and has suggested homosexuals be allowed to donate blood only if they give all of it. His career in state politics spans five dec-

ades.

Chandler told the Jackson joke Tuesday night at the Merrimack County Republican Association meeting and over the weekend at traditional town celebrations in Salisbury, Webster and Henniker. He said the joke is no different from any other.

"All jokes are racist jokes because all jokes are about people and all people belong to one race or another," Chandler told United Press International in a telephone interview from his Warner home.

But in an interview published

yesterday in The Concord Monitor, Chandler said Jackson annoyed him during the 1984 New Hampshire primary by kissing a teenage white girl in public.

"I don't like race mixing," Chandler told The Monitor. "It was repulsive I almost threw up."

Chandler, in an interview with UPI, pointed to Jackson's 1984 "hymietown" comment, a derogatory term to refer to New York City's large Jewish population.

"If he can dish it out, he should be able to take it," Chandler said.

## on Jackson

Chandler said he was not singling out Jackson for his race and would poke fun at the other candidates, given the opportunity.

"It's a political joke," Chandler said. "If I heard a joke about about (Vice President George) Bush or (Senate Republican leader Robert) Dole or any of them that I thought was funny, I would repeat it."

Asked if he would continue to repeat the joke, Chandler said, "I will until I hear a new one. Do you know any?"

Chandler, a six-term senator, is the honorary Merrimack

County chairman for Rep. Jack Kemp's GOP presidential campaign. Kemp's New Hampshire campaign director quickly distanced the campaign from Chandler's statement.

"Senator Chandler's endorsement means he agrees with what Jack Kemp stands for, it doesn't mean Jack Kemp agrees with Jack Chandler," Paul Young said.

Rep. Linda Long, D-Nashua, the state's only black lawmaker and a Jackson campaign supporter, said Chandler's comments are not surprising.

Chandler was referring to the magazine's depictions of primitive cultures in different parts of the world, in which women and men appeared nearly naked.

Chandler said in an interview after the election that he heard the joke over the weekend but didn't recall who passed it on to him.

He told the joke at "Old Home Day" in Salisbury, Webster and Henniker.

He also reported getting laughs. Among them was at the county Republican association meeting, the response was tepid, but for one he quipped in response, "You'll never see the black vote in Franklin."

Chandler is chairman of the association, a fraternal group that broke away from the Merrimack County Republican Committee. At age 76, he has been in and out of state politics in the House, Senate and Executive Council since the 1940s.

# Chandler Says He's Not Racist

By BEN STOCKING  
Monitor Staff Writer

Sen. Jack Chandler says he's not a racist, even though he told a joke making fun of Jesse Jackson's race and later said he was sickened when he saw Jackson kiss a white girl.

"I'm not a racist," Chandler said after listing 16 black organizations to which he said he has donated money over the years. They included the National Association for the Advancement of Colored People, the United Negro College Fund and the Black Silent Majority Committee, a conservative group.

Chandler said he gave most of the groups \$10 or \$20 a year, and has been giving to some for up to 25 years.

Chandler's joke goes like this: It seems Jackson has abandoned the race for the Democratic presidential nomination. "He dropped out because they found out that his grandmother had posed for the centerfold of *National Geographic* magazine."

He was referring to the magazine's photographs of primitive cultures around the world, in which men and women have appeared nearly naked.

Chandler said the joke at the Merrimack County Republican Association meeting Tuesday night. Afterward, in explaining the joke, he mentioned the time he saw Jackson kiss a white girl when he filed for the 1984 presidential primary at the Secretary of State's Office. "It was disgusting," Chandler said. "I almost threw up."

Yesterday, the *Monitor* ran a front-page story on Chandler's remarks, and other papers ran wire

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## CHANDLER

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stories about them this morning. Chandler said today that he hasn't received any criticism since the article appeared.

He said he went to a dinner last night hosted by one of the organizations in his district, and nobody criticized his comments. (Chandler wouldn't name the group because he didn't want to "drag them into this.")

About 25 people attended the dinner, Chandler said, and about half of them made supportive comments. "They thought that the media was making a mountain out of a molehill," he said.

The people he talked with thought the joke was funny, Chandler said.

In a telephone interview this morning, Chandler explained why he doesn't consider himself a racist, despite the joke.

All jokes are racist, Chandler said. "Most jokes refer to some people," he said. "All people belong to one race or another."

There are jokes about Italians, Jews, Poles, and the Irish, he said; there are jokes about all kinds of people.

"They haven't made too much of a hullabaloo about it. . . I think it's a certain form of folklore humor, you might say."

Worldwide, Chandler said, the white race is in the minority "I just point that out because sometimes people are claiming the minority is the one who is being picked on or something."

Chandler was asked why he found it so upsetting that Jackson had kissed a white girl. "It's a kind of a gut reaction," he said.

"I don't like it," he continued. "There's things in life that I like, and things in life that I don't like. And I can't necessarily give a logical explanation for them all. It's just the way I feel."

Some people prefer Coke and others like Pepsi, he said. "You can't always explain it."

A Warner Republican, Chandler is 76. He has served off and on in state politics since the 1940s, in the House, the Senate and on the Executive Council. He has made other re-

marks that have generated much publicity. During last year's legislative session, he said he wouldn't mind letting homosexuals give blood, despite the AIDS epidemic — as long as they exhausted their entire supply.

Asked if he could understand why some people found his Jackson joke offensive, Chandler replied, "There's millions of people. Everybody's got their rights and their own ideas. And if they don't agree with mine, I respect them for what they believe in, within certain limitations."

"I don't think everybody agrees with everything God said. You just can't please all the people all the time."

Chandler said he expects to hear from some constituents who disagree with his comments. But he agrees with the people he talked to at dinner last night: His remarks have been blown out of proportion.

"I don't see why a little joke would create such a big stir," he said. "It's like all the vultures are pouncing on me, the media vultures."

Yesterday, a spokeswoman for Jackson said the candidate would probably decline to dignify Chandler's comments with a response. A spokesman for the presidential campaign of U.S. Rep. Jack Kemp, for whom Chandler serves as honorary Merrimack County chairman, repudiated the remarks, but not the man.

This morning, Lionel Johnson, chairman of the Manchester chapter of the NAACP, said Chandler's remarks were ignorant and unworthy of comment. He said Chandler can't present himself as a friend of blacks on the one hand, and crack racial jokes on the other.

Chandler said he donated money to the national NAACP organization, as well as the Rural Farmers Coop, an Alabama group that helps poor black farmers.

"In a way, we could commend him for giving the money," Johnson said. "But we haven't seen any of it. We're the local chapter."

"I would gladly accept some of his money instead of sending it all the way to Alabama," he said. "We could put it to good use."

# Chandler's Constituents Are Willing To Forgive And Forget

By JAY MERWIN  
and HOLLY IDELSON  
Monitor Staff Writers

In New Hampshire, state Sen. Jack Chandler can make racial remarks of the sort that have cost a secretary of agriculture, a secretary of the interior and a major league baseball executive their jobs.

Even among those who believed that Earl Butts, James Watt and Al Conroy were performing well in office, most recognized that joking about black caricatures, quipping about cripples and suggesting blacks were less capable of baseball management had made their positions politically untenable.

But not Chandler's Senate seat. Based on

conversations with more than 50 people among the 15 towns he represents, it would appear that few supporters were having second thoughts about giving him an eighth term.

Chandler occupies the rightmost end of the Republican spectrum. Some constituents join him there, while others just like him or dislike him. And those who don't never heard of him, or voted against him anyway.

In the joke that would end other political careers, Chandler told audiences at recent social and political functions that the Rev. Jesse Jackson, who is black, was dropping out of the presidential race "because they found out his grandmother had posed for the centerfold of National Geographic."

Later, Chandler elaborated to a reporter about his disgust at the sight of Jackson bawling the cheek of a white girl at a campaign event. "I don't like race mixing," he explained.

Many of Chandler's constituents thought the media was making too much of his loose talk, though nearly all acknowledged that he shouldn't say such things, at least not in public, not in the newspaper. But, the refrain went, "That's Jack."

They know him, and assume he didn't mean anything as bad as it looked in print. They know him as "Happy Jack," the charming and genial politician who says hello at nearly every parade, church supper, American Legion breakfast. They know him

as an old man of 76, maybe entitled to be a character.

Chandler cares enough to send a streamer of cards and clippings to constituents. And he spends enough of his own money at election time -- as much as 10 times more than his opponents -- to drown out their campaigns with his media advertising and literature.

Peg Feldbaum, of Feldbaum's clothing store in Hillsboro, has chuckled about Chandler, admired his persistence in running for state office since the 1960s, but rarely voted for him.

His racial remarks didn't outrage her only because they didn't surprise her. "I think that's him," she said. "If someone else said that, you'd be a lot more concerned than

if he says it."

Feldbaum disapproves of racial cracks, but she said, "I don't think he's a racist. And those who don't tend to take him less than seriously. In the whole scheme of things, when he says it, I sort of laugh."

Earl Trench can't take it. She crossed Main Street in Hesserth specially to condemn him on the record: "I am ashamed every time I see him because of his bigotry."

But since Chandler is loved, Trench here looks friends over what she just said. "I'd miss their friendship. It would be the

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## CHANDLER

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friendship of people who don't agree with me." loss of

One who likes Chandler is George Guimond, who used to visit rooms from him in Warner. He thought Chandler's public service and personal giving to the poor had more than made up for the occasional indiscretion. "It don't bother me."

A joke like Chandler's wouldn't have raised a fuss years ago, he said. "This day and age you really have to be careful."

But others find that on racial matters, New Hampshire's nearly all-white culture can still be like a locker room where people talk more freely.

"In New Hampshire people think they can make ethnic slurs and get away with it because there are so many minorities," said Patti Albano, an active Democrat in Warner, Chandler's hometown. "It's kind of a safe remark here."

And Chandler himself has assumed a certain permission for doing things his way.

In the Senate he can close his eyes for several minutes of business, re-submit bills that have lost in session after session, seek lower state licensing standards at the request of a single constituent trying to transfer his out-of-state examining practice to New Hampshire, and write that placing foster children in homosexual homes "is like putting a pound of roast beef in a cage with a lion."

Supporters prefer to dwell on Chandler's activity in local affairs.

"I like him," said Barbara Merullo, a waitress at Norm's Place in Warner. When a flood damaged her land, Merullo wrote to Chandler and got a detailed reply about where she could find help. "I think he's concerned."

He can be so accessible that constituents need not see him out. If you live in Antrim, Belmont, Bennington, Boacawan, Bradford, Deering, Franklin, Hamden, Hillsboro, Northfield, Salisbury, Warner, West, Webster or Winsor, chances are Chandler knows what's happening in your life.

Friend or foe, if you live in those communities — his district — you get a card for a death or birth in the family, a clipping when your name or business appears in the newspaper, a personal reply to your letter.

Even those who oppose Chandler remember these gestures.

"Definitely I appreciate it," said Abdellatif Najib, who owns Najib's pizza parlor in Hillsboro. "But I don't like his views. I don't share it at all."

When he tries to define Chandler's sometimes extremist creed, the first thing that comes to Najib's mind is: "Reagan. The birthday of (Martin Luther) King, you remember what he said?"

Chandler spoke against a bill to establish a state-wide holiday in memory of King, citing King's friendships with known or suspected communists. Chandler called him "an evil man, an immoral man." And Najib is still shocked. "It be believe in God, and he's a Christian, he shouldn't say anything like that about a reverend who was leading people."

Najib thought other constituents might be only dimly aware of shots

from the hip by the man who appears to have their personal interests at heart.

"People think of him as a god. I never heard anybody say anything bad about Chandler," Najib said. "It's a small community of mostly blue-collar workers. They don't have the time to judge their politicians."

And many in the streets, shops and laundromats of the district had somehow passed over Chandler's familiar presence. They had never heard of him, or vaguely knew the name.

Edward Dillon, who had seated himself behind a table at Najib's, knew of Chandler, but couldn't elaborate beyond the general approval he had heard from others. And that was enough for him.

"I don't delve into politics," Dillon said. "What happens up in the State House doesn't really bother me."

But many who follow the politics of the Senate and their senator tend to approve. "Whatever I've read about him, I favor," said Bob Munro, who owns the Awincos window and door business in Weare.

The joke was an exception. But a joke is a joke, not to be held seriously against anyone. Munro suggested, since almost any questionable joke can rouse a laugh at first. "If we all sat down and scrutinized every joke we told or listened to for its moral significance they wouldn't be funny."

Kevin Harvey, who teaches English at New England College in Henniker, had heard the joke a week ago, days before Chandler began retelling it. To him it sounded racist in public, harmless in private. "That's really the way people speak. They don't mean anything negative."

Harvey agreed in part with Chandler's subsequent defense that Jackson had uttered worse in the 1964 campaign when he spoke of Jews as "Hyman's" and New York as "Hymanstown."

"But people looked the other way clearly because a black liberal politician made the remark," Harvey said. "You on hesitate to nail this down, you sound like a reactionary not to say these things, (but) we've got a double standard here. We clearly do."

Others offered up their own ethnic stock for ridicule, an appointment to the targets of Chandler's gibes.

"I'm half Polish. You got a Polish joke?" asked Ron Fowler, who owns Fowler's pizza parlor in Hillsboro. "I'd listen to it. We all have to laugh at ourselves a little."

David Currier, a Hamden selectman, said sure, but in private. "It's really weird. I can't believe the man says those things in public."

Currier, who challenged Chandler in a Republican primary last year, said he would soon announce another run at him for 1988.

"More and more people are taking notice of this thing," Currier said. "This year's citizens are going to come back to haunt him."

If so, an specter is likely to hang over the American Legion post in Hillsboro, where Ralph Longo said over late afternoon beers, "he's always welcome here as far as I'm concerned."

If Chandler's Annies offend anyone, Longo suggested they consider: "This is New Hampshire. Take it the way you want to."

## Chandler: resign

Jack Chandler's latest outrage must be answered. His blatant racism is not only a disgrace and embarrassment to the constituents he (theoretically) represents, but also to the state of New Hampshire.

His "repulsion" of a black man kissing a white girl and his disbelief in "race mixing" reeks of pre-Civil War bigotry and is in concert with the thinking of members of present-day racist organizations such as the Order and the Ku Klux Klan.

I disassociate myself from my "representative," as I'm sure all civil people do, and respectfully suggest that he excuse himself from public office. His credibility as an effective senator was dismissed years ago by his peers, and now he has exposed to the rest of us his total lack of human decency. Barring his own resignation, at best should be soundly defeated in any future attempts to hold any position that allows him to represent more than just himself.

SUSAN McKEVITT

Bradford

## Mistaken belief

I think it is very sad that a man like Jack Chandler represents New Hampshire. He perpetuates the mistaken belief that people from this state are ignorant and backwards. He is a racist — nothing more, nothing less.

If Jack Kemp really opposes Chandler's statements, let's see some action — replace him as honorary chairman.

SUSAN SEIDNER

Pembroke

# Letters

## Open your mind

Sen. Jack Chandler is lucky he's a small fish. Otherwise he would have been cleaned and fried for his visionless and ignorant remarks regarding the Rev. Jesse Jackson.

Nobody else was willing to dignify those comments with any sort of reply. The senator should have followed suit, rather than trying to cover his obviously bigoted comments with such shallow reasoning as "I think it's a certain form of folklore humor, you might say." You might say a lot of things, senator, but you probably ought to stop before you get any more feet in your mouth.

If you were blind and a friend had described the occasion of Jesse Jackson giving a 9-year-old girl a kiss, without mentioning the skin color of either, would you have found it "repulsive"? I sincerely hope you will be able to open your eyes and your mind to the oneness of humanity.

GEOFFREY G. MARTIN

Penacook

## Natural mindset

News headline: Chandler's Constituents Are Willing To Forgive and Forget. Editorial: Repugnant remarks. From your paper's script today (Aug. 21) it would seem your editorial staff is rather angry and frustrated over Sen. Jack Chandler's comments about Jesse Jackson. It would seem to me the nature of your anger and frustration is your inability to settle into the basic and natural mindset of the predominantly white public of the state of New Hampshire, and of New England in general.

If the general feeling bothers the staff of the *Concord Monitor* so much, all I can say is you better get used to it. Because unless we get a mass migration of colored stock, you're not likely to see any great change in the public attitude regarding ethnic jokes, especially involving blacks.

Now personally, I found Jack's joke interesting but I've heard and laughed at better. What I think is that there are a lot of hypocrites out there that are afraid of being called "bigots." You liberals don't

seem to me to have much to worry about.

ALLISON CALDWELL  
Pembroke

## The air is free

Do you have a small sailboat, such as a Sunfish, or are you a wind-surfer? If the answer is yes, you know the feeling of freedom that comes when you move with the wind.

But did you know that the wind isn't free in New Hampshire? Any sailboat, or sailboard, that is 12 feet or larger must have a New Hampshire license each year. The fine for not having the New Hampshire decal license is \$44. In a state where the slogan is "Live Free or Die," it seems ironic that one must pay for using the wind.

If you, too, feel that licensing small boats and boards, which use only the wind to propel them, is wrong, then let's start writing our state representatives today to get this law changed, and restore the meaning of "free" in New Hampshire.

JOAN LAMSON  
New London

# Against A Wall At UNH, Blacks Cope With Racism

By LESLIE ROBINSON  
For The Monitor

Rebecca Carroll is no stranger to all-white schools. She was one of three blacks at Keeneville High School, and the only black during her first eight years of education. Her adoptive parents and natural mother, with whom she is close, are white. So are her two siblings.

Sue Carroll cannot reconcile herself to the feeling she has as a black student at the University of New Hampshire. After three semesters there, she is leaving the school, planning to take the spring semester off and transfer next fall. One black professor, who made her feel "celebrated" about her blackness, wasn't warm enough to stay. Nor was the Black Student Union, the group she helped form last spring to confront the university's great racial imbalance.

"What saddens me most about this university is the students have no opinion about learning in this unhealthy environment," Carroll said.

Despite awareness among administrators, the number of blacks at UNH remains very low. The most recent statistics available are from the fall of 1966, but administrators say they have changed little since. That semester, UNH had 3,086 undergraduates. Of these, 37 were black.

Stephanie Thomas, a registrar who reports on affirmative action, said UNH has no black

administrators. There are less than a dozen black professors, though the proportion of black staff members is probably higher. "It's what's 'better' than one tenth of one percent," Thomas said. "Most people who are educated will admit that it really diminishes the whole educational experience of students to live in such a homogeneous environment."

Getting and keeping black students, faculty, staff and administrators poses a problem UNH says it is trying to combat. (See sidebar). "Because we're such a white state, it's easy to meet the letter of the law," Thomas said. "We want to be aggressive in our actions. We don't want to just meet the guidelines."

Stan Fish, dean of admission, said more blacks would enroll at UNH if more blacks were hired. "In order for minority students to come to the university and feel positive and successful," Fish said, "they need the support of a large minority population within the community, and that population needs to include faculty, administrators and staff who are minority persons."

The few black teachers at the school often find themselves besieged by minority students eager to share their ideas. One former member of his department, Fish said, felt obliged to act as a role model for black students. "They sought him out in such numbers for support that it really became very difficult for him to feel he could meet their expectations," Fish said.



Carroll felt the benefit of having even one black professor. Lester Fisher and his Afro-American literature class had a major impact on her. "The literature we read and the thoughts and feelings that were elicited from me — it was an awakening for me," she said. "That class and Les gave me a lot of inspiration. He made me feel like I did as a child, real celebratory about being black, and different."

Much of Carroll's perspective comes from growing up with white siblings and attending white schools. "I've been in the limelight. I've gotten some mileage out of being black. I've been a token," she said. Carroll believes tokenism is "completely detrimental to your growth in the long run."

She calls herself "culturally white and cosmetically black. I can speak on black culture

## University Plans Policy Changes

As a state university, the University of New Hampshire is primarily obligated to admit New Hampshire residents, only 3 percent of whom belong to minorities. All minorities, however, receive preferential treatment in the sense that UNH reviews their applications as though they were in-state candidates.

This year, the admissions office in Durham received 288 minority applications. Forty of those students enrolled in September; seven were black.

UNH has always sought minority students, said Dean of Admissions Stan Fish, but such efforts have found little success. The retention rate of black students "is well below the general university retention or graduation rate," he said. Faced with the isolation of being a minority student, some drop out even when they are doing well academically. UNH offers three scholarship programs, one largely for Hispanics, one for blacks and one for in-state minorities.

The university wants to improve the representation of blacks among faculty, staff and administrators, says Stephanie Thomas, registrar and special assistant to the president. It has no full-time affirmative action officer, but plans to hire one, Thomas said. For now, several employees share the job.

The school will soon implement new guidelines for hiring minority teachers. When a department with low representation of minorities and women has an opening, advertisements to fill the vacancy will say: "Women and minorities encouraged to apply." All tenure-track search committees will have an affirmative-action advocate.

Thomas also plans to instruct departments about how to actively recruit women and minorities. The University of New Hampshire has to be aggressive.

"You've got to get on the phone and call institutions," she said. "Pass the word on. That's what being aggressive is."

Racial climate may not be the only thing detracting from the school's appeal to minorities. Salaries, the number of teaching assistants and research money combine to make up a package. UNH, Thomas said, "just can't compete in that arena."

— Leslie Robinson

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## RACISM

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because I've read, and because of people who've influenced me who know, but I've never been to the heart of black culture. She admits she cannot say what it's like to be culturally black at UNH, but she notes, "I do know what it's like to be black."

Last spring, in an effort to create a black presence on campus, Carroll helped found the Black Student Union, which was mainly a support group then. Members hope to work more as activists this year, but a recent meeting revealed a split in their ranks.

"My foundation for starting this was anger," Carroll said to the few members who remained after the meeting. That declaration disheartened Keith Carpenter, who responded that, to draw more people into the Union, the group needed to plan some fun activities.

To Carroll, the purpose of the Union was primarily political, not social. There are times, she said during the divisive meeting, when she would not recommend UNH to a single black person. "Are you trying to start this so you won't feel that way?" another student asked her.

"I'm trying to start this so you won't feel that way," she answered.

The opposing visions within the Union caught Carroll by surprise. By the next day, she was rebuking her role as leader. "My big error is to assume the other black students, be-

cause their skin is black, are going to be sharing any concerns, or that their concerns would be different from any other students on the campus who are here to study and drink," she said, a hard edge to her words.

She once asked a member of the Union to explain what the group meant to him. He could not. By comparison, Carroll said, "I could tell you with urgency. If that doesn't come off the top of your head or you don't think of it as something that merits urgent attention, then I don't know if our priorities are the same."

Carpenter came to UNH from New York City. He is a junior majoring in business administration, and a member of the basketball team. He admitted that if he weren't black, chances are he wouldn't be involved in an activist group. "I'd probably be happy with just basketball and school and partying. Like everyone else," he said.

He has been aware of racism on campus, but "I've been pretty much sitting back and accepting it." He said he could have accepted it for four years and still been happy.

"Now that I'm in the Union, I'm not gonna go home something," he said with a laugh. "I may not be as angry as Rebecca is. Whereas I've lived in a black culture, she hasn't. I'm not saying she's less black than me, or I'm less black than she is. . . . She should be in charge of the tough stuff, and I should be in charge of having the parties. That's me saying. I go into the meetings and feel

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around. Sort of the comic relief." and Carpenter said he enjoys UNH. "Two bad fun," he said. "I like it here. I like the kids a lot."

Carroll has a different view. UNH students, she said, are "provincial, laid-back, comfortable, self-satisfied." She sees the students as young people eager simply to feel comfortable in school and make money afterwards. They think, "They got it made in the shade," Carroll said. "Why would you want to shake that? I feel sad for them. I feel like they're selling out."

Carroll's differences with other students surface inside and outside of class. In two recent discussions, her views of works by black authors were at direct odds with those of the rest of the class. In comparing the philosophies of 19th-century black activists Booker T. Washington and W.E.B. DuBois, she was appalled at how the class embraced Washington's Uncle Tomiah vision. Some class members seemed to accept the notion that, in spite of a white audience, a black speaker must "tune up to them."

Carroll said she hesitates to put her classmates down. "I know that all they know is a white perspective," she said. "(But) it makes me feel like I'm in a time warp, the wrong decade. And then you wonder, 'Is it just

me?'"

She would like to see white students "not be afraid to think a little bit other than what's acceptable. I'd like them to take some risks. I'd like them to feel at ease taking risks. I'd like them to be open-minded."

As she smiles these demands, Carroll realizes she must not seem like an average 19-year-old. She has noticed that she no longer has an exaggerated concern with appearance and parties.

Often, other blacks at the university who speak about racism are older than her. Valerie Cunningham, for example, is an administrative secretary in counseling and testing, hours and raised in Portsmouth. The subtle racism she encounters is of the stereotypical variety, when people assume she voted for Jesse Jackson, or that she is Baptist.

"I just have learned to not pay too much attention to that," Cunningham said. Sometimes she jokes to expose the offense gently. "I realize these remarks are made out of ignorance."

Fisher, the black professor who taught Carroll's literature class,

agreed that ignorance is the root of much racism. He refers to the "large-scale ignorance that continues to victimize many people in our culture."

Although he has encountered blatant racism from store clerks and even from repairsmen in his own home, he believes "the college community is much more difficult. Guys get drunk, they yell things. It's often worse on campus because there's a high level of rudeness. (The students) have a general disrespect for other people. When you have that kind of environment, those people who are obviously different become the objects of frustration."

An ideal UNH, Fisher said, would have women in the administration's top ranks, and "people of minority experience all throughout the different functions of the university, so that in the daily encounters certain experiences would be available in the most

implicit way with respect to diversity."

Carroll said she can't stay at UNH until that ideal is realized. After 10 years, she plans to transfer - hopefully to Brown University in Providence, R.I. Money will be a factor in her choice; she was on full scholarship at UNH.

"I'm leaving because I know my New Hampshire is. I do not feel comfortable that the students here nor do I aspire to it."

College, she said, should be a time to take risks and be curious. "Flowering rhododendrons and babbling brooks is not enough for me. I appreciate what this university has to offer but it's not enough."

Leslie Robinson is a graduate student at the University of New Hampshire.

**F**lowering rhododendrons and babbling brooks is not enough for me. I appreciate what this university has to offer, but it's not enough.

- Rebecca Carroll



GARY LUCAS/UNH Photo Staff

# Union Leader

*There is nothing so powerful as truth* - DANIEL WEBSTER

MANCHESTER, N.H., FRIDAY, MARCH 3, 1969

## King Holiday Defeated Again

By **DONN TIBBETTS**  
State House Bureau Chief  
**CONCORD** — Although proponents claimed growing grassroots support, a bill to have New Hampshire celebrate the birthdate of Martin Luther King with a holiday sustained one of its worst defeats in 10 years yesterday.

A move to overturn an ad-verse committee report and substitute ought-to-pass garnered only 89 votes in the House with 255 representatives opposed. Moments later the bill was killed via voice vote.

The nearly 3-1 majority refused to dump New Hampshire's traditional Fast Day holiday on the fourth Monday in April and replace it by observing the federal Martin Luther King holiday on the third Monday in January.

Only 65 Democrats and 24 Republicans voted for the bill yesterday following a 70-minute emotional debate.

Rep. Wayne Burton, D-Durham, hailed the slain civil rights activist as envisioning "a country free of hate, prejudice and violence in a dream we should remember."

But Rep. Maurice MacDonald, R-Derry, retorted that "many have worked and suffered to gain rights for many people."

The bill's sponsor, Rep. Linda KING

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### KING

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Long, D-Nashua, complained of receiving mail "telling me to go back to hell where I came from, but I'm staying here." MacDonald assured her "that the House has the highest esteem for you, but every member of this House has no respect for anyone who sends out mail like that."

Rep. Jacquelyn Domaingue, R-Manchester, told of servicemen giving their lives for the U.S. flag "with a sense of honor" in Vietnam at a time she said Martin Luther King "was labeling the U.S. the greatest purveyor of violence in the world" and accusing the U.S. of "testing our weapons on peasants as did the Germans."

"I can't turn around and give the same honor to a man who condemned" the U.S. military, she said.

Later Burton told reporters that as an Army captain who served in Vietnam, "I resent her remarks."

A move to have Domaingue's remarks printed in the House Journal failed 124-198.

Gov. Judd Gregg said he wanted to retain New Hampshire's unique Fast Day that originated with a day of prayer for colonial Gov. John Cuff who became ill in 1661 and died.

Gregg said he would not oppose a King birthday observance if it were held on a Sunday.

This month 1,523 of 1,706 readers responding to a poll by The Union Leader and New Hampshire Sunday News were opposed to the King holiday effort.

"We will keep trying to pass this bill as long as it takes," said Arnie Alpert who helped coordinate the King holiday effort this year.

He said the public is behind the bill "but the word just hasn't reached some of our legislators yet."

For hours on Feb. 8, the pros and cons of the controversial holiday bill were voiced at a public hearing in Representatives Hall at the State House. The overwhelming majority hailed King's contributions to the cause of civil rights, including former Sen. James Splaine of Portsmouth who first attempted such legislation 10 years ago.

A similar King holiday bill was killed in the Senate March 12, 1967. Another was killed in the House in 1965. The House and Senate both defeated separate measures in 1961 and the Senate killed another bill back in 1979.

[Monitor, May 16, 1989]

# Swastika, Slur Painted On Temple

Someone spray-painted a swastika and the words "blood drinkers" on the roof of the Temple Beth Jacob on Broadway Sunday night.

Rabbi Robert Schenkerman said members of the temple were shocked and outraged.

"It's something that belongs back in the days of the Holocaust," he said. "We do not find this a prank at all. It was a malicious act of unwarranted hatred and bigotry and stupidity and ignorance."

The graffiti is the first sign of bigotry against Jews in Concord in a long time, Schenkerman said. "There are people who have lived in this community for 30 years who have never seen anything like this."

The temple was vulnerable to vandalism during the construction of its addition recently, but suffered none, Schenkerman said.

The graffiti was scrawled high on the sloping roof in white paint sometime after 11 p.m., according to a police report. A passerby saw it from the road Monday morning, Schenkerman said.

The fire department covered the graffiti with black paint yesterday, but the paint is darker than the roof, so the words and sign are still obvious, Schenkerman said.

- Linda Goetz

# The Little Green

Vol. XXVI No. 1

Central High School, Manchester, NH 03104

October 18, 1989

*'I have noticed an increase in tension...'*

## Racial problems surface; non-students plague campus

By Bob Gaumont

Racism on campus has become a concern of the administration, according to Principal William A. Burns. The presence of non-students on campus, the increased enrollment of minority students, and the lack of tolerance among racial groups all have contributed to the problem, he said.

"I have noticed an increase in tension between black and white students. I've also heard a tremendous number of racial slurs this year," Burns said.

Racism was evident September 18 when a fight occurred on campus after school hours. According to social studies teacher Robert Lord,

who witnessed the incident, three or four white adults instigated the fight with at least as many black and white students.

"One adult came on to the campus, made threatening gestures at the students and taunted them in a racially derogatory manner. I think he had been drinking," Lord said.

Manchester Police arrived on the scene with an ambulance. One participant was in need of medical assistance, but refused to enter the ambulance, Lord noted.

According to Sergeant Thomas Steinmetz of the Manchester Police Department, Juvenile Division, the police did not arrest anyone because nobody was available to file

a complaint.

It was difficult to locate the students involved in the fight because of the relative chaos at the scene, according to Burns.

"I could only get a few names of students involved in the fight. Because a crowd of kids surrounded the fighters, it was hard to distinguish who had actually fought, once the incident ended," Burns said.

Lord is unsure whether he would blame the students for fighting.

"After seeing a conflict start that way, you wonder if the students were just in fighting. It's a tough one to call," he said.

Burns is more concerned about the reasons behind the disturbance

rather than the actual fight.

"We've had fights before at Central and we'll have fights again. It's the racial overtones of this particular fight that really bother me," he said.

The Manchester Police Department is not "tremendously concerned" about their recent visits to Central, according to Steinmetz.

"These things tend to come in spurts. Next month we might be making a lot of visits to West or Memorial," he said.

Central receives fewer police visits than many junior high schools, according to Steinmetz.

"By the time most kids that cause problems hit high school age,

they've usually dropped out. In junior high, the trouble makers are still around," he said.

Racism is a concern of the Police Department as it relates to fights and law-breaking, according to Steinmetz. However, there has not been a notable increase in racial violence, he said.

"Our primary concern with racism is the racial violence that can come with it. On the juvenile level, racism has not been much of a problem," he said.

Ward 4 School Board member and National Association for the Advancement of Colored People (NAACP) Secretary Vanessa Racism

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# Teachers, NAACP explain reasons for racial attitudes

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Johnson contacted Burns about the incident shortly after it occurred.

"Mr. Burns and I talked for quite a while about how and why a conflict of that nature would still occur. It still puzzles me," Johnson said.

Johnson stated that one reason that bigotry is becoming more visible in school is because of the increase in the number of minority students attending Central.

"It's pretty easy to accept minority students when there are just a couple of them. When those numbers increase, many people begin to feel threatened and have a more difficult time accepting those minorities," she said.

There are about 40 black and 40 Hispanic students currently attending Central, according to Assistant Principal Roland Blanchard. This is a substantial increase from the previous years, he noted.

"State and federal agencies periodically request statistics concerning minority students. We used

to have so few that teachers could just take a head count during homeroom," Blanchard said.

Science teacher Tim Bertrand thinks that a lack of understanding may be a cause of racial attitudes.

"Many people in Manchester have lived here their entire lives and have

closed campus," he said.

NAACP President Lionel Johnson thinks that students should ignore the color barrier and unite against the non-students who enter the campus.

"Central students should not allow any person to destroy their

*"Black and white students should act as one unit,"  
Lionel Johnson, NAACP*

difficulty accepting a different culture. Likewise, many of the newcomers are expecting bigotry and have trouble accepting Manchester's culture," he said.

Another reason for the increase in negative racial attitudes is the presence of non-students on campus grounds, Burns said. Many incidents occurring on campus are caused by people who do not attend school, he noted.

"We cannot tolerate people on campus who are not enrolled at Central. If this persists, we will have a

Burns to call the police.

Steinmetz confirmed that a juvenile was arrested September 22, but could not comment on the circumstances surrounding the arrest.

"State and federal laws mandate that most facts concerning juvenile cases are to remain confidential," he said.

Basic intolerance and ignorance between the different races may be another reason for racist attitudes, according to Lionel Johnson. He experienced black intolerance as well as white intolerance.

"For every white student with a chip on his shoulder, there is a black

Burns agreed that there are black students who are very defensive.

"There have been times that I've punished students, who were black, for breaking school rules. A lot of students think that I'm punishing them just because they are black,"

Burns said.

Lionel Johnson recommends that all students "wipe the color off" once entering school grounds.

"Education is so important in today's society that all students should work together to make sure that they receive the best one they can possibly get. Black and white students should act as one unit," he said.

All students have a right to an education, according to Burns. Students have an "equal right whether they are black, white, or green," he said.

"As principal it's my job to eliminate any force that would stop a student from learning. I will punish individuals, not entire races, who interfere with any student getting an education," he said.

community. They should ban together against these outside forces," he said.

One non-student was arrested by

*"As principal it's my job to eliminate any force..."  
Principal William A. Burns*

police September 22 for roaming the campus, according to Burns. The individual was asked to leave by a faculty but refused, prompting

with a chip on his. Many students walk around just waiting to knock the other's chip off," Johnson said.

# Manchester Club Denies Bar Service to Black Man

By JOHN DISTASO  
Union Leader Staff

A black high school football official was denied bar service of a membership card at one of Manchester's best-known social clubs last month, apparently cause of the color of his skin. The Sept. 16 incident at the Upland Social Club, 237 Granite St., has embarrassed many of the club's 300-plus membership, which includes a judge, politicians, writers and local sports figures. A spokesman for the New Hampshire Human Rights Commission said the incident ap-

**"You might expect something like this in southern Mississippi. But I never expected it in Manchester, New Hampshire."**

David Barnes

pears to meet the legal criteria that would warrant an investigation by the agency if the man were to step forward and lodge a complaint.

But David Barnes, a soft-spoken 44-year-old computer specialist from Nashua, says he has

no interest in doing so because he was treated kindly by the overwhelming majority of the club members who witnessed the incident.

Other law enforcement authorities said that although the

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## Club President May Be Ousted

By JOHN DISTASO  
Union Leader Staff

Richard Creedon's refusal to allow a black man to buy a couple of beers may have cost him the presidency of the Raphael Social Club, but some

members feel he may survive a recall election.

Club members say Creedon has been president of the Granite Street drinking establishment for a long time, although none of many members inter-

viewed could say with certainty how long, and at least one member says he has run it well.

But on a Saturday afternoon last month, Creedon allegedly ordered the club bartender no

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to serve 44-year-old David Barnes, a black man from Nashua. Barnes and members of the club said Creedon also shouted racial slurs at him.

"I don't think anyone in the club condoned that," said James St. Jean, Sr., the father of the Manchester state senator.

"We just hope it's not a black mark on the club."

According to West High School teacher Robert Kerrigan, who accompanied Barnes into the club on Sept. 16, "There are an awful lot of good people in the club. Everything is going to be handled from the inside."

Several members reported hearing that efforts were under way to organize a meeting, perhaps for this weekend, to elect a new president.

But none of the members interviewed said they were directly involved in organizing it or knew who was involved.

If there is a meeting and a recall election for Creedon, the elder St. Jean said Creedon has support and could be retained in office.

"I'm sympathetic to the guy because he's done a good job for a number of years, although I don't condone what he did," said St. Jean, who recalled that many years ago, the club had a black member.

The younger St. Jean, a Manchester Democratic senator, said, "There is no place for this kind of thing in the social club or anywhere in this country. The actions of that night were something I cannot tolerate."

## CLUB

(Continued from Page One)

Another prominent member, State Superior Court Judge William O'Neil, said he was not there when the incident occurred, and added, "I don't get involved in how they run things. I don't pay attention to what's going on. I go in to have a beer, shoot the breeze for half-an-hour at most and leave."

But Manchester Alderman William Cashin said an apology — from Creedon to Barnes — is in order.

"It never should have happened," Cashin said. "It's a very unfortunate situation, and it can't be tolerated."

Jack Amero, a coach at Manchester's West and Central high schools, said he would withhold judgment. "I want to go to the meeting of the membership, listen to the facts and judge. I don't want to make a judgment over what you hear over a beer."

Law enforcement officials said that while state and federal laws outlaw discrimination on the basis of race, unless Barnes comes forward and lodges a complaint, their hands are tied. Barnes said he has no interest in doing so.

Associate Attorney General Richard Cheney said, "There is no criminal sanction in the state statute for an act of racial discrimination," and he said his office has no jurisdiction "unless there were violence or criminal activity associated with it."

State Human Rights Commission Deputy Director Susan McKeivitt generally takes no

action unless it receives a direct complaint from the individual involved. Occasionally, she said, a member of the commission may take a special interest in a case and ask that the agency investigate unilaterally.

Told by a reporter what happened here occurred at the club on the afternoon of Sept. 16, McKeivitt said, "If you were the complaining party, I'd say you have grounds to file a charge. Whether you would prevail or not is another matter."

"But what you've told me meets the legal standard to file a charge, and that would initiate an investigation," McKeivitt said.

McKeivitt said that if, in any case, the commission finds discrimination took place, state law gives it rather dull teeth with which to act.

The commission can not, for example, fine an offender or shut down an establishment. "What we can do is contact both parties and try to conciliate the case, try to resolve the conflict."

Sometimes, she said, a simple apology satisfies the complaining party.

State Liquor Commission investigator William Frey said the commission "has no regulation which says an individual club can not discriminate."

Of course, he added, there is such a thing as the U. S. Constitution, which allows for lawsuits." (Staff sports writer Vin Sicilia contributed to this report.)

## RAPHAEL

(Continued from Page One)

incident appeared to be a possible violation of anti-discrimination laws, they can do nothing unless Barnes files a complaint.

In an interview this week, Barnes said he walked into the club with several white members and was twice denied service by the bartender, who acted on the order of club president Richard Creedin of Manchester Street.

"You might expect something like this in southern Mississippi," Barnes, a 12-year New Hampshire resident, told The Union Leader. "But I never expected it in Manchester, New Hampshire."

Club president Creedin recalled the incident but denied that it was racially motivated. He said the club membership list was full.

However, Barnes said Creedin shouted racial slurs at him, a charge with which other members concurred.

The club's bylaws do not discriminate on the basis of race, although they do discriminate on the basis of sex, which itself may be illegal, according to Human Rights Commission Deputy Director Susan McKevitt.

Membership is open, upon payment of a \$5 fee, to any male U.S. citizen, 21 or over.

McKevitt said that since the club as a practical matter is no different than a commercial tavern, she doubted it could legally discriminate against women, as can some clubs that follow specific charters.

Barnes is a former wide receiver at the University of Southern California and a 32nd-degree Mason. He said that while Creedin's behavior "steamed" him, the other members who were at the Raphael Club that day deserve praise because many of them told Creedin his actions were wrong. They were clearly "mortified" and proceeded to buy Barnes beverages for the hour he remained.

Barnes was reluctant to be interviewed for this story, not because he feared recrimination, but because he said he was no longer upset about it. But he eventually decided to discuss it publicly in the hope it will bring about Creedin's removal as club president and "make it so that anyone who wants to can get served there."

Barnes also said he was so pleasantly surprised by the support he received from the other members that he wanted the story told clearly. Because of that support, Barnes said, he would even return to the club if invited.

Barnes said that he and two or three Manchester men returned from Newport, where they had officiated a high school football game, to the Raphael Club, where he had parked his car in the late afternoon on Sept. 16.

"Since we officiated a good ball game," he said, "I asked them, 'How about me buying you guys a beer?'"

Barnes said he saw worried glances among the other men, but none protested, so they entered.

About 100 patrons were inside. On the television, Notre Dame played Michigan in a top 10 gridiron battle.

Barnes walked to the bar and began to order beers for the group from the bartender, whose name he and other club members said they did not know.

Immediately, Barnes said, Creedin walked to the bartender and ordered him: "No (expletive deleted) way."

"The bartender turned to me and said, 'It's not me. It's not me,'" Barnes said, and one of the other football officials, Robert Kerrigan, a physical education teacher at West High School, intervened.

Barnes said Creedin told Kerrigan that Barnes could not be served because he was not a member. Barnes said he put his

\$5 membership fee on the bar.

He said Creedin then said the membership list was full, and with that, he said, another member tore up his card to make room for Barnes.

Barnes said he then asked a second time to be served, but with Creedin standing there watching, the bartender refused, still saying, "It's not me. It's not me."

Kerrigan then bought the beers, and according to Barnes, Creedin shouted at him that he was "out of the club" because of it.

At the same time, Barnes said, other members began shouting at Creedin. "You're wrong."

"I have to take my hat off to the patrons for that," Barnes said. "Everybody was apologizing to me," and so, he said, he decided not to press the matter further, walked away from the bar and drank a couple of beers others bought for him.

Barnes said that during that time, Creedin stood at the corner of the bar and "shouted all the slurs. Some things you can't print. And other things like, you let one in here and the next thing you know, there'll be 50 of them in here. All the good ones."

Creedin, in a separate interview, acknowledged he ordered the bartender not to serve Barnes. "He wasn't a member," he said.

Asked why Barnes was not allowed to become a member, Creedin said, "That's kind of tricky."

He said, "We've had them in here before — colored gentlemen, I mean." Asked why, then, Barnes was denied, Creedin cited "mitigating circumstances," which, he said, was club business.

"This is a private club," Creedin said to end the interview. "We don't want any publicity." (Staff Sports Reporter Vinylia contributed to this report.)

## Raphael Club President Tells Members He's Willing to Quit

By JOHN TOOLE  
Union Leader Staff

Raphael Social Club President Richard J. Creeden has informally told members of the private Manchester men's club he's prepared to resign for the good of the club, due to the outcry over his refusal of membership to a black man.

"Mr. Creeden has agreed if he has to resign for the benefit of the club he will do so," the club's chief steward, George Paradise, said last night.

Meanwhile, after receiving a petition from club members, Creeden has scheduled a special membership meeting at 7 p.m. Oct. 30 for what members say is a discussion of club policies and election of officers, including president.

Creeden "is the one who called the meeting," Paradise said.

Creeden, a Manchester Street resident, got into trouble with the club, and the community, for refusing both a drink and membership to a 44-year-old black Nashua resident, David Barnes.

The NAACP last week demanded Creeden at least apologize for the incident.

And the state's Human

## RAPHAEL

(Continued from Page One)

Rights Commission chairman, Barry J. Palmer, a copy editor at The Union Leader, said if the club didn't remove him as president, he would call for a state investigation.

Barnes said an apology wasn't enough and Creeden should quit his post. Barnes also commended club members who stood up for him in the face of Creeden's actions.

Paradise characterized the membership meeting as an effort "to resolve the whole, unfortunate mess."

Said Paradise, "We are definitely handling it."

Paradise notes club members were put in the difficult situation of promptly resolving the trouble but having to research club rules first to see what could be done.

"This is one of those things we couldn't solve overnight," Paradise said. "We had a lot of pressure on us, but we didn't want to rush into it."

## Don't Blame the Club

Given the presence of good will and intelligence, a final resolution of the nasty racial controversy at Manchester's Raphael Social Club, whose membership includes judges, lawyers, businessmen, politicians and prominent local sports personalities, should be imminent. All signs are positive.

Granted, there may be some striking similarities between the now revealed September 16th racial incident at the West Side club and an early-1960s infamous controversy at the American Legion's Jutras Post, but it is the differences that distinguish the former from the latter.

To be sure, in each instance, a black man was refused bar service because of the color of his skin, refused by a bartender acting under orders of a club official.

In each instance, the black man discriminated against conducted himself in a gentlemanly manner.

In each instance, although he was quite properly angry that this sort of thing could happen in the "Deep North," he was reluctant to speak out.

In each instance, he did so only when he became convinced that silence was the worst of evils, that the intolerable simply could not be tolerated lest others be similarly victimized.

But there the similarities end.

The Jutras Post racial controversy was a total debacle from beginning to end. At a time when the public pulpits of the clergy, academicians and the news media were aflame with righteous indignation over racial discrimination — in Little Rock, Arkansas — most prominent local citizens ratified the bigoted decision not to serve the young serviceman. That is, they ratified it either openly by their words and actions or tacitly by their silence.

Subsequently, the state department of the American Legion shamefully whitewashed the whole affair. This came as no surprise at all, since its "investigator" began his "inquiry" (in the presence of this writer) with the words, "Okay, where is this nigger troublemaker?"

But it is now nearly three decades later. In refreshing contrast to what transpired during the Jutras incident, prominent Raphael Club members

interviewed by this newspaper (the sole exception being Superior Court Judge William O'Neil, who cravenly sought refuge in professed non-involvement) expressed their chagrin at the refusal to serve one David Barnes, a soft-spoken 44-year-old computer specialist from Nashua and high school football official.

Eager to make amends, these members are understandably concerned about the effect of the incident on the club's reputation and, inferentially, on their own.

Well, we submit that, depending on what happens now, they need not be concerned — not on either count.

Barnes, a former wide receiver for the University of California, says he was treated kindly by the overwhelming majority of the club members who witnessed the disgusting affair and has no interest in prolonging the controversy by filing a complaint with the New Hampshire Human Rights Commission.

*Club president Richard J. Creeden, assuming that he values the club's reputation, could, if he chooses, preserve the club's reputation unilaterally, simply by following up on his long overdue promise to apologize to Barnes with a voluntary submission of his resignation from the club presidency.*

If Creeden cares about the club's reputation, he should not put the membership in the position of having to consider whether to remove him from office. Barnes, who reportedly was on the receiving end of several Creeden racial slurs, expressed his conviction that the club president "was in no way representative of the clientele of the club."

Barnes surely is entitled to more by way of redress of his entirely justified grievances than a mere apology, belatedly and begrudgingly offered.

Creeden must go, if not voluntarily then by vote of the membership. Indeed, the only way to harm the reputation of the Raphael Club would be for the membership to tread the benighted path that Jutras Post followed in the early-Sixties and allow the ill will generated by this incident to fester.

It is almost inconceivable that that could be allowed to happen.

—Jim Finnegan

## Kudos For Kerrigan

Paeans, kudos and a special tip of the hat to Robert Kerrigan, a physical education teacher at Manchester West High School, who during the racial incident at the Raphael Social Club (see editorial above) tore up his membership card in order to "make room" for a prospective member who

was being denied service because of his black skin pigmentation. Kerrigan then bought the beers and reportedly endured threats from the club president that he was "out of the club."

The non-membership argument was phony; Kerrigan's gesture was not.

—Jim Finnegan



# Manchester Social Club To Apologize to Black Man

## Accepts President's Resignation

By JOHN TOOLE  
Union Leader Staff

Members of Manchester's Raphael Social Club, meeting privately last night in an effort to put a racial incident behind them, voted unanimously to offer an apology and membership to the black man barred from the club by their former president.

The 217 members who attended the 52-minute session also formally accepted the resignation of that club president, Richard J. Creeden of Manchester Street.

"The members unanimously voted a letter of apology be sent to Mr. (David) Barnes in the name of the club and he will be offered membership in the club," spokesman Frank Harlan said in a telephone interview from the club. "Mr. Creeden's tenure . . . ended officially this evening."

Visiting the club with friends in September, Barnes, 44, a high school football official from Nashua, was refused service and denied membership by Creeden.

The apology will be made to Barnes, Harlan said, because "It

(was clear) that day and every day since that the club members deplored the actions of Mr. Creeden."

After the incident became public through reports in The Union Leader earlier this month, Creeden resigned.

Barnes, although he commended club members who defended him at the time, has since filed a complaint with the state's Human Rights Commission over the matter.

Club members also chose one of their number to co-sign checks with the treasurer and selected a five-member nominating committee to search out candidates for the annual club elections, scheduled in January.

They also reaffirmed membership rules, which state that any male, 21 years of age and a citizen in good standing of the United States, may belong.

Club members demanded the meeting, which Creeden called before resigning.

Several indicated they wanted to move quickly to put the incident behind the club and get things back to normal. But because Creeden had run the club — well, by their accounts —

for more than two decades, and was consistently reelected, so few knew what to do to replace him, they were sent scrambling to check club rules.

But then the club encountered the problem of finding people to step forward and fill leadership roles.

"The adverse publicity scared many people away," Harlan said. "Nobody wanted to face the press."

Harlan, who is used to doing so as a leader of the city's teachers' union, stepped into the breach, as did a handful of others.

The spokesman last night said he did not want to release names of the new officials because members want to keep their internal workings private for now. "Most of the people are a little sun-shy" due to the bad publicity, he said.

"It's a cleaning up," Harlan said of last night's meeting.

"It was a very orderly meeting," he said. "Many members expressed they were horrified, appalled and hoped it would never happen again. Most felt that it happened once was too much."

Not one person condoned what Creeden did, Harlan said.

Even those loyal to Creeden, aware that he "did a good job" over the years, urged the former president to make amends after the incident. "Even his strongest supporters have told him he is wrong and urged him to make an apology," Harlan said.

"I understand Mr. Creeden this week sent a registered letter with his personal apology to Mr. Barnes," Harlan said. "I was told that, and I certainly hope he did."

The club is prepared to deal with a state investigation.

"Our position is if they want to come down and make an investigation, we welcome it," Harlan said. "We feel we have a very strong, pro-civil and human rights position in the club."

Witness, Harlan notes, the strong reaction by club members to Creeden's actions. "It was unanimous condemnation of Mr. Creeden and Mr. Creeden's actions," he said.

"I think we want to go forward, go in a positive direction," Harlan said of the club's active 476 members.

## When Good Men Do Nothing

When we are wrong, we admit it.

And we were clearly mistaken in our editorial conclusion that, "given the presence of good will and intelligence" and the fact that the membership of the Raphael Social Club includes judges, lawyers, businessmen, politicians and other prominent citizens, all signs were positive for a prompt resolution of a nasty racial controversy that had developed at the Manchester establishment.

We wrote in our October 16th editorial, "Don't Blame the Club," that it was "inconceivable" that the Raphael Club, whose president, Richard J. Creeden, reportedly refused bar service to a black man, would "tread the benighted path that Jutras (American Legion) post followed in the early-1960s and allow the ill will generated by this incident to fester."

Although Creeden finally announced his long-overdue resignation yesterday, we still stand justly accused of naivete, albeit we are in agreement with New Hampshire Human Rights Commission Chairman Barry Palmer that "this type of bigoted demonstration was outlawed more than a quarter-century ago and . . . has no place in New Hampshire, now or ever." Had our cynical faculties been in good working order when we wrote the editorial, we would have realized that the problem would be transformed into a crisis once good men decided to do nothing when confronted with evil.

As a result of the failure of the club's leadership to take the instant remedial action required, the gentleman treated so shabbily, 44-year-old David Barnes, appealed last week to the Human Rights Commission.

Which should surprise no one. The failure of the club's officials to contact him, and of Creeden to proffer his resignation — or even his belated, reluctant, all-but-promised apology — left Barnes with no other dignified alternative. The high school football official, a former wide receiver

for the University of Southern California, is soft-spoken, but he is obviously not a pushover.

*"I'm the one who was humiliated in front of about 100 people and I still haven't heard a thing from anyone in the top echelon of the club,"* he told The Union Leader over the weekend.

Nevertheless, it is to the credit of the computer specialist from Nashua that he has somehow managed to retain perspective on what happened to him last September 16th, when he reportedly was also on the receiving end of some vicious racial slurs. Early on, he expressed his conviction that the club president "was in no way representative of the clientele of the club," many of whom rallied to Barnes' support at the time of the incident. And, explaining his reluctant decision to avail himself of the Human Rights Commission's subpoena and decision-making powers, Barnes reemphasized:

*"I'm not after the patrons."*

Now, on the heels of Barnes' statement that he had protested to the state Human Rights Commission, comes news of Creeden's long-overdue resignation. Yet, over the weekend, the club's chief steward, George Paradise, had announced that "we can't do it overnight."

Well, apparently it was done . . . overnight.

*The tragedy is that there was a time, at the very outset of this controversy, when the entire affair could have been — and should have been — resolved overnight, literally, by the simple expedient of Creeden apologizing promptly following the shameful, now five-week-old incident and perhaps, to demonstrate sincerity, offering to serve Barnes a drink personally.*

Had that been done, the matter would not have been publicized and Barnes, judging by his earlier statements, would have had the satisfaction that was his due.

—Jim Finnegan

# Raphael Club President Quits

By JOE MAPOTHER  
Union Leader Staff

Richard J. Creeden, embattled president of the Raphael Social Club, resigned his position yesterday in another aftershock from a September incident when Creeden refused service to a black customer in the private club.

The long-time president orally gave his resignation yesterday morning and then signed a brief statement to that effect which was posted in the West Side club, according to George Paradise, chief steward.

The resignation came one day after the man who was refused service, David Barnes, 44, of Nashua, announced that he had contacted the state Human

*"Personally speaking, it's welcome."*

David Barnes

Rights Commission about the Sept. 16 incident.

According to Paradise, the resignation had been in the works for some time but only became official yesterday.

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Creeden refused service to Barnes when he entered the 237 Granite St. club with two members after they had officiated a

high school football game. According to Barnes, Creeden shouted racial epithets and refused to let other club members buy Barnes a beer, although the membership present largely was opposed to Creeden's actions.

"Personally speaking, it's welcome," said Barnes of the resignation. But he said, "I have yet to hear from anyone in management and we're talking six weeks now," since the incident.

"I am technically still in pursuit of restitution.

"I still can't drink in there even if the patrons say I can. They said it was all right the first time I walked in there." Barnes said.

Paradise has said the club has

no objections to Barnes coming in, but Barnes said he is waiting to see whether the club leadership will apologize for the incident. Barnes said he feared the same type of incident could happen if club leaders maintained the status quo.

Attempts to reach Creeden yesterday for comment were unsuccessful.

Before resigning, Creeden called a special meeting for Oct. 30 and, according to Paradise, it still will be held although the question whether membership can elect new leadership under club bylaws has not been sorted out. The bylaws state nominations will be taken in December and elections held in January, Paradise said, and the club wants to stick to the rules it was founded under.

"I'm still high on New Hampshire," said Barnes, who moved to Nashua 10 years ago. He said one of the reasons for moving was to escape racial tension.

"It's kind of a left-handed slap in the face that says, 'Hey, it's still around.'" Barnes said.



**THOMAS HERMAN, a part-time Newfields police officer, handed out Halloween candy in his Ku Klux Klan robes. (AP)**

## ***Newfields Selectmen Complain KKK Hotline Lists Their Phones***

**NEWFIELDS (AP)** — The Ku Klux Klansman who works for the Rockingham County Sheriff's Department is continuing to make waves.

Dozens of calls have come into the department in recent weeks complaining about Thomas Herman, an active member of the KKK who had been working as a radio technician for Rockingham County.

To compound matters, a controversial photo of Herman in his Klan robe handing out candy to children on Halloween appeared in a local paper and rekindled emotions in the area.

Now selectmen in Newfields say they're upset with Herman because he has included their names and phone numbers in a Klan recording

that is played on his home's answering machine.

"He is, in essence, steering the Klan on the selectmen," board chairwoman Betsy Coes told Foster's Daily Democrat of Dover.

Last month, selectmen voted to suspend Herman from his job as a police officer with the Newfields Police Department for 60 days. They cited threats against Herman and concern that another officer might be confused with him as reasons for the decision.

Herman's message urges callers to complain about the selectmen's decision.

Meanwhile, Rockingham County Sheriff Wayne Vetter says he has no intention of firing Herman from his job as long as he keeps his personal views away from his work.

## New Hampshire Faces Influx Of Ethnic Population

CONCORD (AP) — New Hampshire's snow-white image is being colored by an influx of ethnic groups and the state has to be prepared to deal with the potential racial problems that might ensue, some observers say.

"If the state's self-image adheres more to myth than reality, it will have great difficulty dealing with problems like the possibility of increasing racial hostility in communities," said Arnie Alpert, program coordinator for the New Hampshire chapter of the American Friends Service Committee.

The state is expected to gain more Central and South American residents, more blacks, and may see more refugees from Soviet bloc nations, according to a report in the Boston Sunday Globe.

"It's not very apparent to people, but there are 7,000 Hispanics in Manchester, and Nashua's population is even larger," said Nury Marquez, executive director of Manchester's Latin American Center.

Patricia Garvin, the state refugee coordinator, said that because New Hampshire's population has been 99 percent white until now, even a change to 92 percent white can be significant.

Garvin said the state has a number of Cambodian, Laotian and Vietnamese refugees and she expects there will be more Vietnamese coming in, as well as Romanians, Czechs and possibly Soviets.

"Romanians are the largest growing group," she said. "But it's possible we may see a real increase in the number of Soviets because half of the refugees admitted to the U.S. over the next year will be Soviets — Soviet Jews and evangelical or Pentecostal Christians with fam-

ily here. So it's likely we'll get more."

State officials acknowledge that New Hampshire's demographics are changing, but they say the real ethnic mix won't be known until results of the 1990 census come out in 1991.

State and private groups have shown concern over potential problems. The state Department of Education has created a panel to encourage multicultural education in the schools.

The New Hampshire Humanities Council will hold a conference Saturday on the state's cultural landscape.

"The purpose of this conference is to get people to start thinking New Hampshire is not this monolithic, Anglo-Saxon state," said Kathy Smith, the council's assistant director,

The conference will feature a black keynote speaker, Henry Louis Gates, an award-winning literary critic and author who attended Phillips Exeter Academy and has an honorary degree from Dartmouth College.

A new group backed by the Exeter Chamber of Commerce was formed to oppose the spread of the Ku Klux Klan in the area after the disclosure of a Klan recruiter on the Newfields police force.

Alpert said more racial diversity may threaten the state's image of itself as it looks in a new mirror.

"The New Hampshire myth is that everybody's white and Protestant, that they live in small towns with white people, white churches, white houses and white mountains," he said. "In the country, there has been an increase in racist incidents on campuses in the past few years," reflected by some at Dartmouth and the University of New Hampshire.



**DEMONSTRATORS**, mostly from St. Paul's School in Concord, carried placards calling for New Hampshire to honor Martin Luther King Day yesterday at the State House in Concord.

(Staff Photo by Nancy West)

## NH Students Protest Lack of King Holiday

### From Staff and Wire Reports

**CONCORD** — Four of every five school districts in New Hampshire did not officially recognize Martin Luther King Day yesterday, but students at several held demonstrations in memory of the slain civil rights leader.

Students at high schools in the Penacook section of Concord, Milford, Merrimack and Wolfeboro held demonstrations to protest the state's unwillingness to recognize King's birthday as a holiday.

And several hundred students and faculty members of St. Paul's School, which announced yesterday morning that it would observe the holiday, marched from the private school's Concord campus to the State

■ The nation paused yesterday to honor the memory of Martin Luther King Jr.

Page 3

■ Five lawmakers will move to make Dr. Martin Luther King's birth date a New Hampshire holiday.

Page 4

House.

Meanwhile, a Ku Klux Klan leader and two companions dressed in white robes and hoods handed out leaflets in downtown Portsmouth and two neighboring towns.

Steven Schultz, a reporter for Foster's Daily Democrat in Dover, said KKK recruiter Tom Herman of Exeter handed out leaflets yesterday afternoon

during a snowstorm in downtown Portsmouth.

"We had the day off, so we figured we'd do something useful," Herman said.

Schultz said the Klansmen were pelted with snowballs by young people and left.

Police in Newmarket and Exeter also reported brief sightings of men in white sheets and hoods.

"Nobody seemed interested so they got into their car and left," Sgt. Kevin Cyr of the Newmarket police said.

Herman, a Rockingham County Sheriff's Department employee, was fired recently from his job as a part-time police officer in Newfields. He also is challenging Exeter's refusal to let him sell guns from his home.

**PROTESTS**

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## PROTESTS

(Continued from Page One)

Though New Hampshire is one of four states that does not recognize the national Martin Luther King Day holiday, 35 of the state's 171 school districts do.

The other states that do not recognize King Day are Montana, Idaho and Arizona. Arizona had been set to take the day off but did not, pending another vote to ratify the holiday.

At Merrimack Valley High School in Penacook, about 150 students — organized by an impromptu series of telephone calls Sunday night and word of mouth in the halls yesterday morning — walked out of their second period classes to remember King.

"I think they're just trying to show that Martin Luther King Day is important," said Thom Tucker, a senior who helped organize the rally.

"A lot of people don't know who he is or what he was all about," senior Mike Krummacker said. "This was our own personal way of remembering him. To quote him, 'If we're wrong in what we're doing, then justice is a lie.'"

More than 200 students at Milford AREA High School used the school library for a sit-in demonstration.

Nathaniel McBee, one of a small number of black students at the school, said his parents gave him permission to stay home in honor of King but he chose instead to organize the sit-in.

"I decided to come and make my reasons known because I believe he deserves a holiday," McBee said. "I'm just planning

on educating the group about Martin Luther King."

As students crowded the library to share thoughts and impressions of Dr. King, some refused to attend the protest, laughing and exchanging skeptical remarks in the hallways.

"There are a lot of people here (just to get the day off from classes)," said student Betsy Nolan.

Nolan said she agreed with the idea of taking a stand for civil rights, but suggested a request to the school board or other administrators might be more effective.

McBee said he plans to petition the school board for a King holiday.

Some students who participated stood at a microphone and expressed opinions of King, his ideas, and how they affect their own lives today.

"This isn't just white-black racism, it's everywhere. Every race of people has been oppressed at some point in history and Martin Luther King stood up for every race of people. That's why we're here," said student Alan White.

Junior Amy Potlcha told a cheering audience, "I'm Jewish and I'm here for the blacks (and everyone). We need to get together. We need to believe in each other as well as Martin."

Some at the sit-in said the speeches were their only source of information about King at school.

"We're learning what our teachers should be teaching us," said junior Mim Malin.

She reported one of her classmates this year did not even

know King was black. "That's disgusting," she said. "That just proves how we're not being taught."

But assistant principal Brian Erwin said students are taught about King at the school.

Students in other districts that celebrate King day probably are skiing, working or sleeping, according to Erwin. "At least these kids have some sense of what we're doing here," he said.

Students who cut classes to attend the sit-in will be penalized depending on their discipline record, which could mean "a detention situation all the way through to a suspension," according to Erwin.

At Kingswood Regional High in Wolfeboro, about 125 students took part in a demonstration that kept them out of classes for about two hours after lunch.

Students from St. Paul's carried signs and chanted, "Ain't gonna let nobody turn me around."

At the State House, House Speaker Douglas Scamman told them a bill calling for an official King holiday could not be introduced again until next year. Such legislation has been voted down in the past.

In Manchester, the Martin Luther King Day Coalition sponsored a breakfast at the Chateau Restaurant in Manchester.

Special awards were presented to Lionel Johnson, president of the Manchester chapter of the NAACP, and the guest speaker, State Rep. Wayne M. Burton, assistant dean of the Whittemore School at the University of New Hampshire.

Union Leader Correspondent Robin Morgasen contributed to this report

[From the Portsmouth Herald, Jan. 16, 1990]

# Klan holds King Day area recruitment effort

By **MAGGIE REED**

Herald Staff Writer

EXETER — Ku Klux Klan members, dressed in full Klan garb, showed up in various Seacoast towns in a recruiting effort on the occasion of Martin Luther King Jr. Day Monday afternoon.

Klan members, including Exeter's Thomas Herman, showed up in Newfields, Exeter, Newmarket, Portsmouth and Dover Monday as part of an area-wide recruiting sweep, according to Mr. Herman.

Peter Lewis, a Newmarket resident, said there were three men and one woman recruiting in his town. "I saw them going up and down the street, and thought this was a piece of American history so I went out and took a couple shots ... pictures, not guns," the Main Street resident said.

The Klan members were handing out leaflets up and down Main Street, Mr. Lewis said. One carried a sign that read "Save our land, join the Klan" and gave a

## Five Seacoast communities visited

telephone number. Mr. Lewis said he did not talk to the Klan members, except to wish them a happy Martin Luther King Day.

Mr. Lewis said some youths came out of the Newmarket House of Pizza and started yelling at the Klansmen, "giving them grief.

eter, is the Grand Secretary of the Invisible Empire, Knights of the Ku Klux Klan, Realm of Maine, New Hampshire and Vermont.

Although the Klan's presence has been known, Monday was the first occasion that Klan members recruited in public in Klan outfits.

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**"I saw them going up and down the street, and thought this was a piece of American history, so I went out and took a couple of shots ... pictures, not guns."**

—Peter Lewis  
Newmarket resident

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Even I was tempted to throw snowballs at them, but that wouldn't have done any good."

The existence of the Ku Klux Klan in the Seacoast area first came to light in a Portsmouth Herald story in late September. Mr. Herman, of 9 Salem St., Ex-

Several towns, including Exeter, have received reports of Klan literature being left on motor vehicles, but no Klan members have been seen.

Exeter Police Chief Frank Caracciolo said his department

received calls of Klan members walking up and down Water Street around 3 p.m. Monday, but by the time police officers arrived, they were gone.

Newmarket Police Chief Paul Gahan related a similar story. "They stayed a few minutes, no one showed any interest, and they left. We received a couple of calls but by the time we got there, they were gone," Chief Gahan said this morning.

Mr. Herman is currently a radio technician with the Rockingham County Sheriff's Department. Prior to the revelation of his involvement with the Ku Klux Klan, he was also a part-time Newfields police officer.

He was relieved of his duties as a police officer by the Newfields Board of Selectmen in early December. Board members cited a lack of confidence in Mr. Herman, insubordination and intimidation as reasons for the dismissal.

Mr. Herman has said he will file a civil rights violation suit with the American Civil Liberties Union concerning the firing.

## In the Legislature

# Plan Would Stiffen Sentences For Criminals Motivated by Hate

CONCORD (AP) — Criminals driven by racism or bigotry will face stiffer penalties under a bill that would add hate crimes to a list of offenses that qualify for longer jail terms.

The House Judiciary Committee will vote next week on the bill sponsored by Rick Trombly, D-Boscawen.

At a committee hearing, Trombly said crimes committed out of religious, racial, sexual or ethnic hatred should be punished more severely than other offenses.

"We must put people on notice now that we're not going to

tolerate these types of actions," Trombly said.

Trombly said vandalism last year at a Concord synagogue was one of the incidents that inspired him to propose the new legislation. Another such event, he said, was the 1988 Nashua murder of two women said to be lesbians.

New Hampshire law currently allows judges to give stiffer sentences under six circumstances, including cases involving elderly or handicapped victims, extreme cruelty in a murder and sex crimes on a victim under the age of 13.

A crime which normally

would carry a maximum sentence of a year could bring a sentence of two to five years. Felonies which usually bring a maximum of 15 years could put the offender away for life.

Claire Ebel, executive director of the New Hampshire Civil Liberties Union, was the only person who spoke against the bill at Thursday's hearing. Ebel said she would prefer to see New Hampshire develop comprehensive civil rights legislation, so that defendants in such cases would face separate charges to which they would have an opportunity to respond.

Marcus Hurn, a board member of the Citizens Alliance for Gay and Lesbian Rights, praised Trombly's legislation. He said people who act out of prejudice and bigotry pose more of a threat to society than other criminals.

When swastikas are painted on a synagogue or violent language against homosexuals is painted on a gay man's door, that affects all Jews and all homosexuals, he said.

"It spreads fear in a way ordinary crime doesn't," he said. "The ripple effects of these individual hate crimes are severe."

# Nashua Police Agree to \$140,000 Settlement in Brutality Suit

By KRIS FRIESWICK  
Union Leader Correspondent  
NASHUA — A \$140,000 out-of-court settlement has been reached between the police department and a fiscal man who alleged three officers beat him with a billyclub during a routine visit in 1987, according to the man's lawyer.  
The settlement between Fred Gomez, 22, of 18 Conant Road, at the Nashua Police Department was reached during the first week of February, according to Ralph Holmes, Gomez's lawyer.  
A \$2 million civil case, which sought damages from the department for alleged false ar-

rest, assault and battery, malicious prosecution and deprivation of constitutional rights, was scheduled to go to trial March 5.

George Lindh, the Manchester attorney representing the police department in the case, would confirm only that the case had been resolved, but he refused to confirm the settlement amount.

"The Nashua Police Department has made no admission of liability or wrongdoing whatsoever," said Lindh. "This is still a disputed claim."

Gomez was arrested at 1:30 p.m. on April 12, 1987, after his girlfriend called police following an argument with him.

Three police officers, Harold Even, Nelson Gerow and Kenneth Parker, responded to the scene, according to police reports.

As a group of people looked on, Gomez alleged, one officer handcuffed him, and when the two other officers arrived, he was beaten on the back, arms and legs with a billyclub by Even while Parker and Gerow held him against the roof of the police cruiser.

Gomez, who was 18 at the time, was charged with disorderly conduct, two counts of resisting arrest and assault, a charge which was added later. Gomez was found innocent of all charges in July 1987.

Officer Even has since left the Nashua Police Department and is working in Hartford, Conn. Parker and Gerow are still working as police officers in Nashua.

The Gomez family, while happy with the settlement, hoped that they would get their day in court.

"All we wanted was the truth

to come out," said Rose Gomez, Fred's mother. "I want it to be known that there is something wrong with the Nashua Police Department. I want to see that this doesn't happen to anyone else."

Gomez said that his life has changed much since the incident in 1987. He is on medication. He has had trouble sleeping and eating, and he doesn't like to go anywhere by himself.

"I feel like I always have to have a witness with me," said Gomez.

Witnesses, eight to 10 of whom came forward after the 1987 incident, were the only reason Gomez received an out-of-court settlement, said Mrs. Gomez.

"The only way we beat this thing was because we had the witnesses that came forward," said Mrs. Gomez, "and thank God for them. It never would have gone as far as it has if it weren't for the witnesses."

Another key factor in the out-of-court settlement, said Mrs. Gomez, was the tape recording of a phone conversation

between Even and Gerow shortly after the incident, a conversation in which Even tells Gerow to add an assault charge to the arrest report so that "we can better justify what happened." Gerow responded, "It ain't gonna look good" to charge him after the fact.

The tape, which came from the routine recordings made of all phone calls in the police station, was played at Gomez's criminal trial in 1987, according to Holmes.

Gomez said he still faces charges of speeding, resisting detention and possession of marijuana stemming from his arrest earlier this year.

Gomez alleged that this recent arrest is just one more in a series of harassment stops made by Nashua police against him and his family since the incident.

"The settlement is a lot of money," said Gomez, "but for what they have done, it's not enough."

Lawyers will take a large percentage of the settlement amount, said Gomez, and the



FRED GOMEZ

remainder will be used to pay medical bills and reimburse his mother and father for other expenses he incurred over the past three years.

[From the Union Leader, Mar. 20, 1990]

## Attorney: Accent Offer 'Disgusting'

By JOHN HART  
Union Leader Correspondent

EXETER—An Exeter Hospital program designed to tame the foreign accents of people who speak English as a second language has drawn a strong protest from the president of the Rockingham County Bar Association.

"This is disgusting," said Larry Gillis, a criminal defense attorney.

"I think the mindset behind this program is dangerous," he said. "It invites criminal lawyers to participate in cultural imperialism and cultural genocide."

"My clients are not performing bears in a circus," said Gillis. "You don't have speak 'Yankee' to get a fair jury trial here."

Exeter Hospital officials say they can't comprehend Gillis' criticism of the Foreign Accent Reduction Program.

Karen Michel, speech-language pathology supervisor, said of Gillis, "I don't know where he's coming from. This (program) is specifically developed just to enhance someone's speaking skills, intelligibility . . ."

The program was developed under the guidance of the hospi-

tal's Speech-Language Pathology Department. The hospital sent out more than 100 letters to attorneys, managers, professors and others. The letters said, in part, " . . . you may have clientele who would benefit from a program which reduces foreign accent and improves overall speaking skills."

The letter was signed by Michel and her associate, Michele Poynton-Marsh.

Michel said the program is not widely known in this area but is popular in other parts of the country.

Michel and Poynton-Marsh asked the recipients of the letter — which came with an attached program outline — to "disseminate copies to your clients as appropriate."

Michel said, "We're targeting professionals in the business of communicating with a variety of people who may be of a foreign background and have English as a second language."

The program was developed by Arthur J. Compton of the Institute of Language and Phonology in San Francisco.

The program outline said, in part, that it is intended for "English-speaking foreign individuals whose accents are interfering with the ability to communicate effectively within the confines of their work or social environments."

Michel said the program is taught by certified instructors in small groups or privately.

THE UNION LEADER, Manchester, N.H. — Thursday, April 5, 1990

## 3 More States OK King Day; NH Opponents Are Unmoved

CONCORD (AP) — Spreading national acceptance of a holiday honoring the Rev. Martin Luther King Jr. has left New Hampshire opponents of the observance unmoved.

Twenty-two years after King's death, only three states — New Hampshire, Arizona and Montana — have not adopted a holiday in honor of the civil rights leader who was assassinated April 4, 1968, in Memphis, Tenn.

Kentucky, Wyoming and Idaho recently bowed to pressure to name days that indirectly honor King, seven years after Congress created a holiday to honor him on the third Monday in January, near his Jan. 15 birthday.

New Hampshire won't be quick to follow suit, Senate Majority Leader Edward Dupont, R-Rochester, said Tuesday.

"We always have the distinction of being the last or the first," he said. "In the minds of most legislators, it (the national practice) isn't a significant fact we use to support Martin Luther King day."

In fact, the Legislature just rejected a plan to change its Memorial Day observance from May 30 to the federally mandated last Monday in May.

New Hampshire legislators have consistently voted down King holiday proposals since 1979. After losing in 1989, backers said they would try again in 1991, the next time legislative rules allow it.

Rep. Deborah Arnesen, D-Orford, said her first speech as a lawmaker seven years ago was in support of the King holiday, and she expects to make more next year.

"There are times when New Hampshire can feel pride in its unique posture," she said. "However, I feel that our unique status vis-a-vis this holiday does



MARTIN LUTHER KING JR.

*"We always have the distinction of being the last or the first."*

Edward Dupont, R-Rochester,  
Senate Majority Leader

not suggest a badge of courage but rather a badge of intolerance and prejudice."

Dupont suggested honoring King "as one of many civil rights contributors," including Presidents Kennedy and Johnson, but holiday backer Sen. Susan McLane, R-Concord, said that won't wash.

"We want to do what the rest of the nation has done," she said. "Having it on a Sunday or changing the focus doesn't do the trick."

"Having Martin Luther King day has become a national symbol and it's time New Hampshire joined the throng."

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## National Digest

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### Arizona Lawmakers OK King Day

PHOENIX (AP) — The Arizona House Tuesday joined the Senate in voting to create a paid state holiday honoring the Rev. Martin Luther King Jr. and Gov. Rose Mofford said she would sign the bill before the day's end.

The House measure, passed 35-24, designates the third Monday in January as Martin Luther King-Civil Rights Day for state employees.

It also would repeal a September bill that created a King holiday but eliminated the state's paid Columbus Day holiday.

THE UNION LEADER, Manchester, N.H. — Thursday, May 17, 1990

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# ACLU To Support Klansman Who Lost Police Job

By MICHAEL COUSINEAU  
Union Leader Staff

The state chapter of the American Civil Liberties Union has agreed to represent an Exeter man who says his membership in the Ku Klux Klan cost him his job as a Newfields police officer.

The New Hampshire Civil Liberties Union agreed late Monday to provide legal representation to Thomas Herman, who was terminated from his part-time job last December by the Newfields selectmen.

"If you start permitting the government to make a list of groups non-compatible with public employment, you give them the right to say what groups you can belong to," said Claire Ebel, NHCLU executive director.

"It's the speech that is unpopular, that we judge, that needs the protection the most," Ebel said.

Herman said he was fired last December, because of his KKK membership, a white supremacist group in which he is a regional recruiter. The Newfields Board of Selectmen maintains Herman was terminated because

members lost confidence in his ability to perform his duties as a part-time police officer.

Herman, who is also a radio technician with the Rockingham County Sheriff's Department, said yesterday he is "ecstatic" that the NHCLU will represent him.

"The town of Newfields has to realize they can't get away with it — can't violate people's constitutional rights and get away with it,"

Herman said. "I'd like fat punitive damages lodged against the town of Newfields," he said. Herman said he also will request back pay from the time he was

## KLANSMAN

(Continued From Page One)

suspended last October and reinstatement to the department.

The reasons cited for Herman's firing included the public's reluctance to rely on emergency help because Herman might respond to calls; Herman's stated affiliation with the KKK; listing Selectmen's home phone numbers on his KKK telephone hotline; and Herman's insubordination for calling the selectmen harassment.

"His political affiliation with the KKK is not the reason we took the action we did," Selectmen Fran Lane said last night.

"I feel we were weighing questions of fundamental constitutional rights vs. serious issues concerning our community and we felt we had no other choice," Lane said.

"I'm confident (the decision) will be upheld," Lane said.

Herman, who has been seen in Exeter wearing the Klan's traditional white-hooded robes, called the reasons for his dismissal "a smokescreen." Herman ran unsuccessfully last March for a seat on the Exeter Board of Selectmen.

Ebel said the 21-member board of directors has a spirited discussion several hours every week to represent Herman.

A majority of the board members chose to allege rights violations against Herman.

Members of Exeter's Board of Selectmen targeted (by the KKK) Concord attorney John Berg, who is on vacation at the time.

The group's legal pay last month to reconvene the board of directors.

Rockingham County Wayne Vetter said he was surprised that the civil liberties group will represent Herman.

"It really was a hot issue. I'd have thought they would have jumped on it a long time ago," Vetter said.

Vetter said Herman's membership in the KKK is a public "hot" disciplinary problem. He has not attempted to recruit efforts to work would violate a council policy.



THOMAS HERMAN



CLAIRE EBEL

# Cheshire Officials: Racist Paraphernalia Has No Place at Fair

**NORTH SWANZEY (AP)** — Cheshire County fair officials say racist and anti-Semitic paraphernalia has no place at the fair and can no longer be displayed or sold there.

"We will tell (the vendors), 'Don't display it and don't sell it. It's not for sale here,' " said Robert F. Silk, one of the Cheshire Fair Association's 18 directors. "We try to keep all that stuff out of here. We try to run a clean, family fair here."

Silk referred Wednesday to at least two vendors who were selling bumper stickers and pins with swastikas and racist slogans.

One vendor's wares included a round bronze tag that said, "Member KKK in Good Standing."

Displayed among stacks of assorted bumper stickers for sale also were small stickers saying "White Power" and others with derogatory slogans against homosexuals, Japanese, and people with AIDS.

"There's 300 vendors down

there," said fair general manager Wesley Cobb. "Hard as you may try with a limited number of people running the organization, it's extremely difficult to weed out people who are selling items that aren't up to the type of standards that we try to project."

Cobb said he was confident that the vendors would remove the items "because they'll want to come back next year."

One of the vendors, who would not give his name, told The Keens Sentinel that he's been "selling this stuff for years and never got a complaint."

Most of his goods were motorcycle T-shirts, stickers and other trinkets.

He said the swastikas and racist slogans have sold well this year, as they have in past years he has attended the fair.

But pewter peace-symbol pins, which he also displayed, sold equally well, he said.

"I've got a right to sell these things and people have a right to buy them," he said.

# SHIRAZI'S deputy in N.H. described as Klan recruiter

By Bob Holter  
Globe Staff

MANCHESTER, N.H. — A police officer who describes himself as the grand secretary of the Ku Klux Klan in New Hampshire and Maine has asked for a license to run a mail-order gun business out of his Exeter home, according to an Exeter selectman.

Tom Herman, 27, a Rockingham County sheriff's deputy and part-time police officer in Newfields, wrote in a recent recruiting letter obtained by the Globe that the KKK is "already making inroads in the Seacoast area" in its campaign to save the white race from "the ash heap of history."

Herman, who sources said owns a large cache of weapons, including machine guns, last week requested a license to sell handguns out of his home, arousing concern in the area.

"We have to assume that he really does intend to create a disturbance," said Algene Bailey Sr., president of the NAACP chapter in Portsmouth. "We could have a real disaster if people like him start burning crosses and trying to intimidate people here."

Herman, whose KKK involvement has shocked officials in Newfields and Rockingham County, is vacationing in Germany and could not be reached for comment yesterday. But a recording on a telephone hot line operating from Herman's home until two days ago said: "The media wants you to think we are evil. The truth is they're terrified of us because we dare to stand up for decency."

The recorded male voice on the hot line called for keeping the white race pure and returning blacks "to the land of their ancestors."

Selectman Paul Binette of Exeter said yesterday that the Board of Selectmen would not issue Herman a license to sell guns out of his home in a residential neighborhood. The board denied a similar request by another resident last year.

"We can't deny him his right to belong to the KKK," Binette said. "But I'm very disturbed that he has chosen to do it in our own back yard. We have a picturesque, peaceful little town here, and we want to keep it that way."

Newfields Police Chief Michael Daley said he was shocked to learn of Herman's role in the white supremacy group.

"The way he has treated people in my town, I would never suspect him of getting into something like

this," Daley said. "Everybody seems to like him."

Herman joined the Newfields department two years ago and has faced no disciplinary action since, according to Daley.

"I'm hoping it's not true," Daley said of Herman's KKK involvement. "But I'll confront him with it as soon as he gets back."

In Exeter, Police Chief Frank Caraccolo said he first learned of Klan activity in the area last summer when a resident reported finding a recruitment brochure on his windshield. An investigation led police to the hot line, he said.

Though Caraccolo declined to elaborate on the investigation, Binette said the police investigation conducted in connection with Herman's firearms application detailed his involvement with the KKK.

Literature mailed by Herman included a KKK newspaper that referred to Jews as "international loan sharks" and carried several stories denigrating blacks, including an article that suggested blacks were more susceptible to venereal disease.

In addition, there was a tribute to the American flag, a discourse on the KKK's white supremacist principles and a membership application that requires applicants to "swear that I am a white person of non-Jewish ancestry." The application also requires prospective members to "swear an unqualified allegiance first to the white race throughout the world, second to my country."

Included in the literature was a tribute and direct recruiting appeal to police officers.

"We thank God for all the little boys who said they would be policemen and kept their promise," the tribute said.

Commissioner Ernest Barke of Rockingham County said he will consult with the county attorney on whether authorities should take any action involving Herman's position as deputy sheriff.

"I sure as hell don't approve of the KKK at all," Barke said. "But I'm not sure how we can get rid of him and not get hit with a \$3 million lawsuit."

Although police reported that KKK recruitment letters were distributed in Concord in 1981, the last major public event involving the Klan in New Hampshire occurred in 1978 when Imperial Wizard Bill Wilkinson held a recruitment rally outside the nuclear power plant in Seabrook, N.H.

Mr. RAUH. You will recall that Judge Souter made a statement in his speech in 1976 to the Daniel Webster College that affirmative action was affirmative discrimination. Well, he has said that he hoped he didn't say that. He hasn't denied it. He ought to be asked about that.

But you ought to know something about the Daniel Webster College. Daniel Webster College is the Bob Jones University of the North. Souter's speech to Daniel Webster College in 1976 was just exactly what they were looking for: calling affirmative action affirmative discrimination. If you have any question about it, here is the letter that was received 2 years later from minority students at Daniel Webster College talking about the harassment of black students there, the slurs the KKK made, and "niggers suck" are frequently written on the walls of our room. Judge Souter should be asked, is this the kind of a place that you can say does not have any discrimination? Were you aware of the kind of place you were going to? Then the idea that there is no discrimination there.

This is a piece from the Atlanta Constitution, making clear the exact degree of discrimination. This is what the Atlanta Constitution says about this matter. It says, "White Bias in America, Part 2, New Hampshire." Then over here it says, "Racism is not a Southern or even a regional phenomenon," and New Hampshire is their example.

You have over here another absolutely frightening example of the problems in New Hampshire that our friend, Judge Souter, couldn't see. When Meldrim Thomson, the Governor of New Hampshire, visited South Africa, he is the one person who came back and said blacks in South Africa were doing very well under apartheid. His attorney general never spoke out against that. I can only say for myself I could not work for a man who said in 1978 that blacks in South Africa were doing very well under apartheid.

We have here the story of a racial club that wouldn't serve a black man, a black referee of a well-known reputation. And I don't know. Maybe there is no discrimination, but the press up in New Hampshire doesn't say that. It is only Judge Souter who has said that, and in this particular instance, he should have been asked—and will be asked, if you recall him, as we beg for—whether he has ever been a member of or even gone to such a club. I don't think the members of this committee which has voted on that subject would want to go to a club that wouldn't admit a black man.

There is also here the story of "Klan holds King Day area recruitment effort." There are two stories on that.

Now, he says we really don't have a problem here, we don't do anything wrong in New Hampshire on race, but they have defeated under acrimonious terms, time and again, having a person to deal with this problem. Here is a story of a man he appointed to the Human Rights Commission who had to be withdrawn when it was found his own company was guilty of international intentional race discrimination.

Here is the story of the Human Rights Commission case on a man named Rallett who was harassed by being called "nigger." Is this the place where there is no racial discrimination?

Finally, just on these, Senator Chandler is the district senator from Weare, the home of Judge Souter. Shouldn't he be asked what

his relations are with his own senator? He was the attorney general. This is his own senator. Listen to what he said as a racial joke: "Jesse Jackson has stopped running for President because it was found out that his grandmother had posed for the centerfold of National Geographic."

That is a pretty rough joke.

I want to make perfectly clear that I am not accusing Judge Souter of ever having done these things. I am saying he should be questioned about them when he brought up—the leadership conference didn't bring up here that the State of New Hampshire does not have racial problems. Nobody on our side has ever said that. That was brought up by Judge Souter.

I am saying if Judge Souter is so insensitive to these problems of race, to these problems that are going to come before the Court, so insensitive that he says they don't exist, I don't see how a man can get a fair deal from him.

Finally, I see my time is up, and I have appreciated what you gave me, Senator. But I do want to make this point because it is so important. There are ways of finding out Judge Souter's views without asking him how he is going to vote. What you simply didn't do that you should have—and I think if you will recall him, you can do it—you can ask him what he ever said to people about a particular case, using *Roe v. Wade* as an example, although I don't mean it as the thing. He should be asked, Did you ever discuss *Roe v. Wade* with your nice friends and lawyers in the situation there? Why, he would have had to answer, and if he hadn't told the truth, why, someone would have come forward. There is a way of finding what a person said about a thing, and that is a fact, not an opinion.

I thank you for the chance to be here. I hope you will recall the judge. I think we are entitled to that. Everything that I have said has come up since last night because we didn't know what you would ask about. Please analyze the record, work with us, and there will be plenty to ask. I have only given you 10 examples. There are at least that many more in here of racism in New Hampshire, which Judge Souter says doesn't exist. I hope that these can all be put in the record, and I hope your staff will examine them to see whether we do not have a real case of new items for a new interrogation. Thank you.

The CHAIRMAN. Thank you very much.

Ms. Bronk.

#### STATEMENT OF JOAN BRONK

Ms. BRONK. Thank you, Mr. Chairman.

Senators, I am Joan Bronk, national president of the National Council of Jewish Women. I am not an attorney. I am not a constitutional law scholar, and my testimony has not been prepared in consultation with such experts. I proudly speak as an American Jewish woman on behalf of an organization of 100,000 volunteers serving women and their families through community service, education, and advocacy in 500 communities nationwide.

Each day, NCJW volunteers deal with the outcomes of court actions, as volunteer service providers for homeless families, juveniles involved in abuse and neglect cases, victims of domestic vio-

lence, and youngsters in correctional facilities. These people are affected by the courts and so, too, by the outcome of your deliberations. They depend on the courts to make "the promises of the Constitution a reality," an obligation expressly recognized in Judge Souter's testimony before this committee.

We have listened carefully to the nominee's comments and explanations to discover the extent to which he is likely to fulfill that obligation. In two areas of vital importance to the National Council of Jewish Women, we were not reassured.

Time and again throughout his testimony, Judge Souter adamantly refused to discuss the issue of reproductive rights. Despite the fact that the nominee expounded on issues related to other upcoming or controversial cases, such as church-state relations and criminal justice, he would not elucidate even his methodology for approaching reproductive rights. He merely promised to listen to both sides—a restatement of what we know to be the obligation of all jurists.

Based on the testimony we have heard, it would require a leap of faith to assume that Judge Souter recognizes and would protect the fundamental right to privacy beyond the right of married people to bear children. And as for the fundamental right of privacy for unmarried people, the judge remains silent.

Reproductive rights, including abortion, is not just a woman's issue. It is a family issue. If women are not free to control their reproductive lives without Government intervention, what kind of future can their families expect? If the Court continues to limit or eliminates the ability of women to make this basic personal and private decision, how can women ever hope to realize equality and freedom? In fact, NCJW believes that reproductive freedom is a religious liberty issue. When Government eliminates that freedom, it preempts individuals from basing their decisions on religious beliefs and practices.

In addition to our concern about Judge Souter's silence on reproductive rights, we are wary of his views on gender discrimination. Although Judge Souter recognizes that such cases should not be left to the minimum scrutiny, his vagueness on how to handle gender discrimination is disturbing. So, too, was his statement to you, Mr. Chairman, expressing concerns about the present middle tier because he has yet to support this as a minimum starting point.

In recent years, NCJW's community service and educational projects have focused on women in the workplace. From our experience, we are aware of the importance of protections against gender discrimination in employment and on the worksite. We are concerned that antidiscrimination protection for all workers has been severely eroded by recent Supreme Court decisions. We cannot risk continued setbacks in this critical area.

The committee's deliberation on this nomination covered many areas beyond those we have addressed in our testimony. NCJW also has a wider range of concerns and activities. However, the National Council of Jewish Women believes that the right to privacy and equality for women are promises of the Constitution that must be kept.

Judge Souter's intellect and apparent warmth are to be admired, but Judge Souter's failure to respond directly and adequately to questions concerning privacy and equality for women lead us respectfully to ask you to oppose this nomination.

Thank you for inviting us to participate in the process.

[The prepared statement of Ms. Bronk follows:]

**Testimony of Joan Bronk**  
**President, National Council of Jewish Women**  
**Senate Judiciary Committee, September 18, 1990**

I am Joan Bronk, National President of the National Council of Jewish Women. I am not an attorney. I am not a constitutional law scholar, and my testimony has not been prepared in consultation with such experts. I speak as an American Jewish woman on behalf of an organization of 100,000 volunteers serving women and their families through community service, education and advocacy in 500 communities nationwide.

Each day, NCJW volunteers deal with the outcome of court actions, as volunteer service providers for juveniles involved in abuse and neglect cases, homeless families, victims of domestic violence, and youngsters in correctional facilities, among others. These people are affected by the courts and so, too, the outcome of your deliberations. They depend on the courts to make "the promises of the constitution a reality," an obligation expressly recognized in Judge Souter's testimony before this Committee.

We have listened carefully to the nominee's comments and explanations to discover the extent to which he is likely to fulfill that obligation. In two areas of vital importance to the National Council of Jewish Women, we were not reassured.

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Time and again throughout his testimony, Judge Souter adamantly refused to discuss the issue of reproductive rights. Despite the fact that the nominee expounded on issues related to other upcoming or controversial cases, such as church-state relations and criminal justice, he would not elucidate even his methodology for approaching reproductive rights. He merely promised to listen to both sides--a restatement of what we know to be the obligation of all jurists.

Women cannot afford to take the leap of faith required to assume that Judge Souter would recognize and protect the fundamental right to privacy. Does the nominee only recognize that fundamental right as it pertains to procreation within a marriage? Based on the testimony we have heard, we have no indication to the contrary, and we are deeply concerned.

Reproductive rights, including abortion, is not just a woman's issue--it is a family issue. If women are not free to control their reproductive lives without government intervention, what kind of future can their families expect? If the Court continues to limit or eliminates the ability of women to make this basic personal decision, how can women ever hope to realize equality and freedom? In fact, NCJW believes that abortion rights is a religious liberty issue. When government eliminates freedom of choice in abortion, it pre-empts individuals from basing their decisions on religious beliefs and practices.

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In addition to our concern about Judge Souter's silence on reproductive rights, we are wary of his views on gender discrimination. Although Judge Souter recognizes that such cases should not be left to the minimum scrutiny, his vagueness on how to handle gender discrimination is disturbing. So, too, was his statement expressing concerns about the present middle tier test because he has yet supported this as the minimum starting point.

In recent years, NCJW's community service and educational projects have focused on women in the workplace. From our experience, we are aware of the importance of protections against gender discrimination in employment and on the worksite. We are concerned that anti-discrimination protection for all workers has been severely eroded by recent Supreme Court decisions. We cannot risk continued setbacks in this critical area.

The Committee's deliberation on this nomination covered many areas beyond those we have addressed in our testimony. NCJW also has a wider range of concerns and activities. However, the National Council of Jewish Women believes that the right to privacy and equality for women are promises of the constitution that must be kept. Because of Judge Souter's failure to respond directly and adequately to questions concerning privacy and equality for women, we respectfully ask you to oppose his nomination.

The CHAIRMAN. Thank you, Ms. Bronk, for a well-reasoned and succinctly stated statement, and within the time. Let me begin with you.

With regard to the issue of the equal protection clause of the 14th amendment, let me be the devil's advocate for a moment. It is true, isn't it, that the last part of his discussion on this issue and the least part of his criticism, when he talked about the middle tier, when he was refusing to say precisely what tier he would apply, attempting to avoid discussion of the precise principles he would apply, he said that his concern was, and his concern with the middle tier as presently constructed, was that it too easily "collapsed into the very lowest tier of review."

Now, so while you are correct in saying that he did not establish that he was for a test more exacting than the current test, some of his comments suggest that he might be inclined in that direction. Do you find his concern about collapsing into the lowest tier some evidence of the fact that he at least thinks that the middle tier is an appropriate test?

Ms. BRONK. Yes; as a matter of fact, for a few moments there, I was encouraged when I was listening to him speak. However, since he has obviously thought about the question in depth and written about it, I was very disappointed and we were disappointed to know that he could not clarify his position better, that he hadn't thought it through so that he did have one, when the minimum tier has been accepted for such a long period.

The CHAIRMAN. Ms. Hernandez, as you probably know, the newspaper articles referred to Judge Souter's speech, as you did, the speech that was made in the mid-seventies. In that speech, the article reported that he called affirmative action affirmative discrimination.

Now, during the hearing, Judge Souter testified that he did not believe that he had made that statement. I don't know whether he did or not, but I am sure that all of us have wondered sometimes whether we have been properly quoted, I suspect yourself included.

He also argued that in the face of discrimination the appropriate response was to undo the wrong, undo the wrong rather than just call for the discrimination to stop. That is a distinction.

Now, what are your views with regard to Judge Souter's testimony that, first, he doesn't think he made such a statement; and, second, that he was in his statement willing to go beyond merely stopping the discrimination, ending the discriminatory practice, and saying he wished to, felt we must undo the wrong? Do you find any significance in either of those two statements?

Ms. HERNANDEZ. Well, as to the first statement as to, you know—

The CHAIRMAN. I apologize. You must pull that very close. None of us can hear you.

Ms. HERNANDEZ. As to the first question as to whether he, in fact, made that statement or not, he questioned whether he was quoted properly, but he never denied the statement or disavowed the statement. And so, you know, in reading—

The CHAIRMAN. You are making a distinction. He said, "I didn't say it," so you are saying that that means that because he didn't say "I never said it in my whole life, or I never thought it," there-

fore he must have thought it or he must have said it some time? Is that what you are saying?

Ms. HERNANDEZ. No. If you look at what he said, he said, you know, that he could possibly have been misquoted, or he doesn't remember saying it. He never said, "I didn't say it," or, more importantly, "That statement, if I did say it, did not represent what I believed then," or, more appropriately, "does not represent where I stand today." That is one.

Now, on the second question—which I forgot. What was it?

The CHAIRMAN. That is understandable. The second question, I almost forgot, was that he indicated that with regard to the standard that should be applied when discrimination is found, he was asked by me and others what action the Government should take—because, as you know, the debate is just stop it and don't let it go forward, or go back and attempt to undo the wrong that was done. And he said that the appropriate response was to go back and undo the wrong, that Government must go back and undo the wrong.

Obviously, you find no solace in that assertion.

Ms. HERNANDEZ. Let me tell you why I find no solace. In reviewing our position as to Judge Souter, not only did we look into the few instances in which he had dealt with civil rights, and in those instances had been antagonistic, but we also reviewed the 200-some cases that had come before him. And our concern is his view of the courts, of the legal profession, and they are very limited. Whenever possible, and in the cases that he has taken, he has not seen the courts as an avenue for redress. Moreover, which is something that is of great concern to us, we want to know on what past record must we place our belief that he understands and that he is committed to these issues.

It is surprising that in his entire opening statement he never raised or addressed the issue of civil rights, and it was the prodding of you, Senator Kennedy, Senator Simon in which he was given opportunity after opportunity to say something about these issues, that he addressed questions that you posed. He had no problem addressing, you know, his values, his positions on, let's say, criminal justice, the death penalty and other issues. Those are values. And the questions that we asked ourselves is: What are his values as to these issues? Upon what is he going to draw? On what experiences—when he says that there is no discrimination in New Hampshire—is he going to draw when he decides issues of concern to us?

You know, the English-only issue has been very divisive in New Hampshire if you go beyond affirmative action. For the Hispanic community today and in the 1990's, the issue of access to the voting booth is critical to us. And for him to make those statements—so, yes, I was heartened that he made some statements after some prodding, but I would like to see much more than that. And why is this critical? This is not just another Associate Justice to the Supreme Court. That is what is at stake here today.

The CHAIRMAN. Thank you very much. My time is up.

I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

There was a reference made to Daniel Webster College. I have been informed that Daniel Webster College was founded by Senator Rudman about 1965, that he was chairman of the board until 1980,

that it is an aeronautical training and business college. I just wanted to put that on the record.

I have no questions of these witnesses.

Senator KENNEDY [presiding]. I want to join the chairman in welcoming the panelists to the committee and express our appreciation for the time that you have spent in the consideration of your recommendation.

I would just ask of Mr. Rauh, were you able to complete your thought on the kinds of incidents which had taken place in New Hampshire? Were there additional points that you wanted to make in just completing the testimony?

Mr. RAUH. Thank you, sir. I did say a sentence or two in a hurry about each of the 10 examples. We have then another 10 or a dozen that we are putting in the record. I don't know if you were here the whole time, but I wanted to make sure that I had made myself clear.

We are not charging anything on the judge. We are charging he didn't do anything. We are charging he hasn't done anything. He claims that there is no discrimination. How can a man who says there is no discrimination find discrimination? How can he be so insensitive to our problems? We are not making an attack on him.

I would like, if I might, to address myself to Senator Thurmond. I have a letter here from 22 students there which includes this statement:

These harassments range from students dressing as members of the Ku Klux Klan, walking around the college yelling "We don't want your kind around here," to the breaking, entering, and destruction of our rooms and personal property. The slurs "KKK" and "niggers suck" are frequently written on the walls of our rooms.

Now, to forget that, to try to put that under the table or sweep it under the rug because Senator Rudman may have had a connection with this about which I didn't know, but the fact of the matter is, Senator Thurmond, that this letter shows what kind of a place it is, and that these students that were harassed, there was no outcry from the attorney general. They made a plea for help. No help whatever. This is an insensitive man that you are foisting on us.

Senator KENNEDY. I think all of us, including my own State, have gone through and continue to go through a good deal of anguish, in terms of trying to deal with the problems of racism, and that continues even today and has existed for a long period of time. I think we understand that that certainly is not limited to the problems in any particular part of the country. It is more widespread than is generally understood.

There is the Human Rights Commission in new Hampshire and they deal with a number of allegations, charges, and complaints. And as I understand the procedure, when there is some finding and when the Human Rights Commission then is challenged by a defendant, then the attorney general represents the Human Rights Commission, so there is this association with the Human Rights Commission. I believe that to be the situation.

I was wondering, in your review of the record, whether the problems dealing with race had been raised with the Human Rights Commission and what the record—you know from your own—

Mr. RAUH. Some of the cases I gave you, at least one or two of them, the attorney general's office was the lawyer for them and, therefore, he would have been aware of the discrimination charges there, and, therefore, you do not get the situation where he did not know about the charges.

We have not been able, as I understand it—I have not been up there, but others of the Leadership Conference have—we understand that we may not see the record of the Human Rights Commission, the various records. I am not being critical of that. That is to protect some of the witnesses, I am sure. But what has happened is that we only know there were a certain number of complaints and we know some of the things that got in the newspapers. We have not been allowed to look at the actual transcripts.

Senator KENNEDY. Let me go back to a line of questioning that I had in the opening day of the hearings, and that had to do with representing the State's position on the question of collecting data and information relevant to the EEOC, and also representing the Governor on challenging the literacy tests, both situations which were eventually overturned by the Supreme Court, in one instance 9 to 0.

The judge indicated that he was just effectively living up to the kind of ministerial function of attorney general in pursuing the State's interest. I tried to point out during the questioning that the attorney general of New Hampshire takes an oath to uphold the Constitution, as well as the New Hampshire Constitution, and I read in the record the particular New Hampshire statute that indicated that part of his functions relate not just to the attorney general, but to the public at-large, and we had an exchange on that issue.

My question is this: If the position that was taken by the Judge in those particular cases had prevailed, what would have been the impact, in terms of Congress' power to enforce the 14th amendment with regards to race discrimination?

Mr. RAUH. Well, there could not have been any affirmative action, without it. When he denies the words "affirmative discrimination," he is going contrary to the whole thing, he against affirmative action. How can you have affirmative action, if you do not know the results, if you do not know whether people are getting hired, if you do not know whether there are any blacks on the roster.

The whole thing is a pattern, Senator Kennedy. What you have is a speech at a racist school which I read to you, and then after the speech, in the same year, he is saying that you cannot get a racial breakdown. There is no way that you could possibly have affirmative action.

There has been a rewriting of history. What he has done is to say I am for affirmative action, in a sense. He has made that statement, but everything in his career has opposed it. If there was any conversion, confirmation conversion, Senator, when Judge Bork was up here, this is a constitutional rewriting. It has just changed the whole thing, from what the facts were during the time he was there and what they have been since Thursday morning, this statement of his.

Remember—and I think it was in answer to you, sir—that he said one of my reasons for taking that position was there is no discrimination in New Hampshire. He made that statement in connection with the answer to you, in addition to the statement that I read the committee in my testimony.

Senator KENNEDY. You provided the information with regard to gender, but not with regards to race.

In talking about the sensitivity, did you form any impression about his comments during his pursuit of the challenge to the United States on the suspension of the literacy tests? Remember, New Hampshire had a literacy test that was used to suspend it. I know you have been involved in the long history of the battles over the 1965 act and the 1970 act, I know from personal experience.

I stated at that time that the reason that we were abolishing the literacy test nationally was really to indicate, when that issue was raised by many sections in the southern part of the country, that we were going to lift them with regard to the South, why do we not do it nationwide, and the Congress responded to that, and he challenged Congress' power under section 5 of the 14th amendment to do so.

Then he made some comments about the illiterates and how that watered down the rights of others. Did that statement trouble you, with regards to this issue of sensitivity to individuals? I think, by and large, those are going to be the poor individuals, working men and women, in many instances I suppose minorities, people who are often left out, left behind. I would ask you both, or any members of the panel—maybe you would make a comment and then Ms. Hernandez make a comment.

Ms. HERNANDEZ. Well, that is most troubling, in watching Judge Souter testify, that there is no question about his intelligence, there is no question that, in many ways, he is a legal scholar. The problem is in his value system and what he uses as a resource to make his decisions, the human compassion, the understanding, the experience to really understand how the law is applying to human beings, particularly those that in the past have been deprived of their constitutional civil rights. He reverts back to very analytical frame of mind.

Well, the law is meant to protect people, it is for the benefit of people. It is not for the benefit of intellectual theorizing of how one point of view might go or the other. And if you listen to his testimony for the last three days, when pushed on these issues—and I believe if you looked at my testimony, I go specifically to those questions—is that you really push on those issues, he reverts back to that, because of the fact of the lack of—well, there is a lack of experience there from which to choose from.

You have judges who are going to be put on the Supreme Court for life, who are going to judge on cases that deal with human beings, and if you do not know, if you do not understand, if you do not have a feel for their problems and what they are encountering, then it is very easy to fall back.

The other point, as far as the issue of Section 5 of the Fourteenth Amendment, is that, you know, he questioned Congress' ability to legislate in that area. And what is most troubling to us is the Jus-

tice that he most admires, Harlan II, is the one that dissented in *Katzenbach v. Morgan*.

So once again, there is a paucity of any affirmative statements or activities that show a sensitivity, and the only thing that we have to go on is on his statements here before you, and I will tell you that I was here before you on the Kennedy nomination and we were asked to rely on the same thing.

And we are asking once again, on a very critical nomination to the Court, to once again take a leap of faith based on some statements for the first time made before here in this hearing that he will be open-minded and neutral. We are not asking his views specifically on how he would deal. We are asking him to be open-minded, neutral and to have a reservoir of experience from which he is going to use when he decides the cases that impact our lives.

Mr. RAUH. I agree with that completely, and I think the word "open-minded" is good, because, in fact, what you have, you cannot be open-minded if you are unwilling to look, and he is unwilling to look.

Senator, you will recall that in one of the answers to your questions was, Judge Souter saying, "I was persuaded that this was a reasonable argument, because there was no discrimination in the literacy tests." What he meant by that, there was no discrimination against black voters, well, we do not know the answer to that, because we were not there and we did not do it, but there was discrimination. This happened to be a poor education discrimination against the people who could not read, but he will not see. You cannot be open-minded, unless you are willing to have an open sight and look at the problems. He says there are no problems. He answered that on both of your questions, he answered there are no problems.

Senator KENNEDY. What is the significance of those range of different reports and newspaper articles in relationship to the Judge's statement that he does not believe that there are racial problems? I mean what conclusion can you draw?

Mr. RAUH. Well, I do not see how you can look at the ten cases I gave—these are going into the record, the ten cases I gave—and say that New Hampshire is not a discriminatory State. I do not say it is the worst State, it just happens to be the worst State on Martin Luther King's birthday, but it is not the worst State on everything, but it is a State where there is substantial discrimination, which Judge Souter has refused to see.

Ms. HERNANDEZ. Let me add another point as to that. As I indicated, we are looking to those newspaper articles. He was an attorney general, a deputy attorney general, and, as you know, that office in most States or at least the States that I am familiar with, has the responsibility to monitor and sometimes to prosecute in cases involving issues of discrimination.

It is difficult for me to sit here and understand and believe that, during his tenure as deputy attorney general or attorney general, that he never ran across such complaints or such problems. That is the problem in this nomination.

Senator KENNEDY. Let me add, Joan Bronk, you said that NCJW views reproductive freedom as a religious liberty issue. Can you

give an example of how Court action to overturn *Roe* would impinge on your religious liberty?

Ms. BRONK. Yes, sir, the fact of the matter is that, in my own religion, I am taught that the mother's life is paramount to the fetus, and if, obviously, *Roe* were overturned, that would put women of the Jewish faith in an untenable position.

Senator KENNEDY. Do other religious organizations agree that this is a religious liberty issue?

Ms. BRONK. Yes, we work in coalition with many partners, other Jewish organizations and Protestant organizations, as well, who would agree with me on that, yes.

Senator KENNEDY. OK. Is there any further comment?

[No response.]

Well, I want to thank you all very much. You have been very provocative in your comments and I think all of us are going to certainly give them a good deal of weight. I certainly will.

I want to thank you very much, and we will recess until 3:00 p.m.

[Whereupon, at 1:50 p.m., the committee was in recess, to reconvene at 3:00 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order, please.

We are, as I indicated earlier, voting in the Senate, so the Congressman understand, I suspect, better than anyone how the process is working here, and my colleagues are still there, anticipating there may be another vote. I have taken the chance of thinking that the vote that we just took will prevail, which would preclude another vote, so one of two things is going to happen very shortly: I am either going to leave or a number of people are going to appear, but I thought it important that we start.

Our fourth panel consists of four highly respected citizens of the State of New Hampshire: John T. Broderick, Jr., current President of the New Hampshire Bar Association, an extremely well-respected member of the community, and I think in this context it is relevant to say is active in the Democratic Party and here to testify on behalf of the nominee.

Steven J. McAuliffe, president-elect of the New Hampshire Bar Association, who worked under Judge Souter as an assistant attorney general and equally involved in the community; and Deborah Cooper, former deputy attorney general of New Hampshire, who also served with Judge Souter and very involved in the community, as well; and Congressman Chuck Douglas, whose comment to me earlier is he is in a sea of Democrats at the table.

Congressman, welcome to the body. Congressman Douglas represents Judge Souter's hometown in the United States Congress, and obviously is here to testify on behalf of the nominee.

Now, unless you all have worked it out, I would like to reverse the order and give the Congressman the opportunity to speak first, because I know there are votes on the House side off and on and he may have to leave to vote, so why don't we just work our way back. Actually, we should go then to the current president, President

Broderick, and then to Steve McAuliffe, and to you, Ms. Cooper, and we will do it in that order, if we may.

Congressman.

**PANEL CONSISTING OF HON. CHUCK DOUGLAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE; JOHN BRODERICK, PRESIDENT, NEW HAMPSHIRE BAR ASSOCIATION; STEVEN J. McAULIFFE, PRESIDENT-ELECT, NEW HAMPSHIRE BAR ASSOCIATION; AND DEBORAH COOPER, FORMER DEPUTY ATTORNEY GENERAL, STATE OF NEW HAMPSHIRE**

#### STATEMENT OF CHUCK DOUGLAS

Mr. DOUGLAS. Thank you, Mr. Chairman.

In addition to representing the Town of Weare, I also was a colleague of Dave Souter's. From 1983 to 1985, we served together on the New Hampshire Supreme Court, in a former life I had before coming here and serving on House Judiciary. But I go back even farther than that in knowing Dave Souter, back into the early 1960's.

His father and my father both worked at the same bank in Concord. My sister Margaret dated David on occasion during a couple of summers when he was home from college. I had the chance to work with him when he was a trial judge and I was on the State Supreme Court and then, of course, in 1983 he came up and joined the rest of us on the New Hampshire Supreme Court.

What I wanted to do is just mention two things that I think are special strengths that Judge Souter will bring to the U.S. Supreme Court, and I say that as one who worked with him on a day-to-day basis for 2 years.

First, the way we conference cases in the Supreme Court of New Hampshire is unique, I think, among most appellate courts, because we actually sit down around a table and talk about the cases, line by line, and when you do that, that process that they still go through—even though David and I are no longer there, the process continues—it is very conducive to the fact that you will also be working with these folks on the next case and the next case and the next case. You do not personalize the interplay. You have your intellectual argument, you fight over the law, but then you know there is another case and you may be teamed up together for that next opinion, and I think that brings the law to the forefront and keeps personality disputes and feuds out of the process.

That is the experience. I always enjoyed working with Judge Souter and I know he will bring an open mind and an ability to work in a very good way with his colleagues at the U.S. Supreme Court.

The second thing that I know from my experience of sitting on the bench with him is his keen intellect that you all have obviously observed, but also the fact that he is an intense questioner, and in an appellate court that is very important. This is the apex of our judicial branch of Government.

You do not go any higher than the U.S. Supreme Court, and if there is a loose end or a point that has to be clarified or some argument that is shaky, key questioning from the bench is very, very

important, and Judge Souter is an aggressive questioner and I know he will do so, if he is approved by the Senate, which he should be, for service on the U.S. Supreme Court.

I am very proud to have known him and to work with him and I certainly can say nothing but that I know the hearing that he has been through would not have been dramatically different, if you had gaveled it in the morning after he was nominated. It is the same Dave Souter and the questions and the answers would have been handled the same way.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Congressman.

Mr. Broderick.

#### STATEMENT OF JOHN BRODERICK

Mr. BRODERICK. Thank you, Mr. Chairman and members of the committee.

My name is John Broderick and, as the chairman said, I am the current president of the New Hampshire Bar Association. On behalf of its members, acting through its Board of Governors, I am genuinely privileged to appear before this distinguished committee today to report the enthusiastic support of the New Hampshire Bar Association for Judge Souter's nomination to the U.S. Supreme Court.

The bar's 21-member Board of Governors recently passed, by unanimous vote, a resolution urging this committee to act favorably on Judge Souter's nomination and requesting confirmation by the U.S. Senate.

The board whose resolution I carry to this committee today has a diverse membership of men and women representing all geographic areas of the State of New Hampshire. The board also reflects the breadth and scope of the practice of law in New Hampshire.

Judge Souter has been a highly valued member of our bar association for almost 25 years. He has served with true distinction and vigor for the last 12 years on the Superior and Supreme Courts of New Hampshire. His service as attorney general of our State was exceptional and admired by those who worked with him and by the public which benefited from the professional leadership he provided.

Earlier this year, we were pleased to support his nomination and confirmation to the First Circuit Court of Appeals and were honored, as Judge Souter was, with the unanimous vote of the U.S. Senate, and we are not surprised that he has been nominated by the President of the United States for service on the Supreme Court.

Let me tell you a little something about my State. New Hampshire is a small State, with a bar of 3,400 lawyers and judges. We tend to know one another in New Hampshire, and because of our size and constant interaction, we are uniquely positioned to recognize quality.

Our bar is politically diverse and reflective of the demographics of our State. The quality of our membership is high and our practical approach to the practice of law is well respected. The people of my State are fiercely independent and we revere our individual lib-

erties. However, we fully understand that our strength derives from our diversity and sensitivity to the rights of others. Judge Souter exemplifies that tradition.

My colleagues are sensitive to the critical importance of constitutional stability and the compelling need to entrust the interpretation of individual freedoms and liberties only to those who have demonstrated the highest standards of intellect, fairness and personal integrity. Judge Souter is such a person.

Those of us who have witnessed Judge Souter's judicial performance first-hand can, in good conscience, report to this committee that he possesses, as I think you have seen, a first-rate legal mind, a flexible and curious appetite for the law, an unbiased ear for argument, an uncommon civility and, I think it is fair to say, a quiet compassion. He also, from our observation, understands the world in which he lives and the need for a judge to protect our system of justice from the whims of transient public opinion.

Judge Souter has never practiced or pursued any political or ideological agenda while serving on the bench in New Hampshire, and we would not expect any change in his commitment to the integrity and predictability of the law and our system of justice, if confirmed by this Senate to the U.S. Supreme Court.

In the final analysis, it is the considered and respectful opinion of the New Hampshire Bar Association that Judge Souter is an outstanding nominee to the U.S. Supreme Court. Those of us in New Hampshire know him, we like him, we respect him, and, more importantly, we trust him to fairly and consistently interpret the Constitution of the United States for the protection of the rights and liberties of the American people.

In closing, and on a personal note, on my behalf and on behalf of two members of our bar, Terry Shumaker and Bill Glahn, who have sat with me in the public gallery throughout this hearing, I would like to compliment this committee and the nominee on an extraordinary hearing. As a trial lawyer who has practiced law for 18 years and as a practitioner of constitutional rights, it has been a genuine honor to be present before this hearing.

Mr. Chairman, I would like to leave with this committee the resolution passed unanimously by my Board of Governors on August 16, 1990, and have it made a part of the official record of this proceeding.

The CHAIRMAN. It will be entered in the record.

Mr. BRODERICK. Thank you very much.

[The resolution referred to follows:]



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E 228-1181

### RESOLUTION

WHEREAS, Judge David H. Souter has brought distinction to the Bar as the Attorney General of New Hampshire, as a New Hampshire Superior Court trial judge and as an associate justice of the New Hampshire Supreme Court; and

WHEREAS, throughout that period Judge Souter brought distinction to New Hampshire through the keenness of his intellect, the thoughtfulness of his judicial opinions and the even-handedness of his philosophical approach to the legal issues which confronted him as a jurist; and

WHEREAS, Judge Souter enjoys among his colleagues at the bar a well-earned and deserved reputation as a jurist of great integrity, impartiality, independence, and patience; and

WHEREAS, the New Hampshire Bar Association has on three previous occasions been privileged to review and enthusiastically support David H. Souter's nomination to state and federal judicial offices; and

WHEREAS, the excellence exhibited by Judge Souter on the bench has earned him the unanimous approval of the United States Senate, demonstrated by his recent confirmation to the United States Court of Appeals for the First Circuit; and

WHEREAS, Judge Souter has been nominated by the President of the United States to serve on the United States Supreme Court;

BE IT THEREFORE RESOLVED, that the New Hampshire Bar Association, acting by and through its Board of Governors, enthusiastically and unanimously supports and endorses the nomination of Judge David H. Souter, and commends this most respected member of the New Hampshire Bar for confirmation to the Supreme Court of the United States by the United States Senate this sixteenth day of August, 1990.

August 16, 1990

Date

*John T. Broderick, Jr.*  
John T. Broderick, Jr.  
President

*Steven J. McAuliffe*  
Steven J. McAuliffe  
President-Elect

*Patty Blanchette*  
Patty Blanchette  
Vice President

The CHAIRMAN. Mr. McAuliffe.

STATEMENT OF STEVEN J. McAULIFFE

Mr. McAULIFFE. Thank you, Mr. Chairman.

Mr. Chairman, Senator Thurmond, and members of the Judiciary Committee, my name is Steven McAuliffe. I practice law in Concord, NH. I also serve as president-elect of the new Hampshire Bar Association and vice chairman of the university system of New Hampshire's board of trustees.

Mr. Broderick has just spoken for our bar association, and I certainly endorse his comments, but, with your indulgence, I would like to take a few moments to speak for myself about Judge Souter, in perhaps a slightly different way, based upon my own observations and experiences.

After completing military service here in Washington, my family and I moved to New Hampshire, where I had been hired by then Attorney General Souter to work in his office. Like every other assistant attorney general who enjoyed the privilege of working for him, my initial interview with David Souter remains a vivid memory, even after 13 years.

In that interview, I first experienced what I suspect this committee and the American public has experienced these past few days, the enormous depth and breadth of David Souter's intellect, his dignity, his strength, his humility.

The New Hampshire Attorney General's Office under David Souter was an extraordinary place. He demanded only three things: practice of law the highest level; as apolitical an office as was humanly possible, both in fact and appearance; and absolute integrity.

Beyond that, David Souter demanded only that we each follow our own path, and that we be ourselves. The office was diverse in personality, background, attitudes, and approach, yet it was warm, dedicated and effective. David Souter's character and personality recruited and molded our diverse group into the best public law firm anywhere.

The graduates of that office still consider it, as do I, one of the most rewarding and fulfilling growth experiences of our lives, because contact with David Souter made it so.

In David Souter's attorney general's office, we sought the right answer, not the expedient answer and never the political answer. When it was our unhappy duty to represent unpopular positions or positions with which we personally disagreed, David Souter taught us about professionalism, and the higher, more noble duties required of advocates in the American adversarial system of justice. He also taught us that an informed conscience is the individual's ultimate guide.

To know and to have worked for David Souter is to know both honor and frustration. Frustration, because the standards of character and integrity he sets finds the rest of us so often wanting in its pursuit.

Let me tell you what I think David Souter is not. He is not isolated. His friends are many and diverse, from baseball fans to philosophers to bishops to politicians to ordinary small town new

Hampshire neighbors. He is not sanctimonious, he helps people. He helps them with their problems according to their abilities. He is not pretentious. He is easily teased and teases easily.

He is not an elitist, either intellectually or socially. David Souter, as you have seen, is a humble and insatiable student of life, learning from and curious about everyone. He is not humorless. He laughs easily and easiest at himself. Neither is David Souter perfect, except in recognizing the imperfections that we all share.

David Souter is the kind of person who, although a lofty judge, unhesitatingly takes strangers to out-of-the-way gas stations for emergency fuel. He is the kind of person who maintains close personal relationships with the children of his closest friends, who treats Ben and Brooks Glahn and Tim and Ervin Rath as any father treats his own children. He reaches out to thank every kindness and to extend many more to others, quietly and with dignity, who listens to others' distress and provides calm and guidance.

The other day, as I was sitting in the public gallery, an issue was raised in this hearing concerning David Souter's capacity for understanding and human feeling. I have some experience with personal pain, as do most of you. I know many of you share my pain, as I share yours, and I want you to know that David Souter feels and shares and understands the pain of others with great compassion and great dignity. I can tell you that under oath. Tom Rath, Warren Rudman, and scores of others who know David Souter can tell you that, as well. It would be unjust for this record to contain any doubt about that, or for the American people to wrongly think that this man might not appreciate the human condition. He does.

Concerned groups on opposing sides seem to predict with ease, yet contrarily, this nominee's unknown and unknowable future vote on current social-legal issues. No one knows how David Souter will vote—no one. David Souter does not know. David Souter does not know, and those of us who know David Souter know he does not know.

David Souter, the judge, simply does not prejudice cases. He never has. David Souter, the judge, is scrupulous about process and thought and consequences and human impact and precedent and integrity. Those who believe that David Souter is somehow committed or is an idealogue or is known by the White House better than by the Senate, are mistaken.

I, too, care about my children and the life of ordered liberty they necessarily entrust to the U.S. Supreme Court. I, too, care about the social issues of our time. But I also care about the continued power and vitality of our Constitution 30 years from now. I know that David Souter is all that he appears to be, a great judge in the mainstream of legal thought, in whom the Nation can safely and securely place its trust to preserve, protect and defend the Constitution of the United States.

Mr. Chairman, the special privilege of testifying before people I greatly admire, obviously including yourself, on behalf of a person I greatly admire, Judge David Souter, is not a privilege that I will soon forget.

Thank you very much.

The CHAIRMAN. Thank you, Mr. McAuliffe.

Ms. Cooper.

**STATEMENT OF DEBORAH COOPER**

Ms. COOPER. Mr. Chairman, Senator Thurmond, members of the committee, my name is Deborah Cooper. I am a lawyer in private practice in Lebanon, a small town in New Hampshire. In my former life, I was a member of the New Hampshire attorney general's office.

I met David Souter in 1976, when I was a third-year law student. It was the day that then retiring Attorney General Warren Rudman was having his testimonial. It was David Souter's first day as attorney general.

Judge Souter was interviewing me for a job in the office of the attorney general. Earlier in the year, I had had a previous interview with a member of his staff. Prior to the first interview, I had noted that the office letterhead listed only men. Curious as to whether there were any women attorneys in the office, I asked that question during my first interview. The staff attorney responded that we had one, but she died. As you can imagine, I faced my second interview with a fair amount of trepidation and substantial reservations about whether this was the office in which I wanted to start my legal career.

Within the first 5 minutes of my interview with Judge Souter, my reservations disappeared. It was clear that Judge Souter was a man of unquestionable intellect, integrity, and warmth, and with a true devotion to public service. For David Souter, the office of attorney general was governmental, not political. He did not espouse a political philosophy, nor did he ask mine.

The role of an assistant attorney general was to enforce the laws of the State of New Hampshire and to act as the State's lawyer. It was not to establish and implement a political agenda.

While the interview itself was a grueling experience, I left the office with a strong conviction that Judge Souter was a man for whom I would like to work. I was one of two women hired by Judge Souter that year, putting an end to the all-male bastion. I do not know whether David Souter had his own affirmative action plan. I do not know Judge Souter's position on affirmative action. I do know that David Souter treated the women in his office with professional respect and that he gave me and other women equal opportunities.

David Souter inspired those who worked for him and challenged them to excel. His leadership and counsel enabled us to develop our legal skills in a way that might not have occurred elsewhere. But equally important, David Souter's warmth, wit, and daily involvement with his staff made the office of attorney general a great place to be. There was a sense of mutual respect, loyalty, and camaraderie among those who have worked there that is seldom found anywhere else.

After Judge Souter left the attorney general's office, I had the privilege of being named deputy attorney general, a position second only to that of attorney general. I am confident that that opportunity arose largely because of the opportunities and training that I was given during David Souter's term as attorney general.

At the time I was named deputy attorney general, the media gave great coverage to the fact that I was the first woman in New

Hampshire to hold that post. Until our society reaches a level of total equality, such a qualification will always make headlines. Judge Souter made me believe that my gender was not the reason for my appointment. I know that, to him, my sex was not a factor.

I am here today because I respect and admire David Souter. Judge Souter commands the respect and admiration of countless others throughout the State of New Hampshire, regardless of their political philosophies. I have unshakable confidence that Judge Souter, if confirmed, will approach the issues before the U.S. Supreme Court as he did the issues before him as attorney general, not with a preestablished political agenda or ideology, but with superior legal skills, intellect, and unparalleled integrity.

Judge Souter is the best this country has to offer.

Thank you very much.

The CHAIRMAN. Those are four eloquent statements on behalf of a man with whom all four of you or three of the four of you have worked.

Mr. Broderick, have you appeared before Judge Souter?

Mr. BRODERICK. Yes, Mr. Chairman, I have tried cases in front of him when he was on the trial court, and I have argued in front of him in the New Hampshire Supreme Court.

The CHAIRMAN. Ms. Cooper, one of the things that he was questioned on at length by a number of us were cases relating to the Equal Protection Clause and gender discrimination. I assume New Hampshire has no such constitutional provision relating to gender. Were there any cases argued in—

Ms. COOPER. I believe there is a State constitutional provision prohibiting discrimination on the basis of sex.

The CHAIRMAN. Judge Souter indicated, and it seems to me very unclear, that the test, the principle that should be applied in determining whether or not a State, a governmental entity can impact upon what a woman can or cannot do, the level of scrutiny required to impact upon her constitutional right to equal protection under the 14th amendment is somewhere between strict scrutiny and a rational basis test.

As you know, governmental agencies can almost always meet a rational basis test and find it very difficult to pass a strict scrutiny test. He indicated that he thought the test should be somewhere in between, and he indicated, though, that he was not particularly happy with the middle-tier scrutiny. He said it was—I forget his phraseology—fuzzy, not very firm, or whatever.

After having worked with him, do you have any thoughts as to where he is likely to come down on those issues?

Ms. COOPER. I cannot predict how Judge Souter would come down on those issues, Senator. I know that he would approach them with the fundamental sense of fairness and I believe that, based on my personal experience and working with him, that he has great respect for women and for women in the profession.

The CHAIRMAN. As a woman, do you have any, not doubts about his integrity or his capability, but do you wonder where he will come down on issues relating to sex discrimination and on reproductive rights? Does it concern you at all?

Ms. COOPER. Yes, it certainly does. I do wonder. I have concerns and I have questions, but I have ultimate faith in David Souter's

ability to approach those in a professional and skilled manner. He is not—

The CHAIRMAN. Congressman—excuse me, go ahead.

Ms. COOPER. I just wanted to add that he is not insensitive to the issues that affect women.

The CHAIRMAN. Congressman, you served with him on the Supreme Court—

Mr. DOUGLAS. Yes, sir.

The CHAIRMAN [continuing]. You as a Supreme Court Justice and he as a Supreme Court Justice. For how long a period?

Mr. DOUGLAS. From 1983 to 1985, when I resigned to go back into practice, Mr. Chairman.

The CHAIRMAN. He indicated that there was a ninth amendment, which came as a surprise to many of us, and he seemed to imply, although, when pressed, did not give much to back it up, that there were unenumerated rights potentially yet to be discovered in the Constitution.

I had great trouble, along with the Senator from Pennsylvania, I had great difficulty squaring his asserted judicial philosophy with the statements that he made in attempting to explain it. He sounded to me, when he spoke, just like a man who admitted that there was as good deal of subjectivity in application of the Constitution. Could you enlighten us at all on what you believe his judicial philosophy to be?

Mr. DOUGLAS. Well, I would not want to attempt to do that in the sense of summarizing what you folks have heard for 3 days from Judge Souter. I will say that, with regard to the ninth amendment, if the text of the Constitution and the Bill of Rights itself is read, the ninth amendment's very words say that there are rights unenumerated and they are reserved to the people. The writers of the Bill of Rights were concerned, as any group of lawyers would be, what if we forget something, what if we leave something out, we have search warrants and we have got freedom of religion and speech, but we might forget something, and whatever those fundamental and inherent rights are that the citizens have, they are protected in the ninth amendment.

There is a recent book out about the forgotten ninth amendment and it is very helpful reading, because it is one of those amendments that rarely gets used. It was cited in *Griswold*. I am not sure it has been cited much at all since then, possibly, you know, a footnote somewhere, but the ninth amendment is in the text, it is part of the 10 amendments that form the Bill of Rights, and I think all he was saying is that there is a textual recognition in the Bill of Rights itself that you cannot just put blinders on and say unless it is right here in these first eight amendments, the tenth being reserved to the States, it does not exist.

The CHAIRMAN. My time is up. Let me yield to my colleague from South Carolina.

Senator THURMOND. I want to thank the witnesses for coming here today, and you are people who know the judge personally. You worked with him and know him well and I am not going to take more of your time. I appreciate your testimony.

He has impressed me as being a very fine, able man and an excellent lawyer and has a good record as a judge. I presume you agree with that.

Now, I have just one question I want to ask each one of you and I will just start with you, Mr. Broderick. Incidentally, you are now president of the New Hampshire Bar Association?

Mr. BRODERICK. Yes, I am, Senator.

Senator THURMOND. Ms. Cooper, you are former deputy attorney general under Judge Souter?

Ms. COOPER. Yes, sir.

Senator THURMOND. Mr. Douglas, you are now a Representative from the State of New Hampshire?

Mr. DOUGLAS. Yes, sir.

Senator THURMOND. I just want the record to show that. The question is a very simple question. Is it your opinion that Judge Souter has the competency, the dedication, the courage, the integrity, and the fairness to be a Justice of the Supreme Court of the United States? We can start, Mr. Broderick, with you.

Mr. BRODERICK. Yes, Senator, I think he is uniquely qualified in that regard. I think he has all of those qualities.

Senator THURMOND. Ms. Cooper.

Ms. COOPER. I concur wholeheartedly.

Senator THURMOND. Mr. McAuliffe.

Mr. MCAULIFFE. Absolutely, Senator Thurmond.

Senator THURMOND. Mr. Douglas.

Mr. DOUGLAS. Same answer. Absolutely.

Senator THURMOND. Thank you very much. I have no more questions.

The CHAIRMAN. Thank you, Senator.

Senator Kennedy.

Senator KENNEDY. I just want to welcome all of the panelists and thank them very much for joining us here and for your statements and comments. I have no questions.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Ms. Cooper, you commented about being the first woman to join the attorney general's office. Were you recruited or were you a walk-on?

Ms. COOPER. I think I wrote a letter to the Office of Attorney General, along with 1,000 other letters, during my third year in law school, and I received a response and an invitation to an interview in response to that.

Senator SPECTER. Was there any active recruiting program by Judge Souter to bring in other women or minorities into the State attorney general's office?

Ms. COOPER. I don't know that, Senator. I am not aware of any at the time that I was hired, and I was not in a position to know whether he was doing that at the time he was making the hiring decisions.

Senator SPECTER. Was there any Afro-American on the staff?

Ms. COOPER. Not during the time that I was there.

Senator SPECTER. Was the Office of the Attorney General an activist in the sense of pursuing consumer rights cases or antitrust cases if you had jurisdiction there, or activist in the sense of being

concerned about issues like prison overcrowding, if your prisons were overcrowded in that era?

Ms. COOPER. I think that it was becoming during the time of Judge Souter's appointment as attorney general increasingly active in the fields of consumer protection and environmental law. I believe it was under Senator Rudman's term that those divisions of the office were established, and they continued to grow and become more involved in those issues in New Hampshire during Judge Souter's term.

Senator SPECTER. Well, I know that the Office of Attorney General of New Hampshire has responsibility of trial of murder cases, as I understand it. Was the office active in programs such as police education programs to try to give instruction on observing constitutional rights to make valid arrests without infringing on constitutional rights?

Ms. COOPER. At some point during my term—I don't know exactly when—there was established a State agency called the Police Standards and Training Council that was charged with the responsibility of training police officers. And I know that there were members of the staff that would provide seminars and assistant teaching during any of the continuing type of education provided to police officers in that context.

Senator SPECTER. Congressman Douglas, were you on the State supreme court at the same time that Judge Souter was?

Mr. DOUGLAS. I was from 1983 to 1985. I was appointed in 1977, and he went on the Superior Court in 1978. So we served as judges for about 8 years at the same time, but for 2 of those years we were at different levels of the court system.

Senator SPECTER. During the course of Judge Souter's testimony, I think there was a uniform reaction among committee members as to the powers of his intellect. We have very wide ranging discussions on many subjects, and he has a thorough command of the cases and of the rationale and of the reasoning and constitutional history. You might be in a position to give us some insight into his potential as a Supreme Court Justice. I would be interested to know what your speculation would be as to his potentiality as an intellect of some substantial dimension.

The Court is characteristically occupied by men and women of significant talent, but there are some legal giants in the Court from time to time. You have had a unique opportunity to work with him. I am not asking you to divulge any confidences of your court conferences, but I would be interested in your speculation or judgment on that question.

Mr. DOUGLAS. Well, Senator, if I could, I think that one thing that I observed, yesterday afternoon I sat in for about 1½ hours to see the questioning and how Judge Souter handled it. It impressed me at the time that this is the same David Souter I have known for years. He basically could have done the same job if the hearings had begun the morning after his nomination. You could have had him in here sitting here at 9 o'clock just the day after, and he would have been the same.

Senator SPECTER. All that preparation was for naught?

Mr. DOUGLAS. No. I am sure he was more prepared than he would have been, but his style, his demeanor, his ability to understand cases—I won't get into any specifics in conference, but—

Senator SPECTER. Was he a leader on the Court?

Mr. DOUGLAS. It would depend on the issue, as with any court. In other words, on a given case, each of the five of us might have stronger views than on the next case. Frankly, some areas of the law are less of interest to each particular Justice, just as all of us in the legislative body find some bills more interesting than other bills. But always he was on top of the material, could synthesize the arguments. If we seemed to be drifting aside and had not quite gotten the thing nailed down, Judge Souter would always be the one who could say, well, what you really want us to say is such-and-such, and if we were to change this paragraph, this would keep the principle of the law the way you want it but wouldn't do violence to the concern of Judge X over here.

Senator SPECTER. Excluding yourself, perhaps, was he a leader, a cut above the other justices?

Mr. DOUGLAS. Oh, yes, yes, in terms of intellectual capability, reasoning skills, writing skills, he is definitely not like most of the judges I have had contact with, and that is true around the Nation. He is an exceptional human being with a phenomenal ability to hear the arguments and synthesize the case and come out with something that I know will be a great credit, not only to this body who will hopefully confirm him, but also the Court.

Senator SPECTER. You may not want to answer this question, but I would be interested in your observation. We discussed extensively interpretivism and original meaning and judicial activism. In reading Judge Souter's cases, I had the firm impression that he was restrictive in his interpretation of the law, not expansive, selecting those words as opposed to liberal or conservative which have so much baggage which attaches to them.

In one of his cases, *Richardson*, he found a liberty interest. That was the only one that I could find. And while he recognized criminal rights in a number of cases, he was strong on law enforcement. I thought there was good balance in the criminal law.

In the civil side, it seemed to me that his opinion in the *Estate of Dionne* was more characteristic of his approach, where he went back to original meaning, wanted to find out the intent, the content of the drafters at the time the doctrine was entered. Judge Bell cited that this morning as a case of vision. I disagreed with that characterization. It seemed to me that that was restrictive, and that is all right if that is where he was.

His testimony was really significantly different, I thought. He was prepared to have the Court fill a vacuum which was not acted on by the legislature and by the executive. He found the liberty clause expansive. It wasn't just an incorporation of the Bill of Rights into the due process clause of the 14th amendment. The ordered concept of liberty of Cardozo in *Palco* was only a starting point for him. That is the bane of the existence of the interpretivists, as I read their writing.

I would be very interested to know, if you would care to comment, to whatever extent you would care to comment, about where

you saw Judge Souter on the philosophical spectrum in your work with him.

Mr. DOUGLAS. I wouldn't want to even speculate on that because we were in a different situation. When you serve on a State supreme court, you are not the free agent that you are in the sense of making a final decision as the U.S. Supreme Court does. A State supreme court does not have, in certainly Federal constitutional law, any variant. You are really an intermediate court.

When it comes, however, to our own common law, which, again, State supreme courts make but the U.S. Supreme Court does not—areas of law like torts, contract, family law—he is—I don't want to label anything. He did the job that we had to do. We are makers of law in the areas torts, contracts, whole varied areas where judge-made law is what you administer and you decide on a case-by-case basis the common law for New Hampshire, or in your State, the Commonwealth of Pennsylvania.

He knows the distinction between those two roles. So I don't know what label that gives you, but he knows the difference between where you are making law as a judge, where you are trying to figure out what a legislature or a Congress meant, perhaps inarticulately, and where you are looking at a constitutional provision such as one of the fundamental liberties in the Bill of Rights. And that is all I would say.

He does not view it with one label that would sweep all of those. He can make those distinctions, did on a day-to-day basis, and I think his cases reflect that, that he did so very admirably.

Senator SPECTER. One final question for you, Mr. Broderick. Senator Thurmond has a wonderful comment which he makes on nomination proceedings about Federal judges being courteous. The more power someone has, the more courteous they should be.

You practiced before Judge Souter. In terms of courtesy and perhaps better characterized as patience, not only for you, a former associate of his, but was he a patient judge, a very patient judge, a very, very patient judge? How many "very's" would you give him?

Mr. BRODERICK. Well, I would say this, Senator Specter: I have tried jury cases in front of him, and I think you can appreciate, as a former practicing lawyer, that things tend to get heated on occasion in a trial setting. Sometimes judges are given to get involved in that.

Judge Souter resisted that temptation. He was painfully courteous to lawyers, although expected quality performance and competence. He was a task-master in that regard but very civil, and painfully courteous to litigants.

I think if you had jurors here and litigants in front of this committee who appeared in front of Judge Souter, they would tell you that he is a gentleman. And so I think he has a unique temperament, and I think he will exercise it consistently on the Supreme Court of the United States. He is a very unusual man.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

First of all, two of the witnesses are old friends, Steve McAuliffe and John Broderick, and we are very pleased to have you here.

If I may follow the first question of Senator Specter just a little, structuring it a little differently, Ms. Cooper, you talked about Judge Souter's professional and skilled manner. But there is one other thing that we look for—at least I look for—in addition to being a champion of basic civil liberties. That is, some compassion, some understanding of those who are less fortunate.

The testimony of Judge Souter, I have to say, was somewhat different in tone, more compassionate than the opinions I read, than the record I read. Any reflections, if I may ask each of you, of how Judge Souter would be as a Supreme Court Justice in this area?

Ms. COOPER. I have not made a great study of Judge Souter's opinions, and I cannot comment on what compassion might be revealed by his record. I can state that having worked with him and having known him since 1976, there is a deep human compassion there. He understands the issues that are there, whether he has personally experienced them or not. And I am sure that he will bring that with him when he addresses any issues that would be before the Court if he is confirmed.

Senator SIMON. Did you see evidence of him reaching out to those who clearly are the least fortunate in our society?

Ms. COOPER. No, but I am not sure that I was in a situation where I would have witnessed something like that firsthand. I think what I can describe and perhaps am not articulating well is more a sense of the man from knowing him and from having had general discussions with him over a period of years.

Senator SIMON. Mr. Broderick.

Mr. BRODERICK. My associations, Senator, with Judge Souter have been largely professional. Therefore, I can't cite a specific instance other than by hearsay.

I would say this, however, on that topic: What strikes me most about the judge is his enormous sense of humility. I find that people who are humble, who have very little to be humble about, are rather extraordinary people. And I think Judge Souter is a man of enormous humility, and in my personal contact with him, he has a great sense of humor. And I find that people that have a sense of humor have a sense of proportion.

I have no question in my mind, having seen him for 12 years in our State, about his instincts or about his ability to be both intellectual and compassionate. And I think Mr. McAuliffe, in his statement today, indicates that in his own personal experiences, knows the judge to be a compassionate man.

Senator SIMON. Mr. McAuliffe.

Mr. MCAULIFFE. Senator, I think, as I said in my statement, I would like to reiterate that the issue of compassion, of course, was raised in this hearing while we had the pleasure of sitting in the back and listening. And as I said, I think it would be terribly unjust for this record to contain any doubt about David Souter's compassion and humanity. As Deborah Cooper said, there are many ways to approach it. I think I would approach it as follows:

Having worked for the gentleman, I can assure you that every person—and this was doctrine. I mean, anybody in the attorney general's office, from the lowest staff person to the deputy attorney general, understood very, very clearly that any person, however low in stature, however high and mighty in the State of New

Hampshire that came to our office for any matter, was treated with incredible respect, uniformly.

David Souter does not distinguish between people of low station in life or high station in life. He is not a man easily impressed by titles or position, and he is not a man that is adversely impressed by a low station in life.

There is a great story, and I will take a few minutes, since you have tempted me, and I will tell it to you, although it is probably going to take up somebody's time. But there is a wonderful woman who runs a convenience store near the office where I am now a partner. It is what I am sure everybody is familiar with. It is like a 7-Eleven where you go in and buy bread and milk and so forth.

When Judge Souter's nomination was announced, I was in there getting my daily candy bar, and she said, "You know, David Souter is quite a fellow." And I said, "Oh, Mary, I didn't know you knew David Souter." And she said, "Well, he comes in here to pick up milk or cokes and things when he is on hiking trips." And she said, "You know, one day he was in here, and he was in a rush and on his way to a hiking trip. And he was clearly in a rush. And there was a man behind him who was in, who I knew, whose car had run out of gas. And he was telling me about it, and he was about ready to hike off to a gas station and get some gas. And David Souter said, without even hesitating, turned to him and said, 'Oh, don't worry about it. Hop in my car. I'll take you.'"

You know, is it a monumental experience? Is it dramatically important in the universe in the sense of universal concerns that are discussed in this body? No. But I think it gives you an insight into the kind of man David Souter is. And I don't think you will find anybody who knows this man that has a doubt about that. I think you will understand—I hope—the frustration that we in New Hampshire sometimes feel when questions like that are asked, because it is the kind of question where you say, "my God, how can anybody ask a question like that about David Souter?" Then you hear the stumbling responses that we have.

It is simply not an issue. And as I said in my statement, I can tell you under oath without hesitation, David Souter is a compassionate man and a man of great dignity in his compassion. And I know Warren Rudman can tell you that from his personal experiences, and I know Tom Rath can tell you that from his personal experiences.

Thank you, Senator.

Senator SIMON. Congressman.

Mr. DOUGLAS. We are a small State, and I am going to ask Mary Hill sometime about you, Steve. [Laughter.]

I know just who she is.

Senator, if I could, the only thing that I can suggest as an indicator is one of those things that the record probably doesn't reflect. But when you sit on an appellate court, as I did, and you review the appeals from the superior court, you get a very strong feeling about who the problem judges are in terms of excessive sentencing, people who are going far beyond a fair and strong sentence and just, frankly, being excessive.

I had a chance to sit on our sentence review board, which was a group of judges on the superior court, and also on the supreme

court. We could always see who the peaks and valleys were. And I can tell you that we never had any sense at all that Dave Souter was being unfair, too strict in his sentencing. He was in the normal range, which means on a day-to-day basis, when someone had a legitimate argument, he heard it and he listened. We had judges who did not and, quite frankly, one of the reasons we had to create a mechanism was that there were some members of the bench who were overdoing the sentencing and in cases when it frankly wasn't appropriate.

So I can see it, having sat there and reviewed the sentences. You didn't get complaints that it was excessive, unfair, outrageous, heartless, done to play to the galleries, and that tells me a lot about that human being. And Dave Souter I know to be someone who is aware that those decisions have a big impact on someone's future and their life.

Senator SIMON. One final question, if I may address it to each of you. It is a speculative question. If you were to guess where on the spectrum of the Court Justice Souter ends up—presumably he will not be where Justice Brennan is, but Justice Stevens, Justice Powell, Justice Rehnquist, anywhere in that spectrum—what would you guess, Mr. Broderick?

Mr. BRODERICK. My initial instinct, Senator, as a trial lawyer is never to guess, but I would be happy to answer your question.

I don't know, to be honest, directly with you. My sense is—and that is all it is—that Judge Souter, if confirmed by this Senate, would be in the tradition of Justice Powell, perhaps.

Senator SIMON. Ms. Cooper.

Ms. COOPER. I don't know either, and I am not sure I can characterize Judge Souter in comparison to someone else who has been on the bench, except when you asked the question, the word "moderate" came to mind.

Senator SIMON. Mr. McAuliffe.

Mr. MCAULIFFE. Senator, you know, one thing that struck all of us from New Hampshire watching this is how beauty is in the eye of the beholder in terms of whether Judge Souter is a conservative, so-called, or a moderate, so-called. And I can tell you this: Wherever he falls, it will not be because he has a particular personal viewpoint that he will bring to the Court. He just doesn't do that.

I said in my statement even David Souter doesn't know what he is going to do in a particular case, and that is true. He doesn't. What he will do will, indeed, be a product of his analysis and sensitivity and respect for law and precedent. And I, being a Democrat and having worked for him, differ quite much, I am sure, with other people who think of where David Souter might be on the Court. I agree with Mr. Broderick. I think David Souter is going to be not only a great Justice, but I think he is going to be a pivotal centrist Justice.

Senator SIMON. Congressman Douglas.

Mr. DOUGLAS. I wouldn't want to try to speculate, Senator, if I could. The one thing I do say is this: Unlike the present Court that very often divides over footnotes and paragraphs and part 1, part 4, part 7, what he does bring to the Court is a goal that we always had for unanimity, if at all possible. And that requires some compromise, because five judges don't always see every case alike, and

yet our court had in the high 90 percentile unanimous opinions. You have to search long and hard in a pile of our cases to find dissents and concurrences. And so I think Judge Souter will bring a feeling of trying to give some better consistency to the law, and where that puts him on the scale I couldn't begin to speculate.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Congressman, if Judge Souter becomes Justice Souter and he brings unanimity to this Court—

Mr. DOUGLAS. Oh, well—

The CHAIRMAN [continuing]. I will be the first to move for canonization. [Laughter.]

I understand your point.

Mr. DOUGLAS. I am not saying he is—

The CHAIRMAN. He has one heck of a job cut out for him.

Mr. DOUGLAS. He won't pull it off, but at least his approach will not be to look for these little fine line differences. That is, I think, important.

The CHAIRMAN. I understand the point you are making, and I thank you for making it.

Senator Humphrey.

Senator HUMPHREY. Well, Mr. Chairman, I want to welcome my neighbors from New Hampshire. This, I think, you have to acknowledge, colleagues, represents a pretty fine mesh, this panel, people of diverse political points of view, probably diverse points of view on controversial decisions, judicial decisions; and yet, to a person, unanimous in their support of David Souter, both with respect to his professional competence and his personal attributes.

I don't know what finer mesh the committee can devise through which to push the nominee. Maybe we should subpoena his personal diaries or something or have somebody inventory his house or something. This is reaching ridiculous proportions.

The testimony of the witnesses is eloquent and speaks for itself. I can't embellish it further by questions, so I shall not.

The CHAIRMAN. Senator Hatch.

Senator HATCH. I would just like to welcome you all here. I think your testimony has been very persuasive. Representative Douglas, having served with him on the court, we are happy to have your viewpoint in particular. And, Mr. McAuliffe, Ms. Cooper, and Mr. Broderick, we really appreciate you.

Chuck, I have to say, being the authority that you are on the Constitution over in the House, I have a lot of respect for you. I am really happy to have you here speaking for Judge Souter. I think it makes a lot of difference here.

Mr. DOUGLAS. Thank you, Senator.

Senator HATCH. You bet.

The CHAIRMAN. Thank you, Senator.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, it is good to hear people that know someone best. I think that is a very important thing, the people that have their daily lives entwined with any person that we are having before us. And it has actually been quite moving in some of the things you say about this man, and I think this is a very important part of it for me. I always look at little things with people, especially politicians. I would never vote for a man who I

didn't think listened to anything that I was saying, that he wasn't home when I was speaking. There are people like that. Their eyes just glaze over, and you know that you are cut out of the process.

Then I am always interested in politicians and what vote they get in their home precinct. I always like to mess around. I say get me the election results, and let me look at the results in District 25-1 and see how that guy does right there among the people that he or she lives with. Ten years, 20, 5, that is always an interesting study for me as to how they really do in their lives and their interaction with others.

Well, I had some questions, but I am not going to ask those. We have a lot to do, and the chairman is very patient and would have allowed that. But I think we are ready to go forward.

Thank you very much for your testimony.

The CHAIRMAN. Thank you.

Before I dismiss the panel, in the interest of full disclosure, so it is not printed somewhere later and given a meaning or put in a context that it maybe shouldn't be put in, both Mr. Broderick and Mr. McAuliffe are very, very close personal friends of mine, and they were the cochairs of my effort to be the Democratic nominee. So I just thought that should be stated at this point before one of the reporters concludes that they found something out. I will just make it easy for them. I thank them and, as you might guess, I am somewhat prejudiced with regard to both of them. I thought their statements were eloquent, although not totally persuasive. [Laughter.]

Mr. BRODERICK. Thank you, Mr. Chairman.

The CHAIRMAN. I thank them both. I thank Ms. Cooper for being here. And, Congressman, thank you for coming over. I have one question for you before you depart and we go to vote. Would you rather be on the bench or in the Congress?

Mr. DOUGLAS. Congress.

The CHAIRMAN. Thank you.

Mr. MCAULIFFE. Mr. Chairman, if I might, just because I know you would otherwise have mentioned it, I think that the record should also reflect that we did not testify at your request, but actually were requested by the administration to testify and sought your permission.

The CHAIRMAN. That is correct on both scores, and I thank you all for being here. This panel is dismissed.

Now, before we go to the next panel, let me discuss out loud with my colleagues the way to proceed here. We have a very important panel that is coming next made up of Ms. Smeal, Ms. Yard, Ms. Allred, Ms. Neuborne, and Ms. Holtzman, and they all represent important groups and are important persons in their own right.

We have two votes. One has just been signaled. There will be two votes that are, as we say in this business, back-to-back, which means they will be in a row. I would suggest, depending on what my colleagues think, rather than bring such a distinguished panel up and then interrupt them and go and vote, why don't we go and vote, catch the tail-end of this one and the front-end of the next one and then get back here as quickly as we can.

Although I now look at the photographers who have good reason to be angry with me for not allowing them to be in that well

during the Souter hearing, and they are already to take their pictures, is that all right with you guys? [Laughter.]

All right, if it is all right with the photographers, that is the way we will do it. We will recess for the approximately 15 minutes it will take us to make both votes and come back. We will recess until then.

[Recess.]

The CHAIRMAN. The committee will come to order.

We are prepared to proceed, and I thank our fifth panel for being so gracious. As I indicated, our panel is made up of a very distinguished group of Americans: Ms. Eleanor Smeal, president of the Fund for the Feminist Majority; Molly Yard, president of the National Organization for Women; Gloria Allred, a Los Angeles attorney, Ms. Allred is accompanying her client, Ms. Norma McCorvey, who was a plaintiff in the landmark case of *Roe v. Wade*; Helen Neuborne, executive director of NOW Legal Defense and Education Fund; and Elizabeth Holtzman, former U.S. Representative from New York and now the comptroller of the city of New York, who is not representing the city, but is here representing herself.

It is nice to see you, Liz.

I welcome you all and appreciate your great concern and interest, and I for one am going to have a number of questions, but let me begin by inviting opening statements. Unless you all have agreed to another way to proceed, I would like to suggest that we begin with you, Ms. Smeal, if you would go first, and then we will just work our way across the table, if that is appropriate. Is that the way you would like to do it, or does anybody have a preference?

Ms. YARD. Unless you want our former Congresswoman to go first.

The CHAIRMAN. OK. We will start with Liz and we will work our way down the other end of the table, then.

Again, welcome. It is good to see you back here. I wish you had never left.

**PANEL CONSISTING OF ELIZABETH HOLTZMAN, COMPTROLLER, CITY OF NEW YORK, NY; HELEN NEUBORNE, EXECUTIVE DIRECTOR, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ORGANIZATION FOR WOMEN; GLORIA ALLRED, LOS ANGELES, CA, ACCOMPANIED BY NORMA MCCORVEY; MOLLY YARD, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN; AND ELEANOR CURTI SMEAL, PRESIDENT, THE FUND FOR THE FEMINIST MAJORITY**

#### **STATEMENT OF ELIZABETH HOLTZMAN**

Ms. HOLTZMAN. Thank you very much, Senator Biden. Mr. Chairman and members of the committee, I am very grateful for the opportunity to testify here today, and it also gives me particular pleasure to be here to see a number of colleagues with whom I had the great privilege of serving together with at the time that I was in the House of Representatives.

The vacancy left on the U.S. Supreme Court by the resignation of Justice William Brennan, Jr., is slight, compared to the deeper void felt by the people of America throughout these confirmation proceedings. There is too little in these hearings, and in the past

record of the nominee, to reassure those concerned about civil rights, human rights or women's rights that Judge David Souter is suited to interpret our constitutional rights on the highest Court in the Nation.

For women, Judge Souter has failed to pass muster in three basic areas, three R's as fundamental as any subject in modern-day life: rape, *Roe*, and the right to be free from discrimination. Because he has failed to assure us of his fitness in these three basic subjects, he should not be confirmed.

Nothing exposes Judge Souter's sentiments more clearly than his attitude toward rape. In this regard, I refer to an opinion that he authored in 1988, as a Justice on the New Hampshire Supreme Court, *State v. Colbath* (130 N.H. 315, 540 A.2D 1212). As a former district attorney, and the first woman district attorney in New York City, I have overseen the prosecution of more than 1,000 rape cases. Judge Souter's opinion demonstrates a lack of understanding of the human dimensions of rape.

Rape is a crime that for too long was shrouded in myths. For many years, rape was a word barely mentioned in polite company. After all, it was thought, nice women did not get raped. Rape was perceived as something that happened to women who asked for it. Women, it was thought, brought rape upon themselves by being in a public place, wearing certain clothing, or conducting themselves in a certain manner.

Alternatively, it was believed that women falsified claims of rape to preserve their reputation. A woman's word was not considered trustworthy and corroborating testimony was necessary for conviction. And the woman's prior sexual activity was considered probative to showing that she consented to the conduct in question on the theory that once a woman said "yes," she would not be likely to say "no."

In those instances, a rape defendant was permitted to show that the victim was not "chaste," "upon the theory that it is more probable that an unchaste woman would have consented to intercourse than one of strict virtue"—this is Richardson & Prince, "The Law of Evidence." Or, as Judge Cowan said in an 1835 rape case in New York: "Will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?"

Over the years, rape began to be recognized for what it was: a crime of assault and violence. Courts and legislatures began to recognize that the attention at trial should focus on the activity of the offender in causing the rape, not on the activity of the victim. Rape shield laws were specifically enacted to prevent the mistreatment of rape victims and to protect juries from the introduction of evidence that fostered the myths of rape.

The premise of rape shield laws is that a woman has an absolute right to say "no" to any man at any time. Forced sex is rape. Whether or not a victim said "yes" to some man at some time should be irrelevant to whether or not a man attacked and raped her.

In 1977, as a Representative in Congress, I introduced the Federal rape shield law, which became rule 412 of the Federal Rules of Evidence, still in force. Today, all 50 States have rape shield laws.

Yet, in the *Colbath* case in 1988, Judge Souter cast the rape shield aside. His opinion is disturbing, because it resounds with the very myths that the rape shield was designed to remove.

*Colbath* was an appeal from a rape conviction under a charge of aggravated felonious sexual assault. The defendant argued on appeal that the trial judge improperly excluded from jury consideration the activities of the rape victim in a bar several hours before the rape. At worst, the prior activities consisted of very flirtatious behavior. The trial judge barred consideration of the victim's conduct under the rape shield law, but the normally pro-prosecution Judge Souter overturned the conviction.

In language reminiscent of Judge Cowan and without any analysis, Judge Souter found that the victim's "openly sexually provocative behavior" was crucial evidence and highly relevant to an assault by the defendant hours later. Judge Souter said that a defendant was entitled to show that the woman had earlier in the day invited "sexual attention." The victim may have alleged rape, the Judge wrote, as a way "to explain her injuries (she was beaten around the breasts and arms) and excuse her undignified predicament."

Judge Souter draws entirely upon the myths of rape—from the view that the victim had a motive to falsify a rape claim to the idea that she "asked for it." In a "blame the victim" stance, he states that the victim's flirtation was "provocative" behavior—as if that would justify the attack upon her.

While Judge Souter is promoted as a scholar, in the *Colbath* opinion, examples of such scholarship are lacking. References are not current and the many relevant, then-current Law Review articles and cases are ignored. For example, he dismisses as trivial the possibility that admission of the victim's prior activity could prejudice the jury, despite numerous studies that prove otherwise. But what is striking about this opinion is the willingness—even as late as 1988, only 2 years ago—to rely upon an antiquated and demeaning view of women.

The Supreme Court has yet to rule on the constitutionality of a rape shield law, but it might find an unreceptive audience, if Judge Souter were among the Justices.

Judge Souter has also been unwilling to discuss *Roe v. Wade*. It is no secret that Judge Souter could be the vote that would send abortion to back alleys, across borders, or to endless statehouse battles. Judge Souter's refusal to respond to repeated inquiries on this subject suggests a further remoteness from the reality of women's lives. We cannot play hide and seek with the fundamental right of women to privacy and to the control of their bodies.

Unlike Judge Souter, women do not find the right to choice to be distant. To women and girls, reproductive rights are not faraway memories of a conversation in a dorm room 24 years ago. They are right here, right now; they are teenage pregnancy; they are poor women who cannot find family planning services; they are women who have become pregnant through rape and incest. Yet, Judge Souter will not so much as endorse the result of *Griswold* and acknowledge the right to use birth control.

Enforced pregnancy will never be acceptable to women. Nations around the world—Italy, Spain, France—have changed their laws.

Like the people of those countries, the women of America have torn down that wall and they do not want it erected again by a hostile Court. For many women, a life without reproductive freedom is a life of limited freedom.

Appeals from decisions striking down restrictive legislation in Pennsylvania and Guam are working their way to the Supreme Court. Already on the docket is *New York v. Sullivan*, which will review the ability of federally funded family planning agencies to furnish information about abortion.

In the area of civil rights, Judge Souter once again has demonstrated a cold technocratic approach to matters of vital concern.

Judge Souter asserted that new Hampshire could enact a voting literacy test, and tells us that the voting of illiterates would dilute the votes of literates. Judge Souter called that a mathematical statement. He is wrong. It is a statement of values, a statement that the system would do better without the votes of some of its citizens. Some would say it is a statement that is deeply anti-democratic.

Judge Souter tells us that the middle level of scrutiny for sex discrimination cases under the 14th amendment is too vague, but he cannot tell us what level of scrutiny he would consider appropriate in sex discrimination matters.

Judge Souter, in these hearings, refuses to affirm the power of Congress to address equal opportunity and affirmative action issues, unless, in his words, it involved "a specific remedy for a specific discrimination." This limited view does not promote broad-ranging legislative solutions to the rectification of discrimination.

Judge Souter has repeatedly stated that, if confirmed, he will listen, and I believe him. But his past has shown little indication that he can hear the voices of people. He did not hear the need in the voices of two elderly brothers in their late seventies, when he rejected their unemployment compensation claim, because they could only work 4 hours a day. He wrote, "It is neither common knowledge, nor do the plaintiffs claim, that a weak back, poor eyesight, or angina necessarily prevents an individual who can work four hours a day from working eight."

He did not hear the pain in the childhood voice of the only Jewish student in his elementary school class who was excused from class during the recitation of the Lord's Prayer when, years later, he fought for the use of the Lord's Prayer in schools.

He did not hear the voices of environmentalists when he refused bail and demanded jail sentences for Seabrook Power protestors, while the State was contemporaneously accepting funds for prosecution of the cases from the company.

And he does not hear the voices of women and their loved ones—women who could be injured, mutilated, killed or sterilized from illegal abortions—when he describes the possible consequences from overruling *Roe v. Wade*, merely in terms of political struggles, legislative battles and a tug of war over federalism.

Given this, we have no assurance that when he listens, he will hear the human voices—the pain, the trouble, the need. And how can we entrust him with a position on the most powerful tribunal in the Nation otherwise?

Watching these hearings, reviewing Judge Souter's record, has been a disquieting experience. People in general, women in particular, feel they have been left in a void.

A vote to affirm Judge Souter could be a vote against important rights, a vote against rape victims, a vote against a woman's right to control her body, a vote against birth control, a vote against the right to equal opportunity.

Instead of tearing down the walls of discrimination, Judge Souter's confirmation could mean the erection of new barriers, a step backwards into dark ages we will no longer accept. I urge the rejection of Mr. Souter as a Justice to the United States Supreme Court.

The CHAIRMAN. Thank you very much.

Before I move to you, Ms. Neuborne—by the way, I would like to thank you for all the help you have personally given me and the committee on the Violence Against Women's Act that you played a major part in helping us draft.

I say that and now I am going to say something else, that I would really appreciate it, if it is possible, to try to keep the statements to 5 minutes. We have roughly 20 or 25 more witnesses and a lot of questions, and so to the extent that you can all keep it at 5 minutes, we would appreciate it. I understand that may not be able to be done, and I am not going to go banging the gavel down, but it will give us a chance to ask some more questions, as well.

With that, Helen, why don't you proceed.

#### STATEMENT OF HELEN NEUBORNE

Ms. NEUBORNE. Thank you, Senator. We look forward to continuing working with you on this legislation which, we agree, is very important.

I will keep my statement to 5 minutes and would ask that a longer women's rights analysis that we have prepared on Judge Souter be placed in the record.

The CHAIRMAN. Your entire statement will be placed in the record.

Ms. NEUBORNE. Thank you.

I am the executive director of the NOW Legal Defense and Education Fund, which is a women's rights organization founded 20 years ago. During those 20 years, the status of women in American society has advanced dramatically, not to the point where a woman sits on the Senate Judiciary Committee, but certainly to the point where concerns of women, half of the electorate, must be taken seriously by the Senate.

NOW Legal Defense and Education Fund is not a single-issue organization, any more than women are single-issue citizens. It is Judge Souter in these hearings who has arbitrarily singled out one issue, an issue of bedrock importance to all women, the scope of the right to privacy. He has refused to answer questions about this one issue, in the same forthcoming way that he has addressed all other questions. This selective refusal and Judge Souter's own imposition of a "litmus test" to determine what he will or will not tell the public about his opinions on prevailing law requires us to oppose him.

We call upon members of this committee and the Senate to vote against this nomination. When privacy hangs in the balance, as it does today, and women live under the threat that our fundamental constitutional right to decide for ourselves when and whether to have children may be taken away, Supreme Court nominees must be assessed according to their candor on that subject. Judge Souter has made up his own rules on what he will answer, which are different for privacy than for all other issues. This is not a game and we cannot condone such a selective approach.

We know that you cannot force Judge Souter to answer, but just as you would in a civil proceeding, it is fair in this proceeding to draw a negative inference from his selective silence, especially when so much is at stake. He has failed to meet the burden that so many of you so eloquently described. Therefore, the responsibility is now yours to reinforce the integrity of the confirmation process and the important role that you play under the advice and consent clause of the Constitution.

If you do not know—and none of us know—where Judge Souter stands on the settled law that was announced in *Roe v. Wade* and applied in every abortion-related case since, you must oppose him. You have no right to gamble with our bodies and our lives.

What has Judge Souter said and what has he refused to say? His insistence on referring to marital privacy instead of the generally accepted individual privacy rights that now exist, and his statement that not all privacy rights, even marital privacy rights are fundamental, in themselves mark a retreat from the principles articulated by the Supreme Court, even before *Roe*. It is, therefore, meaningless to say, as he did, that he has no agenda on what should be done with *Roe v. Wade*, when it is clear that his view of the law diverges from the established practice of the past generation. The Court will overrule its settled privacy precedents, only if Judge Souter wants it to and becomes the fifth vote to make that change.

The current Supreme Court is divided on, and constantly re-evaluating, many issues other than privacy, issues like affirmative action, church-state, equal protection doctrine, aspects of criminal procedure, modes of statutory construction, as well as the role of the 10th amendment. However, the real prospect of Supreme Court reevaluation has not precluded Judge Souter from discussing his views on these subjects, sometimes very forthrightly and fully with this committee.

For example, Judge Souter was prepared to tell this committee where he stands on affirmative action ordered by Congress to remedy past discrimination, always a controversial subject. He was also prepared to discuss fully his views on the continuing development of legal doctrine based on the religion clauses of the first amendment. He criticized existing law, but expressed reluctance to overrule precedent, without knowing what comes next.

Similarly, he discussed equal protection doctrine critically, but cautiously.

By contrast, his adamant refusal to be candid in the area of privacy and abortion can do nothing but create the very reasonable and strong inference that he is prepared to jettison established law in this most important area for women. It was, therefore, simply

wrong for Judge Souter to have told Senator Biden that the reason he was so expansive on some issues, yet so reticent on privacy, is because "there is no serious possibility" that the Court will change its basic approach on any issue but privacy and abortion. Judge Souter provides that serious possibility; where the Court is closely divided, he will dictate its future direction.

Judge Souter has created the single-issue problem. The only area he declined to discuss openly was privacy and abortion. It is your responsibility to look beyond what he has said to what he has refused to say. Judge Souter's selective silence on the issue of privacy speaks louder than words.

Thank you.

[Ms. Neuborne submitted the following analysis for the record:]

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**DAVID HACKETT SOUTER****A WOMEN'S RIGHTS ANALYSIS****SEPTEMBER 4, 1990**

Since David Souter was selected by President Bush as his Supreme Court nominee to replace retiring Justice William Brennan, the NOW Legal Defense and Education Fund has researched Souter's judicial opinions, spoken with attorneys who appeared before him while he was a judge on the superior court (1978-1983) and the state supreme court (1983-1990) in New Hampshire, and reviewed his opinions and briefs as New Hampshire Attorney General (1976-1978). Contrary to popular media pronouncements, Souter is not a blank slate. Although there is not a long paper trail, all of the information about him indicates that we have ample reason to fear what his appointment would mean to the future of reproductive and other women's rights, civil rights and individual rights.

NOW LDEF has serious concerns about this nomination and will oppose it unless these concerns are addressed satisfactorily by Souter upon questioning at the Senate Judiciary Hearings. If Souter does not recognize that the Constitution guarantees the fundamental right to privacy and gives women the right to equal protection of the law, he does not belong on the U.S. Supreme Court.

JUDICIAL PHILOSOPHY ON THE CONSTITUTION

The Bork confirmation hearings were noteworthy for the Senate Judiciary Committee's thoughtful and thorough questioning of Judge Bork as to his judicial philosophy. Bork's adherence to extremist theories of constitutional and legislative interpretation doomed his nomination. Evidence suggests that Souter's theories are similarly troubling.

Souter's record on the New Hampshire Supreme Court reveals that he is a judge who apparently believes that perplexing constitutional law issues of our time should be decided solely by reference to the intent of the framers of the Constitution. This posture has dramatic negative implications for equal protection and privacy rights, which are rights of citizens not written into or interpreted as part of the Constitution until long after the document was originally framed. Throughout the nineteenth century and the first seventy years of this century, equal protection challenges were rejected by the U.S. Supreme Court to such obviously discriminatory sex-based classifications as laws denying women the right to enter into contracts or practice as lawyers. Only in the 1970's did the Court develop a new test for evaluating such challenges, the application of "intermediate scrutiny," which resulted in many sex-discriminatory laws being struck down.

Souter has questioned the development of this level of scrutiny, which requires the Court to find that a sex-based classification in a law is substantially related to an important government interest or to strike it down. This level of scrutiny is not as rigorous as that applied to race-based classifications or those based on national origin, alien status or being born out of wedlock. It is, however, more likely to result in a statute being struck down than "rational relationship" scrutiny, which is applied to all other types of legal classifications and which requires a challenger to show that the classification has no rational relationship to the legitimate government interest allegedly served by the statute.

In one case in 1978, Helgemoe v. Meloon, while Souter was Attorney General of New Hampshire, the Attorney General's office filed a petition for a writ of certiorari with the U.S. Supreme Court requesting that the Court review a decision by the U.S. Court of Appeals for the First Circuit. The brief was submitted under the names of Souter and an assistant Attorney General, but given the importance of petitions for writs of certiorari to the nation's highest court, it is likely that Souter approved all the contents. The appellate court had struck down the New Hampshire "statutory rape" law which criminalized sexual intercourse regardless of consent between a man and a female less than fifteen years old. The court had done so after applying intermediate scrutiny to the law, which it found to contain a

sex-based classification because only females could be victims and only males could violate the law. The Attorney General's brief to the Supreme Court argued that the intermediate scrutiny test, which had been fully articulated by the Supreme Court two years before for the first time in Craig v. Boren, 429 U.S. 190 (1976), "lacks definition, shape or precise limits," that it would "permit subjective judicial preferences and prejudices concerning particular legislation," and that "the instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard." Helgemoe v. Meloon, petition for writ of certiorari at 18-19.

This is strongly negative language about a test which ended nearly two centuries of state sanctioned sex discrimination. While the intent of the petition for review may have been to argue for upholding laws protecting young women from being coerced or manipulated into sex by older men, this legal approach would have sacrificed the larger goal of protection for women from sex discriminatory laws. The Supreme Court chose not to review the case, but ironically, in 1981, in Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464 (1981), when the Court did review the equal protection issues raised by sex-specific statutory rape laws, intermediate scrutiny was applied and the identical Californian statute was upheld.

Souter's reliance on an extremist original intent method of

analysis can also be seen, for example, in In Re Estate of Dionne, 518 A. 2d 178 (N.H. 1986). Souter was the lone dissenter in this case arising from a will contest. Under a New Hampshire legislative scheme, the parties are required to pay a fee to the judge if the will is probated at a contested hearing on a day the probate judge is not scheduled to sit. In this case, both parties argued that the lower court ruling was null, void and unconstitutional under the state constitution because they were required to pay for the probate judge. The relevant section of the state constitution, part I, article 14, provides the "right to obtain right and justice freely, without being obligated to purchase it." The majority of the state supreme court held that the imposition of such fees was unconstitutional. Souter makes several interesting statements in his dissent. He first concludes that although he disagrees with the fee system, the system is not "subject to the regulation of the judicial branch in accordance with its own notions of good public policy," Dionne, 518 A.2d at 183, and is subject to review only under the state constitution. Souter then rejects the constitutional argument based on his analysis of the legislative history and the intent of the New Hampshire Constitution's framers. He writes, as to the framers' intent, that,

"the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption." ...We confirmed the vitality of this interpretive principle as recently as five years ago...and it is just as applicable today in the construction of article 14 as it was in that recent

case, construing the article 15 right to jury trial. The court's interpretive task is therefore to determine the meaning of the article 14 language as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text that took effect in June of 1784.

Dionne, 518 A.2d at 181 (citations omitted). Under Souter's analysis, the payment of a special fee to judges for contested hearings does not violate the state constitution because the fee scheme was reenacted at about the same time as the relevant constitutional provision was being considered and ratified, leading Souter to believe that the constitutional framers did not find the fee system unconstitutional. Although the parties in the case did not allege inability to pay, it is noteworthy that Souter's constitutional analysis contains no discussion of whether the fee system might be inappropriate in modern times, or of whether such a fee requirement might deny access to probate court to the poor, a group not protected and perhaps not even considered when the statute and the constitution were being written.

This "original intent" approach is entirely inappropriate for Supreme Court Justices. The most important cases facing a Supreme Court Justice are those of first impression requiring constitutional interpretation. Some decisions are dictated by stare decisis, the doctrine requiring decision-making consistent with past Supreme Court precedent, but many require the Justices to decide what is constitutional with only the language of the

Constitution to guide them. If the Justices are guided by the framers' specific intent, they will necessarily undermine or eliminate constitutional protections recognized or given substance since the eighteenth century, some as recently as two or three decades ago, for women, the poor, and minority groups. It is impossible to ascertain the "intent" in all situations of the men who wrote the Constitution, the Bill of Rights and all later amendments until the 19th Amendment which gave women the right to vote, but they certainly did not envision that their protections would extend to women. The 18th century framers expressly excluded women and African-Americans from such protection. A framers' intent analysis is also worthless on important issues for women that the framers could not even imagine, such as conflicts over surrogate parenting and new reproductive technologies.

More is required from a Supreme Court Justice than a literal understanding of laws. Laws are an embodiment of the values we adhere to as a nation. The interpretation of those laws requires a connection with the world we live in today. The beauty of the Constitution lies in its ideals of a free and just society. It continues to guide us, not because the framers were wiser than we are today, but because of those ideals. The Supreme Court needs justices who understand their obligation to apply those living ideals flexibly to modern society. Souter must be required to explain his beliefs about the ambit of equal protection of the

law and other vital constitutional guarantees.

SOUTER AND ABORTION

Clearly, abortion, and the right to privacy more broadly, will be issues upon which searching questioning will be required at the hearings. Such questioning will not seek answers about Souter's personal beliefs on abortion and contraception or his views on particular pending cases - the irrelevant litmus test President Bush unnecessarily fears - but must rather focus on Souter's method of analysis of the Constitution and his understanding, or lack thereof, of the fundamental nature of the well-established privacy right.

In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court recognized, by a 7 to 2 vote, that the fundamental right to privacy provided by the U.S. Constitution encompasses a woman's decision whether or not to terminate her pregnancy. The decision cited and relied on earlier cases finding a constitutional right to privacy. Since the case was decided, Republican appointments to the Supreme Court have created a new conservative majority which places the Roe holding at risk. Justice White and now-Chief Justice Rehnquist were the two dissenting votes in Roe, and they have continued to uphold all statutes regulating abortion. In Webster v. Reproductive Health Services, 109 S.Ct. 3040

(1989), Justices White, Kennedy, and Rehnquist rejected further use of the Roe trimester framework, Justice O'Connor called it "problematic", and Justice Scalia stated that he wants to overrule Roe v. Wade and eliminate the right of privacy that it (and prior and subsequent cases) set forth.

The justice who replaces Justice Brennan, a staunch advocate of women's reproductive rights, could be the swing vote on future abortion cases. As a state supreme court justice, Souter wrote only once on reproductive rights. This decision, together with his adoption of the framers' intent theory of constitutional interpretation and the consistent deference he has shown as a judge to the claimed right of states to legislate without judicial monitoring, discussed below, warn us that he might dismantle Roe v. Wade and our fundamental rights if given the opportunity.

While David Souter was a member of the New Hampshire Supreme Court, the court issued an opinion in a medical malpractice case which included a discussion of abortion, Smith v. Cote, 513 A.2d 341 (N.H. 1986). Much of the media attention on this case has focused on the concurrence written by Souter; however, a close analysis of the majority opinion is also warranted, since Souter joined in both its holding and its reasoning.

In Smith v. Cote, a woman sued her obstetrician for failing

to warn her of the potential birth defects her child could suffer as the result of the mother's exposure to rubella during pregnancy. The child was born severely disabled with congenital rubella syndrome. Prior to ruling on the defendant's motion for summary judgment, the trial court sought a ruling by the New Hampshire Supreme Court on several issues, under a New Hampshire procedure called an interlocutory review of questions.

The state supreme court was asked to address the four specific questions summarized below:

- A. Will New Hampshire law recognize a wrongful birth cause of action against a physician who failed to test, detect, and give counsel regarding the risks of potential birth defects, thereby depriving the mother of the information about rubella, based upon which she might have decided to have an abortion?
- B: If the answer to question A is in the affirmative, what type of damages are recoverable?
- C. Will New Hampshire law recognize a cause of action for wrongful life? (Wrongful life actions are brought by the child suffering from birth defects; in contrast, wrongful birth actions are brought by the child's parents.)
- D. If the answer to question C is in the affirmative, what general and specific damages may the child recover?

The issue of abortion arose in the case in the context of the potential wrongful birth cause of action. In explaining the trend toward judicial acceptance of wrongful birth actions, the majority opinion finds that there are two main causes for the trend: medical advances which allow doctors to predict and detect fetal defects; and the principles of choice in pregnancy outcomes outlined in Roe v. Wade, 410 U.S. 113 (1973) and later cases. Based on these factors, the Court finds that a cause of action for wrongful birth exists.

Although the ultimate holding is pro-choice, the language neither affirms nor supports women's privacy rights or any fundamental right to choose abortion. Instead, the opinion is replete with language that suggests that the outcome would be very different if Roe v. Wade, a United States Supreme Court case, were not controlling.

In Roe the Supreme Court held that the constitutional right of privacy encompasses a woman's decision whether to undergo an abortion. Roe, 410 U.S. at 153, 93 S.Ct. at 726. During the first trimester of pregnancy, a woman may make this decision as she sees fit, free from state interference. Id. at 163, 93 S.Ct. at 731. The Court has repeatedly adhered to this holding in the face of regulatory attempts to circumscribe the Roe right of privacy. See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists \_\_\_ U.S. \_\_\_, 106 S.Ct 2169, 90 L.Ed.2d 799 (1986). As we indicated above, we believe that Roe is controlling; we do not hold that our decision would be the same in its absence.

Cote, 513 A.2d at 346 (emphasis added). Later in the opinion, the court once again makes it clear that it does not independently support this fundamental right:

Notwithstanding the disparate views within society on the controversial practice of abortion, we are bound by the law that protects a woman's right to choose to terminate her pregnancy.

Cote, 513 A.2d at 348. This majority opinion is joined and accepted by David Souter. By writing a separate concurrence, he had an opportunity to base his holding on different reasons or to state his views on the constitutional basis of Roe, but he did neither. Instead, he agreed with the majority's subtle attack on abortion rights and went on to address the needs and concerns of doctors morally opposed to abortions. This anti-choice issue was totally unrelated to the facts presented in Smith v. Cote and was not raised, briefed or argued by either of the parties.

Furthermore, there is no explanation as to why Souter raised this issue at all, other than the statement in his concurrence that the directed "questions fail to raise a significant issue in the area of malpractice litigation that we raise today." Cote, 513 A.2d at 355. This was not, however, a burning issue in the medical community, a community with which Souter was familiar. Souter served as a board member of Concord Hospital and as an overseer to the Dartmouth Hitchcock Medical

Center. Interviews with other members of those boards published in a July 25, 1990 article in the Manchester, New Hampshire Union Leader, provide evidence that this issue never arose in the context of hospital meetings.

This is judicial activism of the type we have been told that Souter rejects. In the judicial questionnaire he completed for the Senate Judiciary Committee prior to questioning for his federal judicial appointment to the U.S. Court of Appeals for the First Circuit, Souter wrote: "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." In Cote, the New Hampshire Supreme Court was given a very specific area of inquiry, and Souter's concurrence clearly exceeds that boundary. Thus, the questions become, is Souter a judicial activist to the detriment of the rights of women, minority and other disenfranchised groups? How does Souter equate his statement of principle to the Senate Judiciary Committee and his practice?

In the Cote concurrence itself, Souter affirms that women have the right to abortion counselling, but only because it is "necessarily permitted under Roe v. Wade", Cote, 513 A.2d at 355. He then discusses what is the appropriate course of action for physicians with "conscientious scruples against abortion." Cote, 513 A.2d at 355. He finds that a physician must consider

counselling about abortion as an option because of Roe, but the physician does not have to provide such counselling personally. Doctors in this situation should disclose their moral convictions and refer the patient to another physician.

Souter's response to the possible conflict between pregnant women and physicians opposed to abortion is reasonable, but he clearly went out of his way to address this hypothetical. Moreover, it is notable that in the entire opinion, majority and concurrence, there is no indication from Souter that he believes that the woman's right to choose arises from any fundamental right or constitutional imperative.

Souter's other significant writing on abortion was completed when he was a superior court judge. In 1981, the New Hampshire legislature was considering a bill requiring parental consent for abortions on unmarried minors. Under the pending bill, an abortion could be performed on an unmarried minor without parental consent only when a justice of the superior court determined that performing the abortion would be in the best interests of an immature minor. Souter, writing a letter to the legislature at its request on behalf of the members of the superior court, addressed the constitutionality of the judicial bypass option contained in the bill.

This letter is curious not only for the issues it addresses,

but also for those left unanswered. The judges refused to take a position on parental consent but did find two fundamental problems with the bypass provisions. The first was that the bill left it to judges "to make fundamental moral decisions about the interests of other people without any standards to guide the individual judge." In many ways this posture is puzzling. The standard the bill envisions is one frequently used when cases involve minors: the best interests of the minor. Other applicable standards would be those set forth in Roe v. Wade, 410 U.S. 113 (1973), and many later cases which created a framework for ensuring protection of the rights to privacy of all women. Souter's letter does not distinguish this situation from many others in which the judiciary is forced to make similar decisions by balancing interests, such as child custody cases.

The second problem anticipated by Souter was judge shopping. The letter anticipated that minors would try to avoid judges who find abortion morally wrong and judges who believe that the assessment of the best interests of the pregnant minor requires moral decision-making of a type the judge should not make. There is no mention of the constitutional validity of the parental consent bill without a judicial bypass and no suggestion of a simple recusal procedure to ensure that only unbiased judges would sit.

In analyzing a judicial bypass provision, Souter

inexplicably restricted his response to a discussion about judges. There is no real discussion of the minor who would be involved in the process. It is the discomfort of judges rather than the hardship of young women which garners all the attention. The focus is entirely on the problems faced by anti-choice judges who are unable to fulfil their judicial responsibility to put aside their personal biases, rather than on the problems of minors facing perhaps the most important decision of their lives. Even assuming the judges felt they were not knowledgeable enough to write about pregnant minors, Souter's analysis is chillingly lacking in compassion and empathy.

Although the tone of this letter is anti-choice, in practice it was an important tool in the fight against parental consent laws in New Hampshire. This letter was used to defeat parental consent legislation on several occasions because many parental consent supporters would not vote for a bill without a judicial bypass option. The Supreme Court recently clarified in Hodgson v. Minnesota, 58 U.S.L.W. 4957 (U.S. June 25, 1990), that a parental consent bill is unconstitutional without a bypass provision, but Justice Brennan provided the fifth vote for the plurality on this point.

The final written evidence on Souter's abortion position is more tenuous. In 1976, the New Hampshire Attorney General's Office submitted to the U.S. Court of Appeals for the First

Circuit, a brief which argued that the state should not provide Medicaid funds to pay for what the brief alleged that New Hampshire residents see as the "killing of the unborn." (Coe v. Hooker, Civil Nos. 75-206, 75-244, 75-253.) The assistant attorney general who wrote the brief, upon which Souter's name also appears, denies speaking with Souter specifically about the brief. Given the small size of New Hampshire's Attorney General's office and the importance of the case, however, it is likely that the assistant attorney general was reducing to writing what was office policy. The fact that Souter's staff filed a brief containing such explicit anti-choice rhetoric reflects either his failure as a professional to supervise his direct subordinates on an important policy matter, or else his willingness to adopt biased extreme rhetoric against women and to argue that alleged majority opinion should override fundamental rights, in direct contravention of the Constitution's mandate.

The preceding opinions appear to constitute Souter's writings on abortion and reproductive rights. The following analysis of other cases is integral to prediction of how Souter would rule on any future abortion and women's rights cases.

#### LEGISLATIVE DEFERENCE IN SOUTER'S OPINIONS

Another disturbing trend in Souter's opinions is a marked

deference to legislative judgment, even when the legislation is quite restrictive of individual rights. He also believes, as noted above, that the Constitution should be interpreted solely by reference to the framers' intent, an analysis which precludes intermediate scrutiny of sex-based classifications under the equal clause, which has been guaranteed only since the 1970s. Moreover, he sometimes applies an overly strained and technical interpretation of the law.

These tendencies may be critical in any prospective abortion case. The more recent Supreme Court pronouncements, while maintaining Roe, have allowed states to legislate more and more restrictions on a woman's right to choose.<sup>1</sup> Thus, even if Souter has no personal or professional bias against abortion, which is unlikely, he can be very dangerous if he continues his pattern of unqualified judicial deference to the other branches

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<sup>1</sup> The executive branch under the Reagan/Bush administrations has also been attempting to regulate and restrict access to abortion. One example of this type of executive regulation is the current abortion rights case pending before the Supreme Court. In Rust v. Sullivan, Nos. 89-1391, 89-1392, at issue are Title X federal family planning regulations which prohibit physicians at clinics receiving Title X funding from discussing the option of abortion with their patients. If the patient inquires about an abortion, the response must be, "The project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. To let regulations like this stand is to make reproductive choice a mere illusion for low income women with no funds to seek unbiased medical counsel. Rust may also be the type of case which provides the court the next opportunity to overturn Roe v. Wade. If Souter is intellectually consistent, his reasoning in Smith v. Cote, 513 A.2d 341 (N.H. 1986), would require him to either to find the Title X regulations unconstitutional or to vote to overturn Roe v. Wade.

of government.

As described above, in In Re Dionne, 518 A.2d 178 (N.H. 1986), Souter is willing to give a great deal of deference to legislative decisions, even if those decisions were made hundreds of years ago. Another case in which the legislative branch was given undue consideration is In Appeal of Bosselait, 547 A.2d 682 (N.H. 1988). Souter, writing for a unanimous court, upheld a law that required unemployed workers to be available for a full-time job to qualify for New Hampshire's unemployment compensation. The plaintiffs, two elderly brothers in their seventies, had been denied unemployment compensation after losing the full-time janitorial job they had shared for 22 years. Both brothers could only work part-time because of health problems. Souter rejected their age discrimination claim, because it had not been adequately raised at the lower level, and rejected their disability discrimination claim because the plaintiffs' inability to work longer hours due to their age did not constitute a "handicap".

Souter also addressed the plaintiffs' equal protection argument. He found that the requirement of availability for full-time employment as a condition for receiving unemployment compensation did not violate the state equal protection rights of those who were only able to work part-time.

Employing the rational relation standard, Souter found that the plaintiff brothers would have to prove "that the restriction of benefits to those able and willing to accept full-time work is not rationally related to the advancement of any legitimate governmental interest." Bosselait, 547 A.2d at 690. The court held that the plaintiffs did not meet this burden because the state had two legitimate government interests which it found were rationally served by the statute. The first was to conserve government funds for the benefit of those who need them the most. Souter found it reasonable for the government to conclude that unemployed people available to work full-time would be the most needy based on the assumption that those only able to work part-time must have another source of income.

The second government interest was in limiting unemployment payments to the shortest time possible. Souter wrote that the restriction to persons available to take a full-time job accomplished this end because the government stated that there are more full-time jobs available and thus, a person is likely to get a full-time job more quickly than a part-time job.

Souter's opinion contains no discussion of the validity of either of these ideas, and no supportive evidence. While rational relationship scrutiny often results in the upholding of statutes, this case is notably overly deferential to government rationales. Unemployed people who can only work part-time

because of disability, age or responsibility for care-giving to children or the elderly are likely to be at least as needy if not more needy than those available for full-time work, and no more likely to have additional sources of income. The court does not even consider the possibility of partial payments to part-time employees. The opinion seems to grasp any legislative reason to uphold the regulation. It is not enough for the judiciary merely to require statement of some alleged reasons for legislative actions; the judiciary must truly judge how rationally the statute and interests are related.

#### ABSTRACT REASONING IN SOUTER'S OPINIONS

While Souter has been hailed for his presumed legal acumen, his opinions demonstrate a tendency to take abstract reasoning to an unreasonable level. People are not machines. Any legal analysis which fails to take the realities of normal people's daily lives into account risks undermining the law and can lead to absurd conclusions.

State v. Denney, 536 A.2d 1242 (N.H. 1987) is a typical case illustrating this error. In Denney, the defendant was arrested for drunk driving and given Miranda warnings. He refused to take a blood alcohol test but was not specifically informed that his refusal could be used against him at trial. He

was advised that a refusal could result in license revocation. The New Hampshire Supreme Court reversed Denney's conviction, finding that his due process rights under the state constitution were violated when his refusal to take the test was admitted into evidence at trial. Justice Souter dissented. He felt that the Miranda warning that "any statement could and would be used against him" should have been sufficient to inform the defendant that his refusal to take the test would be used against him, even though immediately prior to the test he was informed of only one consequence of refusal: loss of license. Souter's argument is based on abstract legal thinking and ignores the fact that most of the population has not been taught to think like a lawyer. After being told, at a separate time, that any statement may be used against you, most people, as the majority realized, would not understand that such statements include a negative response to a later police request to take a test.

#### STEREOTYPICAL VIEWS OF WOMEN IN SOUTER'S OPINIONS

Souter also appears to have an anachronistic and stereotypical view of women. The most glaring example is in the case of New Hampshire v. Colbath, 547 A.2d 682 (N.H. 1987). In Colbath, the defendant was convicted of aggravated felonious sexual assault. The defendant met the victim in a tavern. They went to the defendant's trailer, where he raped her. The

defendant's girlfriend came upon them and violently assaulted the victim.

The court admitted evidence by a state witness that the victim had left the tavern in the company of various men during the afternoon and had been "hanging over" men and "making out" with the defendant and others, but would not allow defense witnesses to testify about the victim's behavior. In his jury instructions, the trial judge stated that the testimony presented about the victim's conduct was not relevant to the issue of consent.

Writing for a unanimous court, Souter found that the jury should have been allowed to consider the victim's behavior toward men other than the defendant in the hours preceding the incident. He found the defendant had a right to have the jury consider the victim's "sexually provocative behavior" toward the group, which he considered relevant to the issue of consent. Souter intimated that, given the facts that intercourse was not denied by the defendant and that all the victim's injuries could possibly be explained by the defendant's girlfriend's attack on the victim, he believed that the victim might have falsely accused the defendant of rape to explain her "undignified predicament."

This case required Souter to interpret New Hampshire's rape

shield law. Rape shield laws were introduced in response to the injustices inflicted on rape victims as a consequence of gender bias and stereotypical notions about women prevalent in the criminal justice system. It is a basic rule of evidence that irrelevant information is inadmissible. Yet without rape shield laws, many trial judges fail to understand why the victim's prior sexual history is irrelevant. The stereotypical view is that a woman's prior sexual activity is relevant because a woman who will have sex with one man is more likely to consent to have sex with another and that a woman who has had sex with a number of men is not a credible witness. It was in response to this type of thinking that rape shield laws limiting admissible testimony about the victim's sexual history were designed. However, these laws are typically designed not to be an absolute bar, but to yield to the rights of the defendant if in the view of the trial judge, exclusion of such evidence would unduly prejudice the defendant's case. The irony of such provisions is that they leave the ultimate decision to the same trial judges who are often unable to understand why the evidence was irrelevant in the first place.

Colbath was not a case of first impression in interpretation of the rape shield law in New Hampshire. The rape shield law was first interpreted by the New Hampshire Supreme Court in People v. Howard, 426 A.2d 457 (N.H. 1981), before Souter was appointed to the court. In Howard, the court ruled that the defendant must be

given the opportunity to prove that the probative value of the victim's prior sexual activity outweighs its prejudicial effect on the victim. At first blush, this holding appears reasonable, but subsequent cases demonstrate that the New Hampshire courts tend to give an unusual and offensive degree of latitude to defense proffers of evidence of the victims' sexual history. See Baker v. Cavanaugh, 508 A.2d 1059 (1986).

In Colbath, Souter showed exactly this sort of insensitivity and stereotyped thinking about rape victims. He found that evidence of the victim's flirting with another man suggested a "contemporaneous receptiveness to sexual advances," and that perhaps the victim falsely accused the defendant of rape as a way to excuse her "undignified predicament." Such language is unacceptable in any context. The case could have been decided on the basis of the interpretation of the state rape shield law with simple language to the effect that exclusion of the evidence would unduly prejudice the defendant's case, without speaking at length and in such derogatory terms about the victim. The language is reminiscent of the age-old stereotype that women are either "whores" or "madonnas" and that any woman who flirts with one man is sexually available to all men.

Souter's bias is also shown in Colbath in the facts he discloses in the opinion and those he leaves out. His recitation of the facts essentially presents the defendant's point of view.

This is peculiar because any factual disputes had been resolved by the trial jury, which chose to believe the victim and convicted the defendant. His opinion fails to mention the facts in the trial record that the victim had gone to the tavern to meet her sister, that she had sat on the lap of an old friend for approximately five minutes, that she was talking with the defendant about a recent fight with her boyfriend when they went to his trailer for a quieter place, and that the defendant's girlfriend, whose attack could supposedly explain the victim's bruises on her breast and upper arms, was several inches shorter than the victim and had filed several assault and domestic violence complaints against the defendant. Finally, Souter fails to mention that the victim displayed all the classic symptoms of rape trauma.<sup>2</sup> (From Hoffman, Rape: Judge Souter for the Defense, Village Voice, Aug. 7, 1990, at 24).

Bias held by a judge is likely to permeate all of her or his decisions. If a Supreme Court justice cannot view women free of stereotypical notions of propriety, it is unlikely that the justice can decide cases on a host of other issues in such a

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<sup>2</sup> Souter's holding for the defense in Colbath is also unusual in that in most of his other criminal law opinions he finds for the state and the prosecution. See State v. Koppel, 127 N.H. 286 (1985), in which Souter dissented from an opinion which held roadblocks to catch drunk drivers a violation of the Fourth Amendment and Coppola v. Powell, 130 N.H. 148, 536 A.2d 1236 (1987) rev'd in Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989), in which Souter, writing for a unanimous court, found that the admission into evidence of the defendant's statement that he was too smart to confess to police was not a violation of the Fifth Amendment.

manner as to accord equal justice to women.

STEREOTYPICAL VIEWS OF FAMILY IN SOUTER'S OPINIONS

Another area in which the appointment of a new Supreme Court justice could have a significant impact on women's rights is family law. Issues raised by surrogate parenting, newly-discovered fertility methods, and non-traditional families may reach the Supreme Court.

As a member of the New Hampshire Supreme Court, Souter had an opportunity to write on family law issues. Generally, his opinions reflect traditional notions of family responsibility and composition. The most controversial opinion is In Re Opinion of the Justices, 430 A.2d 21 (N.H. 1987), in which the New Hampshire Supreme Court held that it was not unconstitutional to deny lesbians and gays the opportunity to become adoptive or foster parents.

In In Re Opinion of the Justices, the New Hampshire Supreme Court was giving an advisory opinion on a proposed statute which would have prohibited lesbians and gays from adopting children, becoming foster parents, or running childcare centers. It would accomplish this end by denying a license to those foster parents and childcare applicants found to be "unfit by reason of being

homosexual." The court was asked to rule on whether the bill violated the equal protection and due process clauses of the United States or the New Hampshire Constitutions, and the right to privacy.

Although no author of the opinion is given, since Souter joined in the majority, its reasoning can be imputed to him. The court held that lesbians and gays constitute neither a suspect class nor a "middle tier" requiring heightened scrutiny with respect to questions of equal protection. Thus, the government need only demonstrate a rational relation between the proposed legislation and a legitimate government purpose. The court found that the need to provide appropriate role models is a rational government purpose, the furtherance of which justifies the exclusion of lesbians and gays from adoptive and foster parenting. The opinion cites but then chooses to disregard several studies which show no connection between the sexual orientation of parents and the sexual orientation of their children.

The court found that the bill did not violate due process because there is no property or liberty interest in being a foster or adoptive parent. The court also held that the bill did not violate the right to privacy, relying on the United States' Supreme Court's ruling in Bowers v. Hardwick, 478 U.S. 186, (1986). The Court held in that case that because there is "no

connection between family, marriage, and procreation on one hand, and homosexuality on the other hand." Bowers, 106 S.Ct. at 2844, lesbian and gay sexual activity does not fit into the Supreme Court's definition of privacy. The New Hampshire opinion also rationalizes that, in the case of foster care and adoption, there is no intrusion into a person's privacy because the person voluntarily invites scrutiny by submitting an application. Lastly, the bill was found not to violate the freedom of association clause because, pursuant to Bowers, no freedom of association for the purpose of engaging in lesbian or gay sexual activity exists.

The one aspect of the bill found to be unconstitutional is the exclusion of lesbians and gays from employment as child care workers. The court holds that this exclusion is not sufficiently "rationally related" to the government purpose of providing role models for children in state-licensed care because the person holding the license to the facility is not necessarily in close enough contact with children to provide a model. Also in the childcare context, parents are responsible for making the choice as to what is best for the child, whereas in a foster care or public adoption context, the state must do so.

The basic assumption underlying this decision is that it would be bad public policy to allow children to become lesbians and gays. No evidence is offered to support this homophobic

proposition. Although, unfortunately, this reasoning is not unique to the New Hampshire Supreme Court, it is a clear indication that the opinion is based on bias rather than reason. Other evidence of this fact is the acceptance of the proposition that the sexual orientation of parents is the primary determinant of their children's sexual orientation, in the face of overwhelming evidence to the contrary. By joining this opinion, Souter demonstrates that he does not always act as a legal scholar ruled by facts and reason rather than bias and emotion.

The dissent written, by Judge Batchelder, indicates that the New Hampshire Supreme Court received no relevant evidence

to show that homosexual parents endanger their children's development of sexual preference, gender role identity or general physical and psychological health any more than any heterosexual parents. The legislature received no such evidence because apparently the overwhelming weight of professional study concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents.

In Re Opinion of the Judges, 430 A.2d at 28. Disregarding the weight of the evidence, for illogical and emotional reasons, is not, we hope, the way in which Supreme Court Justices make decisions.

This opinion also exhibits a very narrow view of due process. As Judge Batchelder's dissent indicates, the New Hampshire Supreme Court had previously recognized that a person may be entitled to due process "even when his or her interest was not 'natural, essential, and inherent'," In Re Opinion of the Judges, 430 A.2d at 28, and had even held that a person was entitled to due process in a state athletic board's determination of his eligibility to compete. Duffley v. New Hampshire Interscholastic Athletic Association, 446 A.2d 462 (N.H. 1982). By refusing to hold that parenting is entitled to some type of due process protection, the opinion essentially holds that playing a sport is more fundamental than parenting a child.

Souter's other opinions on family law issues such as divorce and child custody are unremarkable, because he has been very reluctant to overrule the discretionary rulings made by the trial judge. They generally reflect traditional notions that the husband should support the family and the wife should be given custody of the children if she wants them. See Doubleday v. Doubleday, 551 A.2d 525 (N.H. 1988), and Kayle v. Kayle, 565 A.2d 1069 (N.H. 1989).

While the obligation of both parents to support their children after divorce, and the resolution of custody disputes in favor of the primary caretaker before divorce (which in our

culture frequently results in the mother gaining custody), are ideas which should be embraced by the judicial system, it is important that this stem from the recognition that both partners share the responsibility to support and nurture their offspring, and not merely from traditional notions that a man's role is to provide financial support and a woman's role is that of nurturer.

The ramifications of such traditional notions could be tremendous. When the Supreme Court is asked to rule on modern family law issues, it must do more than merely reaffirm what have been our traditional notions of family. The Court must be sufficiently open to receive and adopt evidence that the traditional view is not necessarily the correct view.

#### CONCLUSION

The issues and concerns raised in this paper should serve as a starting point for intensive questioning of David Souter. As a prospective lifetime appointee to the U.S. Supreme Court, Souter's methods of constitutional and legislative analysis could determine the Court's views on life and liberty well into the next century. This is no single-issue litmus test but a question of his judicial philosophy. Particularly in the absence of any non-judicial legal writings, the American people have a right to demand that he answer questions about his judicial philosophy.

David Souter must explain the ambit of his framers' intent reliance and how he would apply framers' intent to modern issues the framers could not foresee. He must address how a framers' intent analysis functions within the concept of stare decisis. The people also have a right to know whether David Souter is committed to the fundamental constitutional principles of privacy and equal protection of the law for women.

If David Souter cannot or will not address these concerns, he should not be confirmed.

Senator KENNEDY [presiding]. Ms. Allred, proceed.

#### STATEMENT OF GLORIA ALLRED

Ms. ALLRED. Good afternoon, Senator Specter, Senator Hatch, Chairman Biden, Senator Kennedy, and Senator DeConcini. My name is Gloria Allred. I am a Los Angeles attorney, representing Norma McCorvey, who is here beside me today. Norma is better known as Jane Roe, the plaintiff in the landmark *Roe v. Wade* decision, and I am here today representing her in her efforts to defend *Roe v. Wade*.

Twenty years ago, Norma was young, pregnant, alone and afraid. Unable to obtain an abortion in her home State of Texas, she spoke to some local attorneys who agreed that it was fundamentally cruel for her State to require her to endure an unwanted pregnancy.

While Norma's pregnancy progressed, her attorneys challenged Texas' anti-abortion criminal statute as a violation of her essential constitutional right to privacy. To protect Norma and out of fear for her safety, she was renamed Jane Roe in court papers and in the press, and became an anonymous representative of millions of American women who sought to control their own bodies, free of Government intrusion.

After years of legal struggling, Norma won her case. In 1973, the United States Supreme Court handed down *Roe v. Wade*. In the sweep of a pen, the Supreme Court promised all American women that there would never again be another Jane Roe, beginning distant courts for the basic human right to decide for herself whether to terminate a pregnancy. Never again, the Court promised, may the State presume to intrude on a decision so intimate and significant that it may well determine the remainder of a young woman's life.

To Norma McCorvey, the decision was a hollow victory. For Norma, our legal system had moved too slowly, and in the meantime she had been forced to endure the unspeakable pain of bearing and giving birth to a child she could not keep. As Joe Roe, however, Norma rejoiced at the decision and she believed the Supreme Court's promise to women for the future.

As attorneys, as lawmakers, and as judges, our first questions should be the effect of our decisions on real human lives. While *Roe v. Wade* brought no relief to Norma McCorvey, Jane Roe's victory transformed the future for American women.

As the years passed after *Roe v. Wade*, American women slowly began to believe the Supreme Court's promise in Jane Roe's case. Although some restrictions remained, primarily for poor women, for the most part, women's choice to terminate a pregnancy was protected by the courts. Back-alley abortionists disappeared, women's death from unsafe and illegal abortions became just a sad chapter in history, women's anguish in being forced to carry an unwanted pregnancy to term faded from memory.

Yet, recently, because of the *Webster* decision, women have once again been forced to live in fear. We know that the Court's decade-old promise to us could be reversed with the sweep of a pen. We know that the Court is now closely split on whether the promise should or should not be kept.

We cannot pretend that these hearings exist outside of that context. We cannot pretend that the question before this Senate Judiciary Committee is simply whether Judge David Souter is a competent jurist. We know that the next Supreme Court Justice will become the deciding vote in the Court's decision to either preserve its promise to American women, that they will never again be forced into illegal and, therefore, unsafe abortions, or to renege on that promise. We know that the next Supreme Court Justice will decide the fate of women into the next century.

We, therefore, have one question about this and every future nominee to the United States Supreme Court: Has this nominee demonstrated a commitment to the Supreme Court's promise to women in *Roe v. Wade*, or not?

In these hearings, Judge David Souter has claimed that he has not yet decided whether or not he would reverse Jane Roe's victory of 17 years ago. He claims that he may or may not sign a decision returning millions of women to the fear and second-class status of 20 years ago. Perhaps he would relegate women to back-alley abortions and unwanted pregnancies. Perhaps not. He is not quite sure.

This uncertainty, of course, has never been publicly expressed before Judge Souter became a nominee to the U.S. Supreme Court. Before he became a nominee, Judge Souter freely expressed extremist anti-abortion views. David Souter expressed no such lack of resolve when he put his name to a 1976 brief, referring to abortion as "the killing of unborn children." He did not claim to have a "open mind," when he spoke out against repeal of New Hampshire's criminal abortion law in 1977. And Judge Souter's newly professed doubt was nowhere to be found in a 1986 New Hampshire Supreme Court decision, in which he went out of his way to express sympathy with doctors opposed to abortion.

But let us take Judge Souter at his word and assume that he truly never has considered the question of whether American women should have the right to decide for themselves whether to bring an unwanted pregnancy to term. Let us assume further that Judge Souter is an able judge. A lifetime appointment to the U.S. Supreme Court should to be granted, based upon a professed "open mind" or mere technical competence.

In that seat should sit a judge who has proved a lifetime of dedication to the highest principles a Supreme Court judge is sworn to protect, self-determination, equality and dignity for every member of our society. This body should not be ashamed to insist upon the highest caliber of excellence, and firm evidence that a nominee will preserve and defend essential human rights, before confirming that nominee.

Unfortunately, Judge Souter has not made that commitment to women. For example, among many reasons that could be cited, a very important one is that Judge Souter openly and unequivocally has testified at these hearings that he would not apply "the strict scrutiny test" on the issue of women's right to equal protection. This clearly signifies that, if confirmed, he would treat women as second-class citizens, to whom he would afford fewer constitutional protections than he would afford to blacks and other minorities. Women know that only a judge with a keener sense of the importance of women's rights to decide their own destinies, a judge that

has demonstrated a commitment to women's right to choose, is entitled to the highest privilege of occupying that pivotal Supreme Court seat.

We know that, unfortunately, Judge David Souter is not that judge. The Senate should not confirm a nominee that it cannot wholeheartedly endorse as meeting these most rigorous standards.

Ms. Roe and I, therefore, recommend and respectfully urge that you reject the nomination of Judge David Souter to the United States Supreme Court.

I thank you.

The CHAIRMAN [presiding]. Thank you very much for your testimony.

Ms. ALLRED. And may I say that I am sorry I did not have a chance to say greetings and hello to Senator Simon, whom I know.

Senator SIMON. Thank you.

Ms. ALLRED. May I also ask, Chairman Biden, if I may put into evidence *Roe v. Wade*, because it may be the last time that we ever see it in its present form. I would like to know if I could attach that as an exhibit to my testimony.

The CHAIRMAN. Yes, you may.

Ms. ALLRED. Thank you very much, sir. Ms. McCorvey will be available to answer any questions, when you are ready.

Thank you.

[Ms. Allred submitted the following material:]

Cite as 93 S.Ct. 706 (1973)

410 U.S. 113, 35 L.Ed.2d 147  
 Jane ROE, et al., Appellants,  
 v.

Henry WADE.  
 No. 70-18.

Argued Dec. 13, 1971.  
 Reargued Oct. 11, 1972.  
 Decided Jan. 22, 1973.

Rehearing Denied Feb. 26, 1973.

See 410 U.S. 959, 93 S.Ct. 1409.

Action was brought for a declaratory and injunctive relief respecting Texas criminal abortion laws which were claimed to be unconstitutional. A three-judge United States District Court for the Northern District of Texas, 314 F.Supp. 1217, entered judgment declaring laws unconstitutional and an appeal was taken. The Supreme Court, Mr. Justice Blackmun, held that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional; that prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician, subsequent to approximately the end of the first trimester the state may regulate abortion procedure in ways reasonably related to maternal health, and at the stage subsequent to viability the state may regulate and even proscribe abortion except where necessary in appropriate medical judgment for preservation of life or health of mother.

Affirmed in part and reversed in part.

Mr. Chief Justice Burger, Mr. Justice Douglas and Mr. Justice Stewart filed concurring opinions.

Mr. Justice White filed a dissenting opinion in which Mr. Justice Rehnquist joined.

Mr. Justice Rehnquist filed a dissenting opinion.

1. Courts  $\Leftarrow$  385(7)

Supreme Court was not foreclosed from review of both the injunctive and

93 S.Ct.—45

declaratory aspects of *case* attacking constitutionality of Texas criminal abortion statutes where case was properly before Supreme Court on direct appeal from decision of three-judge district court specifically denying injunctive relief and the arguments as to both aspects were necessarily identical. 28 U.S.C.A. § 1253.

2. Constitutional Law  $\Leftarrow$  42.1(3), 46(1)

With respect to single, pregnant female who alleged that she was unable to obtain a legal abortion in Texas, when viewed as of the time of filing of case and for several months thereafter, she had standing to challenge constitutionality of Texas criminal abortion laws, even though record did not disclose that she was pregnant at time of district court hearing or when the opinion and judgment were filed, and she presented a justiciable controversy; the termination of her pregnancy did not render case moot. Vernon's Ann.Tex.P.C. arts. 1191-1194, 1196.

3. Courts  $\Leftarrow$  383(1), 385(1)

Usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at date action is initiated.

4. Action  $\Leftarrow$  6

Where pregnancy of plaintiff was a significant fact in litigation and the normal human gestation period was so short that pregnancy would come to term before usual appellate process was complete, and pregnancy often came more than once to the same woman, fact of that pregnancy provided a classic justification for conclusion of nonmootness because of termination.

5. Federal Civil Procedure  $\Leftarrow$  331

Texas physician, against whom there were pending indictments charging him with violations of Texas abortion laws who made no allegation of any substantial and immediate threat to any federally protected right that could not be asserted in his defense against state prosecutions and who had not alleged

any harassment or bad faith prosecution, did not have standing to intervene in suit seeking declaratory and injunctive relief with respect to Texas abortion statutes which were claimed to be unconstitutional. Vernon's Ann.Tex.P.C. arts. 1191-1194, 1196.

#### 6. Courts ⇐508(7)

Absent harassment and bad faith, defendant in pending state criminal case cannot affirmatively challenge in federal court the statutes under which state is prosecuting him.

#### 7. Federal Civil Procedure ⇐321

Application for leave to intervene making certain assertions relating to a class of people was insufficient to establish party's desire to intervene on behalf of class, where the complaint failed to set forth the essentials of class suit.

#### 8. Constitutional Law ⇐42.1(3)

Childless married couple alleging that they had no desire to have children at the particular time because of medical advice that the wife should avoid pregnancy and for other highly personal reasons and asserting an inability to obtain a legal abortion in Texas were not, because of the highly speculative character of their position, appropriate plaintiffs in federal district court suit challenging validity of Texas criminal abortion statutes. Vernon's Ann.Tex.P.C. arts. 1191-1194, 1196.

#### 9. Constitutional Law ⇐82

Right of personal privacy or a guarantee of certain areas or zones of privacy does exist under Constitution, and only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy; the right has some extension to activities relating to marriage. U.S.C.A.Const. Amends. 1, 4, 5, 9, 14, 14, § 1.

#### 10. Constitutional Law ⇐82

Constitutional right of privacy is broad enough to encompass woman's decision whether or not to terminate her pregnancy, but the woman's right to ter-

minate pregnancy is not absolute since state may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life, and at some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of factors that govern the abortion decision. U.S.C.A.Const. Amends. 9, 14.

#### 11. Constitutional Law ⇐82

Where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.

#### 12. Constitutional Law ⇐210, 252

Word "person" as used in the Fourteenth Amendment does not include the unborn. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

#### 13. Abortion ⇐1

Prior to approximately the end of the first trimester of pregnancy the attending physician in consultation with his patient is free to determine, without regulation by state, that in his medical judgment the patient's pregnancy should be terminated, and if that decision is reached such judgment may be effectuated by an abortion without interference by the state.

#### 14. Abortion ⇐1

From and after approximately the end of the first trimester of pregnancy a state may regulate abortion procedure to extent that the regulation reasonably relates to preservation and protection of maternal health.

#### 15. Abortion ⇐1

If state is interested in protecting fetal life after viability it may go so far as to proscribe abortion during that period except when necessary to preserve the life or the health of the mother.

## 16. Abortion ⇐1

## Constitutional Law ⇐258(3)

State criminal abortion laws like Texas statutes making it a crime to procure or attempt an abortion except an abortion on medical advice for purpose of saving life of the mother regardless of stage of pregnancy violate due process clause of Fourteenth Amendment protecting right to privacy against state action. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.P.C. arts. 1191-1194, 1196.

## 17. Abortion ⇐1

State in regulating abortion procedures may define "physician" as a physician currently licensed by State and may proscribe any abortion by a person who is not a physician as so defined.

## 18. Statutes ⇐44(6)

Conclusion that Texas criminal abortion statute proscribing all abortions except to save life of mother is unconstitutional meant that the abortion statutes as a unit must fall, and the exception could not be struck down separately for then the state would be left with statute proscribing all abortion procedures no matter how medically urgent the case. Vernon's Ann.Tex.P.C. arts. 1191-1194, 1196.

*Syllabus* \*

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parent-

hood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held:*

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. Pp. 711-712.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 712-715.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. Pp. 712-713.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688. Pp. 713-714.

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United*

*States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 714-715.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 726-732.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 731-732.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 731-732.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 732-733.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. Pp. 732-733.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional. P. 733.

314 F.Supp. 1217, affirmed in part and reversed in part.

↓ Sarah R. Weddington, Austin, Tex., ↓↑↑ for appellants.

Robert C. Flowers, Asst. Atty. Gen. of Texas, Austin, Tex., for appellee on re-argument.

Jay Floyd, Asst. Atty. Gen., Austin, Tex., for appellee on original argument.

↓ Mr. Justice BLACKMUN delivered ↓↑↑ the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend

to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, <sup>1117</sup> we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905):

"[The Constitution] is made for people of fundamentally differing views, and the accident of our finding

certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

## I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code,<sup>1</sup> Vernon's Ann.P.C. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.<sup>2</sup>

## 1. "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

## "Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

## "Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

## "Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

## "Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

## "Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

2. *Ariz.Rev.Stat. Ann.* § 13-211 (1956); *Conn.Pub.Act No. 1* (May 1972 special session) (in 4 *Conn.Leg.Serv.* 677 (1972)), and *Conn.Gen.Stat.Rev.* §§ 53-20, 53-30 (1968) (or unborn child); *Idaho Code* § 18-601 (1948); *Ill.Rev.Stat.*, c. 38, § 23-1 (1971); *Ind.Code* § 35-1-59-1 (1971); *Iowa Code* § 701.1 (1971); *Ky.Rev.Stat.* § 436.020 (1962); *La.Rev.Stat.* § 37:1285(6) (1964) (loss of medical license) (but see § 14-87 (Supp.1972) containing no exception for the life of the mother under the criminal statute); *Me.Rev.Stat. Ann.*, Tit. 17, § 51 (1964); *Mass.Gen.Laws Ann.*, c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish v. Bd. of Registration*, 356 *Mass.* 98, 248 *N.E.2d* 264 (1969)); *Mich.Comp.Laws* § 750.14 (1948); *Minn.Stat.* § 617.18 (1971); *Mo.Rev.Stat.* § 559.100 (1969); *Mont.Rev.Codes Ann.* § 94-401 (1969); *Neb.Rev.Stat.* § 28-405 (1964); *Nev.Rev.Stat.* § 200.220 (1967); *N.H.Rev.Stat. Ann.* § 585:13 (1955); *N.J.Stat. Ann.* § 2A:37-1 (1969) ("without lawful justification"); *N.D.Cent.Code* §§ 12-25-01, 12-25-02 (1960); *Ohio Rev.Code Ann.* § 2901.16 (1953); *Okla.Stat. Ann.*, Tit. 21, § 861 (1972-1973 Supp.); *Pa.Stat. Ann.*, Tit. 18, §§ 4718, 4719 (1963) ("un-

<sup>119</sup> Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev.Stat., c. 8, Arts. 536-541 (1879); Texas Rev.Crim.Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother."<sup>3</sup>

<sup>120</sup>

## II

Jane Roe,<sup>4</sup> a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to termi-

nate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and <sup>121</sup> that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to de-

lawful"); R.I.Gen.Laws Ann. § 11-3-1 (1969); S.D.Comp.Laws Ann. § 23-17-1 (1967); Tenn.Code Ann. §§ 39-301, 39-302 (1966); Utah Code Ann. §§ 76-2-1, 76-2-2 (1963); Vt.Stat. Ann., Tit. 13, § 101 (1958); W.Va.Code Ann. § 61-2-8 (1966); Wis.Stat. § 940.04 (1969); Wyo.Stat. Ann. §§ 6-77, 6-78 (1957).

3. Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void, in that it does not sufficiently define or describe the offense of abortion. We do not concur with counsel in respect to this question." Jackson v. State, 55 Tex.Cr.R. 79, 89, 115 S.W. 202, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. Thompson v. State, 493 S.W.2d 913 (1971), appeal docketed, No. 71-1200.

The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in [United States v.] Vuitch" (402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In 493 S.W.2d, at 920 n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see Veevers v. State, 172 Tex.Cr.R. 162, 168-169, 354 S.W.2d 161, 166-167 (1962). Cf. United States v. Vuitch, 402 U.S. 62, 69-71, 91 S.Ct. 1294, 1298-1299, 28 L.Ed.2d 601 (1971).

4. The name is a pseudonym.

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termine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,<sup>5</sup> a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant,<sup>112</sup> and the licensed practicing physician,<sup>113</sup> all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to al-

lege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (N.D.Tex.1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941, 91 S.Ct. 1610, 29 L.Ed.2d 108 (1971).

### III

[1] It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell v. Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L. Ed.2d 378 (1970), and *Gunn v. Universi-*

5. These names are pseudonyms.

ty Committee, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter v. Jury Comm'n*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73; 80-81, 80 S.Ct. 568, 573-574, 4 L.Ed.2d 568 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201.

## IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968), and *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

1134 [2] A. *Jane Roe*. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For

purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 462 F.2d 1121, 1125 (CA2 1971); *Crossen v. Breckenridge*, 446 F.2d 833, 838-839 (CA6 1971); *Poe v. Menghini*, 839 F. Supp. 986, 990-991 (D.C.Kan. 1972). See *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S., at 102, 88 S.Ct., at 1953, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,<sup>6</sup> or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

[3] The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munisingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95

6. The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2, and the

transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

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L.Ed. 36 (1950); *Golden v. Zwickler*, *supra*; *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 80 L.Ed.2d 560 (1972).

[4] But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). See *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 178-179, 89 S.Ct. 347, 350, 351, 21 L.Ed.2d 325 (1968); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633, 73 S.Ct. 894, 897-898, 97 L.Ed. 1303 (1953).

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

[5] *B. Dr. Hallford*. The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

"[I]n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-

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69-2524-H. In both cases the defendant is charged with abortion . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

[6] *Dr. Hallford* is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, *Dr. Hallford* seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to *Dr. Hallford* instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels v. Mackell*, *supra*, and in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L. Ed.2d 669 (1971); *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L. Ed.2d 696 (1971); *Perez v. Ledesma*,

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401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); and *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971). See also *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

[7] Dr. Hallford's complaint in intervention, therefore, is to be dismissed.<sup>7</sup> He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

[8] *C. The Does*. In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

<sup>7</sup> We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger v. Harris*, 401 U.S., at 41-42, 91 S.Ct., at 749; *Golden v. Zwickler*, 394 U.S., at 109-110, 89 S.Ct., at 960; *Abele v. Markle*, 452 F.2d, at 1124-1125; *Crossen v. Breckenridge*, 446 F.2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827,

adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

<sup>1129</sup> 25 L.Ed.2d 184 (1970); *Land Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). See also *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915).

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

## V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *id.*, at 460, 92 S.Ct. 1029, at 1042, 31 L.Ed.2d 349 (*White, J.*, concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S., at 486, 85 S.Ct., at 1682 (*Goldberg, J.*, concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

8. A. Castiglioni, *A History of Medicine* 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter *Castiglioni*).

9. J. Ricci, *The Genealogy of Gynaecology* 52, 84, 113, 149 (2d ed. 1950) (hereinafter *Ricci*); L. Lader, *Abortion* 75-77 (1966) (hereinafter *Lader*); K. Niwander, *Medical Abortion Practices in the United States, in Abortion and the Law* 37, 38-40 (D. Smith ed. 1967); G. Williams, *The Sanctity of Life and the Criminal Law* 148 (1957) (hereinafter *Williams*); J. Noonan, *An Almost Absolute Value in History, in The Mor-*

## VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

<sup>1130</sup> 1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.<sup>8</sup> We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,<sup>9</sup> and that "it was resorted to without scruple."<sup>10</sup> The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.<sup>11</sup> Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.<sup>12</sup>

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so

ality of Abortion 1, 3-7 (J. Noonan ed. 1970) (hereinafter *Noonan*); Quay, *Justifiable Abortion—Medical and Legal Foundations*, (pt. 2), 49 *Geo.L.J.* 395, 406-422 (1961) (hereinafter *Quay*).

10. L. Edelstein, *The Hippocratic Oath* 10 (1943) (hereinafter *Edelstein*). But see *Castiglioni* 227.

11. Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

12. Edelstein 13-14.

long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)–377(?) B.C.),<sup>11</sup> who has been described as the Father of Medicine, the “wisest and the greatest practitioner of his art,” and the “most important and most complete medical personality of antiquity,” who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?<sup>12</sup> The Oath varies somewhat according to the particular translation, but in any translation the content is clear: “I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,”<sup>14</sup> or “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.”<sup>15</sup>

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:<sup>16</sup> The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dog-

ma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, “echoes Pythagorean doctrines,”<sup>17</sup> and “[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity.”<sup>17</sup>

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130–200) “give evidence of the violation of almost every one of its injunctions.”<sup>18</sup> But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath “became the nucleus of all medical ethics” and “was applauded as the embodiment of truth.” Thus, suggests Dr. Edelstein, it is “a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.”<sup>19</sup>

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. *The common law.* It is undisputed that at common law, abortion performed before “quickening”—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy<sup>20</sup>—was not an indictable offense.<sup>21</sup> The absence of a

13. Castiglioni 148.

14. *Id.*, at 154.

15. Edelstein 3.

16. *Id.*, at 12, 15–18.

17. *Id.*, at 18; Lader 76.

18. Edelstein 63.

19. *Id.*, at 64.

20. *Dorland's Illustrated Medical Dictionary* 1261 (24th ed. 1965).

21. E. Coke, *Institutes* III \*50; 1 W. Hawkins, *Pleas of the Crown*, c. 31. § 16 (4th ed. 1762); 1 W. Blackstone, *Commentaries* \*129–130; M. Hale, *Pleas of the Crown* 433 (1st Amer. ed. 1847).

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common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.<sup>22</sup> This was

1134 "mediate animation." Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or

animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.<sup>23</sup> But the later and predomi-

For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223-226; Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1964-1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411, 418-428 (1968) (hereinafter Means I); Stern, *Abortion: Reform and the Law*, 59 J.Crim.L.C. & P.S. 84 (1968) (hereinafter Stern); Quay 430-432; Williams 152.

22. Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, *Hist.Anim.* 7.3.583b; *Gen.Anim.* 2.3.736, 2.5.741; Hippocrates, *Lib. de Nat.Puer.* No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, *De Origine*

*Animae* 4.4 (Pub.Law 44.527). See also W. Reany, *The Creation of the Human Soul*, c. 2 and 83-86 (1932); Huser, *The Crime of Abortion in Canon Law* 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C., 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the *Decretum*, published about 1140. *Decretum Magistri Gratiani* 2.32.2.7 to 2.32.2.10, in 1 *Corpus Juris Canonici* 1122, 1123 (A. Friedberg, 2d ed. 1879). This *Decretal* and the *Decretals* that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon-law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* 18-20 (1965).

23. Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1963). See Quay 431; see also 2 Fleta 60-61 (Book 1, c. 23) (Selden Society ed. 1955).

nant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder."<sup>24</sup> Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.<sup>25</sup> A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime.<sup>26</sup> This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,<sup>27</sup> others followed Coke in stating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor."<sup>28</sup> That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-

law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of

24. E. Coke, *Institutes* III \*50.

25. 1 W. Blackstone, *Commentaries* \*129-130.

26. Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) (hereinafter *Means II*). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime. See also Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after

1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, *infra*, at 718, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

27. *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth v. Parker*, 50 Mass. (9 Metc.) 263, 265-266 (1845); *State v. Cooper*, 22 N.J.L. 52, 58 (1849); *Abrams v. Foshee*, 3 Iowa 274, 278-280 (1856); *Smith v. Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell v. Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards v. State*, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907); *Gray v. State*, 77 Tex.Cr.R. 221, 224, 178 S.W. 337, 338 (1915); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949). *Contra*, *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *State v. Slagle*, 83 N.C. 630, 632 (1880).

28. See *Smith v. State*, 33 Me. 48, 55 (1851); *Evans v. People*, 49 N.Y. 96, 98 (1872); *Lamb v. State*, 67 Md. 524, 533, 10 A. 208 (1887).

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1137 a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex v. Bourne*, [1899] 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's health, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. *Id.*, at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk

to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

1138 5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child."<sup>29</sup> The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.<sup>30</sup> In 1823, New York enacted legislation<sup>31</sup> that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,<sup>32</sup> only eight American States had 1139

29. Conn.Stat., Tit. 20, § 14 (1821).

30. Conn.Pub.Acts, c. 71, § 1 (1860).

31. N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 8, p. 661, and Tit. 6, § 21, p. 694 (1829).

32. Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177-178 (1898); see *Grigsby v. Reib*, 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913).

statutes dealing with abortion.<sup>33</sup> It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.<sup>34</sup> The exceptions, Alabama and the District of Columbia, permitted abortion to

preserve the mother's health.<sup>35</sup> Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.<sup>36</sup> In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,<sup>37</sup> set forth as Appendix B to the opinion in *Doe v. Bolton*, 410 U.S. 205, 93 S.Ct. 754.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of preg-

33. The early statutes are discussed in Quay 435-438. See also Lader 85-88; Stern 85-86; and Means II 373-376.

34. Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U.Ill.L.F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

35. Ala.Code, Tit. 14, § 9 (1953); D.C. Code Ann. § 22-201 (1967).

36. Mass.Gen.Laws Ann., c. 272, § 19 (1970); N.J.Stat. Ann. § 2A:87-1 (1969); Pa.Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

37. Fourteen States have adopted some form of the ALI statute. See Ark.Stat. Ann. §§ 41-303 to 41-310 (Supp.1971); Calif. Health & Safety Code §§ 25950-25955.5 (Supp.1972); Colo.Rev.Stat. Ann. §§ 40-2-50 to 40-2-53 (Cum.Supp.1967); Del. Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972,

c. 72-186, 1972 Fla.Sess.Law Serv., pp. 350-382; Ga.Code §§ 26-1201 to 26-1203 (1972); Kan.Stat. Ann. § 21-9407 (Supp.1971); Md. Ann. Code, Art. 43, §§ 137-139 (1971); Miss.Code Ann. § 2223 (Supp.1972); N.M.Stat. Ann. §§ 40A-5-1 to 40A-5-3 (1972); N.C.Gen. Stat. § 14-43.1 (Supp.1971); Ore.Rev. Stat. §§ 435.405 to 435.495 (1971); S.C.Code Ann. §§ 16-82 to 16-89 (1962 and Supp.1971); Va.Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp.1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L.A.) L.Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw.Rev.Stat. § 453-16 (Supp.1971); N.Y.Penal Code § 125.05, subd. 3 (Supp.1972-1973); Wash.Rev.Code §§ 9.02.060 to 9.02.080 (Supp.1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

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nancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73-78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

"The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

"The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life.

"The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

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and to its life as yet denies all protection." *Id.*, at 75-76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38-39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient," two other physicians "chosen because of their recognized professional competency have examined the patient and have concurred in writing,"

and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient,"

"sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.<sup>38</sup> Proceedings of the AMA House of Delegates 220 (June 1970).<sup>144</sup> The AMA Judicial Council rendered a complementary opinion.<sup>39</sup>

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations."<sup>145</sup>

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services."

38. "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates

his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 220 (June 1970).

39. "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

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"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am.J.Pub.Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope

with unforeseen difficulties than an office or clinic without such resources.

The factor of gestational age is of overriding importance." Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A. J. 380 (1972). We set forth the Act in full in the margin.<sup>40</sup> The Conference

40. "UNIFORM ABORTION ACT

"Section 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has

reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years].

"Section 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [\$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"Section 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

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has appended an enlightening Prefatory Note.<sup>41</sup>

## VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

<sup>1145</sup> It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.<sup>42</sup> The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

"Section 4. [Short Title.] This Act may be cited as the Uniform Abortion Act.

"Section 5. [Severability.] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"Section 6. [Repeal.] The following acts and parts of acts are repealed:

- "(1)
- "(2)
- "(3)

"Section 7. [Time of Taking Effect.] This Act shall take effect \_\_\_\_\_."

41. "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.<sup>43</sup> This was particularly true prior to the development of antiseptics. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

42. See, for example, *YWCA v. Kugler*, 342 F.Supp. 1048, 1074 (D.C.N.J.1972); *Abele v. Markle*, 342 F.Supp. 800, 805-806 (D.C.Conn.1972) (Newman, J., concurring in result), appeal docketed, No. 72-56; *Walsingham v. State*, 250 So.2d 857, 863 (Ervin, J., concurring) (Fla. 1971); *State v. Geddes*, 43 N.J.L. 86, 90 (1881); *Means II* 381-382.

43. See C. Haagensen & W. Lloyd, *A Hundred Years of Medicine* 19 (1943).

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Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.<sup>44</sup> Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.

<sup>1150</sup> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

44. Potts, *Postconceptive Control of Fertility*, 8 *Int'l J. of G. & O.* 957, 967 (1970) (England and Wales); *Abortion Mortality, 20 Morbidity and Mortality* 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, *United States: Therapeutic Abortions, 1963-1968*, 50 *Studies in Family Planning* 5, 7 (1970); Tietze, *Mortality with Contraception and Induced Abortion*, 45 *Studies in Family Planning* 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, *Legal Abortion in Eastern Europe*, 175 *J.A.M.A.* 1149, 1152 (April 1961). Other sources are discussed in Lader 17-23.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.<sup>45</sup> The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

<sup>1151</sup> Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.<sup>46</sup> Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.<sup>47</sup> The few state courts

45. See Brief of Amicus National Right to Life Committee; R. Drinan, *The Inviolability of the Right to Be Born, in Abortion and the Law* 107 (D. Smith ed. 1967); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 *U.C.L.A.L.Rev.* 233 (1969); Noonan 1.

46. See, e. g., *Abele v. Markle*, 342 F.Supp. 800 (D.C.Conn.1972), appeal docketed, No. 72-56.

47. See discussions in *Means I* and *Means II*.

called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.<sup>48</sup> Proponents of this view point out that in many States, including Texas,<sup>49</sup> by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.<sup>50</sup> They claim that adoption of the "quickenings" distinction through 1152 received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

### VIII

[9] The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S.Ct.

1868, 1872-1873, 20 L.Ed.2d 889 (1968), *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S., at 484-485, 85 S.Ct., at 1681-1682; in the Ninth Amendment, *id.*, at 486, 85 S.Ct. at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454, 92 S.Ct., at 1038-1039; *id.*, at 460, 463-465, 92 S.Ct. at 1042, 1043-1044 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510,

48. See, e. g., *State v. Murphy*, 27 N.J.L. 112, 114 (1858).

49. *Watson v. State*, 9 Tex.App. 237, 244-245 (1890); *Moore v. State*, 37 Tex. Cr.R. 552, 561, 40 S.W. 287, 290 (1897); *Shaw v. State*, 73 Tex.Cr.R. 337, 339, 165 S.W. 930, 931 (1914); *Fondren v. State*, 74 Tex.Cr.R. 552, 557, 169 S.W. 411, 414 (1914); *Gray v. State*, 77 Tex.Cr.R. 221, 229, 178 S.W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Ham-*

*mett v. State*, 84 Tex.Cr.R. 635, 209 S.W. 661 (1919); *Thompson v. State*, Tex. Cr.App. 493 S.W.2d 913 (1971), appeal pending.

50. See *Smith v. State*, 33 Me., at 55; *In re Vince*, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35-37 (Tent.Draft No. 9, 1950).

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535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), Meyer v. Nebraska, *supra*.

[10] This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnan-

cy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (vaccination); Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. *Abele v. Markle*, 342 F.Supp. 800 (D.C.Conn.1972), appeal docketed, No. 72-56; *Abele v. Markle*, 351 F.Supp. 224 (D.C.Conn.1972), appeal docketed, No. 72-730; *Doe v. Bolton*, 319 F.Supp. 1048 (N.D.Ga.1970), appeal decided today, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201; *Doe v. Scott*, 321 F.Supp. 1385 (N.D.Ill.1971), appeal docketed, No. 70-105; *Poe v. Menghini*, 339 F.Supp. 986 (D.C.Kan.1972); *YWCA v. Kugler*, 342 F.Supp. 1048 (D.C.N.J. 1972); *Babbitz v. McCann*, 310 F.Supp. 293 (E.D.Wis.1970), appeal dismissed, 400 U.S. 1, 91 S.Ct. 12, 27 L.Ed.2d 1 (1970); *People v. Belous*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970); *State v. Barquet*, 262 So.2d 431 (Fla.1972).

Others have sustained state statutes. *Crossen v. Attorney General*, 344 F.

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Supp. 587 (E.D.Ky.1972), appeal docketed, No. 72-256; *Rosen v. Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (E.D.La.1970), appeal docketed, No. 70-42; *Corkey v. Edwards*, 322 F.Supp. 1248 (W.D.N.C.1971), appeal docketed, No. 71-92; *Steinberg v. Brown*, 321 F.Supp. 741 (N.D.Ohio 1970); *Doe v. Rampton*, 366 F.Supp. 189 (Utah 1971), appeal docketed, No. 71-5666; *Cheaney v. State, Ind.*, 285 N.E. 2d 265 (1972); *Spears v. State*, 257 So. 2d 876 (Miss.1972); *State v. Munson, S.D.*, 201 N.W.2d 123 (1972), appeal docketed, No. 72-631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

[11] Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S. Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut*, 381 U.S., at 485, 85 S.Ct., at 1682; *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed.2d 992 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940); see *Eisenstadt v. Baird*, 405 U.S., at 460, 463-464, 92 S.Ct., at 1042, 1043-1044 (White, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these prin-

ciples. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

## IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp., at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.<sup>51</sup> On the other hand, the appellee conceded on reargument<sup>52</sup> that no case could be cited

51. Tr. of Oral Rearg. 20-21.

52. Tr. of Oral Rearg. 24.

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that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;<sup>53</sup> in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.<sup>54</sup>

53. We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

54. When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already

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[12] All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.<sup>55</sup> This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751 (W.D.Pa.1972); *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 335 N.Y.S.2d 390, 286 N.E.2d 887 (1972), appeal docketed, No. 72-434; *Abele v. Markle*, 351 F. Supp. 224 (D.C.Conn.1972), appeal docketed, No. 72-730. Cf. *Cheaney v. State, Ind.*, 285 N.E.2d, at 270; *Montana v. Rogers*, 278 F.2d 68, 72 (CA7 1960), *aff'd sub nom. Montana v. Kennedy*, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961); *Keeler v. Superior Court*, 2 Cal. 3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970); *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971). Indeed, our decision in *United States v. Vuitch*, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the

been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

55. Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive." Wis.Stat. § 940.04(6) (1968), and the new Connecticut statute, Pub. Act No. 1 (May 1972 Special Session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

56. *Edelestein* 16.

57. *Lader* 97-99; D. Feldman, *Birth Control in Jewish Law* 251-294 (1963). For a stricter view, see I. Jakobovits, *Jewish Views on Abortion, in Abortion and the Law* 124 (D. Smith ed. 1967).

58. *Amicus Brief for the American Ethical Union et al.* For the position of the National Council of Churches and of other denominations, see *Lader* 99-101.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.<sup>56</sup> It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.<sup>57</sup> It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.<sup>58</sup> As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.<sup>59</sup> Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.<sup>60</sup> The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.<sup>61</sup> The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substan-

59. I. Hellman & J. Pritchard, *Williams Obstetrics* 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1639 (24th ed. 1965).

60. Hellman & Pritchard, *supra*, n. 59, at 493.

61. For discussions of the development of the Roman Catholic position, see D. Callahan, *Abortion: Law, Choice, and Morality* 460-447 (1970); Noonan 1.

tial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.<sup>62</sup>

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive.<sup>63</sup> That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were <sup>1152</sup>sustained, though few courts have squarely so held.<sup>64</sup> In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.<sup>65</sup> Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been

recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.<sup>66</sup> Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

## X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches <sup>1153</sup>term and, at a point during pregnancy, each becomes "compelling."

[13, 14] With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical

62. See Brodie, *The New Biology and the Prenatal Child*, 9 J.Family L. 391, 397 (1970); Gorney, *The New Biology and the Future of Man*, 15 U.C.L.A.L.Rev. 273 (1968); Note, *Criminal Law—Abortion—The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law*, 46 *Orn.L.Rev.* 211 (1967); G. Taylor, *The Biological Time Bomb* 32 (1968); A. Rosenfeld, *The Second Genesis* 138-139 (1969); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 *Mich.L.Rev.* 127 (1968); Note, *Artificial Insemination and the Law*, 1968 *U.Ill.L.F.* 203.

63. W. Prosser, *The Law of Torts* 335-338 (4th ed. 1971); 2 F. Harper & F.

James, *The Law of Torts* 1028-1031 (1956); Note, 63 *Harv.L.Rev.* 173 (1949).

64. See cases cited in Prosser, *supra*, n. 63, at 336-338; Annotation, *Action for Death of Unborn Child*, 15 *A.L.R.3d* 992 (1967).

65. Prosser, *supra*, n. 63, at 338; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 *Notre Dame Law.* 349, 354-360 (1971).

66. Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 *U.C.L.A.L.Rev.* 233, 235-238 (1969); Note, 56 *Iowa L.Rev.* 994, 999-1000 (1971); Note, *The Law and the Unborn Child*, 46 *Notre Dame Law.* 349, 351-354 (1971).

fact, referred to above at 725, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

[15] With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

[16] Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy

and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States v. Vuitch*, 402 U.S., at 67-72, 91 S.Ct., at 1296-1299.

## XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[17] 2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the

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State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.<sup>67</sup>

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the 116points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

## XII

[18] Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately,

<sup>67</sup>. Neither in this opinion nor in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Car-

for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota*, 389 U.S. 241, 252-255, 88 S.Ct. 391, 397-399, 19 L.Ed.2d 444 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris*, 401 U.S., at 50, 91 S.Ct., at 753.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the 117judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

Affirmed in part and reversed in part.

Mr. Justice STEWART, concurring.

In 1963, this Court, in *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10

olina, for example, N.C.Gen.Stat. § 14-45.1 (Supp.1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 480 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

L.Ed.2d 93, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730, 83 S.Ct., at 1031.<sup>1</sup>

Barely two years later, in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the <sup>1158</sup>Constitution.<sup>2</sup> So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.<sup>3</sup> As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

1. Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733, 83 S.Ct., at 1032.

2. There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, left

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 755-756, 1 L.Ed.2d 796; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070; *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 629-630, 89 S.Ct. 1322, 1328-1329, 22 L.Ed.2d 600; *United States v. Guest*, 383 U.S. 745, 757-758, 86 S.Ct. 1170, 1177-1178, 16 L.Ed.2d 239; *Carrington v. Rash*, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; *Aptheker v. Secretary of State*, 378 U.S. 500, 505, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992; *Kent v. Dulles*, 357 U.S. 116, 127, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204; *Bolling v. Sharpe*, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694-695, 98 L.Ed. 884; *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131.

<sup>1161</sup>As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise

largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-351, 88 S.Ct. 507, 510-511, 19 L.Ed.2d 576 (footnotes omitted).

3. This was also clear to Mr. Justice Black, 381 U.S., at 507, (dissenting opinion); to Mr. Justice Harlan, 381 U.S., at 490, 85 S.Ct., at 1659 (opinion concurring in the judgment); and to Mr. Justice White, 381 U.S., at 502, 85 S.Ct., at 1601 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe v. Ullman*, 367 U.S. 497, 522, 81 S.Ct. 1752, 1765, 6 L.Ed.2d 989.

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terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 939 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010; *Griswold v. Connecticut*, *supra*; *Pierce v. Society of Sisters*, *supra*; *Meyer v. Nebraska*, *supra*. See also *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645; *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. As recently as last Term, in *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, we recognized "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fun-

damentally affecting a person as the decision whether to bear or beget a child." <sup>1170</sup> That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)." *Abele v. Markle*, 351 F.Supp. 224, 227 (D.C. Conn.1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridg-

1171 ment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

Mr. Justice REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

## I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States 1172 may impose virtually no restrictions on

medical abortions performed during the first trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 23 L.Ed. 899 (1885). See also *Ashwander v. TVA*, 297 U.S. 288, 345, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

## II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Mr. Justice STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment 1173 protects, embraces more than the rights found in the Bill of Rights. But that

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liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*, *supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 179, 92 S.Ct. 1400, 1408, 31 L.Ed.2d 768 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

<sup>1174</sup> While the Court's opinion quotes from the dissent of Mr. Justice Holmes in

*Lochner v. New York*, 198 U.S. 45, 74, 25 S.Ct. 539, 551, 49 L.Ed. 937 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. *Conn.Stat.*, Tit. 22, §§ 14, 16. By the time of the adoption of the Fourteenth Amendment <sup>1175</sup> in 1868, there were at least 36 laws enacted by state or territorial legislatures lim-

iting abortion.<sup>1</sup> While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.<sup>2</sup> Indeed, the Texas statute

1. Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:
  1. Alabama—Ala.Acts, c. 6, § 2 (1840).
  2. Arizona—Howell Code, c. 10, § 45 (1865).
  3. Arkansas—Ark.Rev.Stat., c. 44, div. III, Art. II, § 6 (1838).
  4. California—Cal.Sess.Laws, c. 90, § 45, p. 233 (1848-1850).
  5. Colorado (Terr.)—Colo.Gen.Laws of Terr. of Colo., 1st Sess., § 42, pp. 296-297 (1861).
  6. Connecticut—Conn.Stat. Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn.Pub.Acts, c. 71, §§ 1, 2, p. 65 (1860).
  7. Florida—Fla.Acts 1st Sess., c. 1637, subc. 3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla.Stat.Ann. §§ 782.06, 782.16, 797.01, 797.02, 782.16 (1965).
  8. Georgia—Ga.Pen.Code, 4th Div., § 20 (1823).
  9. Kingdom of Hawaii—Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850).
  10. Idaho (Terr.)—Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).
  11. Illinois—Ill.Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill.Pub.Laws §§ 1, 2, 3, p. 89 (1867).
  12. Indiana—Ind.Rev.Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind.Laws, c. LXXXI, § 2 (1856).
  13. Iowa (Terr.)—Iowa (Terr.) Stat., 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev.Stat., c. 49, §§ 10, 12 (1843).
  14. Kansas (Terr.)—Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 38, §§ 9, 10, 37 (1856).
  15. Louisiana—La.Rev.Stat., Crimes and Offenses § 24, p. 138 (1856).
  16. Maine—Me.Rev.Stat., c. 160, §§ 11, 12, 13, 14 (1849).
  17. Maryland—Md.Laws, c. 179, § 2, p. 315 (1866).
  18. Massachusetts—Mass.Acts & Resolves, c. 27 (1845).
  19. Michigan—Mich.Rev.Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).
  20. Minnesota (Terr.)—Minn. (Terr.) Rev.Stat., c. 100, §§ 10, 11, p. 493 (1851).
  21. Mississippi—Miss.Code, c. 64, §§ 8, 9, p. 958 (1848).
  22. Missouri—Mo.Rev.Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).
  23. Montana (Terr.)—Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).
  24. Nevada (Terr.)—Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861).
  25. New Hampshire—N.H.Laws, c. 743, § 1, p. 708 (1848).
  26. New Jersey—N.J.Laws, p. 266 (1849).
  27. New York—N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N.Y.Laws, c. 260, §§ 1, 2, 3, 4, 5, 6, pp. 235-236 (1845); N.Y.Laws, c. 22, § 1, p. 19 (1846).
  28. Ohio—Ohio Gen.Stat. §§ 111(1), 112(2), p. 252 (1841).
  29. Oregon—Ore.Gen.Laws, Crim.Code, c. 43, § 508, p. 528 (1848-1864).
  30. Pennsylvania—Pa.Laws No. 374 §§ 87, 88, 89 (1860).
  31. Texas—Tex.Gen.Stat.Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859).
  32. Vermont—Vt.Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt.Acts No. 57, §§ 1, 3 (1867).
  33. Virginia—Va.Acts, Tit. II, c. 3, § 9, p. 96 (1846).
  34. Washington (Terr.)—Wash. (Terr.) Stat., c. II, §§ 37, 38, p. 81 (1854).
  35. West Virginia—Va.Acts, Tit. II, c. 3, § 9, p. 96 (1848).
  36. Wisconsin—Wis.Rev.Stat., c. 133, §§ 10, 11 (1846). By 1868, this statute had been superseded. Wis.Rev.Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1868).
2. Abortion laws in effect in 1868 and still applicable as of August 1970:
  1. Arizona (1865).
  2. Connecticut (1860).
  3. Florida (1868).
  4. Idaho (1863).

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**IDEOLOGY, JUDICIAL SELECTION AND  
JUDICIAL ETHICS**

**ERWIN CHEMERINSKY**

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## Ideology, Judicial Selection and Judicial Ethics

ERWIN CHEMERINSKY\*

In the fall of 1986, there was a bitter fight against the retention of three members of the California Supreme Court, Rose Bird, Joseph Grodin, and Cruz Reynoso. Exactly a year later, the nation's attention focused on the battle over Robert Bork's confirmation to the United States Supreme Court. There were ironic parallels between these two events. In both instances, public opinion and media reporting played an unprecedented role in the judicial selection process. In each situation, there were arguments over whether the candidates' ideology should be a major factor in the evaluations.

In California, conservatives argued that Bird, Grodin, and Reynoso should be rejected because of their liberal views and political activity in demonstrating cases. Liberals in California argued that assuring judicial independence required that the evaluation be limited to the justices' competence; that the individuals' ideology and prior votes should play no role in the retention election. But the sides were reversed in the Bork confirmation. The liberals who argued that Bork should be rejected because of his conservative views and prior votes as a senator. Conservatives argued that evaluation should be limited to the nominee's competence—that his ideology and prior votes should play no role in the Senate's confirmation decision.

A cynic might observe that these experiences reflect a pattern of public rhetoric. If your position is in tune with public sentiment, you use ideology as an issue in your arguments; but if your candidate's positions are against the weight of public opinion, you maintain that ideology is irrelevant and that judicial candidates should be evaluated solely on the basis of professional qualifications.

Such an appraisal, while an accurate description of the recent events, ignores the crucial underlying question of how judicial candidates should be evaluated. The issue will certainly arise in the future, if for no other reason than that ideology was successfully used to defeat Bird, Bork, Grodin, and Reynoso. Moreover, the simultaneous election of George Bush as President and of a Democratically controlled Senate will likely lead to conflicts over judicial nominees. While the experiences of the past two years are still fresh in mind, it is important to consider what criteria should be used in evaluating candidates for judicial office. Many scholars have criticized the Senate's rejection of Bork and the California voters' rejection of Bird, Grodin, and Rey-

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noso.<sup>1</sup> Are these objections valid? If so, how should the process of evaluating judicial candidates be conducted?

This article identifies four major models. Part I identifies three models. Part II defends one of these models, but also suggests how to evaluate prospective judges based on their ideology and other ideological or ideological issues. Allowing such ideological evaluation raises the question of how a person's ideology can be ascertained; what questions may prospective judges be required to answer? The basis for ideological evaluation is discussed in part III. Finally, part IV considers whether such an approach to judicial selection is consistent with the current standards of judicial ethics and, if not, what changes should be made.

This article does not directly address the issue of what system for selecting judges—elections or appointments—is best.<sup>2</sup> Rather, ~~the issue of how to~~ ~~evaluate~~ ~~judicial candidates should be evaluated~~ ~~consistently~~ ~~of the system~~ ~~and~~. The phrase "judicial candidate" is used throughout this article to refer to a person being considered for any state or federal judicial office. Whether the evaluator is the President, the Senate, a governor, a state legislator, or a voter, the underlying issue is essentially the same: what are the permissible grounds for evaluating potential judges?

### I. ALTERNATIVE APPROACHES TO EVALUATING JUDGES

I can identify three different models that have been advanced as to how judicial candidates should be selected and evaluated. Each has its strong supporters. One might be termed the *professional qualifications model*. Under this approach, candidates for judicial office—state or federal—should be evaluated only on the basis of their credentials: their education, the nature of their legal practice, their prior judicial experience, and any other indicia of their competence and ability to serve as a judge. The professional qualifications model expressly excludes consideration of an individual's ideology or likely voting in particular cases.

For the most part, the criteria used by the American Bar Association in evaluating nominees reflect this model. The American Bar Association's rating of a judicial candidate is based on the individual's "character, temperament, and professional aptitude and experience"; evaluation is not supposed

1. See, e.g., Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (criticizing Bork rejection); Uelman, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333 (1988) (criticizing rejection of California Supreme Court Justices in 1986 retention election).

2. However, I do discuss whether differences in the method of selection justify differences in the criteria used in evaluation. See *infra* text accompanying notes 30-31.

to include consideration of the individual's views or ideology.<sup>3</sup> The Twentieth Century Fund's Task Force on Judicial Selection recently declared that "choosing candidates for anything other than their legal qualifications damages the public's perception of the institutional prestige of the judiciary and calls into question the high ideal of judicial independence."<sup>4</sup>

Supporters of both Bird and Bork argued that this was the model to be used and that each should be approved because of excellent professional qualifications.<sup>5</sup> For example, Professor Bruce Ackerman described the rejection of Robert Bork as a "tragedy" on the grounds that Bork was "among the best qualified candidates for the Supreme Court of this or any other era. Few nominees in our history compare with him in the range of their professional accomplishments."<sup>6</sup>

A second approach can be termed the *judging skills model*. Under this approach, in addition to professional qualifications, it is permissible for the evaluator—be it the voter, the Executive, or the Senate—to examine the candidate's skills as a judge, assuming that the candidate has served in a prior judicial position. Supporters of this approach look to factors such as the judicial candidate's use of precedent, the quality of his or her written opinions, his or her temperament on the bench, and the like. As with the professional qualifications approach, the judging skills model expressly excludes consideration of an individual's ideology in evaluating potential judges.

For example, Professor Michael Moore argued against the retention of Chief Justice Rose Bird, but expressly disclaimed that his position was based on an ideological disagreement.<sup>7</sup> Professor Moore maintained that Chief Justice Bird should have been rejected because he believed that her vote to reverse every death penalty case to come before her reflected closed-mindedness and impermissibly result-oriented judging.<sup>8</sup> Similarly, Professor Judith Resnick in her Senate testimony against Robert Bork focused on his judging skills and not on his ideology.<sup>9</sup> She specifically criticized the breadth of his

3. AMERICAN BAR ASSOCIATION, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983).

4. TWENTIETH CENTURY FUND, REPORT OF THE TASK FORCE ON JUDICIAL SELECTION, *Judicial Roulette* (1988) [hereinafter TWENTIETH CENTURY FUND REPORT].

5. See, e.g., Chemerinsky, *The Judicial Conscience of a Conservative*, L.A. Herald Examiner, Sept. 24, 1986 at A13, col. 1; Chemerinsky, *High Court Vote*, San Fran. Examiner, Sept. 4, 1986; Cutler, *Saving Bork from Both Friends and Enemies*, N. Y. Times, July 16, 1987 at A27, col. 1.

6. Ackerman, *supra* note 1, at 1164.

7. See, e.g., Moore, *Politics is Not the Basis for Judging the Judges*, L.A. Times, July 29, 1985, Part II at 5, col. 1; Moore, *Justices' Personal Values Must at Times Give Way*, L.A. Times, July 30, 1985, Part II at 5, col. 4; Moore, *Rose Bird Should Go: On Death Penalty She Has Taken Law Into Her Own Hands*, L.A. Times, July 31, 1985, Part II at 5, col. 3.

8. Moore, *Rose Bird Should Go*, *supra* note 7.

9. Transcript of Proceedings, Senate Comm. on the Judiciary, Hearing on the Nomination of Honorable Robert H. Bork to be Associate Justice of the Supreme Court of the United States (Sept.

opinions and his resolution of questions not raised in the specific cases before him.<sup>10</sup>

A third approach can be termed the *ideological orientation model*. Although this model certainly includes evaluation of professional qualifications and judging skills, it differs from the first two approaches because it expressly permits consideration of an individual's ideology in the selection process. Specifically, the evaluator is allowed to examine a judicial candidate's views on important issues in deciding whether to approve or reject the individual. Many of the critics of both Bird and Bork employed this model. Chief Justice Bird, for example, was opposed for her opposition to capital punishment and also for her liberal rulings protecting consumers and employees.<sup>11</sup> Judge Bork was attacked for his writings criticizing Supreme Court cases protecting the right of privacy, applying the equal protection clause to gender discrimination, and using the First Amendment to protect speech not concerned with the political process.<sup>12</sup> In short, the debates over Bird and Bork were primarily battles over which of these three models should be followed. The model selected determines the appropriate criteria for evaluation.

It must be recognized that, as with any such models, these are only descriptions of approaches in very general terms. Within each there are many specific questions that must be answered, including: how to appropriately measure professional qualifications; how to evaluate judging behavior; what are the permissible ways for determining ideology? Also, it is not always possible in practice to neatly separate the models. Professional qualifications are looked to, in large part, as a way of predicting judging skills.

Admittedly, these three models are oversimplifications. However, they do provide a basis for analysis and discussion. The starting place in evaluating a judicial candidate must be a decision as to which approach should be used.

## II. IDEOLOGY MATTERS

I contend that the evaluation of judicial candidates—by the President or a governor, by the Senate or the voters—should include consideration of ideology. That is, in deciding whether to appoint, approve, or retain a judge, consideration should include examination of the individual's professional

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25, 1987) (testimony of Prof. Judith Resnick) (copy on file with the Georgetown Journal of Legal Ethics).

10. *Id.* at 312-13.

11. See, e.g., P. JOHNSON, *THE COURT ON TRIAL* (1985); Cook and Kang, *Facing Judgment: The Rose Bird Court*, San Fran. Examiner, January 5, 1986, at A-1.

12. See SENATE COMM. ON JUDICIARY, 100TH CONG., 2D SESS., *RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD*, reprinted in 9 CARDOZO L. REV. 219 (1987).

qualifications, his or her judging skills, and also, his or her ideology. It is appropriate and necessary to focus on the individual's views on important issues that are likely to come before his or her court. It is acceptable and, in fact, essential that the evaluator reject a nominee whose views are deemed to be objectionable.

At first blush, this might appear to be a radical suggestion. I contend, however, that it is the description which best describes how judicial candidates have been evaluated throughout American history. Early in American history, President George Washington appointed John Rutledge to be the second Chief Justice of the United States.<sup>13</sup> Rutledge was impeccably qualified; he already had been confirmed by the Senate as an Associate Justice (although he never actually sat in that capacity). The Senate rejected Rutledge for the position of Chief Justice because of its disagreement with Rutledge's views on the United States treaty with Great Britain. Furthermore, throughout the nineteenth century, the Senate rejected many nominees on ideological grounds. Professor Grover Rees explains that "during the nineteenth century only four Supreme Court Justices were rejected on the ground that they lacked the requisite credentials, whereas seventeen were rejected for political or philosophical reasons."<sup>14</sup>

Likewise, during this century, Presidential nominees for the Supreme Court have been rejected even when they possess outstanding professional qualifications. In 1930, a federal court of appeals judge, John Parker, was denied a seat on the high Court because of his anti-labor, anti-civil rights views.<sup>15</sup> In 1969, the Senate rejected United States appeals court judge Clement Haysworth largely because of his anti-union views.<sup>16</sup> Thus the defeat of Robert Bork was in line with a tradition as old as the republic itself.

Of course, such a description is not a normative defense of the appropriateness of considering ideology in evaluating nominees. The ideological orientation model can be defended in the simplest terms: ideology should be considered because ideology matters. Judges are not fungible; a person's ideology influences how he or she will vote on important issues. It is appropriate for an evaluator to pay careful attention to the likely consequences of an individual's presence on a court.

In defending the ideological orientation model, it is useful to begin with a thought experiment. Imagine that the President appoints someone who it

13. For a description of the Rutledge nomination and rejection, see L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 79-80 (1985).

14. Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 944 (1983).

15. L. TRIBE, *supra* note 13, at 87, 90-91; O'Brien, *Background Paper*, in TWENTIETH CENTURY FUND REPORT *supra* note 4 at 77 (1988) [hereinafter *Background Paper*].

16. *Background Paper*, *supra* note 15, at 77.

turns out is an active member of the Klu Klux Klan or the American Nazi party and who had repeatedly expressed racist and anti-semitic views. Assume that the nominee has impeccable professional qualifications: a degree from a prestigious university, years of experience in high level law practice, and a strong record of bar service. I would think that virtually everyone would agree that the nominee should be rejected.

Presidents and governors have always selected nominees because of their ideology. Governor Jerry Brown selected Rose Bird because of their ideological compatibility. President Reagan nominated Robert Bork precisely because of Bork's conservative views. Accordingly, the evaluators—the voters or the Senate—are justified in also looking to ideology.

Early in this century, the legal realists exploded the myth that judging is discretion-free and that formalism is possible. Judges often possess substantial discretion—especially in interpreting an expansively worded document like the Constitution. Ideology inevitably influences the exercise of that discretion. A study published in the *Columbia Law Review* examined the voting patterns of federal court of appeals judges.<sup>17</sup> It revealed that judges appointed by Democratic presidents vote in favor of the government in civil cases less than forty percent of the time.<sup>18</sup> In contrast, judges appointed by Republican presidents vote in favor of the government over sixty percent of the time.<sup>19</sup> Particularly in civil rights cases, Democratic judges vote in favor of the plaintiff more often than do Republican judges.<sup>20</sup> For purposes of comparison, this study found that a group of conservative court of appeals judges, including Robert Bork, voted against parties "assert[ing] a liberal claim" in close to ninety percent of the cases.<sup>21</sup> Although such "scorecards" can be misleading, they prove what few would dispute: a person's political views influence his or her performance on the bench. Everyone knows that William Rehnquist and William Brennan frequently disagree in cases involving constitutional questions. Both are conscientiously performing their judicial duties, yet their ideological disagreement consistently results in differing votes. Thus, if there is a vacancy on the court, it is appropriate to consider whether the evaluator wants someone with Rehnquist's or Brennan's views. People do and should care about how the court will decide important issues.

17. Note, *All the President's Men: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987).

18. *Id.* at 789.

19. *Id.*

20. *Id.* at 770-71.

21. *Id.* at 779 n 66. For an excellent discussion of the Reagan administration's belief that the ideology of judges matters and its attempt to fill the federal judiciary with conservatives, see M. SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988).

Hence, they should pay attention to the effects of their judicial choices on the matters that concern them the most.

Opponents to the ideological orientation model must sustain one of two arguments: either that an individual's ideology is unlikely to affect his or her decisions on the bench, or that even if ideology will influence decisions, it should not be examined because disadvantages to such consideration will outweigh any advantages.

The former argument, that a person's ideology is unlikely to affect performance in office, is impossible to sustain. Unless one believes in truly mechanistic judging, it is clear that judges possess discretion and that the exercise of discretion is strongly influenced by an individual's pre-existing ideological beliefs. For example, in cases involving questions of constitutional or statutory interpretation, the language of the document and the intent of the drafters often will be unclear.<sup>22</sup> Thus judges will often be required to supply the meaning. Moreover, in common law cases courts are left to decide the appropriate content of judicially created documents. Many cases, especially in constitutional law, involve a balancing of interests. The relative weight assigned to the respective claims often turns on the judge's own values. Given the reality of the judicial decisionmaking process, it is difficult to support the claim that a judge's ideology will not impact his or her decision.

The latter argument against considering a judicial candidate's views is much stronger: that even though ideology matters, the ideological model should not be followed because of its undesirable effects. Several disadvantages of the ideological orientation model have been advanced. The most forceful of these arguments is that it will undermine judicial independence. Professor Stephen Carter argues that considering a nominee's views on questions of constitutional theory threatens judicial independence.<sup>23</sup> Professor Carter contends that the Supreme Court exists as a counter-majoritarian institution and that its ability to protect the Constitution's values from the excesses of majority rule is likely to be jeopardized by intense scrutiny of judicial candidates. He states that

[i]f a nominee's ideas fall within the very broad range of judicial views that are not radical in any non-trivial sense—and Robert Bork has as much right to that middle ground as any other nominee in recent decades—the Senate enacts a terrible threat to the independence of the judiciary if a substantive review of the nominee's legal theories brings about a rejection.<sup>24</sup>

22. See E. CHERMERINSKY, *INTERPRETING THE CONSTITUTION* (1987).

23. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

24. *Id.* at 1198. The Report of the Twentieth Century Fund Task Force on Judicial Selection also recently took the position that evaluation of judicial candidates based on their ideology poses a threat to judicial independence. See *supra* note 4.

The critical weakness in Professor Carter's argument is that it is not clear why judicial independence requires blindness to ideology during the nomination or confirmation of a federal judge. Professor Carter maintains that independence requires protection of individuals from scrutiny from the earliest moments of the selection process. According to Carter:

Judicial independence, if the concept is to have any force, is not a cloak that can be thrown around a new Justice at the very last minute—after the administration of the oath. Independence must arrive earlier, and cover all potential nominees, from the moment that sitting Justice retires or dies. A nominee is not independent when she is quizzed, openly or not, on the degree of her reverence for particular precedents.<sup>25</sup>

However, judicial independence means that a judge should feel free to decide cases according to his or her view of the law and not in response to popular pressure. As such, Article III's assurance of life tenure and its protection against a reduction in salary guarantee independence. Judges are free to decide each case according to their conscience and best judgment; they need not worry that their rulings will cost them their seats or their salary. Professor Carter never indicates why this is insufficient to preserve judicial independence. In the above quotation, he subtly shifts the definition of independence, from autonomy while in office to autonomy from scrutiny before being in office. But he does not explain why the latter, freedom from evaluation before ascending to the bench, is a prerequisite to independence in the former, far more meaningful sense.

In fact, it is precisely because federal judges are essentially immune from external checks once they are on the bench that it is essential that they be carefully scrutinized prior to their confirmation. Much of constitutional scholarship in the last quarter of a century has focused on what Professor Alexander Bickel termed the "counter-majoritarian difficulty"—the exercise of substantial power by unelected judges.<sup>26</sup> Perhaps the most significant majoritarian check is at the nomination and confirmation stage. After judges are on the bench, judicial independence is essential for all of the reasons Professor Carter describes. He implicitly assumes that preserving the counter-majoritarian function of the courts requires complete exclusion of all majoritarian influences at any point in the system. Not only is this impossible, but it is quite undesirable. Selection by the President and confirmation by the Senate properly exists precisely to have some majoritarian influence over the composition of the federal courts.<sup>27</sup>

Finally, Professor Carter's position requires that both the President and

25. Carter, *supra* note 24, at 1194.

26. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

27. See Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-85 (1957) (arguing that since presidents do not appoint justices hostile to their

Congress avoid examining an individual's ideology. If preserving the Court's function as an anti-majoritarian body requires, as Professor Carter argues, blindness to ideology, then all in the process must avoid attention to ideology. In fact, if the President appoints an individual reflecting the majority's views on an important issue, an aggressive Senate role permits Senators representing minority viewpoints to provide a check. At minimum, so long as the President considers ideology, there is a majoritarian presence in the selection process and it is equally appropriate for the Senate to focus on ideology in the confirmation process.

An alternative argument against the use of ideology is that it will deadlock the selection process—liberals will block conservatives and vice versa. Although there have been times in history when several nominees in a row have been defeated, ultimately a compromise candidate always was found.<sup>28</sup> Most likely, aggressive review of judicial nominees would result in more centrist judges because candidates would have to please evaluators of all viewpoints. Although both liberals and conservatives will lose some of their persuasion on the courts, the existence of a more moderate Court might have many benefits, such as stability and more widespread acceptability of the law.

A variation of this criticism of a deadlock in the selection process is concern that attention to ideology will lead to litmus tests for nominees based on their views on one or two or a few specific issues. The Republican platforms in 1980 and 1984, for example, exhorted the President to appoint only federal judges who adhered to the pro-life position on the issue of abortion.<sup>29</sup> However, this objection is not a reason to reject the ideological orientation model, but is instead an argument against a particular way of using the model. In other words, if one opposes the use of litmus tests for judicial candidates, then one should urge use of a broader basis for assessing ideology. By analogy, if someone using the professional qualifications model focused only on where nominees went to law school, the appropriate response would be to enlarge the basis for evaluating professional qualifications. Likewise, concern about single issue ideological tests justifies expanding the grounds for evaluation, not rejecting the ideological orientation model.

Another basis for criticizing the ideological orientation model is to argue that it should be used only some of the time. For example, one might claim that it should be used in initial appointments, but not in retention election; or that it should be followed by the President, but not by the Senate; or that it should be used for Supreme Court Justices, but not for lower court judges.

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own public policy views, and Senate is unlikely to confirm appointee at odds with majority, policy views dominant on Court are in line with dominant views among lawmaking majorities).

28. See, L. TRIBE, *supra* note 13, at 58-9 (rejection of several nominees by President Tyler).

29. See H. SCHWARTZ, *supra* note 21, at 5 (discussing Reagan administration efforts to pack federal courts with "right-thinking" judges).

The most persuasive distinction is that the ideological orientation model should be used in initially reviewing a nominee for a position on a court, but in a retention election an individual's ideology should not be considered.<sup>30</sup> The argument is that a judge on a court should decide each case without an eye toward the coming retention election. The only way to assure such impartiality is to prevent consideration of the judge's decisions in the subsequent election. This argument can be used to justify how liberals could both oppose Robert Bork and support Rose Bird: the former was an initial appointment, while the latter was a retention election.

Although I recently argued in print in favor of this distinction, I am no longer persuaded by it.<sup>31</sup> Treating retention elections differently makes sense only if one believes that ideological consideration in them will influence judicial decisions and that it is possible to exclude ideological consideration from the election process. The latter seems impossible. If the Bork, Bird, Grodin, and Reynoso rejections demonstrate anything, it is that people evaluate nominees based on ideology. In fact, so long as a judge even thinks that ideology might matter in the subsequent election, there is the danger that a desire to please the voters might influence decisionmaking. Inherent to judicial elections is the risk that voters will evaluate judges based on their decisions and opinions.

Furthermore, the concern that the election process will influence decisions is best dealt with by abolishing or reforming that process, not by preventing consideration of ideology. Elections are particularly poorly suited to selecting judges because of the difficulty voters have in informing themselves and evaluating candidates.<sup>32</sup> In any event, ideology is so important in determining who is desirable for a seat on the bench, that concerns for judicial independence should be dealt with by reforming other aspects of the process and not by prohibiting examinations of ideology.

Alternatively, some might contend that it is permissible for the President to look to ideology, but not permissible for the Senate to do so. This argument is unsupported by history. The framers of the Constitution definitely intended for the Senate to play an independent and aggressive role in evaluating nominees for judicial office.<sup>33</sup> More importantly, such Senate deference is unjustified because the President possesses no special expertise in selecting judges. Checks and balances are the core of the design of the federal system and Senate confirmation is a crucial check on presidential choices.

30 Chemerinsky, *Evaluating Judicial Candidates*, 61 So. CAL. L. REV. 1985 (1988).

31. *Id.* at 1989-92.

32. There is an extensive body of literature demonstrating voter ignorance in judicial election, see, e.g., P. DuBois, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980); Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. BAR J. 152 (1976); Boschan, *Can Judicial Elections Express the People's Choice?*, 57 JUDICATURE 242 (1974).

33. See Background Paper, *supra* note 15, at 29-35.

Finally, it might be argued that the ideological orientation model should be used for state or federal supreme court justices, but not for lower court judges. The argument is that the former have substantial discretion in interpreting the Constitution, making ideology particularly important. Because lower court judges possess less discretion, ideology should not be considered. However, judges at all levels possess enormous discretion. All of the cases ruled on at the highest level are first considered in a trial court. In fact, many similar cases never make their way to the Supreme Court. With so few cases ever reaching the Supreme Court, the decisions of the trial and appeals courts become rather significant. Although lower courts possess less discretion and decide more "easy cases," ideology should be considered in evaluations because there still is sufficient opportunity for ideology to manifest itself in decisionmaking.<sup>34</sup>

A final objection to the ideological orientation model concerns the appropriate record for determining a nominee's views. Unless the nominee has extensive writings documenting his or her positions on controversial issues—such as Robert Bork did—how is the evaluator to know the judicial candidate's ideology? This issue is examined in part III.

In summary, the argument for the ideological orientation model is simple: people should care about the decisions likely to come from a court on important issues; the ideological composition of the court will determine those decisions; and the appropriate place for majoritarian influences in the judicial process is at the selection stage. In fact, one can wonder whether it really is ever possible to select judges without some attention to ideology. A rejection of the ideological orientation model does not necessarily mean that ideology can be excluded from consideration. More likely, ideology still is present in the evaluation, but never openly acknowledged; ideological objections get rephrased as arguments against judicial skills or professional qualifications.

### III. THE BASIS FOR IDEOLOGICAL EVALUATION

The ideological orientation model requires attention to a judicial candidate's views on issues. This raises two questions. First, how is it determined which issues should be examined as part of the ideological evaluation? In other words, just as the professional qualifications model necessitates a determination of the criteria for evaluating qualifications and the judging skills model requires a measure of judging skills, so does the ideological orientation model demand an elaboration of the basis for evaluating ideology. Second, how should an individual's ideology be determined? Once the content for

34. For example, the Report of the Twentieth Century Fund Task Force on Judicial Selection recently recommended more intensive scrutiny for appointees to lower federal courts because of the importance of these positions. See TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 8.

evaluation is determined, it is necessary to decide the method for implementing the model in assessing particular candidates.

The ideological orientation model permits consideration of an individual nominee's views on: 1) the appropriate method of judicial review; 2) the appropriate content of legal doctrines likely to be decided by the judge's court; and 3) the appropriate results in particular types of cases. First, evaluation of judicial candidates should include consideration of their views on methodological questions. For example, it is appropriate to consider whether a nominee for a federal judicial office believes that the rights protected by the Constitution should be limited to what the framers intended or whether it is appropriate for the court to protect rights not contemplated by the drafters.<sup>35</sup> Although I personally believe that any nominee who expresses a strictly originalist philosophy should be rejected as unacceptable, I recognize that the ideological orientation model licenses the rejection on non-originalists if a majority of the Senate were committed to the opposing philosophy.<sup>36</sup> Similarly, evaluation of a person's judicial methodology should include consideration of his or her views on the role of precedent and when it is appropriate to overrule prior decisions.<sup>37</sup> A Senate particularly concerned with preserving or discarding particular decisions is likely to be very attentive to the nominee's position on the role of *stare decisis*. In evaluating state judges, attention might be paid to an individual's belief concerning when it is appropriate for the court to create new common law rights rather than waiting for legislative action and the individual's approach to statutory construction.<sup>38</sup>

A second basis for ideological evaluation is a judicial candidate's position on particular legal doctrines. The specific doctrines to be considered will

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35. A major issue in the debate over the confirmation of Robert Bork was whether his philosophy of "original intent" was a too restrictive basis for constitutional interpretation. See D. RUTKUS, *SENATE CONSIDERATION OF THE NOMINATION OF ROBERT H. BORK TO BE A SUPREME COURT ASSOCIATE JUSTICE: BACKGROUND AND AN OVERVIEW OF THE ISSUES*, CONG. RES. SERV. REP. No. 87-761, 36-39 (1987).

36. There is voluminous literature debating the proper method of interpreting the Constitution. Some of the more prominent works include: M. PERRY, *THE CONSTITUTION, THE COURT AND HUMAN RIGHTS* (1982); J. ELY, *DEMOCRACY AND DISTRUST* (1980); R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

37. For a discussion of the role of precedent in constitutional interpretation, see, e.g., Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988) (offering a rationale for role of precedent which permits competing societal influences to be reconciled with *stare decisis*); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (examining use of precedent outside the law to give new perspective on how it should function in the law).

38. This article has not focused at length on differences in the criteria for evaluating judges depending on the specific court involved. However, the evaluation process should include recognition of differences, for example, between state supreme courts and federal courts and the fact that the former play a pivotal role in the development of state common law and in interpreting state statutes.

vary over time. During the 1930's, President Roosevelt rightly considered candidates' views on the proper scope of federal power because of his desire to ensure the approval of New Deal programs.<sup>39</sup> During the 1950's and 1960's, the Senate should have assured that federal judges would be committed to upholding the Supreme Court's desegregation decisions.<sup>40</sup> During the 1980's, it is appropriate for the Senate to consider a nominee's views on topics such as whether the Constitution protects a right to reproductive privacy, whether the individual believes the Bill of Rights should apply to the states, and whether the equal protection clause protects women from discrimination.

Finally, it is appropriate to consider a judicial candidate's views on important previously decided cases. How does the judge view *Brown v. Board of Education*, *Baker v. Carr*, or *Roe v. Wade*? Certainly, an individual's position on these precedents is revealing of his or her ideology and likely performance as a judge.

I realize, of course, that the legal doctrines or cases selected will depend directly on the evaluator's own ideology. Although some might insist on judges who are committed to upholding *Brown*, *Baker* and *Roe*, others might believe that judges should be rejected for having those beliefs. The use of ideology in the evaluation process is thus equally available to those who have radically different views from one another. During the early 1980's, conservative Senators Jeremiah Denton and John East asked some prospective federal judges to answer a series of questions.<sup>41</sup> Included were questions such as "Do you believe that the Constitution guarantees a right to privacy? If so, please indicate the constitutional sources of that right, its precise nature and its limitation?" Also, there were detailed questions about the nominee's views on abortion and questions dealing with subjects such as the death penalty, the exclusionary rule, and affirmative action. All of the inquiries concerned the nominee's beliefs; none asked how the individual would vote in a specific case. Although I could not disagree more with the political and constitutional values of then-Senators Denton and East, I believe that their questions were generally appropriate. Senators, whether they are liberal or conservative, should be able to learn about judicial nominee's views and ideology.

Ultimately, the argument over judges becomes an argument over the desired meaning of the Constitution. I regard that as good rather than bad. I

39. Background Paper, *supra* note 15, at 49-51.

40. For a discussion of the importance of the lower federal courts in securing compliance with desegregation orders, see J. BASS, UNLIKELY HEROES (1981) (discussing role of Fifth Circuit judges in turning Supreme Court's *Brown* decisions into revolution for equality).

41. Questions by the Honorable Jeremiah Denton and Honorable John P. East to Andrew Frey, Nominee to the District of Columbia Court of Appeals, reprinted in TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 107-11.

think that the best possible celebration of the Constitution's Bicentennial was the Bork confirmation hearings which took place exactly 200 years after the Constitution was drafted in Philadelphia. For a few weeks, the nation's attention was riveted on the Constitution. Conversations were dominated by discussions of whether the Constitution should be limited to the framers' views and whether there should be a right to privacy. Such discussions are important in informing the public about the content of the Constitution and the nature of judicial decisionmaking.

I realize that not every judicial candidate will have views on every doctrine or case. An evaluator must be sensitive to this, but realistic, as well. Does anyone really lack a position on *Brown v. Board of Education* or *Roe v. Wade*? Certainly, an individual's views on issues can change over time. The evaluator, however, will have to make a judgment as to whether a claimed shift is genuine or whether it is a "confirmation conversion," a change motivated by a desire to secure appointment and confirmation to the court.

But how is the evaluator to ascertain a judicial candidate's views on key matters? There are three primary sources of information: the candidate's prior writings and speeches, the candidate's prior judicial decisions, and questions to the candidate during the confirmation process. The easiest of these sources to use is the prior writings and speeches of the candidate. Such documents reveal a person's views on judicial methodology, particular doctrines, and specific cases. While there are two arguments against examining a judicial candidate's writings and speeches, neither has merit.

First, it can be argued that people may express positions in writings or speeches that they do not believe; that they are simply trying to be provocative. Therefore, it is unfair to use a person's writings as evidence of his or her beliefs. This argument was made in defense of some of Robert Bork's more extreme positions. I am very skeptical of this defense, especially when evaluating an academic's writings or speeches. I do not know any law professors who write things they do not believe. Unlike attorneys who must advocate the best interests of their clients, academics have the freedom to espouse their own positions. Moreover, any time such a defense is raised, the appropriate response is to examine the bulk of the person's writings. Does the provocative writing fit within the overall pattern of views expressed; was it expressed on one occasion or repeatedly? The defense of Judge Bork on this ground was unconvincing because each of his controversial views was consistent with his underlying philosophy and each had been restated frequently over a long period of time.<sup>42</sup>

Second, I have heard some say that allowing review of a judicial candi-

42. Background Paper, *supra* note 15, at 103 (describing Senator's concerns that Bork had undergone a confirmation conversion).

date's writings will serve as a disincentive to people taking controversial positions in print. This argument, however, ignores all of the other incentives that people have to espouse distinctive views. For example, given the large volume of legal scholarship, one way in which a person may be noticed is by presenting novel arguments and approaches. Also, it is hard to imagine that very many people will try throughout their careers to shape their writings to please an anonymous group of potential evaluators at some unknown, possibly never existing future time.

In addition to examining a person's prior writings and speeches, a second major source of information is previous judicial decisions. If the candidate has prior judicial experience, much can be learned about the individual's ideology from cases already decided. Two possible objections that have been advanced have considerably more merit than the arguments against considering a candidate's writings or speeches.

One argument is that looking to a judge's past decisions threatens judicial independence because of fear that judges will decide cases with an eye to the evaluation that may later follow. This is a serious concern. As discussed above, judicial independence requires that a judge decide a matter according to his or her best views of the proper outcome. But there is at least the danger that some judges might be influenced in their decisionmaking by the knowledge that their opinions will be scrutinized when their performance is evaluated.<sup>43</sup>

There is no easy answer to this concern. Ultimately, a balancing choice must be made as to whether it is more important to have the ideological information to be gained from reading past opinions or whether it is more essential to preserve judicial independence by preventing a judge's decisions from being examined in any review process. Although I choose the former, there are others who take the latter position and thus exclude consideration of a judge's past decisions from an appraisal of his or her ideology.

A further concern with looking to a judge's prior decisions is the need to be sensitive to distinctions between trial courts, intermediate appellate courts, and the highest court within a jurisdiction. Judges on trial and intermediate appellate courts are obligated to apply the law as set forth by higher courts. Accordingly, many rulings might not be reflective of a judge's own beliefs as to how the case should have been handled, but instead indicate the judge's reading of the appropriate precedents.

A final source of information about judges—and undoubtedly the most important—is direct questions to judicial candidates from the evaluating body. The evaluator—be it the President, a governor, the Senate, or the voters—should insist as a prerequisite to approval that the candidate answer

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43. See Chemerinsky, *supra* note 30, at 1991.

questions about judicial methodology, about specific doctrines, and about particular cases.

Throughout much of America's history, federal judicial nominees did not appear before the Senate or the Senate Judiciary Committee.<sup>44</sup> The first Supreme Court nominee to personally testify before the Senate was Harlan Fiske Stone who appeared to answer charges that an investigation conducted by the Justice Department while he was Attorney General had been motivated by political revenge.<sup>45</sup> Even after Stone's testimony, many candidates did not appear and those that did often set strict guidelines for Senate questioning. Felix Frankfurter, for example, informed the Senate that it would be "improper for a nominee no less than a member of the Court to express his personal views on any controversial political issues affecting the Court."<sup>46</sup>

Nominees for the Supreme Court did not begin appearing before the Senate on a regular basis until 1955, commencing with the nomination of John Marshall Harlan.<sup>47</sup> The scope of questioning has varied enormously, as has the willingness of nominees to answer inquiries. Some Justices—especially Justices Rehnquist, Powell, Stevens, and O'Connor—were aggressively questioned while others—such as Justices White, Goldberg, and Burger—were subjected to little scrutiny.<sup>48</sup> Some nominees were willing to answer virtually all questions, but others refused to answer even quite mundane questions about their views. Judge Bork, for example, was extremely willing to discuss his positions on countless disputed questions of constitutional law.<sup>49</sup> In sharp contrast, Justice Scalia refused to answer questions about any specific Supreme Court case. Justice Scalia, for example, refused to answer a question about *Marbury v. Madison* and stated that "I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*."<sup>50</sup> When Scalia was asked whether he believed in a constitutional right to privacy, he again refused to answer, stating, "I do not think I could answer that, Senator, without violating the line I've tried to hold."<sup>51</sup>

44. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TULANE L. REV. 109, 116 (1987).

45. *Id.* at 126; see also A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 188-97 (1956).

46. Ross, *supra* note 44, at 117 n.28.

47. *Id.* at 119.

48. *Id.* at 120.

49. For a review of the questioning of Bork by the Senate Judiciary Committee, see Totenberg, *The Confirmation Process and the Public: To Know or Not Know*, 101 HARV. L. REV. 1213, 1220-24 (1988).

50. *Hearings Before the Senate Comm. on the Judiciary, on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States*, 99th Cong., 2d Sess., 33 (1986).

51. *Id.* at 102.

I contend that responses such as those of Scalia should be deemed impermissible and that the Senate should refuse confirmation of anyone who refuses to answer questions about his or her judicial philosophy, specific doctrines, or particular past decisions. As established earlier, a judicial candidate's ideology is a proper basis for evaluation and the evaluator thus needs to know the individual's views. Few candidates have the volume of writing produced by Robert Bork. The Senate (or the voters in a retention election) should not be precluded from an effective evaluation merely because the candidate did not write articles. Nor should the process favor the appointment of those without a "paper trail" by only subjecting those with past writings to ideological scrutiny. The Senate voted against Robert Bork, in part, because his views on privacy were deemed unacceptable. Likewise, it should be able to vote against anyone with similar beliefs. It should have been able to learn Antonin Scalia's views before confirming his appointment to the Court.

There are, of course, limits to the permissible questioning. Acceptable questioning includes asking about a person's philosophy of judging (such as, whether the Constitution is limited to the framers' views), asking about the individual's position on particular legal doctrines, and a person's views on specific prior decisions. I do not believe that a judicial candidate should be asked directly how he or she *will* vote on a particular issue or in a specific case, though often that can be inferred from permissible questions. The outcome of any case can depend too much on context and circumstances to permit such promises. Moreover, the judge's actual vote might be influenced by persuasion from attorneys or colleagues on the bench.

I admit that the distinction between what is permissible and what is forbidden under this approach is somewhat ephemeral. Is there really a difference between asking a person his or her views on *Roe v. Wade* and the right to privacy, as opposed to asking directly whether the individual would vote to overturn *Roe*? The former questions certainly are asked with the hope of eliciting information about the latter. Yet, I am convinced that there is a difference. The former is asking a person for his or her views; the latter is asking for a prediction or a promise. Judicial candidates can be expected to have views on important legal questions, but not plans for how they will vote in specific instances. Even if the distinction is only in phrasing, it is preferable that judges not be asked to make explicit promises as to their performance once on the bench.

The primary criticism of intense questioning about a judicial candidate's views is that it will create the appearance of closed-mindedness. In other words, to preserve the appearance of judicial impartiality, it is claimed that a prospective judge should not express any views on subjects that are likely to come before his or her court. The Twentieth Century Fund's Task Force on Judicial Selection, for example, recently issued a report stating that nominees

for the Supreme Court should not be expected to appear as witnesses at their confirmation proceedings.<sup>52</sup> Similarly, Chief Justice Rehnquist gave a speech criticizing the Senate's intensive questioning of Judge Robert Bork.<sup>53</sup> Opposition to such questioning usually results from the idea that litigants will not feel they have an open-minded judge if during the confirmation process the judge expressed views about the subject matter of the proceedings.

This position is based on the premise that ignorance is better than knowledge. No judge is a blank slate; every judge has views on important legal issues before assuming the bench and those pre-existing positions influence decisions. Whether stated or not, these views still exist. Thus, a judicial candidate's refusal to answer questions does not necessarily communicate that the individual is uncommitted and thus is truly open-minded on the subject. Justice Scalia's refusal to answer questions on *Marbury v. Madison* or the right to privacy surely convinced no one that he is without views on these topics. In short, prohibiting questioning about ideology does not create even the illusion of neutrality; it only perpetuates ignorance about the individual's actual beliefs.<sup>54</sup>

I strongly believe that attorneys and parties are better off knowing a judge's views on a subject rather than guessing or pretending that the jurist has no position. Information about a judge's beliefs has enormous advantages. It might facilitate settlements as parties can better assess their chances of prevailing at trial. It can aid strategic decisions, such as whether to take an appeal to a particular court. Most of all, it can improve argumentation as lawyers know more about the audience—the individual judges that they are addressing.

Nor would a judge be disqualified from sitting on a case because he or she previously expressed views on the subject at issue. The Supreme Court declared in *Federal Trade Commission v. Cement Institute* that no "decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."<sup>55</sup> Justice Rehnquist stated this even more strongly in his opinion explaining why he did not recuse himself from sitting in *Laird v. Tatum*.<sup>56</sup> In *Laird*, the Supreme Court considered whether army surveillance of domestic groups violated the First Amendment. Prior to his nomination and confirmation to the Court,

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52. TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 10.

53. Remarks of William H. Rehnquist, Bicentennial Australian Legal Convention, August 29, 1988 (copy on file with the Georgetown Journal of Legal Ethics).

54. For an excellent discussion of specific kinds of questioning and what should be prohibited and allowed, see Ross, *supra* note 44, at 146-72.

55. 333 U.S. 683, 702-03 (1948).

56. 409 U.S. 824 (1972).

Rehnquist testified on behalf of the Justice Department in favor of the constitutionality of such practices. Rehnquist wrote:

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal actions. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rosa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.<sup>57</sup>

Assuring impartiality does not require that the judge pretend to lack views on important topics of constitutional law.

Moreover, prohibiting questioning of nominees about their ideology preserves and encourages an anachronistic, mechanical view of judging. At a time when there was a widespread belief in formalism, questioning of prospective judges was unnecessary because the outcome was thought to depend little on the identity of the judge. The refusal of judges to answer questions perpetuates a notion either that the individual's ideology does not matter or that the judge rises to the bench with far more neutrality than is humanly possible. Institutionalization of Bork-like confirmation proceedings will hopefully encourage the general public to adopt a more sophisticated understanding of the judging process.

Thus, I believe that the Senate's questioning of Robert Bork was just and proper and should be the norm in the future. Bork was an easy case for application of the ideological orientation model because he had expressed his views in so many articles and speeches. However, less prolific nominees whose views are not known should not be immunized from such review. In judicial elections and before confirming bodies, judicial candidates should be required to discuss their views about the law. Rose Bird, Joseph Grodin, and Cruz Reynoso should have been allowed (even encouraged or required) to address the voters prior to the retention election as to their views on the death penalty. The First Amendment embodies the philosophy that knowledge is better than ignorance. The same principle should apply in the judicial selection process.

#### IV. ADAPTING JUDICIAL ETHICS TO PERMIT SCRUTINY OF JUDICIAL CANDIDATES

There is one notable obstacle to the implementation of the ideological ori-

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57. *Id.* at 835 (Rehnquist, J., memorandum).

entation model: ~~the American Bar Association's Code of Judicial Conduct, specifically Canon 7(B)(1)(c).~~

~~A candidate for judicial office should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, announce his views on disputed legal or political issues, or represent his identity, qualifications, present position, or other fact.<sup>58</sup>~~

The rule does not apply to prevent questioning of prospective judges in systems where judicial selection is by appointment rather than election. The very terms of this Canon make it clear that it pertains to elections.

However, forty-two states have some form of judicial elections.<sup>59</sup> In these places, the *Code of Judicial Conduct* imposes a substantial barrier to judicial candidates being able to express their views. The prohibition on expressing "views on disputed legal or political issues" makes questioning of judicial candidates virtually impossible. Nor is this proscription idle rhetoric. There are several instances where judges have been disciplined for violating this provision.<sup>60</sup> For instance, in *In re the Matter of Honorable James C. Kaiser*, a judge was censured for making statements in an election campaign that he would be "tough on drunk driving" and for criticizing many of the attorneys who represent drunk drivers.<sup>61</sup>

The easiest solution to this problem would be to amend the *Code of Judicial Conduct* to permit judicial candidates to answer questions about their judicial philosophy, their views about particular doctrines, and their positions on specific cases. Such an amendment would insure that no judicial candidate would need to refrain from speech out of the fear that answers to questions might lead to disciplinary sanctions.

Yet, such reform by the American Bar Association (or by the individual states adopting the *Code of Judicial Conduct*) may very well be unnecessary because there is a strong argument that the ~~restriction on judicial speech during election campaigns is a curtailment of political speech which is viewed as~~ ~~violates the First Amendment.<sup>62</sup>~~ First, the restriction on judicial speech during election campaigns is a curtailment of political speech which is viewed as

58. CODE OF JUDICIAL CONDUCT, CANON 7B(1)(c) (1984).

59. Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 452 (1988).

60. See Lubet, *Judicial Impropriety: Love, Friendship, Free Speech and Other Intemperate Conduct*, 1987 ARIZ. ST. L. REV. 379.

61. 111 Wash. 2d 275 (1988).

62. For an excellent recent article on the subject, see Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987) (discusses constitutionality of the *Code of Judicial Conduct's* restriction of judicial candidate's freedom of speech).

being at the very core of the First Amendment.<sup>63</sup> Speech relating to the political process, the choosing of government-officers, can be limited only if there is a truly compelling government need and there is no less restrictive way to accomplish the objective. The Supreme Court has explained that the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office."<sup>64</sup>

No compelling interest exists to justify preventing a judicial candidate from openly discussing his or her views. As described above, the need to preserve the appearance of judicial impartiality does not justify silencing judges.<sup>65</sup> The First Amendment is based on the strong assumption that people are better off with more information in making judgments about the political process. Censorship of speech to hide a judge's beliefs is incompatible with this premise. Moreover, a restriction on all speech about controversial issues is not necessary to achieve the government's purpose in prohibiting speech. The goal of preserving impartiality can be achieved by prohibiting individual judicial candidates from making promises of how they would decide specific cases or issues.

Second, the prohibition on speech by judicial candidates about controversial issues risks serious distortion of the marketplace of ideas and information. Judges can be falsely attacked, their positions distorted and misconstrued, and yet, they are forbidden to respond. Falsehoods never get countered with the truth. In California's recent retention election, for example, there were repeated statements about the beliefs of several members of the Court on issues such as the death penalty. To the extent that their views were distorted, the justices could not respond. Allowing speech, even about controversial issues, improves decisionmaking and prevents falsehoods from going unanswered.

## V. CONCLUSION

The irony of the confirmation battles over Bird, Grodin, Reynoso and Bork was the political line-ups. Many of the same individuals who attacked Bird, Grodin and Reynoso based on their ideology subsequently argued in defense of Bork that his ideology was irrelevant. Conversely, many of the same people who defended Bird, Grodin and Reynoso with pleas to focus only on their professional qualification attacked Bork based on his ideology.

This article has argued that the ideological evaluation was proper in both instances. This is not to say that one need agree with the results in either or both cases; one could defend the ideology of each of these judges. Rather,

63. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1130-32 (2d ed. 1988).

64. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

65. See Snyder, *supra* note 62, at 226-39.

the point is that the objection to the outcomes in these cases must be made in substantive terms that judges with their beliefs should have been confirmed.

Ultimately, disputes over confirmation are battles over the proper content of the law. This is as it should be and attention should not be diverted by claims that it is improper to consider a nominee's ideological orientation. In fact, a process should be institutionalized to ensure a full and careful examination of each candidate's views.

## Bush's Choice

# High Court Nominee Is Conservative but Isn't Seen as an Ideologue

David Souter Hasn't Written  
Much in Judicial Career  
On a Key Issue: Abortion

A Solitary Man Fond of Books

By STEPHEN WERMIEL  
AND DAVID SHRIBMAN

Staff Reporters of THE WALL STREET JOURNAL  
WASHINGTON—President Bush, seeking to defuse a political fight already brewing over his first vacancy on the Supreme Court, struck quickly by choosing a conservative jurist with no paper trail on abortion.

In nominating Judge David H. Souter of New Hampshire, President Bush chose a strict constructionist who he hopes will satisfy conservatives, but a man whose lack of any articulated stand on abortion may make him acceptable to moderates in the party. And by moving within 72 hours of getting an opening, the president short-circuited efforts by activists to campaign for a nominee that took their side on the abortion issue.

Mr. Souter, who will turn 51 during his Senate confirmation hearings this fall, is a former member of the New Hampshire Supreme Court, state courts, however, rarely hear abortion cases. In his current post on the federal bench, as a member of the U.S. First Circuit Court of Appeals in Boston, he has spent exactly one day hearing cases. During his confirmation proceedings for that job—he was eventually approved unanimously—he told the Senate he had given no speeches worthy of reporting.

"He doesn't talk much about abortion, even to his closest friends," says Thomas Rath, a former New Hampshire attorney general.

Mr. Souter doesn't have any reputation for the kind of conservative judicial activism that aroused fierce opposition to President Reagan's nomination of Robert Bork in 1987. "He isn't a politician or an ideologue, and he's not much affected by contemporary political winds at all," says Gregory Smith, another former New Hampshire attorney general.

Even Clesson Blaisdell, the dean of Democrats in the New Hampshire state senate, says, "I can't say anything bad about him." Mr. Blaisdell's words may carry some extra weight in Washington: He co-chaired the 1988 New Hampshire presidential campaign of Delaware Democrat Joseph Biden, the chairman of the Senate Judiciary Committee, which will decide on Judge Souter's nomination. Mr. Blaisdell is offering to speak to Sen. Biden on the judge's behalf.

"He'll interpret the law," Mr. Blaisdell says of Judge Souter. "He won't be there representing one side or the other."

In one of Judge Souter's few actions regarding abortion, he joined with a majority on the New Hampshire Supreme Court in 1986 ruling that a woman who gave birth to a seriously deformed child could sue her doctors because she wasn't adequately informed of abortion as an option in her case. That decision may give pause to anti-abortion activists, who generally see such "wrongful birth" decisions as promoting abortion. On the other hand, Judge Souter wrote a separate opinion expressing concern that the ruling would require doctors to engage in abortion counseling of their patients, even if they opposed abortion.

According to some of his friends, Mr. Souter's selection follows a behind-the-scenes campaign waged on his behalf by a group of New Hampshire Republican politicians led by Sen. Warren Rudman and former Gov. John Sununu, now White House chief of staff. They have been promoting Mr. Souter for the Supreme Court ever since the Bork nomination failed. "It's like having your younger brother put on the court," Mr. Rudman said last night. Mr. Sununu officially recalled himself from the choice of a successor to the liberal and activist Justice William Brennan.

Paul McEachern, a Democrat who became an avowed Sununu adversary in losing two gubernatorial campaigns to him, yesterday termed the Souter nomination an eminent one. "He's perfect politically," he said. "He defuses a huge problem for Bush because he has found a man with views that aren't really on one side or the other. They're not going to pin him down on abortion."

"If they wanted somebody who wasn't controversial, he would be the ideal choice," added Rep. Chuck Douglas, a New Hampshire Republican.

By many accounts, Judge Souter is a solitary man who loves his books. Never married, listed in Who's Who as an Episcopalian, he lives in Weare, N.H.—population approximately 2,000—in an old farmhouse distinguished by a living room "so cluttered with books there's a path to where you can sit among the books," says Mr. Rath, the former state official. He is a 1966 Harvard Law School graduate and Rhodes Scholar who drives a dilapidated car. He hikes in the White Mountains and has conquered all the 4,000-footers in the area.

Though ambiguous on abortion, Mr. Souter's views on a variety of other issues are decidedly conservative. On the New Hampshire Supreme Court he wrote numerous decisions in criminal cases, generally taking a tough stance and recognizing society's interests in being protected.

In 1985, for instance, the New Hampshire court ruled that the state constitution barred police from setting up roadblocks to catch drunken drivers. Judge Souter was the only dissenter, saying the technique

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The CHAIRMAN. Ms. Yard.

STATEMENT OF MOLLY YARD

Ms. YARD. Senator Biden and members of the Senate Judiciary Committee—

The CHAIRMAN. Would you mind pulling that microphone closer. This hearing room is so hard to hear in, and if you do not put that right up close—

Ms. YARD. I have never been accused of not being heard. That is a new experience.

The CHAIRMAN. I was not accusing you of that. I just want to make sure I hear everything. My hearing is going. That is a joke, by the way, so there is not an article about that. I was only kidding, folks. [Laughter.]

Fire away.

Ms. YARD. These hearings are taking place on David Souter, because you must replace Justice Brennan. For women and all minorities, all women, no matter our color, no matter our economic circumstances, no matter our age, all Lesbians and gays, for all minorities of every race, Justice Brennan stood for the highest standards on individual rights, and it is painful for us to see him go.

I appreciate the fact that on the floor of the Senate last week, you spoke of Justice Brennan and his contribution to this country. I think I have never felt that I was speaking at a more solemn occasion, because we are here literally on behalf of the lives of the women of this country. It is no little matter. We have been struggling for years to eradicate discrimination and to be free in this society.

When this Constitution was written, African-Americans were slaves and women were the property of their husbands. We had no rights. We did not vote, we could not serve on juries, we could not own property, we could not be much of anything. And we had hoped that, through the democratic process of this country, we could step by step win our freedoms, and we have made progress. We did finally win the right to vote. We celebrate this year the 70th anniversary of the right to vote for women in this country.

But we have a long ways to go, and when the Supreme Court in 1973 gave us the *Roe v. Wade* decision edict, that Court declared freedom for the women of this country. You have no freedom if you can't control your life, and none of you will ever face that problem. Not one of you. If your birth control fails, which is why most women get abortions in this country, and you can't get an abortion and you are forced to carry a pregnancy to term, you haven't any freedom to plan your life, to carry out your life, to do with your life what you dream it to become.

You know, Justice Brennan said that the way women are treated in this society, we think we treat them well, but he said, "The real treatment is ending up not putting women on a pedestal but putting them in a cage." And we have been in that cage, and the door was opened in 1973. How can you contemplate letting that door close on us again? Because we are absolutely convinced that David Souter—and we listened very carefully. We hoped we were wrong, but we are not wrong. He will be the fifth vote to overturn *Roe v.*

*Wade*. And I tell you, we are not going to obey the law in this country. Women will not. There will be lawlessness everywhere. The jails won't be big enough to hold those who break the law and the people who help women break the law.

We are literally—I don't know how to say it to you so that you understand that women's lives are on the line. And if they can't control them because abortion is illegal, they will either break the law and/or they will die. Never, please, forget that illegal abortion was the leading cause of death in this country, maternal death. And it will be again. It will be again.

I would just like to say that, you know, I sit at a desk of the largest feminist organization in this country—250,000 of us—but we speak for many more than that. Last April 1989, we brought 650,000 people here, women, men and children, to petition this Government, Congress, the Supreme Court, and the White House, asking that *Roe v. Wade* not be overturned. And we understand so well why our forebears came to this country and why people keep coming to this country from all over the world. They come for freedom, for freedom from interference by Government on what they believe in, what religion they practice, with whom they associate, what they speak out on, and, above all, to run their lives as they see fit.

Would you deny women that right by allowing *Roe v. Wade* to be overturned? Would you allow the discrimination against women to go on and on, in education, in employment? In every area I get these letters day after day after day after day about what women suffer and the pain they go through, and yet we have a nominee and we have no idea how he is going to treat sex discrimination.

I wish there was some way to make every one of you understand what is at stake here.

[The prepared statement of Ms. Yard follows:]



## **National Organization for Women, Inc.**

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**TESTIMONY OF  
MOLLY YARD  
President, National Organization for Women  
Before the Judiciary Committee  
of the United States Senate  
against the  
Confirmation of David Souter  
September 18, 1990**

My name is Molly Yard. I am President of the National Organization for Women, the largest feminist organization in the United States, an organization which for twenty-four years has worked to achieve through legislation and political action full equality for all women in this society.

Thank you for this opportunity to state to the Senate Judiciary Committee our concerns about the nomination of David Souter to the Supreme Court. Your responsibility is an awesome one, made more so on this occasion because the nomination is for a replacement for Justice William Brennan. William Brennan stood for justice and mercy. He stood for freedom -- for individual rights and individual freedom. He understood why our ancestors came to these shores -- and why people keep coming from all over the world for the right to live their lives as they see fit, and to be let alone without a government telling them what to believe in politics, in religion or in anything else, and without government telling them how to behave, with whom to associate, and how they must live their private lives. Justice Brennan's resignation leaves all of us who cherish individual rights fearful, but women most of all are worried for he was a man who understood the treatment of women in this country as, and I quote Justice Brennan: " 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage."

Because Justice Brennan holds such a unique place in

American jurisprudence, and in our hearts, I am particularly grateful to you, Senator Biden, for your remarks last Tuesday on the Senate floor about William Brennan. We can surely celebrate his life but we are saddened by his resignation as the loss to all minorities and all women is overwhelming.

However, it is no more than empty words to laud Justice Brennan's principles and his extraordinary contributions on the Court, if by your votes, you confirm a nominee who would deny those principles and reverse those contributions.

In these Hearings much has been made of the New England background of David Souter. Lest you think that is somehow unique, let me tell you that my forebears on my mother's side sailed from England for the Massachusetts Colony in 1636 on the good ship "the Plain Joan" for whom my daughter Joan is named. She and I, and indeed all our family, have climbed many times those wonderful mountains of New Hampshire so cherished by David Souter.

There should be no doubt in the mind of any thoughtful citizen of the United States that our Supreme Court must play, and has played, a critical role in protecting the lives of all of us from arbitrary, unreasonable, or abusive legislative or executive excess or intrusion. It has done so largely under the Bill of Rights embodied in the first 10 amendments to our

Constitution as well as under the profoundly important Fourteenth Amendment.

NOW believes that all members of the Judiciary Committee must appreciate the grave responsibility which rests upon the Committee to "advise and consent" to the appointment of a new Justice to the United States Supreme Court. The Constitution is clear -- Article II, Section 2 provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint..."judges of the Supreme Court...." The appointment of a Supreme Court Justice is indubitably a joint appointment and not, as some believe, an appointment made unilaterally by the President, which may be rejected by the Senate only when some gross flaw emerges to preclude confirmation.

It is in light of this basic constitutional requirement that NOW wishes to make our comments concerning the pending nomination of Judge David Souter. The known record of David Souter and what he has said in answer to your questions to him give us serious concern. One issue -- clearly a major concern of NOW, as is well known -- involves the status of the landmark decision in Roe vs. Wade where Justice Blackmun wrote the compelling opinion for a solid majority of the Court. We were concerned before these hearings with Judge Souter's position on the constitutional right to abortion. Having heard his testimony, we are now concerned as

well with Griswold vs. Connecticut, Eisenstadt vs. Baird and the right to birth control, especially for unmarried people.

It is not my purpose today to engage in any discussion of the fundamentals of constitutional law. The NOW Legal Defense and Education Fund has prepared testimony for this Committee which is a careful analysis of Judge Souter's record and we stand fully behind it.

And now I want to state as clearly as I can what this appointment means to millions of women. And in doing so I want to remind you that in April of 1989, 650,000 Americans -- men, women and children -- marched and rallied in Washington in our "March for Women's Lives/Women's Equality to petition the government -- the Bush Administration, the Congress and the Supreme Court -- to leave intact Roe vs. Wade and not to restrict women's right to control their lives.

Marlo Thomas sings a wonderful song called "Free To Be Me" and that is what this hearing is about. When the Supreme Court, twenty-five years ago, affirmed a constitutional privacy right to use birth control and then eight years later extended that privacy right to include the right to choose abortion, the Court declared freedom for women. When our forefathers wrote the Constitution women were the property of their husbands and African-Americans were slaves. Women could not vote, own

property, serve on juries, or much of anything else. To declare freedom from slavery, this country had to fight a civil war. Women believed and hoped we could win freedom through the political process of a democratic society. We have, step by step, won a variety of rights and celebrate this year the seventieth anniversary of gaining the right to vote.

But winning the right to vote did not end our struggle for freedom. Women have a problem which none of you will ever face - we get pregnant. For years women in this country freely obtained abortions. It was not illegal to have one; indeed, their availability was advertised in the papers by ads saying if you had a "woman's problem" here was a place to go. I shall not go into the history of how and why abortion became illegal but it did so become.

But, legal or illegal, women in every society throughout the ages have sought and found those who perform abortions or they have self-aborted, often with dire consequences. Indeed today in many countries of Asia, Africa and South America abortion is illegal, but women continue to get them because they are desperate, desperate because they already have more children than they can afford to feed, desperate because they themselves are ill, desperate because they do not want to bring into the world a child they will have to abandon. (It is estimated in Brazil that 11 million children wander the streets abandoned because their

families can't feed them.) In fact they are so desperate they put their lives on the line. The World Health Organization conservatively estimates that 200,000 women die every year from botched, illegal abortions. As we sit here somewhere in this world every three minutes a woman is dying from these abortions.

When abortion became legal in our country in 1973 because of the Supreme Court ruling in Roe v. Wade, 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.

Not only did Roe v. Wade free women, it also vastly improved women's health; prior to Roe, illegal abortion was the leading cause of maternal death in this country. Abortion must be available as a women's health measure -- the majority of women seek abortions because birth control fails or because there is some problem with the pregnancy. It's not a question of morality but a question of health as well as, more profoundly, a question

of freedom.

For seventeen 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 and furthermore he might overturn Griswold vs. Connecticut. This country must not go back to illegal abortion or illegal birth control. If that happens the law will be broken! Courageous doctors will break the law. Desperate women will break the law. The underworld will flourish with back alley abortion butchers and women will die. There will not be enough jails to house the women who will have illegal abortions and those who will help maintain that option.

NOW is all too aware that four justices on the current Court are prepared to overturn Roe vs. Wade and on the basis of Judge Souter's briefs and opinions we believe he would be the fifth vote the right-wing of this country, led by President Bush and John Sununu, has sought for the purpose of overturning Roe. Certainly the President and his Chief of Staff have made every attempt to assure right-wing groups like the Coalition for America that he is one of them.

In Coe vs. Hooker (1976) a brief signed by Attorney General Souter, in dealing with the propriety of Medicaid funding for

abortions,<sup>6</sup> referred to the "killing of unborn children." As Attorney General in 1977 Judge Souter spoke out strongly in opposition to legislation repealing New Hampshire's strict anti-abortion laws -- which had been passed prior to Roe. Judge Souter wrote a formal letter explaining his desire to keep the punitive legislation in force, and in an interview with the Manchester Union Leader on May 19, 1977 he said, "I don't think unlimited abortions should be allowed" and "I presume we would become the abortion mill of the United States."

Senators, this is the language of the right-wing. They would have you believe that women get abortions one after the other since they use them as birth control, and that any clinic which provides women's reproductive health services, including abortions, is running an abortion mill. These are the words of the right-wing which seeks to obfuscate and denigrate the health needs of women, and employs inflammatory language to cover up a proposition which is patently ludicrous. No woman obtains one abortion after the other as a birth control method -- if she did she would, during her reproductive years, have two or three a year, fifty or sixty during her life. No woman does that!

And why in Smith vs. Cote did Judge Souter go out of his way to worry about a doctor, whom the court found guilty of malpractice, because he did not counsel a pregnant woman exposed to rubella that she should be tested for risks to her fetus and

if problems were found she had the constitutional right to an abortion? Why did the Judge express concern about the doctor counseling his patient in this matter because the doctor might have "conscientious scruples against abortion?" This question was not part of the case. It was not raised in the lower court decision nor on appeal, and was gratuitously injected by Judge Souter. He seems overly anxious to place himself on the side of the opponents of abortion and, in fact, twice, in his answers to your questions, he described women seeking abortions as "the other side."

Senator Metzenbaum tried to discover whether he had empathy with a woman who found herself pregnant with an unplanned pregnancy. After a long pause Souter said he wasn't prepared for the question, no doubt because the Bush legal experts who coached him for this Hearing never themselves would have thought of that question because they have no empathy for anyone in that situation. Whatever the reason, Judge Souter finally answered by remembering the case of a girlfriend of a Harvard student who was pregnant and planning to self-abort. The student was worried about her and wanted Souter to talk to her and Souter did. This shows empathy? How do we know but what he may have cold bloodily told her she would be a murderer if she ended her pregnancy? What we do know from his answer was that he counselled her not to self-abort.

On the issue of birth control, Judge Souter was careful in his testimony always to describe the right to privacy as a marital right. Even in the case of married couples right to contraception, he carefully did not endorse the decision in Griswold vs. Connecticut and did not ever state that the right of married people to contraception is a fundamental right.

On the right of unmarried people to birth control, Judge Souter was even less supportive in his testimony, stating only his agreement with the Court's equal protection approach to the analysis in Eisenstadt, once Griswold had been decided.

It surely would be interesting to know whether Judge Souter's view of Roe vs. Wade and of Griswold vs. Connecticut was explored by, or on behalf of, the White House staff before his nomination was announced. Frankly we do not find credible that it was not; nor do we find credible that Judge Souter, portrayed as an intellect and scholar, could have no opinion on Roe vs. Wade.

Professor Alan Dershowitz reminds us that "...Judge Souter was nominated, in effect by John Sununu, a strident opponent of a woman's right to choose, of separation of church and state and of equal rights under the law. If Mr. Sununu believes that Judge Souter will make a great justice ... then the rest of us have something to worry about."

Apart from this, we have major concerns as to Judge Souter's views concerning the relevance and potential weight of precedent in the Court's interpretation of the Constitution. His general views as to the basic protections springing from the Bill of Rights -- including racial and sexual discrimination, separation of church and state and the right of privacy -- put all Americans at risk. We are, furthermore, very concerned about his standard of scrutiny on gender discrimination under the Fourteenth Amendment.

It seems to us after listening to Judge Souter's responses, that he has an apparent lack of appreciation of, and deference to, the unique nature of the responsibility and authority of the Supreme Court as the only body charged not only to uphold, but also to interpret the Constitution.

For example, Judge Souter emphasizes that Supreme Court Justices are not the only ones to take an oath to uphold the Constitution. He stressed the shared nature of this responsibility, and reminded the Committee that they, as well as the President, had taken the oath. Especially in the absence of a substantial body of scholarly or judicial writing from which may be gleaned a more refined view of Judge Souter's understanding of the scope of judicial, executive and legislative responsibilities as to our constitutional rights, our concern is that he is neither willing nor prepared to embrace the

responsibility which the Committee is considering entrusting to him.

On all such matters there is one obvious basic concern which this Committee must address: Does Judge Souter's total background of experience suffice to qualify him for the enormous responsibility which the next Justice of the U.S. Supreme Court inevitably must face?

As the members of this Committee well know there may be thousands of state and federal judges in the United States who have the basic qualifications and are available to fill this particular vacancy on the Supreme Court; persons eminently qualified to interpret and apply the deliberately broad language in many provisions of the U.S. Constitution.

Presumably the President's advisers, and certainly the Department of Justice, were in a position to suggest a number of such Judges for consideration by the President.

So we ask -- Why Judge David Souter?

What was the basic purpose in advancing this nomination of a man with no substantial discernible record?

Perhaps the White House staff knows more about the nominee

than do the rest of us -- including this Committee.

Judge Souter's assurances last week that he would approach all sensitive issues with an "open mind" is not enough.

It has been reported that Judge Souter greatly admires the works of Justice Oliver Wendell Holmes. No doubt some members of this Committee share this admiration. It thus seems pertinent to recall the immortal words of Justice Holmes in his dissertation on the Common Law --

"The life of the law has not been logic: it has been experience."

Those words were addressed, of course, to the development of the common law over many years. But Justice Holmes also wrote these words, which indubitably apply more generally --

"Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and tradition, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in

the last analysis." (The Common Law." 1963  
Ed-Harvard Un. Press, p. 32)

We call your attention to two polls on the subject of abortion which relate to these Hearings:

1. Every year since 1973 Lou Harris has polled the voters of this country as to whether they support Roe vs. Wade. Each year a majority has supported it, generally at 53 or 54%. In 1989 this shot up to 64% support. In 1990 the support stands at 73%.

2. Planned Parenthood commissioned William Hamilton to poll 1000 registered voters between August 30 and September 4 regarding the Souter nomination. By 76% to 20% voters wanted the U.S. Senate to pose questions to Souter on his personal views on privacy, church-state relations, abortion and civil liberties. By 49% to 23% these voters said his responses should be a major factor in his confirmation. 47% said if he refused to answer this should be the deciding factor in whether to confirm.

In summary we repeat our opposition to the confirmation of Judge Souter. It is important that the Court maintain a balance. To replace Justice Brennan it is important to have someone more in his mold; Judge Souter will tip the Court dangerously out of balance and away from the strong support for individual rights

which Brennan so brilliantly upheld.

What is at stake for American women is far too important for us to do anything but urge you not to confirm him. American women's lives are literally on the line. If we should lose the right to control our reproductive lives the social fabric of our society will be torn apart.

Are you prepared to deny freedom to women?

Are you prepared to deny reproductive health to women?

Are you prepared for lawlessness, and for the death of your daughters and your granddaughters?

I tremble for this country if you confirm David Souter. But most of all I tremble for the women of America and their families.

The CHAIRMAN. I think you did a very compelling job doing just that.

Ms. Smeal.

#### STATEMENT OF ELEANOR CURTI SMEAL

Ms. SMEAL. I am Eleanor Smeal. I am the president of the Fund for the Feminist Majority, and I am also the chair of NOW's advisory committee.

For the past 25 years or 20 years, I personally have worked on women's rights. I have toured this country, and I would like to speak from my heart. And so I am submitting formally my testimony representing my organization and the research of a professional staff, and also the able assistance of Prof. Erwin Chemerinsky, professor of law at the University of Southern California at Los Angeles. It goes through many points of law that were discussed here. But I would—

The CHAIRMAN. Your entire statement will be placed in the record.

Ms. SMEAL. I would like to submit for the record my entire statement which goes through the right to privacy for women, for gays and lesbians; it goes through the rape shield laws; it goes through the whole affirmative action and the middle tier scrutiny; and it goes through essentially original intent, and all this as to how it impacts sex discrimination in this country.

But I also would like to speak from the heart because I believe that it is impossible in 5 minutes to summarize what we believe will happen if the fifth vote goes on this Court, not only against a woman's right to choose, for abortion, but also for birth control, but also another vote to make it ever so hard to fight discrimination in this country.

We have examined everything of Mr. Souter, and there is not one shred of evidence to show that he would maintain the current status, let alone not go backwards. In fact, every act as attorney general and every decision as a judge that had to deal with discrimination on race or sex helped to push us backward. And if it was the national standard, God help us all.

It would be a pity to add such a vote, but to add such a decisive vote is, indeed, a tragedy. I hear a lot about him being warm and understanding and he will listen. Warm and understanding. Yet when he was asked by you all, not once but several times, what would happen if *Roe* was reversed, he gave a legalistic argument. He talked about the political consequences that we would have different laws in different legislatures. He talked about the complications to federalism. To federalism?

When he was asked again, he alluded sneakily to this 1-, 2-hour session some 24 years ago. But, again, he couldn't say what would happen to women. The word "women" did not cross his lips when asked what would happen.

I have a bracelet. The bracelet has the name of Becky Bell on it. Two years ago this past Sunday, she died trying to get an illegal abortion. She was the victim of the parental consent law of the State of Indiana. We don't have to imagine what is going to happen, Senators. We know what is going to happen. Becky died

needlessly because politicians will not stand up and not give women a chance to choose. She was 17 years of age. We don't have to dream what she would look like. We can see her picture. She would be in college today.

That was with the current Court. One more vote, and there will be many more Becky Bells, many more Rosie Jimenezes. We have a bracelet for her. She was the first victim of the Hyde amendment.

In fact, we have a monument already for the courageous women who will die because they had no choice. Right now as I stand here, as we have all talked, women have died from illegal abortion. Worldwide, one woman dies every 3 minutes from an illegal abortion where abortion is illegal. That is the ones who die. The ones who are maimed, the ones who are injured, the ones who can never live a normal life again, are too countless to name.

Are we going to join the reactionary regimes of Romania? Oh, we all criticize Ceausescu today. But our American Government favored his policies that led to the slaughter of women with the highest death rates from illegal abortion.

What is wrong with us? Are we going to go back to an uncivilized day? And do not put us in the box of being single-issue people. Molly and myself and the other women here have marched not only for women. We have marched for minorities. We have marched for gays and lesbians. We have marched for the lesser and the most, for dignity and the rights of people.

That literacy test that you spoke of, Senator Kennedy—and I am so glad that you were appalled by it. I knew you would be. You always stand for justice. If Judge Souter had come from a Southern State, having that position on a literacy test, he wouldn't be considered a moment. You know and I know what literacy tests meant. We know what bias testing is. That he would defend it today and say that New Hampshire has no discrimination just shows that he is insensitive to what discrimination is because such tests are inherently biased, inherently discriminatory. And, yes, women know about such tests. We are challenging tests that are discriminatory all over this Nation right now because we are kept out of scholarship programs and educational programs, and we defend them not only on the basis of sex discrimination but race discrimination.

Yes, we are upset. We feel inadequate. We have pictures, and we have bracelets. But, more important, we have a heart that has walked those streets for 20 years, 25, my colleague to my left for 40 years. And if he is confirmed, it all goes to shreds.

I hope you can live with your conscience because the burden is on you, and we will not forget. We will hold you accountable to the best of our ability.

[The prepared statement of Ms. Smeal follows.]

Testimony of Eleanor Cutri Smeal  
President, The Fund for the Feminist Majority  
Before the Senate Committee on the Judiciary  
on the Nomination of David Souter for the Supreme Court

I am Eleanor Smeal, president of the Fund for the Feminist Majority. The Fund for the Feminist Majority is a national non-profit research, action and advocacy association, dedicated to empowering women and eliminating discrimination. We are the first group to form based on the reality that current public opinion polls demonstrate that a majority of Americans self-identify as feminists (people who advocate women's equality) or supporters of the women's rights movement.

It is ironic and a testimony to the need of groups such as the Fund for the Feminist Majority that seek to empower women, that I must come before this all male Judiciary Committee begging once more for the fundamental rights of women. I express strong and unequivocal opposition to the confirmation of David Souter for a position as an Associate Justice on the United States Supreme Court.

My testimony has been prepared after exhaustive research of our professional staff and with the expert assistance of Erwin Chemerinsky, Professor of Law at the University of Southern California at Los Angeles. We have carefully reviewed and investigated David Souter's record in New Hampshire; as Deputy Attorney General, Attorney General, and as a Justice on the New Hampshire Supreme Court. There is nothing -- not a shred of evidence -- that indicates any willingness to uphold or advance civil rights for women and minorities. In fact, every brief, every opinion, takes a repressive and regressive approach to constitutional protections for women and minorities.

Thus, the burden was on David Souter to show during these hearings that the picture which emerges from his prior work is inaccurate; that he is committed to civil rights for women and minorities. But his testimony -- and I have listened carefully to his testimony -- contains little more than platitudes, unacceptable non-answers, and troubling replies when it comes to these issues. There is nothing but blind faith to justify believing that he will uphold basic constitutional freedoms. And blind faith is not enough. A judicial nominee must not be confirmed without substantial evidence that he or she will protect fundamental constitutional guarantees. No such evidence exists for David Souter.

Although I believe that David Souter poses a threat to constitutional rights in many areas, my testimony will focus on women's rights. At the outset, it is important to emphasize that the rights of more than half of the population must not be dismissed as merely the concerns of a special interest group. I hope that every member of this Committee -- Democrat and Republican, liberal and conservative -- agrees that an individual who does not understand women's rights or has no opinions about women's fundamental liberties under the Constitution has no place on the United States Supreme Court. A person should not be confirmed for the Supreme Court unless he or she evidences commitment to certain basic constitutional values; reproductive privacy and gender equality must be among them. Because David Souter's record and testimony offer no reason to believe he is committed to these values, and every reason to fear that he is

opposed to them, I respectfully urge you to refuse to confirm him for a seat on this nation's highest court.

In general, it must be noted that David Souter's approach to constitutional interpretation poses a real risk for real women. Souter has termed himself an "interpretivist" before this Committee. Traditionally, that has meant a judicial philosophy that limits the Constitution's protections to what the framers intended. Indeed, as a New Hampshire Supreme Court Justice, David Souter wrote a dissenting opinion upholding filing fees in probate cases on the grounds that they were not inconsistent with the framers' intent in drafting the state constitution. Estate of Dionne, 518 A.2d 178 (N.H. 1976).

But adherence to this theory of constitutional interpretation poses a grave threat to women. Women were viewed as chattel with no rights when the Constitution was drafted. And the framers of the Fourteenth Amendment did not intend to eliminate gender discrimination. Robert Bork was properly rejected for a seat on the Supreme Court because of his commitment to this unacceptable method of constitutional interpretation. David Souter, however, said that he is not wedded to "original intent," but instead he would follow "original meaning" or "original understanding." How is this more than a mere word game to make his views seem more palatable? The original meaning of the Constitution with its blatant sexist and racist provisions was disastrous to women, blacks, and unlanded men.

A review of David Souter's record and testimony on the issues of reproductive privacy and gender discrimination reveals that he

is very much the interpretivist he proclaims to be: he finds little, if any, protection for women in the Constitution. His past record on these two crucial issues raises profound concerns and his testimony, if anything, heightens these concerns about what David Souter would be like as a Supreme Court Justice.

An analysis of his record on the issue of privacy must begin with a brief filed by his office, when he was Attorney General, which called abortion the "killing of unborn children." (Memorandum in Support of Defendant's Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, at 5). The state of New Hampshire could have opposed public funding of abortion without describing abortion in this inflammatory manner. As a public official sworn to uphold the Constitution -- the Supreme Court already had interpreted the Constitution to protect a right to abortion -- Attorney General Souter should not have allowed the State to describe abortion in that manner to a federal court.

Attorney General Souter's own statements indicate that the brief likely reflected his strong anti-abortion sentiments. In 1977, he opposed repeal of New Hampshire's strict criminal anti-abortion law. The law had been rendered a virtual nullity by Roe v. Wade and served no real purpose. Nonetheless, Souter opposed its repeal arguing that without it the state would become an "abortion mill." (Manchester Union Leader, May 19, 1977 quoted in Manchester Union Leader, August 4, 1990, p. 1). His position and his language indicate a person opposed to constitutional protection for abortion rights.

Nor does his testimony before this Committee offer the

slightest reason to believe that he would protect constitutional privacy if confirmed for the Supreme Court. Initially, women's rights advocates were concerned about the constitutional protection of the right to abortion; after hearing Judge Souter's testimony we believe that the constitutional protection of the right to birth control for both married and unmarried individuals is also in jeopardy.

In response to repeated questioning, the most David Souter would say is that he believes that the Constitution protects certain aspects of marital privacy, but he was vague as to which specific aspects are protected. Although he was willing to express general support for Griswold v. Connecticut's protections of marital privacy, he refused to endorse its holding or its opinion. Indeed, when asked by Senator Leahy if he considered marital privacy a matter of settled law, he said that "one simply could not say that it is settled."

Most startling, Judge Souter has refused to answer any questions on the Eisenstadt decision which gave single people the right to birth control. When asked by Senator Biden about the guaranteed right of privacy for unmarried couples, Souter stated that privacy rights for unmarried individuals are "not a simple question to answer," and in fact proceeded to say that there is a State interest in precluding people "under those circumstances from obtaining contraceptive information and devices" that should be weighed against this privacy right. What sort of compelling State interest could there be in blocking access to birth control information and contraceptives?

Millions of Americans use birth control and contraceptive devices. They would be shocked to learn that a nominee for the United States Supreme Court does not consider this right as a settled point of law. Millions of women depend on access to abortion and birth control for their very health and well-being.

In his testimony before this Committee, David Souter gave women little reassurance. He stated that he agreed with the late Justice John Harlan on determining when to regard a right as fundamental; that "inquiry into the history and traditions of the American people as being the basis upon which a fundamental valuation should rest."

Repeatedly, Judge Souter has described his judicial philosophy on due process questions as identical to that of Justice Harlan. Yet, a reading of Justice Harlan's opinions reveals that he likely would not have protected a constitutional right for unmarrieds to engage in sexual relations or to purchase and use contraceptives. In Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Harlan quoted his earlier opinion in Poe v. Ullman, 367 U.S. 497 (1961), that the content of due process is determined by history. Although Justice Harlan spoke of the tradition of protecting marital privacy, he expressly recognized the ability of the government to criminally punish "adultery, homosexuality, fornication, and incest." Justice Harlan explained that "Adultery, homosexuality, and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife in necessarily as essential and accepted feature of the institution of marriage an institution which the State not only

must allow, but which it always has fostered and protected."

In other words, Justice Harlan -- and therefore apparently David Souter -- would deny constitutional protection for unmarried sexual activity, including the use of contraceptives. This position is unthinkable in a civilized society. Indeed, it reflected the profound difficulties in limiting the Constitution, an organic evolving document, only to that which has been protected historically.

We have been told that we should be comforted by the fact that David Souter permitted abortions to be performed at Concord Hospital while he served on its Board of Directors. But in reality, very few abortions are performed there, and women are routinely referred away from Concord Hospital. New Hampshire has five hospitals which perform abortions, yet overall, they perform only 5% of abortions in New Hampshire. In most states, hospitals provide 10% of all abortions. If anything, New Hampshire hospitals perform half the level of abortions of other states.

And we are also supposed to gain solace from Mr. Souter's dramatic recollection of counseling a pregnant women for two hours 24 years ago. But he refused to tell us how he counseled her other than away from her original direction, and refused to reveal how he would respond to the same situation today. Such a "confirmation recollection" does not reassure us that our rights are safe or that he would listen.

And Mr. Souter's warm, compassionate, confirmation image melted away in yesterday's hearings, when Senator Leahy asked the pointed question, "What would be the practical consequences, not the

legal, of overturning Roe v. Wade -- the **practical** consequences?" Mr. Souter coldly replied that "There would be the obvious practical immediate political consequences that the issue would become a matter for legislative judgment in every state. It is safe to say that legislative judgment would not be uniform. There would be, I dare say, a considerable variety in the scope of protection afforded or not afforded. The issue of federalism would be a complicated issue."

Mr. Souter did not answer, as he had been asked, in terms of the impact on real people. Instead, he focused on the political consequences. There was no sign of Souter feeling any compassion or understanding for the devastating and lethal impact that overturning Roe v. Wade would have on women. Mr. Souter saw it as a cold, detached, and theoretical discussion rather than one of grave human suffering and misery, and one where we know for sure that women will die.

Over and again, David Souter refused to answer your questions about abortion and reproductive privacy. Of course, members of the Committee did not ask him how he would vote if confirmed for the Court; you wanted to know his views on the subject as of now. But he refused to offer the slightest indication of whether he supports this constitutional right. You were not asking him about an unresolved, speculative future issue; you were asking him about a constitutional right that was established almost two decades ago.

He said that he could not discuss the matter because the Supreme Court might be asked to overrule Roe v. Wade. This answer

seems disingenuous in light of his willingness to discuss other matters, such as affirmative action and criminal procedure, that will come before the Court. Furthermore, the fact that the Court might rule on abortion questions does not excuse him from sharing his beliefs as of now. The people know how other members of the Court likely view the abortion question; there is no reason that they must guess as to how David Souter feels. He would no more be disqualified from sitting on an abortion case than any other Justice who has views that have been expressed. If David Souter has beliefs, there is no point pretending that he does not. And if David Souter truly has no views on abortion and Roe v. Wade, then he is probably the only lawyer, judge, or adult in America without such an opinion.

Under other circumstances, the failure to answer question might not be fatal to a nomination. But here, where David Souter's record shows hostility to reproductive rights for women, it is incumbent on him to show his willingness to uphold these basic constitutional freedoms. And it is incumbent upon this body to determine beyond a reasonable doubt that he will uphold these freedoms. His silence does not create the impression of open-mindedness, but of likely antipathy to abortion rights in light of his earlier positions and the lack of any other evidence.

Reproductive freedoms are not simply one more right among many. They are basic civil liberties guaranteed by the Constitution and essential to the life and health of women. Studies show that forty-six percent of all women will have an abortion. The vast majority of adults will use contraceptives. Without

constitutional protection, women will die and suffer from illegal abortions and unwanted pregnancies. At this point in constitutional history, reproductive freedoms hang by a thread and there is every indication that David Souter will cut that thread.

A person is unsuitable for the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms. Reproductive privacy is one of these guarantees. Moreover, throughout history, the Senate has considered the likely effect of a nominee at the time of confirmation. The simple reality is that the next Justice could decide the future of abortion rights and reproductive freedom. There is nothing in David Souter's record or testimony -- not a scrap of information -- to justify believing that he would safeguard these basic liberties. On this ground alone, I urge the Senate to reject him and to protect American women.

David Souter's unduly restrictive view of constitutional privacy is reflected in his ruling that New Hampshire constitutionally could prevent homosexuals from adopting children or providing foster care. Opinion of the Justices, 525 A.2d 1095 (1987). The New Hampshire House of Representatives requested an advisory opinion from the State Supreme Court on the constitutionality of a state law that would have restricted the ability of homosexuals to adopt or care for children. Justice Souter joined the Court's majority opinion in holding that the proposed law would not deny equal protection by preventing homosexuals from adopting children or being foster parents. Despite copious evidence to the contrary, the Court found that the

state had a legitimate interest in providing heterosexual role models for children. This decision reflects a very narrow conception of constitutional privacy and a view of gays and lesbians based on homophobic stereotypes, not facts.

In addition, David Souter's position on gender discrimination makes him unsuitable for the nation's highest Court. As Attorney General, David Souter filed a brief in the United States Supreme Court urging the Court to abandon the use of intermediate scrutiny for sex-based classifications. The petition for a writ of certiorari argued that intermediate scrutiny created a "twilight zone" that "lacks definition, shape, or precise limits." (Petition for Writ of Certiorari, in Helgenoe v. Maloon, 1978, at 18-19).

Nothing in the nature of this case required Attorney General Souter to argue for lessening the standard for constitutional protection for women. He could have defended that state's statutory rape laws under intermediate scrutiny. In fact, the Supreme Court later upheld such statutes under intermediate scrutiny. See Michael M. v. Sonoma County, 450 U.S. 464 (1981). As a public officer sworn to uphold the Constitution, there is no reason why he should have been arguing that the Supreme Court should overrule its precedents protecting women.

In his testimony before this Committee, Souter was given the opportunity to express a commitment to prohibiting and remedying gender discrimination. Surprisingly, his response to questions centered on criticizing intermediate scrutiny in terms almost identical to those used in the certiorari petition filed by the

Attorney General's office. Although he indicated that he favored using more than rational basis review for gender discrimination, he did not provide any indication of how he would apply the equal protection clause or of a willingness to protect women from discrimination.

Indeed, nothing in his record indicates the slightest sensitivity to issues of gender or race discrimination. As a Justice on the New Hampshire Supreme Court he authored an opinion declaring unconstitutional the application the application of the State's rape shield law. Violence against women is tragically widespread in this society. One in three women will be raped in her lifetime. According to the 1989 Uniform Crime Report and the National Crime Survey, every hour 16 women confront rapists, and every six minutes a women is raped -- close to one million women annually. Yet Mr. Souter referred to this pervasive violence against women as an "undignified predicament." His description of the situation of women who are raped reveals an underlying lack of compassion, understanding and empathy. Would he view male victims of life-threatening assaults with such contempt and insensitivity?

Over the past decade, the rape rate has risen four times as fast as the total crime rate, and 60 - 80% are date or acquaintance rapes; of those only 3% are prosecuted. Many states have adopted rape shield laws to encourage women to report sexual assaults by preventing questioning about their sexual history. New Hampshire's law prohibited testimony of "prior consensual sexual activity between the victim and any person other than" the defendant. State v. Colbath, 540 A.2d 1212 (N.H. 1988). Such

laws reflect the fact that a woman's behavior with others is totally irrelevant to the defendant's guilt.

Virtually no court ever has held it unconstitutional to apply a rape shield law. But Judge Souter, writing for the New Hampshire Supreme Court, found that it was unconstitutional to exclude evidence of a rape victim's allegedly "sexually suggestive" behavior toward several men at a bar. But dress and flirtatious conduct are not an invitation to rape. Judge Souter's opinion reflected tremendous insensitivity to women and the problem of sexual assault.

Likewise, his statement before this Committee that it is a "mathematical" fact that literacy tests "dilute" the votes of other citizens reflects his attitude toward civil rights. The statement once again shows an insensitivity which is inappropriate for a Justice on the United States Supreme Court. If Souter was from a Southern state and defended literacy tests, he would not even be considered in the running for a seat on the Supreme Court. His defense, to this very day, that this literacy test as used in New Hampshire was not discriminatory shows that he does not understand how such tests are fundamentally and inherently discriminatory. There is no way such testing can be used without discriminating. This is not only relevant to the civil rights of minorities, but also the rights of women.

For years I have worked to eliminate discriminatory tests which are used to deny women and minorities educational and employment opportunities; to think that the United States Senate would approve someone who defends the most elementary of discriminatory

tests, one used to bar one of the most fundamental rights of citizenship -- voting -- is chilling indeed. How can we expect him to comprehend the devastating, yet more subtle, sex-biased and race-biased standardized testing commonly used in employment and education?

And Mr. Souter's activities against the peaceful environmentalists at Seabrook are especially frightening to women, who because we have not been included in political decision-making in this nation, are frequently forced to protest and petition the government for redress of grievances. Mr. Souter's Draconian methods to repress free speech and assembly, his use of the power of the government to prevent dissent, and his request for preventive detention of demonstrators are grave warnings of his willingness to gut the First Amendment.

Although the cases I have discussed are familiar to the members of this Committee, I reviewed them because the cumulative picture is deeply troubling. They show not a person who is a blank slate, but one where all the evidence points in one direction. It shows not a person who is warm and compassionate but an individual who does not understand or care about the real needs and rights of people. I ask members of this Committee, can you point to any evidence -- any speech, any article, any brief, any opinion -- where David Souter expressed a commitment to reproductive privacy or civil rights for women?

The rights and lives of millions of women -- and particularly young women -- rest on this nomination. The confirmation or rejection of David Souter will probably have more effect on their rights than all of the laws you will pass in all of your days in the United States Senate.

Please, I urge you, do not place women's rights and women's lives in jeopardy. David Souter is far too great a risk to civil rights, liberties and lives to have a place on the Supreme Court.

The CHAIRMAN. I want to thank you all for your testimony.

Let me begin with you, Ms. Smeal. Tell me what it is that has made you absolutely certain that Judge Souter, if Justice Souter would overrule *Roe v. Wade*?

Ms. SMEAL. I am glad you asked the question.

The CHAIRMAN. So am I, it is better than being—

Ms. SMEAL. I have had the experience of testifying before for Justices and I have been able to call them pretty accurately. We were one of the few women's organizations that stood up against Associate Justice Anthony Kennedy. We were not fooled. We looked at his record. We examined it in detail.

We have examined Mr. Souter's record in detail. He has never once ruled or said anything that would indicate that he is for privacy rights. Before, when he had a chance, as attorney general or judge, in fact, he has written with the language of our opponents.

As I stood here, as I say back here and I also watched on television and I have read and I have heard every word, he has indicated he is on the other side. He has even talked to us and referred to us as "the other side." Check his testimony.

When he talks about the rights of privacy, he talks about certain marital privacy acts being there, but he never says which ones, never specifies it clearly. You, Senator Biden, summarize him more generously than he is, in fact, saying, because he holds back. He will not affirm or endorse the decisions or opinions of *Griswold*. He will not speak to *Eisenstadt*. In fact, he aligns himself with the decision of Harlan, the concurring decision of Harlan, and if you read Harlan's decision carefully, under him Harlan would not go along with privacy rights for unmarried people. He talks about the tradition of the history of our country being against fornication, homosexuality, and against, in fact, rights for unmarried people.

It does not surprise me that he will not talk about *Eisenstadt*, because it would not be very popular to say that you would be against the rights of unmarried people for birth control in this country. He will not go down that road you wanted him to go very far at all. He will not even go as far as Kennedy, in my opinion.

There is no question, he is the fifth vote, because his own words, he says it is not settled law. He talks about it as if it will be called into question successfully. What does that mean, "successfully"? To me, successful would be that it would be reaffirmed; to him, the challenge would be successful.

When you are putting a fifth vote on and he is talking about original intent, original meaning, original understanding, all this jargon, but always around the question, what proof has he given to us that he would not be that vote? Everything has indicated that he will be that vote.

The CHAIRMAN. If he had indicated—and this is a question to all of you—if he had indicated that he believed there was a right to privacy of a woman to determine whether or not to terminate a pregnancy, would that have been sufficient for any of you? If not, would you have been required to know, as well, what balancing test he would apply, with specificity, in order to get your support?

Do you understand the question? I know you understand the question, but I am parsing it in two parts here. Would privacy at present be sufficient, or would you require, in order to give support

for any nominee that will come forward—and if this nominee does not succeed, there will be someone else—would you require that nominee to specifically state how they would rule on *Roe v. Wade*, not just on the principles, but specifically state “I will support *Roe v. Wade*, if in fact put on the Court?”

I guess I should start with you, Ms. Smeal, and then work my way down.

MS. SMEAL. We believe that he should say that he is for the fundamental right to privacy and that this is, in fact, settled law, that—let us put it this way, the word game should stop, he should be saying where he is. You know, we are saying a lot about, well, you cannot ask this question or that question. That would say that the current judges would have to disqualify. They have said where they stood. We know where they are going to stand. It does not say the way they are going to rule on a particular case, but at least you would know where the man stands. He must be the only person in the United States without an opinion.

Think about it. And he sat here and said he has not discussed it, when he has had esteemed colleagues say he has talked hours to them about politics and about the major issues of our day. Well, certainly this is one of them. I think we have a right to know and you have a right to know when you are casting your vote, and he has not been forthcoming.

If this is the standard that you are going to accept, you are going to get a lot of vague questions from now on anything that is important, and we are going to get people who will just say warm, fuzzy things. A 2-hour discussion 24 years ago, in which he will not even say where he stood then, let alone where he stands now, is simply no standard at all.

I do want to again say that if we are to gain confidence on him on Harlan, I think American women and men must know that draws into question, not only his position on *Roe*, but his position on whether or not a woman can get a birth control prescription without the consent of her parents or the consent of her spouse or, if she happens to be in a certain State, or if she is single or married. He is rendering, if he does that kind of stuff and if we go down that road, the social fabric of this country. You cannot put it back together again.

The CHAIRMAN. Ms. Yard.

MS. YARD. Well, I think if he said very, very clearly that he believed there is an absolute fundamental right under the privacy interpretation for a woman to decide when and whether to have a child, that is what you need to know.

I do not know that you need a specific answer on *Roe v. Wade*. I think to say that there is an absolute fundamental right to control your reproductive life is what we want to know.

The CHAIRMAN. Thank you.

MS. ALLRED. Mr. Chairman, I would like to refer to something that I would be very happy to also put into the record, which is a very excellent article from the Georgetown Journal of Legal Ethics, “Ideology, Judicial Selection and Judicial Ethics,” by Erwin Chemerinsky, and basically refers to the question of what questions a judicial nominee can be asked.

Summarizing it, basically, we do walk a fine line. I would not ask him, perhaps, how he would rule, to promise how he would rule on *Roe v. Wade*. I would not necessarily ask him to predict how he would rule on *Roe v. Wade*. I would, however, insist that he answer what his analysis of *Roe v. Wade* is and what guidelines and what standards he would use. And that is not only reasonable, it is absolutely necessary. An ideology is necessary, and I would like to point out to the conservative members of this committee, as well as, of course, the less conservative or liberal or moderate members of the committee, that Phillip Kurland, the conservative law professor at the University of Chicago, has said, "It is not any more unfair for the Senate to have ideological grounds to oppose a nominee, than for the President to nominate someone on those grounds." That is from the Washington Post, July 1, 1987, 1989.

So the point is his ideology is important. Why must this committee operate in ignorance? Why must women in this country be forced to live in ignorance, because somehow he does not want to answer the question. Ideology has played a part for many years in the history of these proceedings, we know that. Talk about a litmus test, talk about Chief Justice Rutledge, John Rutledge, President Washington's first appointee as Chief Justice of the Supreme Court, who was rejected on one ground, because of his interpretation of a treaty with Great Britain—yes, we have a right to even one ground—yes, we have a right to even one litmus test, especially when it is about life and death.

Not only a right, but I would urge all of you Senators to please recall Judge Souter back to this table and require that he answers where he stands on abortion. Chairman Biden and other members of this committee, if he were a member of the Ku Klux Klan or the Nazi Party, I have no doubt, because of your fine records as Senators, you would say to him, "I must know how you would rule, or I must know your analysis on issues involving the Nazi Party, I must know your analysis of the Ku Klux Klan." That one thing alone, because it has so much impact on blacks and other minorities in our country, would be sufficient to disqualify him, I have no doubt, as a member of the United States Supreme Court.

Yes, his position on *Roe v. Wade* alone should be sufficient to disqualify him.

The CHAIRMAN. Ms. Allred and for the remainder of the panel, I am not asking what we should or could ask. We know that. I wrote that speech and so I understand that. As a matter of fact, I respectfully suggest, to the chagrin of my colleagues on my right, that that issue was an issue first raised not too long ago by me, when every editorial writer in the country was writing we had no right to ask or expect to know certain things. So, I have no disagreement about that.

My question for the remainder of the panel is this: What would have satisfied you, not what satisfies me or what we have a right to ask or what we have a right to know, what is what you would have a right to insist on knowing? Is it sufficient to know that he believed there was a fundamental right to privacy relating to termination of pregnancy, or is it required for you to know, as well, precisely how he would rule on *Roe v. Wade*? That is the question I am asking you.

Ms. NEUBORNE. I think it is the first part, if we knew that he believed there was a fundamental right to privacy, basically as defined in *Roe*, that a woman had a right to make a decision of when and whether to carry to term, and that that was as fundamental right—again, that is an important piece, as I know you know, that he is not saying—that would be sufficient, because then, under our standard of laws, it would require a compelling State interest to restrict that, and there would have to be defined what that compelling State interest is, and that decision would be made with the utmost seriousness.

What we are hearing is that some aspects of privacy are protected and we know that if there is just a simple right that is not deemed fundamental, then practically any government regulation would be deemed sufficient to overrule that, and that is our legitimate concern, so that is the point that we felt had to be made.

As you know, Senator Biden, our concern here is that he has been open and forthright on other issues, again using church-state as an example, in areas of the law where there will be changes, where he admitted that the law perhaps was not settled and would likely be changed, and he had no compunction in those areas about discussing the underpinnings of those laws, what the core issues were there. It is only in the area of privacy that he has refused to tell us what the basic fundamental right is.

The CHAIRMAN. Thank you.

Ms. HOLTZMAN. Mr. Chairman, I do not know if I could answer the hypothetical question of what would satisfy me, because I think you would have to take many factors into account, including the nature of his reasoning and his ability to hear.

But I can tell you what does not satisfy me, and the fact is that this committee does not even have a commitment from Judge Souter that there is a right to privacy with respect to abortion, that there is a right to privacy even for married people with respect to the use of contraception. We need to have those commitments.

He was willing to come here and say to you, "I believe the Constitution permits States and the Federal Government to impose the death penalty." Can he not say "I believe the Constitution allows people to use contraceptives, that that is a fundamental right?" I think also that it is especially important that he give a statement on the fundamental right, given, as other members of the panel pointed out, and I myself, other factors in his background that raise questions about the respect that he gives to women and their rights, particularly in the area, as I pointed out in the rape shield, in the area of privacy there, and also with regards to prior statements on abortion.

The CHAIRMAN. I thank you very much. My time is up.

Senator THURMOND.

Senator THURMOND. Mr. Chairman, we have a lovely group of ladies here. We thank you for your presence. I have no questions.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I welcome all of you here and we appreciate the fervent testimonies that you have given.

Now, Ms. Holtzman, I am concerned somewhat about your criticism of Judge Souter's opinion in the case *State v. Colbath*, and that was a unanimous decision of the New Hampshire Supreme Court. As I read your statement, you claim that Souter and all the rest of the New Hampshire supreme court simply ignored the State's rape shield law. You claim that Judge Souter failed to analyze the issue, and you point out the injury suffered by the woman in the case.

Now, the clear implication of your statement, as I read it, is that the defendant caused the woman's injuries and you mentioned them in connection with Judge Souter's holding on the rape shield issue, is to support your view that Judge Souter was somehow insensitive about rape issues and women's rights in that area, but I think there is more to that case.

In that case, there was a third party, the defendant's live-in companion who, as I read the case, surprised the prosecutrix and the defendant in the act of sexual intercourse and then assaulted the woman and caused her injuries. Now, that certainly raised a jury question as to who assaulted whom, thus making relevant some of the evidence that would not be admissible in an ordinary rape case.

Now, that key fact distinguished the *Colbath* case from the standard rape shield case. In this particular case, the New Hampshire State supreme court felt that there was an important sixth amendment right or issue involved, meaning a defendant's right to confront the witnesses against him in this case.

Now, it seems to me that Judge Souter cannot win, by your reasoning. If he refuses the defendant's argument that he is entitled under the Sixth Amendment to have the evidence in *Colbath* admitted, then he is accused of ignoring the defendant's rights. If he admits the evidence, then he is accused of being insensitive to women's rights.

Now, these are kind of tough questions that require fine lines to be drawn. These cases are very difficult and no one, least of all myself, wants to see anybody harmed who may have a right cause in those kinds of cases, and that is why we need judges to take their task seriously and make every effort to get to the bottom of the problem, as Judge Souter did in that particular case.

I just wanted to point that out, because I think that that is a correct statement of the facts in the *Colbath* case, and I just—

Ms. HOLTZMAN. Senator, might I respond?

Senator HATCH. Surely.

Ms. HOLTZMAN. Obviously, the issue in all of these cases is the question of the defendant's right to introduce relevant evidence and the sixth amendment right to confront the evidence, confront the witnesses against him or her and to adduce evidence in his or her behalf.

But the question that the rape shield law tries to address is that the idea of relevance is one that was based in the past on some very antiquated notions. The point was to try to suggest to judges that what they might have thought was relevant was really not only irrelevant, but profoundly misleading to juries, injurious as to the ability of State to prosecute cases, and injurious and humiliating to the complaining witness.

That's the concern here. The concern here is not even so much with the result, although I would have—just from my reading of the facts of the case, another result could have been justified—my concern is the language that he uses and the lack of reasoning.

I mean the very fact that he tossed aside as trivial the possibility of prejudice to the jury from the introduction of prior evidence about a woman's prior sexual act, the fact of the matter is, and I know this case-after-case, and study-after-study has shown that it is highly prejudicial to juries.

Now, he might have said, even though it is prejudicial to juries, I still think it's important, but he didn't show any sense of understanding the prejudice. The same with respect to the issue about the relevance of her prior conduct.

It might have been relevant—let's assume hypothetically—but he didn't explain how it was. Instead he accused her of being sexually provocative, as though somehow she provoked the rape, and that is exactly the point that I was trying to say that the rape shield laws were trying to address.

So I find the language of this very troublesome from that point of view.

Senator HATCH. I didn't read it that way. I read it that he was concerned that there wasn't justice done here. I think the case does show his concern for the strict enforcement of defendant's legitimate constitutional rights.

Ms. NEUBORNE. Senator—

Senator HATCH. I would like to just finish. Let me finish this one thought and then I would be happy to let you speak.

The challenged evidence, in my opinion, was necessary to the defendant's case because, No. 1, it related to public acts. And, No. 2, I might say public acts, not private matters that the rape shield law was designed to protect. And, No. 3, the evidence in the case appeared to be particularly strong since the acts occurred closely in time to the actual time of the alleged assault.

So, I mean who would know unless the case was really retried and this opportunity to hear this evidence was really heard or given? All I'm pointing out is I think you may be right, but I don't think the case shows that. I think the case shows to the contrary.

Ms. HOLTZMAN. Well, with all due respect, Senator, I think that the case, at least his reasoning, is absent with regard with regard to why her prior sexual flirtation has anything to do with whether she consented.

I mean the theory of relevance here is that if she flirted with some other men that she would consent to a rape. You explain to me the relevance of one or the logical connection between one and the other, he didn't.

Senator HATCH. Well, basically, Souter did not accuse her of being sexually provocative. He said he wanted the jury to determine whether the complainant was lying to cover her embarrassment to be discovered by the defendant's real lover or girlfriend, but let me go a little bit further.

That is one side. I don't think you're right on it and I wanted to just point it out because we should both re-read the case. But let me point out another case in the case of *State v.* —

Ms. HOLTZMAN. Excuse me, if I could just read to you from the case.

Senator HATCH. Sure.

Ms. HOLTZMAN. There was evidence, this is a quote on the very first page, in fact, it is the second paragraph, "there was evidence that she directed sexually provocative attention toward several men in the bar."

Senator HATCH. That's different from saying that she did that. He said there was evidence. That doesn't mean it is true, and it doesn't mean it is false. Any judge worth his salt would point that out.

Let me point out another case just to show the other side of it. In the case of *State v. Ducette*, Judge Souter reaffirmed the important right of a rape victim to have her case prosecuted free of judicial inquiry into irrelevant and immaterial aspects of the victim's private life.

This is what he did in this case. In that case the accused rapist sought court permission to conduct discovery into a prior sexual assault that the victim had undergone some, as I recall, seven years prior to this alleged crime.

Judge Souter held and held firmly that this request was properly denied. That he couldn't bring that evidence out of seven years ago, another rape of this victim. That was properly denied because the evidence that was sought was immaterial to any issue involved in this later prosecution.

In other words, I think if you re-read this first case, the mere fact that he said there was evidence, I mean that is what the evidence showed—

Ms. HOLTZMAN. No, it was how he characterized the evidence, not that there was. If you characterize it as provocative, that suggests that she was somehow provoking the action on the part of the defendant and that is the problem that the rape shield laws, I think, and a lot of the work that we have tried to do over the years to permit effective prosecution of rape cases is designed to counter the idea that the woman is provoking the rape.

Senator HATCH. I agree with you on the necessity for rape shield laws and the necessity of protecting the women under these circumstances. I think his case shows that he agrees with you, and, certainly, this latter case shows that he agrees with you. All I'm pointing out is that I'm not sure that the criticism is as well-placed as you feel.

Now, let me just say this. I happened to listen very carefully to all of your testimony and, I respect you for it. Ms. Yard, we have known each other for a long time. Your testimony was very moving. It was very sincere. It was eloquent. So was yours, Ms. Smeal, and others as well. I don't mean to slight anybody here.

I respect you for it. But there is another point of view that is equally as moving, equally as relevant, equally as felt about, and equally as emotionally appealing.

I think that's what we have in this country is we have a tremendously issue that has two sides to it. That if you ask the right questions, you are likely to find majorities on one side or the other, depending upon the questions. And everybody in this country seems to be concerned about it.

Now, what I'm concerned is if we do go to single-litmus test issues to determine whether a person sits on the Court—I read an article by Ben Wattenburg, a Democrat, who said that the real litmus test issue is not abortion, it's quotas.

Now, what if 15 Senators felt that if this man is for quotas, they couldn't vote for him, or against quotas, they couldn't vote for them? What if 15 Senators who felt that school prayer is very important to them and they wouldn't vote for anybody who was not for school prayer? Or 15 Senators who won't vote for anybody who is for the death penalty or against the death penalty?

In other words, if we bring this down to single-litmus test issues, no matter how important, or how emotionally compelling they are to various people, my goodness I'm not sure we would have very good people ever sit on the Supreme Court, or we would ever be able to resolve these very difficult issues.

So I just point that out because I respect you for your viewpoint. I disagree with it, but I respect you for it.

Ms. YARD. But you must remember that every poll in every State and nationally shows that the vast majority believes that it is a woman's right to determine whether or not she will have an abortion—

Senator HATCH. And every poll, in every State shows that the vast majority of people think it's abominable for us to have 2 million abortions in this country every year and—

Ms. YARD. That is not the—

Senator HATCH [continuing]. To become the most, except for Mainland China, the most permissive country with regard to abortion in the world. And most everybody is concerned of finding some way of resolving this issue. Now, we're never going to agree on these things. The point—

Ms. YARD. But the point is—

Senator HATCH. The point I'm making—

Ms. YARD. The point is not whether somebody thinks it's wrong or right. What the polls show is that people believe that you should make the decision yourself. We aren't insisting that people who oppose abortion have them at all. What we are insisting is that each one of us has the right to make the decision for herself.

I don't insist that they have an abortion, and, by the same token, they can't insist that I can't make the choice not to have one.

Senator HATCH. And there may be some way of—

Ms. YARD. That's the issue.

Senator HATCH. There may be some way of resolving this issue, if it is instead of deciding by nine unelected judges, all of whom were men at the time, if it is decided by elected representatives of the people and you may very well win on your contentions. You may very well win. But the point is that there are two sides.

There are two emotional sides, and there are two equally felt-out sides, and if you ask different polling questions, you will find there are different majorities on different aspects of that issue.

Now, we could argue about it for hours and for days and months and years, which has happened around here. But my main point is this, that if we come down to single-litmus test issues to determine whether a person ever sits on the Court and we divide the Senate on litmus-test issues, we will never have any Supreme Court.

We have got to sometimes make these decisions based on the quality of the people, the competence of the people, the ability of the people, the health of the people, and a number of other issues that are far broader than just one or any single-litmus test, as important as this may be to you, and it is important, and I admire you for feeling the way you do.

I can never get mad at somebody who really believes in what they do. I might disagree violently, but I never, never will find fault with your sincere belief. I will just have to tell you that.

But my time is up. I have taken so much time as it is.

Ms. NEUBORNE. I just want to make a comment on that.

Ms. YARD. I don't want your admiration. What I want is for you to understand that it is totally unacceptable to turn back the clock. This body, the Senate Judiciary Committee, has made it very clear that you can't be a racist and sit on the Supreme Court. Well, I say you can't be a sexist and sit on one, too.

If you don't understand what freedom for women means, you don't deserve to be on the Court.

Senator HATCH. Well, from your point of view, I will respect you for that point of view, but there is another point of view that is equally as forceful. I have to tell you that.

Ms. SMEAL. And we don't know what Souter's point of view is.

Senator HATCH. Neither do I.

Ms. SMEAL. Well, the point of the matter is that you know, for he must be worried about what the public would think of his point of view, because he is refusing to say it.

We know, from his past record, that his point of view has been not only on the issue of abortion and privacy opposed to women's rights, but also on every other case that he has taken with gender discrimination at issue he has been on the side against eliminating gender discrimination.

Senator HATCH. I just showed you one where he was on your side. I can show you others. So the fact is that is just simply not a true statement. My time's up.

Ms. ALLRED. Senator Hatch, may I just say it's not a shell game. It's not a shell game where he can't, he doesn't have to answer what is under this shell but he will answer what's under that shell as it pleases him. That's what is unfair.

Of course, it goes well beyond the issue of abortion. We're talking about precedent. We're talking about seventeen years of precedent, where *Roe v. Wade* has been challenged time after time after time for 17 years, and of course, will be challenged again in *Russ v. Sullivan* in the November term, so this is an issue that is well beyond abortion. He has a duty to answer these questions. The Senator should not allow him to avoid answering what we all know is the key question.

Senator HATCH. I have to tell you as a circuit court of appeals judge—

The CHAIRMAN. I have to tell you all this, your time's up. But please finish your thought.

Senator HATCH. I know it's up, but I'm going to finish this thought here. As a circuit court of appeals judge, I don't believe that's correct. I think he has an obligation not to talk about issues

that he knows are presently and currently on the Supreme Court's list.

It's an ethical obligation, and I think that he should not prejudice his right to be able to rule in those matters by telling us in advance how he is going to rule. I would be very upset if he did, in fact, I might not support him if he did do that.

So, that's the problem and he knows that the *Russ* case is on that list and so does everybody else. That is not the only one that is going to come up. There are going to be all kinds of cases until this matter is resolved by elected representatives rather than unelected judges.

It will never go away until it is, and it may not go away then, but at least people are going to say a majority has ruled one way or the other and you may very well win.

Ms. ALLRED. Senator, I have additional—

The CHAIRMAN. I'm sorry, I am not going to allow the answer. You can maybe figure out the answer in response to a non-question from the next person. [Laughter.]

The CHAIRMAN. I didn't mean that quite the way that sounded. You may answer the question, Senator Hatch, in avoiding an answer from Senator Simpson but we have to move on.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I appreciate it. I have seen these women here before as we dealt with issues. It is a particular pleasure to see Elizabeth Holtzman, who I always enjoyed working with on various issues. We worked together on illegal immigration reform legislation and I have great regard and respect for you. I do not know the other women that well.

But obviously, you know, we're in it deep right now. And I look at the testimony of Ms. Yard. A statement of Judge Souter's, you quote on page 8, that "I don't think unlimited abortion should be allowed." That was Souter's statement, "I don't think unlimited abortion should be allowed."

Then you go on to say that "Senators, this is the language of the right wing." And then you go on to right wing it some more.

As you know, I am pro-choice. I strongly support a woman's right to choose and however, I'm always concerned about sweeping statements. You show me a 100 percenter and I will show you a person I like to stay away from. I don't care what the issue is. That's my view of life, just mine, my personal opinion.

So I see sweeping statements, filled charged statements, emotional statements and all of you are very skilled at this. You do more talk shows than we will ever do on the U.S. Senate floor. You are very good at your work.

So is Faye Wattleton and so is Kate Michelman. So let's get that out. There is power and potency in what you say, but you know how to get it across and you know just exactly what you're doing here. There is no naiveness here, no naivete. You are it. So now, let's just go forward here.

So, I'm always concerned with that. If you support unlimited abortion rights I do think you do a disservice to the cause we share, to ensure that women do have this freedom to choose. Because even *Roe v. Wade*—don't shrug, I see that all the time. I get

tired of watching shrugs and kind of looking up at the ceiling when Strom Thurmond says something courteous.

Let's just stay in this picture and just listen for a minute. Maybe that wouldn't be an untoward and maybe it might even be a courteous thing to do, without casting a glance and a shrug and "who are these boobs?" And "how did they not listen to what we say to them and can't they hear us?" That is a tiresome arrogance.

So *Roe v. Wade* presents limits on abortions, ladies, such as when pregnancy is in its third trimester. I think that limitation happens to be reasonable. I am also not very enthusiastic at all about abortions performed simply because the sex of the fetus is not the sex that the parents wanted. I don't really go for that one.

Could not you discern that opposition to unlimited abortion rights might not just be a position of the right wing, but a position of many of us who support the right to choose as well? I will ask you that, Ms. Yard?

MS. YARD. I don't read my testimony, Senator Simpson, as saying that we are supporting unlimited abortions, one-after-another. What I am saying is that that is the charge of the right wing and I am pointing out how ludicrous the charge is. That is all I'm saying.

Furthermore, if you object to abortion for sex selection I invite you to join the National Organization for Women. We do not believe that there should be distinctions between men and women, boys and girls. We want an integrated society and we want everyone to be treated equally, so that I invite you to join us in our struggle to have people treated equally.

And I would——

Senator SIMPSON. I don't know what that has to do with it.

MS. YARD [continuing]. Through you, if I might, apologize to Strom Thurmond if he didn't like my glances but we are greeted every time we come before him as ladies, you are all so attractive. Somehow it does not sit well. Maybe you could explain to him that we would like to be treated the way you treat everybody else. You don't say to men, gentlemen, you all look lovely. [Laughter.]

Senator SIMPSON. Well, you know, we don't have to whack around in that stuff.

MS. YARD. I wish you would explain it to him because it doesn't do him any good.

Senator SIMPSON. He's a man of great civility and a southern gentleman of the first order and if you don't like the way he expresses himself, what business is that of yours? You ought to roll your eyes at it.

The CHAIRMAN. Maybe we could kind of move on. I'm not being facetious when I say, I think it would be useful for us to get to the issue, if we could.

Senator SIMPSON. Well, I would like to get back to page 10 of your testimony. You quote Professor Alan Dershowitz saying that "Judge Souter was nominated, in effect, by John Sununu, a strident opponent of a woman's right to choose."

Could you please tell us what qualifications or experience Alan Dershowitz possesses in the area of White House politics or what evidence does the professor base his speculation? I know that Professor Dershowitz jumps in with both feet in all of these issues.

I have shared a talk show or two with him. I won't ever do one by remote control, he takes that talk show word literally, no one else gets to talk. I would like to do it face-to-face with him the next time.

But what is the qualification, how does he know this? This has been refuted by many already. What is the old saw here, with this one?

Ms. YARD. Well, Alan Dershowitz is a respected professor of law—

Senator SIMPSON. Of course he is.

Ms. YARD [continuing]. At Harvard University.

Senator SIMPSON. I didn't say he wasn't.

Ms. YARD. And I suspect he knows very well what he is writing. Now, if you would like us to do a study of John Sununu and submit it to this body, we would be happy to do that.

Senator SIMPSON. But you see, what I'm saying is that your statement is filled with flash words, and flash statements and that, somewhere that breaks down. I think you do yourself, my personal opinion, a disservice in a cause that I believe in too.

But I would like to ask—well, let me just put it this way since we are sharing some emotion here. We have now a claim by Ms. Smeal that this person is unsuitable to the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms.

And then the ABA has given a unanimous well-qualified rating to the nominee who does not believe in basic constitutional freedoms? That seems odd, because that is exactly where that logic leads, they have given Judge Souter their highest ratings.

Why would it be so that they would give that rating if there were any credibility to that assertion that there is nothing in his record that he would assure basic liberties? I am going to finish the whole question because I know that probably I won't get any more.

But there is a question that you asked on page 12 of your testimony. You stated there, and back to Ms. Yard.

Why Judge David Souter? What was the basic purpose in advancing this nomination of a man with no substantial discernable record.

Well, I respectfully say, ladies, or women, that the answer to that question is that because of the job and the work you went to on Judge Robert Bork, the White House had to do a different kind of proposal. If I may add, it was a hatchet job, where we turned a man into a racist, a sexist, a sterilizer of women, that was all part of it.

I sat and listened to it. I have a little institutional memory. So the White House now has to find bright, thoughtful, intelligent, skillful, qualified judges who do not have a paper trail of any kind.

That is what they have to find. This is my view, not the White House, I have not talked with them. And Judge Souter certainly fits that description, except that I would place the word "very" in front of each adjective to describe Judge Souter: very intelligent, very qualified, very bright. So you know, I think you have been hoist on your own petard.

You have only yourselves to blame for the nomination of someone with "no substantial discernable record." You took one that was discernable in the form of law review articles and things that

had never even appeared, never even paid one whit of attention, and ignored 5.5 years of a man on the bench, with 104 opinions—and six of his dissents became majority opinions of the U.S. Supreme Court—and none of his decisions was ever overturned and you turned him into a gargoyle right before this committee.

So, that's why. Thank heaven though, we do have this man, Souter. How fortunate we are to have a man of his caliber. So if you hadn't hung old Robert Bork so high up in the cottonwood trees, you wouldn't be here asking that question you did on page 12 of your statement.

Ms. ALLRED. Senator Simpson, may I respond briefly to some of the points you just made?

Senator SIMPSON. I would like it, you bet.

Ms. ALLRED. Thank you, very much, sir.

First of all, I really think it is very unfair to blame the victims. To blame women for the fact that Judge Souter has no paper trail and has not been forced to answer, by this committee, where he stands on abortion, and therefore, we have to go into that dark night with little or no information of where he stands on this issue is not, it is patently unfair to blame women for this.

I want to add one thing, which I will get in, as per Chairman Biden's instructions, which is this committee should know and I am sure does know that the ABA Code of Judicial Conduct Canon 7(B)(1)(c) does not stop or prohibit or prevent Judge Souter from answering any questions.

The proof of that is it talks about a candidate, including an incumbent judge for judicial office that is filled either by public election between competing candidates or the basis of a merit system election. It talks about election. It doesn't talk about a judge that is going to be there by appointment. It is clear by the language, you could ask him where he stands on these issues.

Senator SIMPSON. What were you reading from, Ms. Allred?

Ms. ALLRED. I am reading, sir, from the Georgetown Journal of Legal Ethics Article that I cited earlier, but I am reading the exact quote that I just read is from the American Bar Association's Code of Judicial Conduct specifically Canon 7(B)(1)(c).

Senator SIMPSON. Go to three please if you would, may I respectfully say, and you will find that a sitting judge cannot respond, cannot respond to questions about pending or impending legislation and I cite it for you right in the same document you have in your hand. That is the canon, also, at least among judges ethically.

Ms. ALLRED. Well, if that is the case, he has already done it, sir. He has done it talking about the War Powers Act. There is going to be a pending case before him on that. He has done it on the *Lemon* test, and on religious cases.

Senator SIMPSON. Ms. Allred, he is a sitting judge. He is not a simple, you know, it is not a simple nomination. The man is a sitting judge and if you will look at the Code of Ethics that you have in your hand, you will see that he cannot respond to questions, ethically, of a pending or impending nature.

Now, I don't know how clear—I have said that about four times since this started and everyone just shrugs and pooh-poohs that one. That is pretty real. It is right there, right there.

Ms. ALLRED. He has already done it on numerous issues.

Ms. NEUBORNE. He did not have to answer a question about a pending case, Senator. He was asked to discuss the concepts, the concepts that underlie the principles of the fundamental right that exists for 20 years. As he talked about fundamental concepts in other areas, on equal protection. He talked about where those underlying concepts came from.

And again, in—I take Senator Biden at his word that I can answer a nonquestion—when we talked about this being a single issue, I must say that when *Brown v. Board of Education* was the law very recently and Justice Stewart was being appointed to this Court, he was asked how he would have ruled on that case.

That was considered a reasonable question at that time. I would say that if that were the issue now, that is certainly a monumentally important single issue and if that answer were the wrong answer, I would say that he perhaps would not be sitting on the Court. It was valid to ask how the lives of African-Americans and people of color would be with that Justice sitting on the Court, given the change in the law on equal protection and it is just as important for women to know where their fundamental rights will be with another Justice sitting on the Court.

Senator SIMPSON. Mr. Chairman, you have been very kind, but there really is only one case that he was concerned about and could not speak on and it was because of ethics, not because of some great escape mechanism. If you don't recognize that then you don't recognize the portion of the ethics that you just read.

That's the difference here. This is not just some nominee. This is a sitting judge and the first thing that everybody wanted to know was about *Roe v. Wade* and there it is and that is why he couldn't respond.

I thank you, Mr. Chairman.

The CHAIRMAN. I thank you, Senator.

Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

Controller Holtzman, I would like to discuss with you the *Colbath* case, because I think you have made a point that requires some analysis to determine substance because if your analysis is correct, and we have the opinion before us, then I think that has some substantial probative weight.

I agree with your statement that a woman has an absolute right to say no at any time to any man. And that forced sex is rape whether or not, well, forced sex is rape, we will end it there. In your statement, you say, "at worst, the prior activities consisted of very flirtatious behavior."

I would respectfully disagree with you about that characterization. There is a slightly different issue involved, in fact, a significant different issue involved as to the prior contact between the complaining witness and the defendant contrasted with other people. But when you say that it was only flirtatious I think that the contact with the defendant in the presence of the other men is all relevant but starting with the other men.

The testimony was more than the generalization of provocative attention. "A girl with dark hair hanging over everyone and making out with Richard Colbath." Then she had been sitting in the lap of one of the defendant's companions. Then "engaged in

close physical contact with at least one man besides the defendant.”

Then, as to the defendant, himself—and I think this is relevant although there is that distinction that I mentioned—when you raise a question about provocation saying that the complaining witness provoked the rape—and this is somewhat delicate, but prosecutors like you and I know that you have to be specific in a courtroom.

I think it is important because I think you have raised a very significant issue here, and I think it has to be discussed. As direct as this is, I think the testimony has to be articulated.

So, I give some advance notice to those who are watching on television that this is what happened, as the opinion of the Court says, with respect to the defendant. He testified that he had engaged in “feeling the complainant’s breasts and bottom, and that she had been rubbing his crotch before the two of them eventually left the tavern and went to the defendant’s trailer.” Now, I would say to you that, as I read that conclusively, it is a lot more than flirtatious behavior.

You raised the contention that Judge Souter had not made any analysis here and had not really considered the question of prejudice. I know you have the case before you, and at page 1216, this is what Judge Souter said, in part:

“Thus, this court has held that a rape defendant must be given an opportunity to demonstrate that the probative value of the statutorily inadmissible evidence in the context of that particular case outweighs its prejudicial effect on the prosecutrix.

Later on page 1216, the court says,

As soon as we address this process of assigning relative weight to prejudicial and probative force, it becomes apparent that the public character of the complainant’s behavior is significant.

Now, this case is considered, as the opinion of the court says, in the context of the State and national constitutional rights that a defendant has to confront the witnesses against him and to present his own exculpatory evidence.

Now, district attorneys have an obligation to be scrupulously fair to everyone and it is a balancing test which he undertakes here. But as I read the opinion, Judge Souter relies on some pretty positive evidence as to physical contact and action between the defendant and the prosecutrix in the presence of the other men, and then the physical contact and the analysis as to prejudice, and he might be right or he might be wrong in his final conclusion.

You could write this opinion coming out the other way and say that it was too prejudicial, but it seems to me that it is a scholarly opinion and well within the ambit of reasonableness for his conclusion.

I would be interested in his comments.

Ms. HOLTZMAN. Well, Senator, I am very well aware that there is a constitutional limitation with respect to the rape privacy law. The Federal rule that I wrote explicitly requires that judges take that into account. That is not the issue here, it seems to me.

It begs the question to say there was a constitutional right. There would be a constitutional right, if the evidence were relevant

and if the evidence were probative. Further than that, it is also a question of weighing the prejudice, because the State has an interest here, too, as cases have announced, States have an interest in rape privacy laws, because of the interest in encouraging women to come forward and testify.

You are certainly well aware, as a distinguished district attorney, of the history of the rape privacy law. The reason for it was that any time a woman took the stand, her entire sexual activity could be brought to the attention of the jury, on the theory that if a woman ever said yes, she was not going to say no.

It had another purpose, and that is building on the myths and prejudices about rape, trying to enflame the jury's feeling that a woman who was not chaste, was not believable, and fostering a perpetuation of the myths.

Now, what you have here is, No. 1, as I said in my testimony, the judge says, and I quote here, and this is on page 1217, "Because little significance can be assigned to"—let me skip here—"to a fear of misleading the jury." Why is little significance assigned to fear of misleading the jury, when the scholarly opinion, and research has been done on this, shows that prejudice to the jury is a factor. He didn't recognize that.

I am not saying that he could not have said, "I recognize that there is a possible prejudice here to the jury, but the defendant's rights outweigh that." He just ignored the little—dismissed this area of prejudice, which is very important.

Similarly, he did not say the evidence about her past behavior—by the way, I should say, Senator, that that is the defendant's version of her behavior. The complaining witness' version of her behavior was very different.

Senator SPECTER. Well, Ms. Holtzman—

Ms. HOLTZMAN. In any case, let us assume for the moment and take the defendant's version—

Senator SPECTER. Wait a minute. This is a question of admissibility and weight to be given by the jury. You are not saying that because it is the defendant's version, that it is not entitled to be considered?

Ms. HOLTZMAN. Under the rape shield law, the decision is really to be made by the judge as to the question of relevance and the question of prejudice. That is to be made by the judge, not the jury. That is the whole purpose of having the rape shield law, it is to take this issue from the jury and then you—

Senator SPECTER. Well, that does not bear on whether the defendant can testify.

Ms. HOLTZMAN. No; I did not say the defendant, I said that the—

Senator SPECTER. Well, you said "his version," as if his version is entitled to less weight.

Ms. HOLTZMAN. No; I am just saying—

Senator SPECTER. Both versions are entitled to weight.

Ms. HOLTZMAN. Exactly, that is the point I am making and it is the point I am trying to make. We do not hear in Judge Souter's opinion anything about a different version of the facts, but let us assume the facts are the way the defendant, no matter how he presented that evidence, let us assume the facts were as the defendant

claimed them to be. Let us assume exactly what happened happened.

If the complaining witness behaved in this fashion with the defendant, would you call this provocative, in the sense that this provoked a rape? Is that the word you would use to describe it? That is what troubles me, the language that is used by Judge Souter here.

Now, this may be language suggesting—this may be conduct that—

The CHAIRMAN. Excuse me, I am confused. May I ask a question of both of you?

Ms. HOLTZMAN. Yes.

The CHAIRMAN. Is the issue whether or not the conduct provoked a rape or the conduct went to the credibility of the assertion that it was consent or rape?

Senator SPECTER. The latter.

Ms. HOLTZMAN. No, no, no. The question of prejudice goes to the—

The CHAIRMAN. I do not know, that is why I am asking.

Ms. HOLTZMAN. The question of the prejudice goes to the credibility, because if you can show that a woman is not "chaste," you have a chance of affecting the jury's view of her credibility.

The CHAIRMAN. Well, that—

Ms. HOLTZMAN. What troubles me is the fact that Judge Souter characterized her behavior, in his words, as sexually provocative, provocative meaning provoking something. Does that mean provoking the rape? Does that mean the victim is to blame?

The CHAIRMAN. No; I—

Ms. HOLTZMAN. That is what troubles me about this.

The CHAIRMAN. I understand. I am not sure I disagree with you. I did not realize that he was using the word in that way. I did not know how he was using the word, whether he was using it that it provoked a rape, or whether or not it was provocative and, therefore, went to the question of the credibility of the witness of the woman alleging to have been raped, as to whether or not she consented or she was raped, not whether or not it justified any action whatsoever on the part of the man.

Ms. HOLTZMAN. He does not parse it that way, but there is no reason to think that it would not affect—and that is one of the reasons for the rape shield law, that it would not affect the jury's view of her credibility. In fact, as we quoted this judge in 1835, that a chaste woman is more likely to be believable, less likely to have given consent, and that is the problem and that is the problem of prejudice of using this evidence, and that is why there is a very careful balancing test that we urge on judges, and I do not see any real realization in this opinion of the care that is required and that is balancing test and that is my concern.

The CHAIRMAN. I apologize for the interruption.

Ms. NEUBORNE. Could I add a comment to that?

Senator SPECTER. You may, but let me finish this exchange with Comptroller Holtzman.

He does specifically put this in the context of consent and that is in the very first paragraph, at the conclusion, where the judge talks about the defense of consent. With all due respect, Ms. Holtzman, I think you are not on the central issue, when you talk about

the issue of being chaste raises a question of credibility. The issue of chaste—and chaste is the wrong concept, but I use your word, just to follow up with you—

Ms. HOLTZMAN. I am quoting from the judge and perhaps you were not here to hear the beginning of my testimony.

Senator SPECTER. If I can finish here, chaste raises the issue of consent. But never mind the question of chaste, where you pick on the word “provocative” and say that there is an issue here that her conduct provoked the rape. I do not believe that is what Judge Souter is saying at all.

He is saying that if you have a context where a woman in a bar, according to the defendant’s testimony—and again, on a very basic point, it is not a question of whether you assume he is correct or not, we are talking about admissibility of evidence to go to a jury—as to whether the jury believes him or believes the woman, not a question of assuming it for purpose of this legal issue. It is a question of whether the jury hears it. We are not assuming it one way or another.

But when you talk about relevancy and you say you do not see the relevancy, if you have a situation where a man and a woman are in a bar and the critical testimony in question is that “he is feeling the complainant’s breasts and bottom and that she had been rubbing his crotch” all in a consensual context, then the issue is, if sexual intercourse occurs later, is that relevant that the sexual intercourse was consensual as far as she was concerned.

Now, it may not have been, but the issue on relevance is does this kind of contact, where a man feels the complainant’s breasts and bottom and she rubs his crotch, is that relevant as to whether a later act of sex was consensual or not, it seems to me to be directly relevant, especially in terms of the time sequence. You talk about it being hours later. It happened and they went directly to the trailer.

Ms. HOLTZMAN. Excuse me, Senator, I do not think the opinion is very clear on the issue of time. The fact of the matter is that they went to the bar apparently 6 hours before the alleged rape took place, according to newspaper reports about it, so the time sequence here is not at all very clear in that respect. It may have been a matter of 4 or 5 hours before this conduct took place, it may have been a matter of 2 or 3 hours before or 15 minutes before. We have no way of knowing from this opinion.

But as I said to you, Senator, it is not—

Senator SPECTER. If you have no way of knowing, why do you say that it is a long time?

Ms. HOLTZMAN. Because it could have been 6 hours. There is nothing to suggest that it was any closer than that, not from the judge’s opinion. But the issue is not simply one—well, I will say that the rape evidence law, with all respect, raises two issues: One, is it relevant; and, then two, is it prejudicial.

One, on the issue of relevance, I do not necessarily agree with you. Because she may have engaged in flirtatious behavior with him, very flirtatious behavior with him—

Senator SPECTER. Ms. Holtzman, is it flirtatious for him to rub her breasts and bottom and her to rub his crotch? Is that what you call flirtatious?

Ms. HOLTZMAN. Well, I do not call that sexual intercourse, which is what happens in rape, which is——

Senator SPECTER. Of course, it is not sexual intercourse, but is it foreplay? Does that suggest that there is a consensual relationship here, if he did not force her to do that?

Ms. HOLTZMAN. It may——

The CHAIRMAN. Whoa, whoa, whoa.

Ms. HOLTZMAN. Senator, it may suggest a consent to those acts. It may not show consent to any other acts with respect to him. Now, you are assuming that and that may reflect your own view of the relevance, but I am not saying that anyone would necessarily do that.

The CHAIRMAN. Ms. Holtzman, this may help clear it up for me, and I say this to my colleague. We are way over time here, but let me ask you: If the Judge had said, instead of saying provocative conduct, if he had characterized the conduct as follows, "It was alleged that the following conduct took place," and then stated the conduct, without characterizing it as provocative, that would be a different story, would it not?

Ms. HOLTZMAN. That would be part of it, yes, that would have been a different story, in addition to other things in this opinion that also——

The CHAIRMAN. OK. I——

Ms. HOLTZMAN. We did not get into all of them, but I expressed them in my statement.

The CHAIRMAN. All right. And I——

Ms. HOLTZMAN. I suggest a similar concern that I have used——

The CHAIRMAN. I appreciate that.

Ms. HOLTZMAN [continuing]. The language that is used to express it.

The CHAIRMAN. I appreciate that. I am very reluctant to cut off what is a very informative debate, but we really are much over time. But I will, obviously, as I always do, yield, if the Senator wishes to continue, but I implore him not to ask me to continue.

Senator SPECTER. Well, I will not pursue that line. I will let the relevancy of that conduct speak for itself on the issue of consent, but I would like to ask what I consider to be a very important question for Ms. Yard to answer.

The CHAIRMAN. All right, and then we will cease.

Senator SPECTER. It is a question which I directed to Ms. Michelman and Ms. Wattleton this morning, and that is that if the Senate does not give consent to Judge Souter, what expectation is there that President Bush will nominate someone who will give you the kind of commitment that you are looking for to sustain *Roe v. Wade*?

Ms. YARD. Well, I think that there are two answers to that question. I remember very well, because I was part of it, the Haynesworth and Carswell battles. We were told we could never win Haynesworth, and I was very active in Americans for Democratic Action, and we were the only ones in the beginning who spoke out against him. We won that and we finally got Blackmun, and I think it is possible for President Bush to get a message. He can get a message that this country feels very strongly about this, and he has already changed his mind on the question of taxes, so I think it

is very possible for him to change his mind on whom he might nominate for the Supreme Court.

Senator SPECTER. Thank you very much.

The CHAIRMAN. I thank you all very, very much for your testimony and for the insight you provided to your position and to your view as to why the nominee is, from your perspective, one of a position that is opposed to *Roe*, not merely unknown, but opposed, and I thank you for it very much. That will be it for this panel. Thank you.

Now, let me suggest to my colleagues, I indicated that we would stop by 7 o'clock, but we have a problem and that is there are two panels that I would like to combine, because there are two witnesses who cannot be here tomorrow, even though they were told they may not come up until tomorrow. I will not state who those witnesses are, after having characterized it that way, but we will get instructions.

So, what we will do is we will bring up panel six and seven together. Now, on panel six, the names I am about to read are a panel of witnesses who are all four coming to testify on behalf of, in support of, Judge Souter; and panel seven, which will be combined with this panel, is made up of two witnesses, both of whom have not taken a position, but wish to express serious concerns.

Now, let me read the panels: R. Eden Martin, a partner in the Chicago law firm of Sidley & Austin; William L. Dunfey, director of Dunfey Group, in New Hampshire, a very prominent New Hampshire citizen; Robert I. Ruiz, president of the National Hispanic Bar, and that is the first panel; and then on the panel that wishes to express their concern, sharing a different view, Sophia H. Hall, president of the National Association of Women Judges; and Doris Coleman, president of the California Women Lawyers.

Now, I want to make it clear once again, in the interest of time and accommodation, we are putting these two panels together. The first three people who were called are testifying on behalf of, and the last two witnesses are taking no position, but are going to raise their concerns.

So, why don't we begin, and I am going to hold you to the 5-minute rule, even if it means I have to send Senator Thurmond down after you. He is assisting me.

It would be accommodating if we were to allow Mr. Ruiz to make his statement first, because of time constraints. Is that correct, Mr. Ruiz?

Mr. RUIZ. That would be fine, Senator. Thank you.

The CHAIRMAN. Welcome, and why don't you begin first.

**PANEL CONSISTING OF ROBERT I. RUIZ, PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION; WILLIAM L. DUNFEY, DIRECTOR, THE DUNFEY GROUP; R. EDEN MARTIN, SIDLEY & AUSTIN, CHICAGO, IL; HON. SOPHIA H. HALL, PRESIDENT, NATIONAL ASSOCIATION OF WOMEN JUDGES; AND DORIS COLEMAN, PRESIDENT, CALIFORNIA WOMEN LAWYERS**

#### STATEMENT OF ROBERT I. RUIZ

Mr. RUIZ. Thank you, Mr. Chairman and members of the committee. I am very happy to be here today.

As I was introduced, I am Robert Ruiz and I am the president of the Hispanic National Bar Association. I would like to thank you and the other members of the committee for this opportunity to testify on behalf of the Hispanic National Bar Association on the nomination of Judge David Souter to be an Associate Justice of the U.S. Supreme Court.

I also wish to thank the other members of our Washington membership and other members throughout the country who have been very helpful in submitting suggestions for the testimony here today.

In the nearly 20 years of our organization's existence, this is the second time that we have been invited to submit testimony on behalf of a U.S. Supreme Court nominee. In 1987, we testified in support of the nomination of now Associate Justice Kennedy.

My purpose here today is twofold: One, I want to—

The CHAIRMAN. Excuse me, Mr. Ruiz. Again, for the record, because these things sometimes take on a life of their own, you may have been invited by the White House. You are always welcome before this committee, I want to make it clear, so no one thinks that an organization as significant as yours has somehow only had two opportunities to come here. You are able to come any time you wish to come on any judge. You are welcome. The White House may have invited you twice. You are always welcome here.

Mr. RUIZ. I thank you very much for that correction. Thank you.

My purpose here is twofold: First, I wish to report to you that the Hispanic National Bar Association Board of Directors, by a very close vote, did vote to support the nomination of Judge David Souter for the Supreme Court. The board concluded in the statement that it issued that they believed that, if confirmed, Judge Souter would apply the law fairly and would demonstrate the understanding of the impact of civil rights rulings on the Hispanics, women and other minorities of this country.

However, the Hispanic National Bar Association endorsement is not without reservations. It was the concern of many of our members, reflected by some of the members of the board, that Judge Souter lacks familiarity with the largest growing minority group in the United States. He has not been exposed to issues of discrimination as they impact on Hispanics in the areas of education, employment, voting rights, and the delivery of other social services.

Our board members also raise concerns regarding the Judge's positions when he was an assistant attorney general, regarding the Voting Rights Act of 1965.

While the *United States v. New Hampshire* case, that has been discussed here often, may have been decided on what some consider procedural matters, the role of an advocate is different than that of a Supreme Court Justice, and our board was concerned that his role as an advocate showed a lack of sensitivity for the impact that his positions have on the concerns of minorities.

Finally, concerns have been raised regarding Judge Souter's lack of experience and sensitivity on issues that are of concern to women, in general, and Hispanic women, in particular.

While we would concede that there is no direct nexus between Judge Souter's exposure to these issues and perhaps his compe-

tence to serve as a justice, they do raise concerns which were reflected in the discussions of our members.

We have chosen, however, to give Judge Souter the benefit of the doubt and have chosen to be optimistic about the future of justice as administered by the Supreme Court and by a Supreme Court that would include Judge Souter.

We are aware that many attorneys would find that Judge Souter does not have the broad-based and favorable record on civil rights. Our association is a bar association and our membership has much broader concerns. When we voted to endorse Judge Souter, we looked at his legal scholarship and the totality of his career and experience.

We would recommend that Judge Souter, however, read the case of *Hernandez v. Texas* and the cases that followed which laid the groundwork for the Supreme Court's determination of concerns involving Hispanics.

Our association will stand ready to assist Judge Souter at any time and we would formally invite Judge Souter to our next Hispanic National Bar convention, which will be held in San Antonio this fall. We have extended similar invitations to other nominees and will do so in the future.

I thank you very much for your attention.

[The statement of Mr. Ruiz follows:]

TESTIMONY OF THE HISPANIC NATIONAL BAR ASSOCIATION  
PRESENTED BY ROBERT RUIZ, NATIONAL PRESIDENT  
SEPTEMBER 18, 1990

THANK YOU FOR AFFORDING ME TO THE OPPORTUNITY TO TESTIFY BEFORE YOU TODAY. AT THIS TIME I WOULD ALSO PUBLICLY THANK THE HISPANIC NATIONAL BAR MEMBERS WHO GAVE THEIR TIME TO REVIEW THE MATERIAL AND DRAFT SUGGESTIONS THAT WERE CONSIDERED FOR THIS TESTIMONY.

AS THIS COMMITTEE KNOWS, THIS IS THE SECOND TIME THAT THE HNBA HAS TESTIFIED CONCERNING THE NOMINATION OF A U.S. SUPREME COURT JUSTICE. THE RECORD REFLECTS THAT WE TESTIFIED THAT JUSTICE KENNEDY WAS QUALIFIED TO SERVE AS A JUSTICE OF THE U.S. SUPREME COURT.

I AM HERE TO TESTIFY TO THIS COMMITTEE THAT THE HNBA BOARD OF DIRECTORS, HAS VOTED TO ENDORSE THE NOMINATION OF JUDGE SOUTER AS A JUSTICE OF THE U.S. SUPREME COURT.

AS I HAVE NOTED, "THE HNBA BELIEVES THAT IF CONFIRMED JUDGE SOUTER WILL APPLY THE LAW FAIRLY AND WILL DEMONSTRATE AN

UNDERSTANDING OF THE IMPACT OF CIVIL RIGHTS RULINGS ON HISPANICS, WOMEN AND OTHER MINORITIES." HOWEVER, THE HNBA'S ENDORSEMENT IS NOT WITHOUT RESERVATIONS. A SUBSTANTIAL NUMBER OF OUR MEMBERSHIP IS CONCERNED THAT JUDGE SOUTER IS NOT FAMILIAR WITH THE FASTEST GROWING POPULATION IN THE UNITED STATES. AS A NEW HAMPSHIRE NATIVE, JUDGE SOUTER, HAS NOT BEEN EXPOSED TO THE ISSUES OF DISCRIMINATION OF HISPANICS IN SCHOOLS, WORK, AND IN HEALTH CARE, OR THE ISSUE OF BILINGUAL EDUCATION. HOWEVER, BECAUSE OF HIS LACK OF KNOWLEDGE, HNBA, DOES NOT PRESUME JUDGE SOUTER IS NOT QUALIFIED TO SERVE AS SUPREME COURT JUSTICE. THERE IS NO DIRECT NEXUS BETWEEN LACK OF EXPOSURE TO THESE ISSUES AND COMPETENCE TO BE A JUDGE OR A JUSTICE. INDEED, IF THAT WERE THE STANDARD VERY FEW PAST AND PRESENT JUSTICES WOULD HAVE QUALIFIED.

IN DISCUSSION PRIOR TO THE VOTE TO ENDORSE JUDGE SOUTER, THE HNBA BOARD EXPRESS CONCERN REGARDING THE JUDGE'S POSITIONS, WHEN HE WAS THE ASSISTANT ATTORNEY GENERAL, REGARDING VOTING RIGHTS ACT OF 1965, IN THE CASE OF UNITED STATES OF AMERICA V. STATE OF NEW HAMPSHIRE. WE ARE AWARE THAT THE CASE WAS ARGUED ON A PROCEDURAL

POINT AND ULTIMATELY THE HNBA LEADERSHIP REACHED THE SAME CONCLUSION THAT JUDGE SOUTER POINTED OUT ON HIS TESTIMONY HERE LAST THURSDAY, THE DISTINCTION BETWEEN A JUSTICE OF THE SUPREME COURT AND AN ADVOCATE FOR THE STATE OF NEW HAMPSHIRE ARE VERY DIFFERENT ROLES. SURELY, WE DO NOT WANT THAT SAME STANDARD HELD FOR A HISPANIC JUSTICE NOMINEE. THAT IS, THE VIEWS OF ATTORNEYS ARE ALWAYS REFLECTIVE OF HIS OTHER CLIENTS' VIEWS.

WE WERE ALSO IMPRESSED WITH JUDGE SOUTER'S REAL LIFE EXPERIENCES AS HE RELATED THEM TO SENATOR METZENBAUM CONCERNING HIS EMPATHY WITH THE STUDENT FORCED TO AGONIZE OVER THE ISSUE OF ABORTION. AS YOU RECALL WHEN HE AS A PROCTOR AT HARVARD LAW SCHOOL, HE COUNSELED AN ANGUISHED STUDENT ABOUT HIS PREGNANT GIRLFRIEND. WE ALSO THINK THAT HIS POINT OF NOT REVEALING NAMES WITH RESPECT FOR THE PRIVACY OF THE PEOPLE INVOLVED SHOWED GOOD JUDGEMENT. THERE ARE QUESTIONS AMONG THE HNBA WHETHER JUDGE SOUTER HAS ENOUGH LIFE EXPERIENCES TO ISSUES OF GREAT CONCERN TO WOMEN IN GENERAL AND HISPANIC WOMEN IN PARTICULAR. THE HNBA BOARD, ON WHICH HISPANIC WOMEN ARE REPRESENTED IN SIGNIFICANT NUMBERS, HAVE CHOSEN

TO GIVE JUDGE SOUTER THE BENEFIT OF THE DOUBT. WE HOPE HE WILL ADMINISTER JUSTICE FAIRLY, REGARDLESS OF HIS LIMITED LIFE EXPERIENCES. THE HNBA HAS CHOSEN TO BE OPTIMISTIC ABOUT THE FUTURE OF JUSTICE AS ADMINISTERED BY THE U.S. SUPREME COURT.

WITH THE ABOVE IN MIND, AS A MATTER OF LAW, THE HNBA KNOWS THAT THE PRESIDENT HAS THE RIGHT TO NOMINATE THE JUSTICE OF THE SUPREME COURT. WE KNOW THAT SELECTION PROCESS IS SUBJECTIVE. WE NOTE THAT JUDGE SOUTER WAS SELECTED OVER MANY QUALIFIED HISPANIC MEN AND WOMEN ATTORNEYS WHOSE CREDENTIALS ARE EQUAL TO AND IN SOME INSTANCES SURPASS THOSE OF JUDGE SOUTER. WE KNOW THAT IN THE HISTORY OF THIS COUNTRY THERE HAS NEVER BEEN ONE PRESIDENT THAT HAS GIVEN THE OPPORTUNITY TO A HISPANIC TO BE PLUCKED OUT OF ANONYMITY TO SERVE ON THE UNITED STATES SUPREME COURT. HOWEVER, AS OFFICERS OF THE COURT, THE HNBA BELIEVES THAT IT IS REASONABLE THAT THE PRESIDENT'S NOMINATION IS COMPETENT AND HAS AND WILL HAVE THE BEST INTEREST OF THE U.S. CONSTITUTION AND THE AMERICAN PEOPLE IN MIND AS A JUSTICE OF THE SUPREME COURT. WE TRUST THAT JUSTICE SOUTER, IF CONFIRMED, WILL BE ABLE TO PROJECT THE EXPERIENCES OF SENATOR

RUDMAN'S DISCRIMINATION AS A JEW TO HISPANICS AND OTHER DISADVANTAGED PEOPLES IN THIS COUNTRY TODAY.

WHEN JUDGE SOUTER TESTIFIED ON THURSDAY, NOTING THAT "WITH RESPECT TO SOCIETAL PROBLEMS, NONE IS MORE TRAGIC AND DEMANDING THAN...DISCRIMINATION IN MATTERS OF RACE." WE TRUST THAT HE HOLDS THAT SAME SENSE OF URGENCY AS IT RELATES TO ALL CIVIL RIGHTS MATTERS INCLUDING THAT OF NATIONAL ORIGIN IN GENERAL AND HISPANIC PEOPLE IN PARTICULAR. GIVEN THE UNDISPUTED, YET NOT WELL KNOWN, FACT THAT HISPANICS ARE THE ONLY ONES THAT ARE UNDER-REPRESENTED IN THE FEDERAL GOVERNMENT BASED ON NATIONAL ORIGIN, RACE, SEX, AGE, COLOR, RELIGION, OR HANDICAPPED AND GIVEN THE UNDISPUTED FACT THAT THE HISPANIC DROP OUT RATE AT THE HIGH SCHOOL LEVEL IN THIS COUNTRY IS ABOUT 50%.

THE HNBA IS WELL AWARE THAT RELATIVE TO MANY ATTORNEYS AND JURISTS IN THE UNITED STATES, JUDGE SOUTER DOES NOT HAVE A BROAD BASE PROVEN RECORD IN CIVIL RIGHTS ISSUES. HOWEVER, THE HNBA IS A BAR ASSOCIATION, WITH A BASE MUCH BROADER THAN JUST CIVIL RIGHTS, AND IT IS BASED ON THIS BROAD BASED MEMBERSHIP THAT WE VOTED TO

ENDORSE JUDGE SOUTER, GIVEN THE TOTALITY OF HIS DISTINGUISHED CAREER AND HIS OUTSTANDING LEGAL SCHOLARSHIP. EVEN THOUGH THE HNBA IS NOT UNANIMOUS IN THEIR ENDORSEMENT OF JUDGE SOUTER, THE MAJORITY OF THE BOARD DOES SUPPORT HIS ENDORSEMENT.

IN AN EFFORT FOR THE JUSTICE NOMINEE TO BE AFFORDED A BETTER OPPORTUNITY TO BECOME FAMILIAR WITH THE HISPANIC LEGAL COMMUNITY IN PARTICULAR AND THE DIVERSE HISPANIC POPULATION IN GENERAL, WE FORMALLY INVITE HIM ON THE RECORD TO OUR NEXT HISPANIC NATIONAL BAR CONVENTION TO BE HELD IN SAN ANTONIO, TEXAS, NEXT FALL. FOR THE RECORD, JUSTICE SANDRA DAY O'CONNER, ADDRESSED THE HNBA IN 1983, IN WASHINGTON, D.C., AND JUSTICE ANTHONY KENNEDY ADDRESSED THE HNBA IN 1988 IN ALBUQUERQUE. THIS REQUEST SHOULD BE TAKEN EVEN MORE SERIOUSLY BECAUSE, UNLIKE JUSTICE O'CONNER OR JUSTICE KENNEDY, FROM ARIZONA AND CALIFORNIA RESPECTIVELY BOTH WITH SIZABLE HISPANIC POPULATIONS, JUDGE SOUTER DOES NOT HAVE THE EXPERIENCE, BACKGROUND OR HISTORY OF THE HISPANIC COMMUNITY. SUCH LACK OF KNOWLEDGE DOES NOT MAKE HIM UNACCEPTABLE AS A SUPREME COURT NOMINEE; HOWEVER, IN THE MEANTIME WE WOULD RECOMMEND THAT JUDGE SOUTER READ THE CASE OF

HERNANDEZ V. TEXAS AND ITS PROGENY SO HE MAY BETTER UNDERSTAND HOW THE U.S. SUPREME COURT HAS ADDRESSED THE CONCERNS OF HISPANICS IN THIS COUNTRY.

THANK YOU VERY MUCH FOR YOUR TIME AND ATTENTION. WE HOPE THE NEXT TIME THAT WE ARE AFFORDED THE OPPORTUNITY TO TESTIFY THAT WE WILL BE TESTIFYING TO ENDORSE THE FIRST HISPANIC SUPREME COURT NOMINEE OF THE UNITED STATES. GRACIAS. ARE THERE ANY QUESTIONS AT THIS TIME FROM ANY MEMBERS OF THIS COMMITTEE.

The CHAIRMAN. Thank you very much.

Now, although we have questions, we can submit them to you in writing. I know you have a very difficult scheduling problem, so as far as the Chair is concerned, you are excused or you can stay. It is totally up to you.

Mr. RUIZ. I will stay, Mr. Chairman.

The CHAIRMAN. All right.

Mr. Dunfey, how are you?

Mr. DUNFEY. I am fine, Senator.

The CHAIRMAN. It is good to see you.

Mr. DUNFEY. It is nice to see you again.

The CHAIRMAN. Welcome and please proceed with whatever testimony you would like to give.

#### STATEMENT OF WILLIAM L. DUNFEY

Mr. DUNFEY. Thank you, Senator.

The most recent census will probably reveal that we have slightly over 1 million in the State of New Hampshire. However, if you live in the Granite State and become involved in local or State affairs, you more often think of it as a small community, wherein at one time or another you meet just about every man and woman who is active in community affairs.

I am not an attorney. My profession has been the hotel business, with New Hampshire and New England forming the base for what has developed into an international hotel company. In the process of trying to repay New Hampshire for the many good things that it has provided me and my family, I have accepted service on various organizations devoted to maintaining and improving the quality of life in my State.

It was in 1980 that I was asked to serve on the board of overseers of the Dartmouth Medical School. In 1981, Judge David Souter was also appointed a member of the board of overseers at Dartmouth. Our service on the board overlapped about 5 years, 1981-86.

As a former Democratic State chairman and party activist, I was aware that David Souter was an appointee of Republican State officials to positions in the attorney general's office and the judiciary.

In our work together, David Souter won my complete respect, just as his distinguished career as a judge has won the respect of the people of New Hampshire, whatever their political and philosophical views.

Judge Souter brings the unusual combination of serious attention to his responsibilities, along with individual accountability for one's actions.

This approach is not unique to New Hampshire or New England. It is a trait that is fundamental to the fairness of the American system of justice that has produced outstanding members of the Supreme Court.

Judge Souter's reputation for guarding his privacy and devoting his personal time to activities that physically and mentally recharge his batteries should provide a good perspective for the many challenges that the Supreme Court will face in the 1990's.

In New Hampshire, almost without exception, we are very proud of the nomination of Judge Souter, and I am especially honored to have been asked to support and endorse that nomination.

The CHAIRMAN. Thank you, Mr. Dunfey.

Mr. Martin.

#### STATEMENT OF R. EDEN MARTIN

Mr. MARTIN. Thank you very much, Senator.

I am here primarily as a character witness. I must say at the outset that I am probably unable to be strictly neutral about it. David Souter is a close personal friend of mine and has been for many years.

I got to know David Souter when I was in law school. We were proctors together at Harvard College. We were next door neighbors in a dormitory for 2 years. It was his second and third year in law school and my first and second, and we became very close personal friends at that time, and I feel that I knew him very well then, and I have continued to be a friend of his over the years.

I think the reason I am here is because that appeared in the Chicago Tribune on August 21, 1990. It was a commentary on the human quality of David Souter. I believe the committee has been provided with copies, and I do not have any separate written statement.

The CHAIRMAN. That is correct, we do.

Mr. MARTIN. I wrote that article, because it seemed to me that the initial news commentaries that were coming out about David Souter were somewhat misleading. They were accurate in the sense that they reflected his intelligence, but they suggested that he was an excessively bookish individual, somewhat antisocial, somewhat monkish, somewhat ascetic, and not very much fun, or at least some of the articles suggested that, and it seemed to me that that gave quite an unfair and misleading portrait of the man and I wanted to set it straight, which was the reason that I wrote the article.

As I indicated there, he is sociable, he is sensitive to the feelings and concerns of others. I quoted one of the Harvard deans who indicated that he showed compassion and understanding in dealing with the freshmen who were his charges at Harvard, and I have submitted the article and I would be happy to answer any questions that you have.

Thank you.

The CHAIRMAN. I thank you very much. The article will also be placed in the record.

[The article referred to follows:]

September 18, 1990 Chicago Tribune p. 15

## Reflections on the human quality of David Souter

By R. Eden Martin

What kind of person is Judge David Hackett Souter, the president's nominee for the Supreme Court? Because he is not a well-known public figure, reporters have scrambled the past several weeks to find people who knew him and could help answer that question. In so scrambling, they discovered many students in the judge's law school class who do not remember him.

Souter and I were proctors and freshman advisors together at Harvard College for two years, from 1964-66. Our job was to live in the freshman residence halls with the freshmen, provide personal and academic counseling, and make sure that college rules were followed. For these services, we received our room and board, which was a significant part of our law school expenses.

Souter was then in his second and third years at Harvard Law School and I was in my first and second. We lived in adjacent entries in Straus Hall, a freshman residence hall at the corner of Harvard Yard, next to Harvard Square. Because proctoring was time consuming, and also because we lived and ate our meals in the Yard rather than at the law school, many law student proctors did not become parochial well known to their law school classmates.

The news articles about Judge Souter have been generally accurate except for a tendency to paint him as somewhat bookish and antisocial. That picture could not be more inaccurate. It is true, as widely reported, that Judge Souter has a first-rate mind—and that in addition to law, he is widely read in history, literature and philosophy.

But it is not true that at Harvard he let his legal studies or his intellect interfere with his social life. Souter loved a good party, and dated a number of intelligent and attractive women. Also, no one was madder at the end of the day to put aside the books, light a fire, uncork a bottle of Scotch (usually cheap), and launch a conversation on virtually any subject. No one in the Yard was a better talker and no one had more interesting things to say.

To a Midwesterner, Harvard University then seemed disproportionately populated by students from wealthy Eastern families and prep school backgrounds. Despite his New England origins, his fine educational background—Harvard College and Magdalen College, Oxford—and his easy entry to the more rarefied social circles, David Souter did not tie himself to any narrow social group. His family was far from wealthy, and he had attended a small public high school rather than a prep school.

As a proctor, he had a natural ability to sense when

R. Eden Martin is a Chicago lawyer and a Democrat.



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his freshman advisees had problems and a relaxed way of making them comfortable and offering advice. According to one of the deans who supervised our part of the Yard and knew him well, Souter showed "compassion and understanding" in dealing with the freshmen who lived in his entry. An Episcopalian, his closest personal friends among the lawyer-proctor group included a Catholic Irishman from Cleveland, a Jewish student from New York, and a small-town Midwesterner from downstate Illinois.

Some reporters have wondered why he did not graduate at the very top of his law school class. It is an interesting question. Personally, I do not doubt that he could have. He was at the top of his class in college and won the Rhodes Scholarship. No one who knows him doubts his unusual intellectual gifts.

I think the answer lies in large part in his values. The law school was full of smart people competing to get the best grades in order to qualify for clerkships or positions with top firms and companies. In this competitively-charged environment, David Souter was less competitive about grade competition than anyone I knew. He had already proved himself academically—first at the college and then at Oxford. Also, he had no interest in working on Wall Street or LaSalle Street.

I remember him saying several times, only half in jest, that he intended to go back home, practice law and raise pigs. Money may not have been totally

irrelevant, but it ranked pretty low on his personal priority list. Besides, being a grind would have interfered with his social life. So Souter studied what he enjoyed, did very well when he worked at it, and somehow managed to do well enough even when he was not fully engaged by the subject.

If confirmed, David Souter will obviously not bring an empty mind to the Supreme Court, but it will also not be a closed one. Like Justice 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.

Predicting how he will decide particular cases is also a risky business. However, one may safely predict that he will respect the Holmesian tradition of the limited role of courts in a democratic system of government, and that, consistent with this tradition, he will fully support and give effect to the fundamental freedoms of speech, belief and expression, and the protections of due process and equal protection embodied in the Constitution.

One might even venture to predict that, like Justice Holmes, he will from time to time surprise the president who nominated him to serve on our highest court.

The CHAIRMAN. Let us move now to Judge Hall. Welcome, it is kind of you to come.

#### STATEMENT OF JUDGE SOPHIA H. HALL

Judge HALL. I am delighted to be here.

My name is Sophia H. Hall, and I am a judge of the Circuit Court of Cook County, IL, and I have an idea of how you might be feeling after this long trial today.

The CHAIRMAN. I bet you know better than any of us right now.

Judge HALL. I am the president of the National Association of Women Judges. We are a group of almost 1,000 men and women and we are judges of the State courts as well as the Federal courts.

One of our projects is the promotion of gender fairness in the administration of the courts, and one of the programs we have is the National Judicial Education Program to promote equality for men and women in the courts. These programs enable judges to understand how stereotypes and biases about the role of women and men affect factfinding, decisionmaking, as well as courtroom interaction.

The educational programs are necessary, because socially ingrained norms, like women should be at home with the children while the men go to war, may prevent judges from giving credence to contrary evidence in particular cases. The need for these programs has been researched by over 30 State-sponsored gender bias task forces around the country. Over 10 of those task forces have reported so far, and they have reported that gender bias does exist in our court systems.

We believe that this committee needs to know whether Judge David Souter is pledged to basic concepts of fairness, and we have two reasons for this concern. One is his expressed original intent philosophy, which was indicated in a dissent to one of the interpretations of the New Hampshire constitution, and the other is the comments of a close friend of his, Dr. Melvin Levin, another Rhodes Scholar, who stated that he believed that Judge Souter is in the 18th century mold.

These indicators raise concerns, because learned people know that when the U.S. Constitution was written in the 1780's, their original intent apparently was to provide constitutional protections for white males only; women and blacks were under the law, separate and unequal, and that separate and unequal status has continued under Supreme Court case law until the 1970's, when *Reed v. Reed* was decided. In that case, the Supreme Court utilized the 14th amendment, adopted more than 100 years earlier, to strike down an Idaho law. The Idaho law gave an automatic preference to men in appointments as administrators of estates.

The *Reed* case was a tremendous breakthrough for guaranteeing the rights of women under the U.S. Constitution, and that Court's decision was consistent with the changed role of women in today's society.

I think you have asked questions already about what Judge Souter thinks of the reasoning in the *Reed* case and whether or not he thinks that this is an original intent case. I think you probably have asked questions about what Judge Souter thinks of the rea-

soning in subsequent cases which expanded the rights of women under the U.S. Constitution.

You need to examine Judge Souter's testimony and his record to determine whether he harbors 18th century biases as to the proper role for men and women in present day society. We firmly believe this is a crucial area for you to explore.

In addition, this committee must determine Judge Souter's judicial philosophy; how does he reconcile his concepts of stare decisis with his original intent thesis; as a conservative, what does he think of the judicial activism of today's Supreme Court.

You must determine from his testimony and his record whether Judge Souter is an 18th century judge or, on the contrary, is a qualified candidate to resolve the 20th century problems facing the Supreme Court.

The National Association of Women Judges appreciates this opportunity to speak to you. We come here neither to speak for Judge Souter nor against him. We, however, urge a searching inquiry into his testimony and his record, so you all can know Judge Souter's views of basic concepts of fairness and, thus, make a reasoned decision on whether he should be confirmed as an Associate Justice of the Supreme Court of the United States.

Thank you.

[Judge Hall submitted the following memo for the record:]

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September 25, 1990

Senator Joseph R. Biden, Jr.  
Senate Judiciary Committee  
Russell Senate Office Building  
Room 221  
Washington, DC 20510

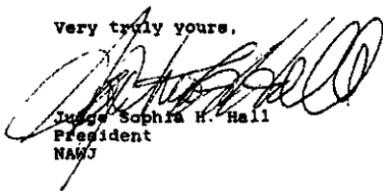
Re: Judge David Souter

Dear Senator Biden,

Enclosed is the memo you requested. I have covered as much of the material as the short time allows. I hope it will be helpful to you and your Committee.

Thank you on behalf of the NAWJ for your endurance and courtesy in those rather grueling hearings.

Very truly yours,



Judge Sophie H. Hall  
President  
NAWJ

SRH:rme

enc.

# National Association of Women Judges

## MEMORANDUM

TO: Senator Joseph R. Biden, Jr.  
Chair, United States Senate Judiciary Committee

FROM: Judge Sophia H. Hall  
President, National Association of Women Judges

RE: Judge David Souter

DATE: September 28, 1990

At your request, I have reviewed the excerpts of Judge Souter's testimony which you have provided. I do not find a significant difference between his original meaning doctrine and the usual original intent process of analysis. Accordingly, I find no reason to change the NAWJ's statement of concern.

In In Re Estate of Dionne, Judge Souter's dissent demonstrates his view that you determine the framers' understanding of constitutional language by looking at the evidence of the thinking at the time the language was adopted. Judge Souter's statement that the decision in Brown v. Board of Education is consistent with his doctrine of original meaning, as exemplified in Dionne, is not supported by his testimony because in discussing Brown he does not use the same process of analysis he used in Dionne. He uses a different analysis which I call the doctrine of "previously ignored evidence."

Judge Souter attempts to distance himself from conventional views of the original intent doctrine by narrowly defining the doctrine.

"I do not believe that the appropriate criterion of constitutional meaning is this sense of

original intent, that you may never apply a provision to any subject except the subject specifically intended by the people who adopted it. I suppose the most spectacular example of the significance of this is the case of Brown v. Board of Education." 9/13 p. 214

"... when I speak of original intent ..., I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted or ratified the provision. ...." 9/17 p. 195

He contrasts his doctrine of original meaning by saying that it is not confined to determining instances or problems in the minds of the framers.

"What we are looking for then, when we look for its original meaning is the principle that was intended to be applied, and if that principle is broad enough to apply to school desegregation, as it clearly was, then that was an appropriate application for it and Brown was undoubtedly correctly decided." 9/13 p. 218

"We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all." 9/14 p. 7

Judge Souter explained his doctrine of original meaning by referring to his analysis in his dissent in Dionne. In that case, the New Hampshire Supreme Court was applying a phrase in its constitution which provided that "[e]very subject of this state is entitled... to obtain right and justice freely without being obligated to purchase it...." In his dissent Judge Souter stated his original meaning doctrine in somewhat different terms than he uses now. "The court's interpretive task is therefore to determine the meaning of the article 14 language as it was

understood when the framers proposed it and the people ratified it as part of the original constitutional text...." 518 A.2d at 181.

In the opinion, he stated that the "...[e]vidence of that understanding comes from two sources. The first is the body of scholarly and judicial commentary on the meaning of the clause of the Magna Carta of 1215..." from which the New Hampshire constitutional language was derived. 518 A.2d at 181 The second source was the history of New Hampshire statutes" "... as a record of what New Hampshire judges and legislators regarded as consistent with English liberties during the early period of our history, and as consistent with the State Constitution after 1784." 518 A.2d at 182 Judge Souter, based on this evidence of the framers' understanding, found that "...the people who framed and adopted article 14 meant principally to guard against bribery of the sort that had corrupted the early medieval judiciary." 518 A.2d at 183-184

In his testimony, Judge Souter described his original meaning analytical process. He said that you first must look at the text. 9/14 p. 60 He did not characterize the next step, but, from the process he used in Dionne, the second step is to look at the evidence of the understanding of the framers at the time they adopted it. In Dionne, he found that evidence in scholarly and judicial commentary of the time and in the conduct of legislators and judges.

Judge Souter, however, does not use this analytical process when he explained how the decision in Brown v. Board of Education

is consistent with his original meaning method of analysis. He did state that first you look at the text of the equal protection clause. It is broad and not limited to race. 9/14 p. 60 The next step he should have testified to, pursuant to his Dionna process, would be to find the framers' understanding when they used the language, by looking at the evidence of the thinking of the times when the Fourteenth Amendment was passed or when Plessy v. Ferguson was decided 30 years later.

Instead, Judge Souter discusses a different analytical process which I call the doctrine of "previously ignored evidence."

"The majority who decide Plessy v. Ferguson in 1896 accepted as a matter of fact that in the context in which they were applying the Fourteenth Amendment there could be separateness and equality. Whatever else we may see in Brown v. Board, there is one thing that we see very clearly and that is that the Court was saying you may no longer in applying this separate but equal doctrine, ignore the evidence of non-tangible effects. When you accept that evidence, then you see that you cannot have separateness and equality.

In 1954 they saw something they did not see in 1896.... ..they saw an application for a principle which was not seen in 1896, and they saw the factual impossibility of applying the terms of 1896 in 1954.

I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses." 9/17 p. 196-197 (Emphasis supplied)

In this testimony, therefore, Judge Souter proposes to disregard what the framers "accepted as a matter of fact" at the time, and use evidence that was presumably ignored by the

framers. This is obviously not the analysis Judge Souter used in Dionna. There, he assiduously relied on the thinking of the times rather than, as here, hypothesize that thinking by supplying evidence not then considered. If he had used his Brown analysis in Dionna, he might have sided with the majority.

In conclusion, Judge Souter's original meaning doctrine as used in Dionna relies on contemporaneous evidence to understand the meaning of language used at the time. His explanation of why the Brown decision is consistent with the Dionna case is not persuasive because he uses a different analysis. Whether Judge Souter's analysis is called original intent or original meaning, the NAWJ finds his analytical process cause for concern, and, particularly so, in light of his shift in analysis in discussing Brown before the Committee.

The CHAIRMAN. Judge, I want to thank you for being here. By the way, I want to thank you for your organization. It has had an impact and a growing impact on hopefully sensitizing—I was going to say us all, but I would like to see in the choice of all nominees to the Court, I would like to see the administration sensitized a little bit more. I really mean it, I think your organization is making a very positive impact and it will only grow.

Thank you for being here.

Let me go to Ms. Coleman and then what we will do is we will go to questions.

#### STATEMENT OF DORIS COLEMAN

Ms. COLEMAN. Mr. Chairman and members of the committee, I am honored to be a part of this historic event. I think any time we discuss an appointment of a Supreme Court Justice, it is historic, and this man is going to play an important part in all of our lives.

I am here as president of California Women Lawyers, the largest women's bar association in the world. With 23,000 women lawyers, judges, and law professors in California, our number is nearly as great as the population in the Capital of New Hampshire, but it is, I am certain, growing at a faster rate.

This comparison is meant to emphasize the size and diversity of California Women Lawyers. We are a nonpartisan organization, with members who are bright, educated, and articulate. Our members and affiliates do not agree on all issues, but we do not knee jerk any issue, but I do want to tell you that there are some issues that we have clear stated positions on. My purpose in being here today is to share some of those positions with you.

We believe that a woman's right to make decisions about her own body and her life in connection with reproductive rights is a fundamental constitutional right, and the most rigid scrutiny test must be applied when that right is in jeopardy. We believe in choice. We believe choice is a fundamental right guaranteed by the Constitution. If that right is taken away, it will be the first time in history that a fundamental right, once recognized, has been taken away. We have always gone forward, never back.

As we approach the 21st century, the message is still clear that it is OK to discriminate against women. Before adjourning for its summer session, the House of Representatives passed a version of the Civil Rights Act of 1990 that placed a cap on damages that can be awarded to women in cases of sex discrimination, without placing a similar cap on discrimination actions brought based on race. That sends a powerful message and it is the wrong message.

Last March, the draft of California's 3-year study of gender bias in the courts was released. The study produced a massive report. Even those who expected to find some bias, were surprised by its pervasiveness. Chief Justice Lucas of California said at the first hearing in Los Angeles that he hoped that our State, with its reputation for progressive and fair social attitudes, would be different. But it did not turn out that way. California, like the rest of the Nation, has strange notions about women. We found that the discrimination experienced by women in California was the same discrimination experienced by women throughout the Nation.

The study not only confirmed the existence of sex discrimination in the judicial system, but it concluded that substantial amelioration of the problem of gender-biased conduct in the courtroom would be accomplished, if more women were appointed to the judicial offices. I suspect that substantial amelioration to many problems in the workplace would be accomplished by more women in leadership and policymaking positions.

There is no such thing as being almost equal; the bubble is either in the middle or the floor is not level. No one likes quotas and few believe they are necessary, but there is a need for some mechanism to correct the problem, and the problem is reflected by numbers. Of your Judiciary Committee of 14, none are women; the Senate is 98 percent male; women constitute a bare 5 to 10 percent of America's total judiciary, depending upon the criteria used for counting; words and phrases such as "glass ceiling, revolving doors" and "mommy track" have evolved to describe the discrimination that women find in the workplace. The next Supreme Court Justice must recognize a long established discrimination against women and the need for mechanisms to correct these injustices.

I would like to share a list of concerns which were extracted from letters exchanged between women lawyers between 1880 and 1900. This is the turn of the last century. They were:

First, the power disadvantage of women in relation to men with whom they associated and competed; second, the balancing of heavy domestic responsibilities for women, in addition to their demand professional work; third, the concern about the condition and quality of life for women; and, fourth, the discrimination which checked their hopes for professional security and advancement—almost 100 years ago.

When California Women Lawyers was formed in 1975, almost 100 years after these problems were noted by other women lawyers, our goals echoed that list. If we are indeed making progress, we are traveling at an exceedingly slow pace.

Finally, I want to ask the committee, in reaching its decision, and each of you individually, to make sure that you are convinced that Judge Souter is enlightened and sensitive to women's issues, and I ask that you keep women's issues foremost in your minds. We are depending on you.

The CHAIRMAN. Thank you very much.

I am going to yield to my colleague, who has one question for all of you, and then I will have some questions.

Senator THURMOND. Thank you very much, Mr. Chairman.

First, I have a question for you gentlemen, Mr. Martin, Mr. Dunfey, and Mr. Ruiz. Is it your opinion that Judge Souter has the competency, the dedication, the courage and the integrity and the fairness to be a Justice of the Supreme Court of the United States? We will start with you, Mr. Martin.

Mr. MARTIN. I certainly do.

Senator THURMOND. Mr. Dunfey.

Mr. DUNFEY. My answer is unequivocally yes.

Senator THURMOND. Mr. Ruiz.

Mr. RUIZ. Our board review the qualifications of—

Senator THURMOND. I cannot hear you.

Mr. RUIZ. When the board reviewed the qualifications of the nominee, it was our determination that he did have the qualifications, the competence, and the judicial temperament to hold the office. Our concerns, as I expressed them to you, went to other matters and that had to do with his exposure to some of the issues that concern our organization, which in a sense are not too dissimilar from other views that you have heard from the other end of the table.

The CHAIRMAN. Your organization has endorsed—

Mr. RUIZ. Yes, we have.

The CHAIRMAN [continuing]. But on a close vote, as you characterized it.

Mr. RUIZ. Absolutely.

The CHAIRMAN. You have endorsed, by a close vote.

Senator THURMOND. Now, Judge Hall and Judge Coleman, I understand you both may have some question about the fairness of the judge, I believe you raised some question like that. Now, I presume you have no question about the judge's integrity or judicial temperament, then, or professional qualifications?

Judge HALL. Since I only know what I have read in the newspapers, so far they have not seemed to indicate any problem with that, and of course what I have heard during the hearing today.

Senator THURMOND. Of course, as a matter of fairness, the committee will have to act on that, as well as other questions involved.

Judge Coleman, did you want to make any statement on that?

Ms. COLEMAN. No, I do not, Senator Thurmond. I am not a judge. I am sitting next to the judge. I am the president of California Women Lawyers, and it is in that capacity that I am here today.

From what I have read, I would recognize that Judge Souter is probably a constitutional scholar.

Senator THURMOND. Well, you look like a judge, anyway. [Laughter.]

Ms. COLEMAN. Thank you.

Senator THURMOND. We thank all of you witnesses for coming and we appreciate your presentations. Thank you very much.

Judge HALL. Thank you.

Ms. COLEMAN. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. I am sorry to keep you so long and I apologize to everyone, including those who expected to be on the 7 o'clock train, if they are watching. I apologize to them, as well, but this is very important and your testimony, as far as I am concerned is very important.

Let me ask a few questions here, if I may, and I will not keep you long, I promise. Mr. Ruiz, what is the most prominent reason given by those in your organization who voted against supporting Judge Souter becoming Justice Souter?

Mr. RUIZ. The most frequently expressed concern was, one that is not too unfamiliar to the members of this committee, in that three was very little information about what he would do as a member of the U.S. Supreme Court and what he would do vis-a-vis civil rights matters and issues of particular concern to the Hispanic members of our organization.

The CHAIRMAN. Now, was your vote taken before or after or during the time the Judge was testifying?

Mr. RUIZ. The vote was taken before the testimony began.

The CHAIRMAN. All right.

Now, Judge Hall, your concern was the same as mine, I guess, if you watched any of the hearings, and I spent most of my time or at least half of my time questioning the judge, I think extensively, I would characterize it as extensively, on his interpretivist view of the Constitution and the notion of original intention, and he very clearly stated and very clearly distinguished himself from—I am characterizing this now—the Ed Meeses and the Judge Borks of the world—he did not use either of those phrases, but they are the ones most recently associated with the notion of original intent, at least before this committee.

He said no, I look at original meaning, which is different than intent. He said, if I am accurately characterizing him, he said original intent means just what you said, Judge Hall, clearly when they wrote the Constitution, it was written not to encompass suffrage or for all citizens, it acknowledged the existence of slavery, et cetera, and so on.

He said if you go back and look at the fifth amendment and read due process in terms of what the intent was at the outset, it would make it very difficult to make the case that there is any substantive due process element; or the 14th amendment, clearly it was written with blacks in mind in the post-Civil War era, and not women, but he said they enshrined principles there; and, in the case of the 14th amendment and women, an interest obviously to which you have testified, he said the equal protection clause meant what it said, the principle was, the principle meaning was that equal protection meant to encompass all human beings.

Therefore, his interpretivist view is fundamentally different than the interpretivist view of others like Judge Bork, for example. Did you have an opportunity to hear any of that testimony?

Judge HALL. No, I did not, and I find it a very interesting distinction. The language that he used in his opinion, that dissenting opinion, the Court's interpretive task is to determine the meaning of constitutional language as it was understood when the Framers proposed it.

The CHAIRMAN. Yes, and he says meaning and he goes to great lengths to make a distinction between meaning and intent.

I would appreciate it, and I am being very serious when I say this, I do not want to make work for you, but I would appreciate it if our staff were to gather for you immediately those exchanges that took place on this issue, if we could get them to you immediately—we will not be voting on the judge for probably 6, 7, 8 days in committee—if you would have a chance to look at it and to tell us whether or not it goes toward answering the question you ask us to answer, and that is you basically said, "Biden, look at this closely, unless you are convinced this guy is sensitized to the concerns, needs and constitutional rights of women, then don't vote for it," I think that is your saying.

Judge HALL. Yes.

The CHAIRMAN. If you think he is not sensitive, don't vote for him; if you think he is, then vote for him, is that the sense of what you are saying?

Judge HALL. I would also like to hear what he has to say about *Brown v. Board of Education*, but the Supreme Court's interpretation of what that meant changed from 1896, when *Plessy v. Ferguson* was decided, to 1954 when *Brown v. Board*—

The CHAIRMAN. You are very sharp.

Judge HALL [continuing]. So when you talk about meaning, it does have a contextual context of the times.

The CHAIRMAN. Well, he argues and he goes to great lengths to distinguish that case and he says that, clearly—well, I will not characterize what he says, I will let you read that.

Judge HALL. I would be delighted to review the testimony and I will get back to you.

The CHAIRMAN. But there is a good deal of testimony on that precise point and I would be interested to hear your view.

Now, Ms. Coleman, you indicated what your concerns are, the concerns of the organization.

Ms. COLEMAN. Right.

The CHAIRMAN. You indicated what our concerns should be, as a committee. You have not drawn a conclusion, I assume, from what you have heard to either allay your fears or reinforce your concerns. Is that correct? Is that a fair statement?

Ms. COLEMAN. Mr. Biden or Senator Biden, I think it—

The CHAIRMAN. Joe is fine, it does not matter. At this hour, you can call me anything. [Laughter.]

Ms. COLEMAN. I think that my organization is not willing to at this point take a position, simply because our members are members of other organizations that have spoken before you today. We have members how belong to NOW, we have members who belong to the ABA, and so from that standpoint I am not going to take a position.

The CHAIRMAN. I see.

Ms. COLEMAN. However, I would like to say that I would be far more comfortable with Judge Souter, if I saw his association with people who are also known to be liberal, as well as those who are merely known to be conservative.

The CHAIRMAN. Well, you are sitting at the table with—I hope you do not mind the characterization, Mr. Dunfey, as one who has characterized in varying degrees of liberal, I have never heard Mr. Dunfey characterized as anything but a liberal, and if you know New Hampshire Democratic politics, the assertion is the reason why “we never win is because we are too liberal,” and you are sitting at the table with one with whom he associated, who is extremely liberal.

Earlier today, there were two very liberal members, present- and past-president of the Bar Association of New Hampshire, who no one has characterized as anything but liberal. So, in New Hampshire, I must acknowledge—Mr. Dunfey, have I mischaracterized you?

Mr. DUNFEY. No; you are very accurate and I think, to take it a step further, in addition to being a Democratic Party State chairman and supporting Judge Souter, I have also been a strong sup-

porter of Planned Parenthood and its aims and a woman's right to choice. Having said all of that, from my acquaintance with David Souter, as a layman, not as an attorney, I would look to him to be a very fairminded jurist on these issues, despite the fact that I have been on the opposite side of the fence.

The CHAIRMAN. Now, when you say "opposite side of the fence," do you assume—

Mr. DUNFEY. I am talking politically.

The CHAIRMAN. Do you mean opposite side of the fence politically, or do you mean opposite side of the fence on those issues that you raised?

Mr. DUNFEY. No; on those issues that I raised, I just wanted to at least explain my own personal feel in support of Planned Parenthood and, having said that and having watched Judge Souter perform in New Hampshire, I still am a strong supporter for this nomination.

The CHAIRMAN. The reason why I raise that, Ms. Coleman, is that one of the things that we are all looking—I should not say all, I will speak only for me—I am looking to determine whether or not Judge Souter has met an overall test of having a judicial philosophy that would encompass and embrace the great traditions of the past, which have acknowledged unenumerated rights, looked toward the expansion of, not the diminishment of those rights, and one that clearly understands that, in my view, the only reasonable reading of the Constitution is one that embraces women in the same way it does men.

I have been searching not make that judgment. I have not made it yet. There are a number of things that lead me to believe, not the least of which is Mr. Dunfey is here. As a matter of fact, when I was seeking another job, I think I was probably too conservative for Mr. Dunfey, if I remember correctly. He liked a fellow from Massachusetts a little better, if I remember correctly.

Mr. DUNFEY. No; it was Governor Bruce Babbitt.

The CHAIRMAN. It was Babbitt. I knew it was not me, I remember that much, which reinforced your good judgment. [Laughter.]

Having said that, it is a very difficult task and that is why I am probing each of you in ways that do not necessarily precisely to whether or not you know exactly what the judge thinks or does not think. It means a great deal to me, and I mean this sincerely, that you are here, Ms. Coleman, representing 23,000 women lawyers, jurists and professors who obviously have concerns.

Ms. COLEMAN. Yes, they do.

The CHAIRMAN. Judge Hall, you have expressed your view well, and, again, I was not being solicitous when I said I would like very much for you to look at the testimony, and I understand why you have not had an opportunity to do that at this point.

As you indicated, Mr. Martin, my failure to ask you questions does not go to my lack of interest in your, it just goes to the fact that the one thing that I am certain of, that anyone with whom David Souter has been a friend or an acquaintance, he has treated them well and he has acted properly.

Mr. MARTIN. Senator, may I make one very brief comment?

The CHAIRMAN. Yes.

Mr. MARTIN. This may, of course, not be determinative, but it strikes me as very interesting. I have listened to the testimony each day and I have listened to it all day today. I have read newspaper accounts that I was able to find, where friends of his or people who know him have expressed their views about him.

Of course, there are organizations that are for him and there are organizations that are against him, but one thing that strikes me as striking and deserving of at least some weight is that, as far as I know, no one has come forward and expressed a view in the newspapers or to commentators or come before this committee who knows him who is not for him, and that is true, whether it is men or women, lawyers or nonlawyers, Democrats or Republicans. I believe it is a true statement that everyone who knows him, who knew him earlier or has known him over his career as a practicing attorney or as a judge, has endorsed him and expressed their support for him.

The CHAIRMAN. Well, I thank you all very, very much for your testimony. Some of you have made a long trip to give it, but it is important and we appreciate your view of your responsibility as conscientious citizens to do it, and I thank you very, very much.

The hearing is adjourned.

[Whereupon, at 7:21 p.m., the committee was adjourned, to reconvene on Wednesday, September 19, 1990, at 10 a.m.]

# NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 19, 1990

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:19 a.m., in room 216, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, DeConcini, Leahy, Heflin, Simon, Thurmond, Grassley, Specter, and Humphrey.

The CHAIRMAN. The committee will please come to order.

Let me again apologize for our late start. Most of us on this panel, all on this panel, have essentially, for the last 5 or 6 or, in some cases, 7 legislative days devoted, as we should, somewhere in excess of 14 or 15 hours a day of doing nothing but this. Quite frankly, our other legislative responsibilities are catching up with us a little bit.

If Senator Kennedy is able to arrive in time or if Senator Heflin is going to be able to stay, I, at 10:30, am supposed to—I am part of a leadership group on the Democratic side meeting to determine what position should be taken relative to the Saudi arms sale, the \$20 billion sale. I will only be in the leader's office for 45 minutes or so, but if I am able to, I should be there. I have been requested by the leadership to be there.

I want to say to the witnesses, I will hear this panel in all probability; but to the witnesses who would come after or any time during the day that I may be in and out on that issue, it is not for a lack of interest. I expect I will be here for 90 percent of all the testimony today.

I know that the chairman of the Agriculture Committee—handling one of the most significant and, from a cost standpoint, one of the most seriously looked at, by him, pieces of legislation we will handle this year—is in what we call, for the public, a markup. That means the House of Representatives has passed a farm bill; the Senate has passed a farm bill. Now they are meeting to reconcile the differences in a multibillion dollar bill. The leader of that group—and his responsibility required him to be there—is the Senator from Vermont.

Let me yield to him for just a moment because he would like to make a brief comment about that.

Senator LEAHY. Mr. Chairman, I appreciate the courtesy. As the Chair knows, I was able to be here by—as we all did—clearing the schedule for virtually every bit of Judge Souter's testimony. I have watched from tapes and from the rebroadcast by C-SPAN and others the testimony and powerful statements of Ms. Michelman, Ms. Wattleton, Ms. Yard, Ms. Smeal, Mr. Rauh and others—I don't mean to leave anybody out of this—my former colleague from my prosecutor's days, Mr. Diamond, and the other attorneys general, former attorneys general who have testified.

I have had a chance to watch, but I am disappointed I have not been able to be here and ask questions as those have gone along. But it is necessary, if we are going to get the 5-year farm bill out, to go back to it, and that is taking an extraordinary amount of my time. I must admit, Mr. Chairman, I am going to have to be borrowing people like Senator Heflin and others for help on that at different times. But the Chair has been extremely gracious in making sure that we have been fitted in and that questions some of us have had have been asked whether we have been here or not. I appreciate that, and I would just apologize for not being here for every minute of it.

The CHAIRMAN. To state the obvious—then we will move on—the same situation pertains for Senators Hatch and Simpson and Grassley and others of us on this committee who have other committee responsibilities. But I suspect I will be able to be here for the vast bulk of it, enough of it. I look at the witness table, and they are looking at me like what in the heck do you have to explain all that for, Biden. There is a real easy reason for having to explain it: To make sure that no one on this panel or any other panel feels they are being slighted. Second, to make clear to our constituents at home that it is not that we are not paying attention, but that there are some other things to do. That is the selfish side of the explanation.

With that, let's begin today's hearing with a very distinguished panel. Our first member of the panel is Wesley Williams, a partner in the very prestigious Washington law firm of Covington and Burling, and it is well beyond Washington, I might add; and Robert L. Beck, immediate past chairman of the board of Mothers Against Drunk Driving, I might add an organization with whom I have worked very closely, and I also might add that I think you have done more to save lives in this country in the last several years than any single organization doing just about anything because of the national consciousness that you have pricked. I compliment you very, very much on your work. Then we have Robert L. Barr, Jr., president of the Southeastern Legal Foundation, Inc.; and a witness who is to be here—and we expect will be here but is not at the moment—Anne Neamon, national coordinator for Citizens and Country.

Now let us begin. If you could attempt to confine your statements to 5 minutes, we would appreciate it a great deal. We will start with you, Mr. Williams. Having argued appellate cases, you can probably get it down to 5 minutes.

**PANEL CONSISTING OF WESLEY S. WILLIAMS, JR., COVINGTON & BURLING, WASHINGTON, DC; ROBERT L. BECK, IMMEDIATE PAST CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER, MOTHERS AGAINST DRUNK DRIVING; AND ROBERT L. BARR, JR., PRESIDENT, SOUTHEASTERN LEGAL FOUNDATION, INC.**

**STATEMENT OF WESLEY S. WILLIAMS, JR.**

**MR. WILLIAMS.** I will try to, Mr. Chairman. Mr. Chairman, members of the committee, with your permission, I would like to submit my full statement in writing and just summarize my remarks.

**THE CHAIRMAN.** Your entire statement will be put in the record as if read.

**MR. WILLIAMS.** Thank you. My name is Wesley Williams, Jr., and I am happy to have this opportunity to appear before you today to serve as a character witness. This is a very personal statement for your nominee, Judge David Souter, whom I have known for somewhere between 25 and 30 years. I want to emphasize that I am testifying on my own personal behalf, and my remarks do not necessarily reflect the views of any organization or any other group with which I may be associated.

Since my remarks are directed to the question having to do with the quality of the individual that the nominee represents, in my written remarks I detailed at some length certain relevant background of mine which might seem at first blush irrelevant, but I am sure the lawyers among you will realize and are familiar with the fact that character statements and reputation testimony of this sort is usually focused more on the person who is making the statement than on the fine points of what is said. It is the larger conclusions that I have for you, and I hope that I will provide you a basis for agreeing with them.

As you will see in my remarks, I have detailed the fact that I am a lawyer in private practice here. I am celebrating my 20th anniversary with the firm of Covington & Burling, at which I have been a partner for 15 years. The fact that I have held leadership positions throughout the 1970's and 1980's in a variety of legal, business, and charitable activities encompassing everything from the D.C. bar, social welfare agencies, educational institutions, the church, civil rights organizations, and so forth and so on. The fact that, like David Souter, I am a graduate of Harvard College and Harvard Law School, where the judge and I overlapped for 2 years in college and 2 years in law school, so we really do go back a long, long way. And, most importantly, as freshmen proctors—that is to say, as resident counselors and faculty advisers to freshmen at Harvard when we were law students—I must have had lunch or dinner with David Souter a half a dozen times a week for a couple of years. I literally saw him day in and day out for a long, long period of time.

I think it is significant that the judge and I crossed paths at a time when he was mature enough to afford his friends a glimpse of the person that he was and would remain, which was also a stage marked by optimal candor, a stage when none of us was in the public life.

With that premise—and I hope I have given you some basis, if not here then certainly in the written remarks, to conclude that I can speak credibly to the judge's professional and humane dimensions—I have these conclusions: In my experience, Judge Souter is every bit the fine human being that his advocates have portrayed him to be. He, of course, has a keen sense of privacy of the sort that we associate with small-town and rural America coast to coast. He has a refined sense of propriety and a sense of the time and place for particular conduct which, to my thinking, seems altogether appropriate for a judge.

He is here, as he should be—and I have watched the tapes—respectful and even demure. But in appropriate settings Judge Souter, like any other human being, can display as much zest as you or I for the play of ideas, for good humor, for good, honest fun, which is to say for life itself. In fact, I hope this will not embarrass him, the judge's reputation is of being something of a master of the bon mot. I have listened to many, many dinner table conversations with him, participated in them, and he is a master at that leisure time art of the clever rejoinder.

I say that because the rather demure image that you have here might convince some that we are perhaps dealing with some sort of legal automaton. He is not that at all. This is a full-blooded, normal human being who is a lot of fun and who is in touch with life.

More importantly, I observed and I am told that David Souter handled his responsibilities as a counselor and as an adviser at Harvard in a highly intelligent and caring fashion, with consistent evenhandedness, with attention always to the intellectual, psychological and social dimensions of the challenges we face from day to day.

To test my recollection, I took the liberty of asking a few of our colleagues, and I also spoke to some of the deans who would know what he was up to, and the view seems to be fairly widely held that Judge Souter was one of the best in his close dealings with a broad cross-section of a very diverse class, year after year, a class of students. The judge was intellectually challenging, as you would expect for a university setting, but at the same time always distinctly humane, thoroughly fair, thoroughly considerate and effective in every respect in that very human calling.

Some, especially in the written media, have called me and have asked me a number of questions, knowing about my friendship with Judge Souter going way, way back, and have asked me whether I have ever seen any signs of mean-spiritedness or prejudice on his part, whether toward racial minorities like me or toward women or otherwise. The answer is, in our personal dealings, in what I have seen from day to day on a sustained period of time, clearly and resoundingly no.

Judge Souter in my view has always conveyed, quite the contrary, very fine sense of accountability, to high-mindedness, to ethical values and to religious precepts, which I consider the ultimate guarantor, that hallmark of one who can be trusted. His charitable urges and compassion and sense of decency and fair play always seemed impeccable.

Again, I am pleased to serve as a character witness for the nominee. I am reminded of the remark that our other colleague, Eden Martin, made last night. The people who know Judge Souter up close and well and personally seem to have a lot of confidence in him and to like him. This person is, in my view, a fine craftsman of a judge and also, without question, an equally fine human being.

Thank you.

[The prepared statement of Mr. Williams follows:]

TESTIMONY OF  
WESLEY S. WILLIAMS, JR.  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
NOMINATION OF  
UNITED STATES CIRCUIT JUDGE DAVID H. SOUTER  
TO BECOME  
ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT

Mr. Chairman, members of the Senate Committee on the Judiciary, I am pleased to testify as a character witness on behalf of U.S. Circuit Judge David H. Souter, as you consider his nomination to become an Associate Justice of the United States Supreme Court.

My name is Wesley S. Williams, Jr. I am testifying solely on my own behalf, and not for any group with which I may be associated. For purposes of identification, you should know that I am an attorney in the private practice of law here in Washington, D.C. I commenced my legal career in 1967, as a staff counsel with the then new District of Columbia Council, and as a teaching assistant at Columbia University Law School. Shortly thereafter I became legal counsel to the U.S. Senate Committee on the District of Columbia, in the 91st Congress. Then in 1970, 20 years ago this month, I joined the law firm of Covington & Burling, where I have remained ever since, including these last 15 years as one of the firm's partners.

Again for purposes of identification only, I have been involved through the years in a range of outside legal, business, and charitable activities -- from time to time as an adjunct professor at Georgetown University Law Center, general counsel of the District of Columbia Bar, president of the metropolitan area's largest private social welfare agency, chairman of the board of a non-profit venture capital firm that specializes in promoting minority entrepreneurship in the broadcast field, a member of the executive committee of a major civil rights organization here in Washington, an officer of various boards and committees of the Episcopal Diocese of Washington and of the Washington National Cathedral, an officer of the Harvard Law School Association, and a member of Harvard University's Board of Overseers (among other positions). By way of further introduction, in addition to advanced degrees from Fletcher School and Columbia University Law School, like David Souter I hold bachelor's (BA 1963) and law (JD 1967) degrees from Harvard University.

I am testifying as an old friend of David Souter. I met the judge, and we enjoyed a passing acquaintance, during his last two, my first two, undergraduate years at Harvard College. Later, when he returned from his two years of study in England,

and I from the Fletcher School's one-year program in international relations, we overlapped two more years, this time at Harvard Law School. It was at the Law School that we became good friends. This was in part an outgrowth of our earlier acquaintance, in part an outgrowth of our mutual involvement in a social club for budding lawyers at Harvard Law School, and chiefly an outgrowth of the fact that neither of us lived at the Law School itself, but rather in Harvard Yard. Like some present and past members of the Senate and of the Supreme Court, Judge Souter and I held faculty appointments as Freshman Proctors, that is to say, as resident counselors to Harvard freshmen, and as members of the University's Board of Faculty Advisers. As a result, I believe I had lunch or dinner with David Souter at least a half dozen times a week for two years, and otherwise saw him with some frequency, both in social settings and as we went about our work as counselors and advisers, throughout our two years together at law school.

It seems fitting that I give this testimony, because I have a sense of the quality of individual now on your docket as a nominee. I would guess that the issue of the measure of the man must weigh heavily on your minds at this time, since Judge Souter comes to you, yes, as an accomplished legal craftsman, but with no discernible (and, I believe, no actual) political or ideological agenda. I think it is also significant that Judge Souter and I crossed paths at a stage when he was mature enough to afford his friends a glimpse of the person he would always be -- which was also a stage marked by optimal candor, when none of us was as yet in the public eye.

I apologize for my prolix wind-up. But I wanted to give you some comfort, or at least some basis to assess, as I venture to characterize the nominee in broad terms, in this exceptionally important context.

Briefly, in my experience, Judge Souter is every bit the fine human being that his advocates have portrayed him to be. He of course has a keen sense of privacy, of the sort we associate with small-town and rural America from shore to shore. Judge Souter likewise has a refined sense of propriety, a sense of appropriateness as to the time and place for particular conduct -- what I and others consider to be an altogether desirable public bearing for a judge. So here he is, as he should be, respectful and demure. But by the same token, in appropriate settings, David Souter displays as much zest as you or I, for the play of ideas, for good humor and good honest fun, for "belly laughs," even, which is to say for life itself. In fact -- and I hope that this will not embarrass him -- the judge's reputation is of being a master of the "bon mot," a master at

the leisure-time sport of matching well phrased, clever insights.

More importantly, I observed and I am told that David Souter handled his responsibilities as a counselor and advisor at Harvard College in an intelligent and caring fashion -- with consistent even-handedness, and with attention always to the intellectual, psychological, and social dimensions of the challenges we proctors faced from day to day. Incidentally, to test my recollection, I took the liberty of surveying a few of our contemporaries, other proctors and advisors from the mid-60s, as well as deans who are familiar with Judge Souter's performance and reputation. The view seems widely held that David Souter was one of the best. In a word, in his close dealings with a broad cross-section of Harvard's diverse freshman class, David Souter comported himself, year after year, in a manner that was intellectually challenging and at the same time distinctly humane. He was, in sum, thoroughly fair, considerate, and withal quite effective, in a very human calling.

Some have asked me whether I ever detected in David Souter signs of mean-spiritedness or prejudice, whether towards racial minorities (like me, for example), or towards women, or otherwise; and the answer is a clear and resounding no. Indeed, David Souter in my view has always conveyed that sense of accountability -- to high-mindedness, to ethical values, and to religious precepts -- which I consider the hallmark of one who can be trusted. Stated another way, the man's charitable urges and compassion appeared intact.

Again, I am pleased to serve as a character witness for the nominee you are considering for the Supreme Court, for David Souter -- a fine craftsman of a judge and, in my experience, without question an equally fine human being.

[I would be happy to answer any questions.....]

\* \* \*

Wesley S. Williams, Jr.

Washington, D.C.  
September 18, 1990

The CHAIRMAN. Thank you.

Since I am going to have to leave now and go to that meeting for a few moments, let me ask, with the indulgence of my colleagues, one question of you, Mr. Williams. One of the criticisms of the judge that we have heard is not that he is prejudiced. It is that he is insensitive.

During the time you and he were classmates—although you were 2 years apart but you overlapped—during the time you ate lunch or dinner or breakfast with him, roughly six times a week over a period of 2 years, the whole country was being turned upside down. Bull Connor had dogs that were running through the streets. The country was in turmoil. Martin Luther King was attempting to make a case for black Americans.

Did he ever evidence any empathy, sympathy, or concern for the plight of black Americans in their fight for equality during that period?

Mr. WILLIAMS. Yes.

The CHAIRMAN. In what way?

Mr. WILLIAMS. I would say that Judge Souter, particularly given his background, was not disposed to be in the fray. I think the record states that pretty clearly. On the other hand, he was awakening to it, was intrigued by it, and was moved by it.

None of us could avoid talking about all those things, and I am glad that you have put this all in context, because those were tumultuous times. My first class in civil procedure involved not the usual subjects but, rather, a discussion of the march in Selma at Harvard Law School. Those were very special times. I would say that David Souter in my recollection was, like most Americans at that time, awakening to a very, very grave problem. He is listening, he is learning, and I think that the compassion and all the human qualities that are necessary—

The CHAIRMAN. Was there any show of emotion?

Mr. WILLIAMS [continuing]. To bring him to the point of having a real understanding are there.

The CHAIRMAN. Do you ever remember David Souter saying anything along the lines of, Wesley, how can you stand it? How can you put up with this? I mean anything that evidenced not only understanding and awakening but anger? Or was Judge Souter the type, well, you know, now the march in Selma, the issue of civil disobedience is something that we really should discuss, because what happened there was arguably an issue, I mean, in what context was this awakening taking place? Was it an intellectual awakening, and was it also an emotional awakening?

Mr. WILLIAMS. It was an awakening of understanding which I think was quite complete.

The CHAIRMAN. Well, I think you are being a very good lawyer. You haven't answered my question. Was there any show of emotion ever, any show of feeling beyond the awakening? I mean, people can be awakened a lot of ways. People can be awakened and say, you know, I didn't realize that was a problem and, golly, some day we are going to have to solve it. Or awakening can be, that is outrageous, I can't believe that is happening, how can you put up with that, Wesley, does it ever happen to you, did anybody ever do that to you.

Mr. WILLIAMS. Those kinds of questions, what had my experience been, they were obviously part of the dialog always.

The CHAIRMAN. In this case, I must respectfully suggest that nothing is obvious in this hearing. [Laughter.]

Mr. WILLIAMS. Well, in any event, they were surely part of the dialog. That was always very much on the table in every conversation. Do I remember particular conversations and the content thereof? No. No. It has been a long time.

The CHAIRMAN. Did he ever go to a rally with you, a meeting with you? There must have been some things happening on campus.

Mr. WILLIAMS. We were at rallies inevitably, but for a purpose that is a little different, which was that as officers of the university we were responsible for making sure that things didn't get out of hand. So, yes, I am sure we were at rallies. Whether we were sympathetic or not and so forth, who can read the heart of a man? But, in any event, I am heartened by the fact that he was concerned about the issues—and remains so, apparently—and deeply concerned and always listening.

The CHAIRMAN. Well, I appreciate my colleagues allowing me the indulgence of questioning one witness before the other two have spoken. Hopefully, I will be back, gentlemen, before the questioning of the two of you is over.

Let's proceed with Mr. Beck's testimony now. Again, I apologize. I am going to have to leave.

#### STATEMENT OF ROBERT L. BECK

Mr. BECK. No apology necessary, Mr. Chairman. Thank you very much for your comments.

My name is Robert L. Beck, and I am the immediate past chairman of the board and chief executive officer of Mothers Against Drunk Driving.

In 1982, I joined MADD following the death of my son, Michael, and his fiance, Lori, at the hands of a drunk driver.

As many of you know, this is the most frequently committed crime in America today. Some 22,000 people will die at the hands of drunk drivers this year. That is about 60 people a day, and several people will die while I give this testimony.

The mission of MADD is to stop the death and destruction from drunk driving and to be the voice of the victims of that crime. Our membership numbers approximately 3 million members and supporters, and we have some 400 chapters across the United States and operations in five foreign countries. This makes MADD today the largest organization of its kind, grassroots organization.

The education and public awareness programs of MADD have played a leadership role in changing public attitudes about drunk driving. Drunk driving is no longer considered an accident. It is seen for what it is: a violent crime, committed willfully, and in total disregard of the rights of an innocent public.

This change in attitude has permitted the enactment of stronger laws and more law enforcement. The law raising the minimum drinking age to 21 has saved thousands of young lives. MADD, with the help of Federal incentive grants authorized in the 1988 Omni-

bus Anti-Drug Abuse Act, is working to enact administrative license revocation in all States where it does not exist, along with Senators like Senator Biden and Senator Thurmond, who have helped try to sponsor legislation to change the loopholes in the Federal bankruptcy statutes which have permitted convicted DWI criminals to avoid their debts in dealing with bankruptcy to victims. You have also sponsored legislation to increase penalties for drunk driving in cases involving young children.

As America has learned from MADD over the past 10 years, so, too, has MADD learned. We have learned that tougher laws and more enforcement is useless without a strong, independent, and fearless judiciary to ensure that these laws are carried out. MADD understands that the courts need to keep a balance between the rights of our citizens as a society and as individuals. MADD faces a similar challenge. We seek to enforce the laws to protect all citizens from the criminal drunk driver. This is a right of society as a whole. Yet MADD is also an advocate for the individual rights of victims.

In no place is this more important than in our picture of the judiciary and presented in the U.S. Supreme Court. This is particularly true in the last term of that Court. It saw the Court wrestle with the balancing of rights in the sobriety checkpoint case, *Michigan v. Sitz*, and the use of video cameras to examine the condition of an alleged drunk driver in *Pennsylvania v. Muniz*. We, therefore, see the selection of Justices for the U.S. Supreme Court as extremely vital to the interests of MADD as well as the vital interest of our Nation.

As we view the selection process, we took a two-pronged approach in making an evaluation of candidates. The first test was we looked at the historical clarity and consistency of the thought process followed by the candidate in his or her judicial decisions. The second test looked to the results reached from those decisions and whether they were supportive of the mission and goals of MADD.

We asked ourselves about Judge Souter: Did he evidence an open mind toward drunk driving and related cases? Did he demonstrate mental acuity and a superior grasp of the Constitution and its history? Was there a quality of excellence in his legal analysis? And did he demonstrate judicial independence? There was a consistent application of all of this, in our opinion. We looked at some 200 of Judge Souter's opinions and decisions.

I think in the interest of time I will let you read through the analysis of the *State of New Hampshire v. Koppel*, which we have selected as a typical case to demonstrate the five points that I have just outlined.

I think the last thing that I would like to point out this morning is that MADD has not attempted to predict how Judge David Souter would act in the future. I think this is an impossible task. We have evaluated how he has acted in the past. We have looked for insight. We have looked for sensitivity to the rights of victims of drunk driving and the rights of society to be protected from the drunk driver. We like what we have seen. MADD is proud of its role in changing society's view regarding drunk driving, the drunk driver, and their victims. We have looked at the record of Judge

Souter and find that, on balance, he understands the true magnitude of this crime. We have concluded that Judge Souter and MADD share a common view of this particular crime and its consequences. He has demonstrated an ability to balance the historical values inherent in the Constitution and the Bill of Rights with the fact that those documents must be relevant to current history.

We, therefore, respectfully recommend your favorable consideration of David Souter as an Associate Justice of the U.S. Supreme Court. Thank you.

[The prepared statement of Mr. Beck follows:]



# MADD

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## Mothers Against Drunk Driving

P. O. Box 541688 • Dallas, Texas 75354-1688 • Telephone (214) 744-MADD • FAX (214) 869-2206/2207  
NATIONAL OFFICE

TESTIMONY  
OF  
ROBERT L. BECK  
ON BEHALF OF  
MOTHERS AGAINST DRUNK DRIVING  
REGARDING  
THE NOMINATION OF DAVID H. SOUTER TO THE U.S. SUPREME COURT  
U.S. SENATE JUDICIARY COMMITTEE  
WASHINGTON, D.C.  
SEPTEMBER 18, 1990

MR. CHAIRMAN, MY NAME IS ROBERT L. BECK. I AM AN ATTORNEY AND BUSINESSMAN IN DALLAS, TEXAS. I AM HERE TODAY ON BEHALF OF MOTHERS AGAINST DRUNK DRIVING (MADD) TO TESTIFY IN FAVOR OF THE NOMINATION OF DAVID H. SOUTER TO THE UNITED STATES SUPREME COURT.

IN 1982, I JOINED MOTHERS AGAINST DRUNK DRIVING AFTER MY ONLY SON, MICHAEL, AND HIS FIANCEE, LORI PFANN, WERE KILLED BY A DRUNK DRIVER. I AM THE IMMEDIATE PAST NATIONAL CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER OF MADD AND CONTINUE TO SERVE ON ITS BOARD OF DIRECTORS.



AS MANY OF YOU KNOW, DRUNK DRIVING IS THE MOST FREQUENTLY COMMITTED VIOLENT CRIME IN OUR COUNTRY TODAY. DRUNK DRIVERS WILL KILL MORE THAN 22,000 INNOCENT VICTIMS THIS YEAR. THEY KILL MORE THAN 60 PEOPLE EACH DAY, AND WILL KILL SEVERAL PEOPLE WHILE I GIVE THIS TESTIMONY.

THE MISSION OF MADD IS TO STOP THE DEATH AND DESTRUCTION CAUSED BY DRUNK DRIVING AND TO BE THE VOICE OF THE VICTIMS OF THIS CRIME. 1990 MARKS THE 10 YEAR POINT IN THE HISTORY OF MADD. DURING THAT 10 YEAR PERIOD, MADD HAS GROWN TO INCLUDE SOME 3,000,000 MEMBERS AND SUPPORTERS, WITH APPROXIMATELY 400 CHAPTERS ACROSS THE UNITED STATES AND OPERATIONS IN 5 FOREIGN COUNTRIES. TODAY, MADD IS THE LARGEST GRASS ROOTS ORGANIZATION OF ITS KIND IN AMERICA.

THE EDUCATION AND PUBLIC AWARENESS PROGRAMS OF MADD HAVE PLAYED A LEADERSHIP ROLE IN CHANGING PUBLIC ATTITUDES ABOUT DRUNK DRIVING. DRUNK DRIVING IS NO LONGER SEEN AS AN ACCIDENT. IT IS SEEN FOR WHAT IT IS ... A VIOLENT CRIME, COMMITTED BY WILLFULLY DRIVING WHILE IMPAIRED ... IN TOTAL DISREGARD FOR THE RIGHTS OF THE INNOCENT PUBLIC.

THIS CHANGE IN PUBLIC ATTITUDE HAS PERMITTED ENACTMENT OF MUCH TOUGHER LAWS AND STRONGER LAW ENFORCEMENT EFFORTS. THE LAW RAISING THE LEGAL MINIMUM DRINKING AGE TO 21 HAS SAVED THOUSANDS OF YOUNG LIVES. MADD, WITH THE HELP OF FEDERAL INCENTIVE GRANTS AUTHORIZED IN 1988 AS PART OF THE OMNIBUS ANTI-DRUG ABUSE ACT, IS WORKING TO ENACT ADMINISTRATIVE LICENSE REVOCATION STATUTES IN ALL STATES WHICH LACK SUCH LAWS. YOU, MR CHAIRMAN, ALONG WITH SENATOR THURMOND AND OTHERS IN THE SENATE HAVE SPONSORED LEGISLATION TO CLOSE LOOPHOLES IN THE FEDERAL BANKRUPTCY STATUTES WHICH HAVE PERMITTED CONVICTED DWI CRIMINALS TO AVOID THEIR DEBTS TO THEIR

VICTIMS BY DECLARING BANKRUPTCY. YOU HAVE ALSO SPONSORED LEGISLATION TO INCREASE THE PENALTIES FOR DRUNK DRIVING IN CASES INVOLVING YOUNG CHILDREN.

AS THE AMERICAN PUBLIC HAS LEARNED FROM MADD OVER THE PAST 10 YEARS, SO TOO HAS MADD LEARNED. WE HAVE LEARNED THAT TOUGHER LAWS AND MORE ENFORCEMENT ARE USELESS WITHOUT A STRONG, INDEPENDENT AND FEARLESS JUDICIARY TO INSURE THAT THESE LAWS ARE CARRIED OUT. MADD UNDERSTANDS THAT THE COURTS NEED TO KEEP IN BALANCE THE RIGHTS OF OUR CITIZENS AS A SOCIETY AND AS INDIVIDUALS. MADD FACES A SIMILAR CHALLENGE. WE SEEK FULL ENFORCEMENT OF THE LAW TO PROTECT ALL CITIZENS FROM THE CRIMINAL DRUNK DRIVER. THIS IS A RIGHT OF SOCIETY AS A WHOLE. YET, MADD IS ALSO AN ADVOCATE FOR THE INDIVIDUAL RIGHTS OF VICTIMS.

IN NO PLACE HAS THE IMPORTANCE OF THE JUDICIARY BEEN MORE CLEARLY PRESENTED THAN IN THE UNITED STATES SUPREME COURT, AND IN PARTICULAR, THE MOST RECENT TERM OF THAT COURT. IT SAW THE COURT WRESTLE WITH THE BALANCING OF RIGHTS IN THE SOBRIETY CHECKPOINT CASE, MICHIGAN V. SITZ, 110 US 2481 (1990) AND THE USE OF VIDEO CAMERAS, TO EXAMINE THE CONDITION OF AN ALLEGED DRUNK DRIVER IN PENNSYLVANIA V. MUNIZ, USSC NO. 89-213 (1990). WE THEREFORE SEE THE SELECTION OF JUSTICES FOR THE U.S. SUPREME COURT AS EXTREMELY VITAL TO THE INTERESTS OF MADD ... AND TO OUR NATION.

AS WE VIEW THE SELECTION PROCESS, WE TOOK A 2-PRONGED APPROACH TOWARD MAKING AN EVALUATION OF CANDIDATES. THE FIRST TEST LOOKS TO THE HISTORICAL CLARITY AND CONSISTENCY OF THE THOUGHT PROCESS FOLLOWED BY A CANDIDATE IN HIS OR HER JUDICIAL DECISIONS. THE SECOND TEST LOOKS AT THE RESULTS REACHED IN THE JUDICIAL DECISIONS AND WHETHER THEY ARE SUPPORTIVE OF THE MISSION AND GOALS OF MADD. IN THIS CASE, THE ANALYSIS FOCUSED UPON JUDGE SOUTER AND HIS JUDICIAL CONDUCT AS IT PERTAINS TO THE U.S. CONSTITUTION.

THE QUESTIONS WE CONSIDERED AS TO HIS CLARITY AND CONSISTENCY WERE:

FIRST: DID HE EVIDENCE AN OPEN MIND TOWARD DRUNK DRIVING AND RELATED CASES?

SECOND: DID HE DEMONSTRATE MENTAL ACUITY AND A SUPERIOR GRASP OF THE CONSTITUTION AND ITS HISTORY?

THIRD: WAS THERE A QUALITY OF EXCELLENCE IN HIS LEGAL ANALYSIS?

FOURTH: DID HE DEMONSTRATE JUDICIAL INDEPENDENCE; AND

FIFTH: WAS THERE A CONSISTENT APPLICATION OF ALL THE FOREGOING FACTORS?

WE REVIEWED MORE THAN 200 OF JUDGE SOUTER'S DECISIONS USING THE ABOVE CRITERIA. WE OBSERVED CONSISTENT APPLICATION OF ALL 5 CRITERIA DURING HIS CAREER.

WHILE REFERENCE TO ONE CASE OUT OF HUNDREDS HAS ITS LIMITATIONS, WE BELIEVE THAT STATE OF NEW HAMPSHIRE V. KOPPEL, 127 NH 286 (1985) IS ILLUSTRATIVE. IT WAS A SOBRIETY CHECKPOINTS CASE DEALING WITH FOURTH AMENDMENT RIGHTS ... SEARCH AND SEIZURE.

JUDGE SOUTER DEMONSTRATED HIS INDEPENDENCE IN THIS CASE AS THE SOLE DISSENTER. HE CHALLENGED THE MAJORITY, WHICH HELD THAT SOBRIETY CHECKPOINTS WERE UNCONSTITUTIONAL, BECAUSE OF THEIR DEPARTURE FROM HISTORICAL LEGAL PRECEDENT...STATE AND FEDERAL. JUDGE SOUTER'S DISSENT IN THIS CASE ALSO DEMONSTRATED AN APPRECIATION FOR THE DISTINCTION BETWEEN PROTECTION OF BASIC CONSTITUTIONAL RIGHTS AND THE DEVELOPING LAW REGARDING THE BALANCING AMONG RIGHTS.

WHILE MANY WHO HAVE BEEN INVOLVED IN SOBRIETY CHECKPOINT CASES HAVE BECOME ENSNARED IN THE EMOTIONAL ISSUES WHICH SURROUND THIS

AREA, JUDGE SOUTER DID NOT. HE SPENT HIS TIME TESTING THE RELEVANT ISSUES TIED TO BALANCING, ON ONE HAND, THE RIGHTS OF INNOCENT CITIZENS TO BE PROTECTED FROM VIOLENT CRIME, AND ON THE OTHER HAND, THE RIGHTS OF CITIZENS TO BE PROTECTED FROM UNREASONABLE SEARCH AND SEIZURE. HIS CONCLUSION NATURALLY FLOWED FROM HIS JUDICIAL REASONING AND, ON BALANCE, HE CONCLUDED THAT CHECKPOINTS WERE CONSTITUTIONALLY ACCEPTABLE.

THE FINAL LESSON LEARNED FROM KOPPEL IS THAT 5 YEARS LATER, THE U.S. SUPREME COURT IN SITZ V. MICHIGAN, 110 U.S. 2481 (1990), HELD, USING VIRTUALLY THE SAME JUDICIAL REASONING AND LOGIC AS JUDGE SOUTER IN THE KOPPEL CASE, THAT SOBRIETY CHECKPOINTS WERE PERMISSIBLE UNDER THE 4TH AMENDMENT AND WERE THEREFORE CONSTITUTIONAL.

MR. CHAIRMAN, MADD HAS NOT ATTEMPTED TO PREDICT HOW JUDGE DAVID SOUTER WILL ACT IN THE FUTURE. WE HAVE EVALUATED HOW HE HAS ACTED IN THE PAST. WE HAVE LOOKED FOR INSIGHT. WE HAVE LOOKED FOR SENSITIVITY TO THE RIGHTS OF THE VICTIMS OF DRUNK DRIVING AND THE RIGHTS OF SOCIETY TO BE PROTECTED FROM DRUNK DRIVERS. WE LIKE WHAT WE HAVE SEEN. MADD IS PROUD OF ITS ROLE IN CHANGING SOCIETY'S VIEW REGARDING DRUNK DRIVING, THE DRUNK DRIVER AND THEIR VICTIMS. WE HAVE LOOKED AT THE RECORD OF JUDGE SOUTER TO FIND IF, ON BALANCE, HIS VIEW OF CONSTITUTIONAL RIGHTS FLOWS IN THE DIRECTION OF UNDERSTANDING THE TRUE MAGNITUDE OF THE CRIME OF DRUNK DRIVING. WE HAVE CONCLUDED THAT JUDGE SOUTER AND MADD SHARE A BASIC COMMON VIEW OF THIS PARTICULAR CRIME AND ITS CONSEQUENCES. HE HAS DEMONSTRATED AN ABILITY TO BALANCE THE HISTORICAL VALUES INHERENT IN THE CONSTITUTION AND BILL OF RIGHTS WITH THE FACT THAT THOSE DOCUMENTS MUST BE RELEVANT TO CURRENT SOCIETY.

WE THEREFORE RESPECTFULLY RECOMMEND YOUR FAVORABLE CONSIDERATION OF DAVID SOUTER AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT. THANK YOU.

Senator KENNEDY [presiding]. Thank you very much.  
Mr. Barr?

#### STATEMENT OF ROBERT L. BARR

Mr. BARR. Thank you, Mr. Chairman and members of the committee. It is an honor to be here 5 minutes to speak before the Judiciary Committee of the United States of America with regard to a nominee to the highest court in the land, I daresay in the world. It is worth more than many years of struggle in other countries. It is an opportunity that we in Southeastern Legal Foundation realize the importance of and deeply appreciate being able to be here today to speak—not so much on behalf of or against Judge David Souter, but on something that we believe is even more important than any single nominee, than any single President, and than any single Senator or Senate body, and that is on behalf of the process of confirming nominees that is embodied in our Constitution; namely, the advise and consent role of the U.S. Senate.

Of the many of the provisions in our Constitution, the most important ones are frequently the shortest. That is, I think, by design of our Founding Fathers, and I think that we ought to keep that in mind as we go through the confirmation process and focusing on the advise and consent role. There is a great deal more written about other provisions in our Constitution than this one, but we believe that the importance of the advise and consent role is really second to none in its importance to the people and to the sanctity of the judicial process in our country, which, of course, is the bulwark on which all other aspects of our Government and our lives in this country rest.

We believe that in focusing on that advise and consent role, the issues are very clear. They were clear to our Founding Fathers as set forth, for example, in Federalist Paper No. 76 by Alexander Hamilton and other writers after him, most recently by publications from this very city, that the advise and consent role of the Senate, as important and as profound as it is, is very limited in scope. We believe that to stray from that very limited focus, to focus on the constitutional understanding of nominees, to focus on their judicial temperament, their ability to reason, their background as judges or whatever background they bring to their nomination, is and should be the sole focus of this committee. We believe also that for other groups to come forward, other individuals and groups to come forward, as important as the issues are that are on their minds and in their hearts, to bring a political agenda to the committee demeans the process of advise and consent; and, indeed, to focus on those aspects of a nominee's opinions or how he or she might rule on a particular case, as opposed to the process that they bring to ruling on a particular case, is inappropriate and raises very serious questions about separating the political from the judicial processes and ideology of our country.

We believe that for groups to come forward and place before this committee a political agenda on which to base a vote on this nominee, or any nominee, is to attempt to perhaps come in through the back door of the political process what they have been unable to accomplish through the front door, namely the ballot box. We be-

lieve that that is inappropriate. It is inappropriate for any group, whichever side of the political spectrum they are from or whichever side of the spectrum on a particular issue, again, no matter how important those issues are, such as civil rights, abortion, property rights, the ability to tax. There is a whole panoply of issues.

Those issues really have no role in being placed before this committee on behalf of a nominee or against a nominee in his or her opinions and how they might rule. This is something that I know has been gone into in a number of contexts and through a number of witnesses but what we believe is a thread that should run throughout the entire process. We believe to stray from that and to place before this committee a nominee and question him or her on how they might rule on a particular case, even if it is done obtusely, if that is the point of the questioning, then we are placing that future Justice in a very untenable situation.

If, then, an issue comes before that person while they sit on the highest Court of this land, for example, and they have already rendered an opinion on how they might rule on case "X" or issue "X," and they, in fact, rule that way, then they and the Court are subject to have its credibility attacked for prejudging issues, for judging issues before they come before that Court, and for making up their mind beforehand. We believe that attacks and that demeans the credibility of the Court.

On the other hand, if that nominee has rendered an opinion or has been forced to render an opinion at a hearing on issue "X" and then rules differently, then that Justice and that Court in the future—not just on that case—is then subject to criticism for changing its mind or for waffling. In either instance, that Justice and that Court is caught in a Hobson's choice, a dilemma. And we believe it is unfair and really an improper use of the advise and consent process to place nominees in that posture.

Again, we appreciate the opportunity to be here. I would appreciate, Mr. Chairman, if the written comments that I have prepared, which go into this in a little more detail, could be made a part of the record. I will not belabor that point, but certainly we believe that is an extremely important function of this committee. We appreciate the opportunity to make these matters known on the record and also to answer any questions that the members might have.

[The prepared statement of Mr. Barr follows:]

TESTIMONY OF ROBERT L. BARR, JR.  
PRESIDENT, SOUTHEASTERN LEGAL FOUNDATION  
BEFORE THE SENATE JUDICIARY COMMITTEE  
ON THE CONFIRMATION OF JUDGE DAVID SOUTER  
TO BE AN ASSOCIATE JUSTICE  
OF THE UNITED STATES SUPREME COURT  
TUESDAY, SEPTEMBER 18, 1990  
WASHINGTON, D.C.

SOUTHEASTERN LEGAL FOUNDATION, INC.  
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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, ON BEHALF OF SOUTHEASTERN LEGAL FOUNDATION, AND ITS OFFICERS AND SUPPORTERS, I WOULD LIKE TO EXTEND MY THANKS TO THE COMMITTEE FOR ALLOWING ME THE OPPORTUNITY TO APPEAR TODAY TO COMMENT ON THE CONFIRMATION PROCESS FOR JUDGE DAVID SOUTER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT.

THE IMPORTANCE OF THE NOMINATION PROCESS FOR A JUSTICE TO THE UNITED STATES SUPREME COURT FAR TRANSCENDS THAT OF ANY NOMINEE, ANY PRESIDENT, OR ANY SENATOR. THE IMPORTANCE OF THIS PROCESS, AND THE NEED TO MAINTAIN ITS INTEGRITY, IS OF FUNDAMENTAL IMPORTANCE TO THE ENTIRE JUDICIAL SYSTEM OF THIS COUNTRY, AND CONSTITUTES ONE OF THE BULWARKS OF THIS REPUBLIC.

EACH SECTION, AND EVERY WORD OF THE CONSTITUTION DESERVES THE MOST CAREFUL CONSIDERATION AND DEFERENCE BY ALL AMERICANS.

WE BELIEVE THAT THE ADVISE - AND - CONSENT FUNCTION OF THE UNITED STATES SENATE, IN CONSIDERING THE PRESIDENT'S NOMINEES FOR HIGH OFFICE, MUST BE GRANTED EXTREME DEFERENCE, AND THAT NO EFFORT OUGHT TO BE SPARED TO INSURE THAT IT IS IMPLEMENTED ACCORDING TO THE STRICTEST INTERPRETATION OF THE FOUNDING FATHERS' DESIGN.

WE BELIEVE ALSO THAT THE INDEPENDENCE AND INTEGRITY OF ALL FEDERAL JUDGES, AND OF THE JUDICIAL BRANCH OF GOVERNMENT GENERALLY, REQUIRES THAT THERE BE NO EFFORT, BY THE PRESIDENT OR THE SENATE, AT ANY PHASE OF THE CONFIRMATION PROCESS, TO INTERJECT POLITICAL VIEWS OR PERSONAL OPINIONS, ON EITHER THE PART OF THE QUESTIONERS OR OF THE NOMINEE. TO DO SO WOULD NECESSARILY AND INEVITABLY BRING INTO QUESTION MATTERS ON WHICH THAT NOMINEE, IF CONFIRMED, MIGHT BE CALLED ON LATER TO

DECIDE. AND, EVEN IF THAT NOMINEE, ONCE CONFIRMED, IS NOT FACED WITH ADDRESSING THE SPECIFIC POLITICAL ISSUES OR PERSONAL OPINIONS ABOUT WHICH HE WAS QUESTIONED DURING THE CONFIRMATION PROCESS, THERE WILL INEVITABLY COME BEFORE HIM OR HER MATTERS THAT DEAL WITH THE SAME CONCERNS AND ISSUES.

IF A SUPREME COURT JUSTICE HAS BEEN FORCED TO TAKE A POSITION OR OFFER AN OPINION AS TO HOW THEY MIGHT RULE ON A PARTICULAR ISSUE OR IN A PARTICULAR CASE, REGARDLESS OF WHETHER THAT CASE OR ISSUE COMES BEFORE THEM DIRECTLY WHILE ON THE BENCH, THEY WILL BE CAUGHT IN A HOBSON'S CHOICE THAT DIMINISHES THE CREDIBILITY OF ALL THEIR WORK AS A JUSTICE. FOR EXAMPLE, IF THE NOMINEE VOLUNTEERS OR IS FORCED TO PROVIDE AN OPINION ON ISSUE "X" AND THEN THAT ISSUE, OR ONE THAT RAISES THE SAME LEGAL QUESTION, COMES BEFORE THEM, AND THEY RULE DIFFERENTLY THAN INDICATED DURING THE CONFIRMATION PROCESS, THE JUSTICE WILL BE CRITICIZED FOR "WAFFLING," VACILLATING OR BEING WEAK AND INCONSISTENT. IN SHORT, THEIR CREDIBILITY AND PERSONAL INTEGRITY WILL BE ATTACKED AND WILL CLOUD ALL FUTURE OPINIONS.

IF, ON THE OTHER HAND, THAT JUSTICE DECIDES AN ISSUE AS A JUSTICE, CONSISTENT WITH HIS OR HER OPINION RENDERED DURING THE CONFIRMATION PROCESS, THEY WILL BE CRITICIZED FOR HAVING PREJUDGED AN ISSUE; HAVING MADE UP THEIR MIND BEFOREHAND; AND NOT DECIDING THE ISSUE BEFORE THEM AS A JUSTICE BASED ON THE MERITS AND PARTICULAR FACTS AND CIRCUMSTANCES PRESENTED DURING THE PRESENTATION OF THE CASE ITSELF. THIS TOO, WILL THEN CLOUD THEIR TENURE AND REDUCE THEIR CREDIBILITY.

IN NEITHER INSTANCE, IS ANYTHING GAINED BY SO QUESTIONING THE NOMINEE OR BY THE NOMINEE RENDERING SUCH OPINIONS, OTHER

THAN SATISFYING ONE'S CURIOSITY. BUT A VERY HIGH PRICE HAS BEEN EXTRACTED FROM THE INTEGRITY AND CREDIBILITY OF THAT JUSTICE AND INDEED OF THE HIGH COURT ITSELF. THE COURT'S INTEGRITY WILL HAVE BEEN DRAWN INTO QUESTION, THEREBY WEAKENING ALL OF ITS WORK FROM THAT POINT FORWARD.

WE BELIEVE THAT, THROUGH PROBING AND IN- SIGHTFUL QUESTIONING BY THE SENATE JUDICIARY COMMITTEE MEMBERS DURING THE CONFIRMATION PROCESS-- INQUIRING IN DEPTH INTO A NOMINEE'S JUDICIAL PHILOSOPHY, BACKGROUND AND CREDENTIALS--THE SENATE SHOULD CERTAINLY BE ABLE TO LEARN SUFFICIENTLY ABOUT THE NOMINEE'S APPROACH TO LEGAL ISSUES, INCLUDING THE WHOLE RANGE OF POLITICAL AND SOCIAL ISSUES THAT THEY MIGHT BE CALLED ON TO DECIDE, WITHOUT GETTING INTO SPECIFIC SPECIFIC OPINIONS OR CASES.

MOREOVER, DURING THE TIME PERIOD BETWEEN THE ANNOUNCEMENT OF A NOMINATION AND A FINAL CONFIRMATION VOTE, THERE IS FULL AND WELL-PUBLICIZED OPPORTUNITY FOR ALL CITIZENS AND CITIZEN GROUPS, INCLUDING MEMBERS OF THE UNITED STATES SENATE, TO CAREFULLY REVIEW AND ANALYZE THE NOMINEE'S WRITINGS, OPINIONS, CREDENTIALS, AND PERSONAL AND PROFESSIONAL LIFE. THIS IS THE "POLITICAL" PHASE OF THE PROCESS; AND IF CITIZENS HAVE A DISAGREEMENT WITH THE PRESIDENT'S CHOICE, THEIR BEEF IS WITH THE PRESIDENT AND THEY SHOULD EXTRACT A POLITICAL PRICE FROM HIM AT THE NEXT ELECTION; THE FORUM FOR THIS IS NOT THE JUDICIARY COMMITTEE HEARING. THE CONFIRMATION PROCESS IS A QUITE DISTINCTLY SEPARATE PHASE OF THIS PROCESS. POLITICAL CONCERNS HAVE NO ROLE WHATSOEVER.

EACH INDIVIDUAL SENATOR IS FREE TO MAKE HIS OR HER CHOICE IN VOTING ON THE NOMINEE BASED ON WHATEVER CRITERIA THEY LIKE.

BUT PROBING INTO A NOMINEE'S OPINIONS IS SIMPLY NOT NECESSARY AND IT VIOLATES THE ADVISE-AND-CONSENT ROLE OF THE SENATE.

WHILE SOUTHEASTERN LEGAL FOUNDATION TAKES NO OFFICIAL POSITION FOR OR AGAINST THE NOMINATION OF DAVID SOUTER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, WE STRONGLY ENCOURAGE THIS COMMITTEE TO INQUIRE INTO JUDGE SOUTER'S JUDICIAL TEMPERAMENT AND PHILOSOPHY, IN AN EFFORT TO INSURE THAT HE, OR ANY NOMINEE, PLACES THE ROLE OF A SUPREME COURT JUSTICE IN PROPER PERSPECTIVE. THAT PERSPECTIVE IS, THAT ALL FEDERAL APPELLATE JUDGES MUST SERVE THE PUBLIC, CONSISTENT WITH THEIR SWORN OATH OF OFFICE, BY INTERPRETING LAWS NOT MAKING THEM. THE MAKING OF LAWS IS THE FUNCTION OF THE LEGISLATIVE BRANCH OF GOVERNMENT; WE CANNOT IMAGINE THAT ANY MEMBER OF THE SENATE WOULD SEEK, THROUGH MODIFYING THE ADVISE-AND-CONSENT FUNCTION, TO HAVE A NOMINEE TELL THE SENATE HOW TO MAKE LAWS OR WHETHER THE LAWS IT HAS PASSED ARE GOOD OR BAD. THAT IS NOT THE ROLE OF A SUPREME COURT JUSTICE; IT NEVER HAS BEEN THE APPROPRIATE ROLE OF A SUPREME COURT JUSTICE; AND IT NEVER SHOULD BE THE ROLE OF A SUPREME COURT JUSTICE IN THE UNITED STATES OF AMERICA.

WE THANK THE COMMITTEE ONCE AGAIN FOR ALLOWING US TO PROVIDE INPUT ON THIS CRITICAL ASPECT OF OUR DEMOCRACY, AND I WOULD BE MORE THAN HAPPY TO ANSWER FURTHER QUESTIONS OR PROVIDE ADDITIONAL MATERIAL.

Senator KENNEDY. Thank you very much.

All of the statements in their entirety will be included in the record. I have no questions.

Senator THURMOND?

Senator THURMOND. I want to thank you all for coming here and testifying. Taking time to come here shows you are interested in this matter, and it shows your admiration, I think, for Judge Souter.

Now, Judge Souter was propounded several questions that he declined to answer because those questions might come before the Court. He is a judge now on the circuit court. He has been nominated to the Supreme Court.

In your opinion, did he take the proper stance to refuse to answer those questions? I would be glad to start with you.

Mr. WILLIAMS. Senator, on balance, I think he has taken the proper approach, given the two circumstances that you addressed: No. 1, that he has been asked a number of questions that relate to matters that would be coming before Supreme Court and matters that would be of live interest before the Supreme Court, not just ancillary issues but matters that are quite fundamental. Second, he sits on a court now that also has to deal with such issues.

I think under the total circumstances it probably would be quite inappropriate for him to express views, if he had them. One of the things that I would urge you to give some consideration to is that perhaps the judge doesn't have well-founded views on these issues but instead is prepared to listen and to assess, as his skill affords him the opportunity.

Senator THURMOND. Mr. Beck?

Mr. BECK. I would share the comments of Mr. Williams. I think it is appropriate under both the ethics provisions and as a sitting judge to not—

Senator THURMOND. Speak out. You all speak into the machine. We can't hear you.

Mr. BECK. Yes, sir. I think it is perfectly appropriate for a sitting judge not to give his opinion on things that are about to or prospectively will be heard by the Court. I think that, on balance, that was appropriate conduct.

Senator THURMOND. Mr. Barr?

Mr. BARR. Senator Thurmond, we at Southeastern Legal Foundation are a body very interested in maintaining the sanctity of the rule of law in this country and all constitutional processes thereunder, and we believe that for Judge Souter to have done anything else in our opinion would have cast doubt on his ability to properly serve on the Court. I think he took the only proper course ethically and in line with the correct reasoning, we believe, under the Constitution in refusing to be drawn into those debates and rendering those opinions.

Senator THURMOND. In fact, wouldn't he have violated the rule of ethics if he had answered such questions?

Mr. BARR. It is my understanding of the rule of ethics as they pertain to judges, the ABA rules, that he would have.

Senator THURMOND. I want to ask all three of you this question. You have studied his background; you have heard his testimony; you are familiar with his education, training, and experience. Do

you know of any reason whatever that he should not be confirmed by this Senate?

Mr. WILLIAMS. I do not.

Mr. BECK. I do not.

Mr. BARR. No, sir. We do not see any.

Senator THURMOND. I will ask you this last question: Is it your opinion that Judge Souter has the competency, the dedication, the courage, the integrity, and the fairness to be a Justice of the Supreme Court of the United States? Mr. Williams?

Mr. WILLIAMS. Very definitely.

Senator THURMOND. How is that?

Mr. WILLIAMS. Very definitely.

Senator THURMOND. Mr. Beck?

Mr. BECK. Based upon our analysis of his historical decisions and the process he followed to reach his decisions, the answer would be yes.

Senator THURMOND. Mr. Barr?

Mr. BARR. Yes, Senator Thurmond, we believe that.

Senator THURMOND. That is all the questions I have. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you.

Let me ask you, Mr. Williams, would your position be any different if Mr. Souter would not discuss the rationale or legal reasoning in *Brown v. Board of Education*?

Mr. WILLIAMS. Would my position be any different if he would not?

Senator KENNEDY. Yes.

Mr. WILLIAMS. I have listened to your discussion, the committee's discussion—not your personal discussion—of that issue with him and to the discussion of the various witnesses on that subject, and I believe that the *Brown v. Board of Education* underlying reasoning is eminently settled and probably at that level of fundamental principle not likely to be challenged in ways that would make it a live issue before the Court, either before the court on which he sits or before the Supreme Court. I think that is a fact if you analyze the dockets of those two courts.

The situation is not the same. The country is being really rent asunder, as you know, by the abortion issue, and I think that it has become a live political topic that really probably at this time in our history requires a little different approach. It is an interesting question, and I don't come to that conclusion easily.

Senator KENNEDY. Well, it is somewhat more than an interesting question. What year do you think it became settled law, the issue of race discrimination?

Mr. WILLIAMS. Oh, gee, I don't think I am qualified to tell you—

Senator KENNEDY. Was there sometime when it was—

Mr. WILLIAMS. It was certainly a settled question with me long before it became settled with the Supreme Court.

Senator KENNEDY. You don't think that there is a parallelism in terms of questions of the constitutional rights in privacy?

Mr. WILLIAMS. I think that stating the question as broadly as you have, having to do with constitutional rights of privacy, I think maybe is not quite the question that we are talking about here. I

think basically we are talking about a manifestation of the constitutional rights of privacy in a context that has taken on political dimensions.

Senator KENNEDY. Well, for how many years now in the *Roe* situation has that been settled law?

Mr. WILLIAMS. I am not quite sure what your question, how many years has it been since *Roe* was, in fact, ordered, or how many years since it has been settled law in the minds of the judges of the judiciary generally or in terms of the way in which courts deal with the matters. I think we know the issue is—

Senator KENNEDY. Well, the Supreme Court is the law of the land and—

Mr. WILLIAMS. Right. I think we know that the—

Senator KENNEDY. In regard to *Roe* it has been in effect for some 17 years.

Mr. WILLIAMS. Yes. But I think the question that you are asking, I believe, is the same question you were asking in the *Brown* context, which is how long has it been settled in the minds of the judiciary, and I think there is a lot of questions about that. Some people would say that it is not settled. Some others would say it is quite settled; aspects of it are, other aspects of it are not.

As I said, it is not a simple matter.

Senator KENNEDY. You noticed that the judge was willing to speak about the death penalty and how many issues are going to be coming up before the Supreme Court with regard to the death penalty and various provisions of what is cruel and unusual punishment. They may very well have that Racial Justice Act which this committee has reported out in regards to the use of the death penalty in a discriminatory manner. Yet Judge Souter expressed no reservation whatsoever in expressing his view on that issue. That certainly may very well be a question that will come up in terms of that particular provision.

Mr. WILLIAMS. Senator, unfortunately I did not review Judge Souter's remarks on that issue. I am not familiar with them, and I can't corroborate whether that is the case or not.

Senator KENNEDY. Thank you.

Senator DeConcini?

Senator DeCONCINI. Thank you, Mr. Chairman.

Mr. Williams, I missed the first part of your statement, but I gather you are a long-time friend of Judge Souter's. Is that correct?

Mr. WILLIAMS. Yes.

Senator DeCONCINI. You went to school with him, and you know him on a personal basis.

Mr. WILLIAMS. Yes, Senator.

Senator DeCONCINI. Socially as well as professionally?

Mr. WILLIAMS. Yes.

Senator DeCONCINI. Can you express to this committee, do you think he is an ideologue in his political directions or his philosophy as it relates to Government and Government involvement in people's lives?

Mr. WILLIAMS. I would say that if one thing is clear to me about David Souter, it is that he is not an ideologue and that he comes to this with no political agenda. It is rather remarkable. He is not an ideologue. He doesn't have a political agenda. He is intensely curi-

ous intellectually. He has a certain sense of the degree of the importance of not getting too much ahead of himself in terms of arrogating unto the judiciary some of the things that perhaps courts from time to time become more involved in. But at a time when we have the Congress in good hands, I take comfort in knowing that we would have in Judge Souter one who would listen carefully and try to administer the Congress' laws as they have been written.

Senator DECONCINI. Has your relationship been such that you discuss political issues?

Mr. WILLIAMS. Actually not. I mean, we were all in formation at the outset, and I would say it was a heyday of the jurisprudence of Justice Brandeis and notions of judicial restraint there and the craftsmanship of John Marshall Harlan. That seemed to be the predominant standard that students were called to address, and, frankly, I personally have seen a lot of similarity and detected a lot of sympathy—

Senator DECONCINI. You have never sat around—

Mr. WILLIAMS. On his part on those issues.

Senator DECONCINI. You have never sat around having a beer or a cup of coffee or lunch or dinner with him and talked political philosophy?

Mr. WILLIAMS. Not as such, no.

Senator DECONCINI. Do you know offhand his personal view on the death penalty?

Mr. WILLIAMS. I do not.

Senator DECONCINI. Or on abortion?

Mr. WILLIAMS. I do not.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Williams, I am concerned about the experience that Judge Souter may have had with Afro-Americans on understanding their problems. There was some testimony about some of his other experience. This is obviously not a ground for rejection, but I think it is a ground which warrants some exploration.

Did you have an opportunity to hear or review the testimony of Mr. Joseph Rauh, the head of the Civil Rights Leadership Conference?

Mr. WILLIAMS. No, I did not. I would have enjoyed doing so since I very much respect Mr. Rauh.

Senator SPECTER. Well, Mr. Rauh testified yesterday. I did not get a copy of his prepared testimony, and he is in the room today. I had asked if he had one. He is a great extemporaneous speaker, and he testified without prepared testimony, but had you heard that and been in the position to comment, I would have been interested.

In the absence of that, I am interested to know what you know about Judge Souter's exposure to the Afro-American or black community. He has lived in a State which does not have the kinds of problems that, say, Philadelphia, PA, has, or other major American cities have. There is a good bit to the feel of those kinds of problems, and I would be interested in what you could give us in a factual context which would shed some light on his experience in that context.

Mr. WILLIAMS. All I know, Senator, is that in our years in Boston and Cambridge, certainly David Souter had as much exposure as anyone else to African-Americans.

Senator SPECTER. That may not be a whole lot in Cambridge at Harvard. It could be in Boston.

Mr. WILLIAMS. That may or may not be true relative to the country and to the community of universities to which our alma mater belongs. I think it was more than at most in those days, but—

Senator SPECTER. Well, but that is a different—

Mr. WILLIAMS. I have not reached my conclusion, Senator.

Senator SPECTER. OK.

Mr. WILLIAMS. I would also say that surely he had responsibility for supervising and for looking after minority students and—

Senator SPECTER. Many?

Mr. WILLIAMS. I would say some, not many. The number has grown dramatically, but it was certainly a lot more in the years when we were faculty advisers than in the year when I was a student. I was—

Senator SPECTER. Could you give an approximation as to how many black students he counseled?

Mr. WILLIAMS. Oh, I would say all of us had—I would say the minority population of the class was probably somewhere on the order of 5 percent in those days. That was out of a class of maybe 1,200.

But let me say that I cannot give you factual information that can confirm to you that David Souter has been widely exposed to African-Americans. I tend to suspect that he has not. What I can tell you is that in the dealings that he has had, I have had the impression that he has been on a personal level—and I am not speaking to larger political issues, but on a personal level he has been eminently fair and has shown in that wonderful New England way a remarkable color-blindness—a concern about the issues of the day, yes, but no signs of uneasiness.

Senator SPECTER. Well, Mr. Williams, I certainly think it is possible to listen and learn a lot, but there is a difference if you have experience. The kind of student that you would have at Harvard College, Afro-American, is different from the kind that you face, for example, in the discrimination cases which we are concerned about under the Civil Rights Act. One of those matters is now before the Congress. It arises in the *Griggs* case and the *Ward's Cove* case, I am sure—you are nodding in the affirmative—where you really have a feel for the underclass of minorities who are seeking employment. The Court has set up some very important guidelines beyond actual discrimination where we have the so-called disparate impact, illustratively where a community may be, like Philadelphia, 45 percent Afro-American, and illustratively there may be only a few percentage in the work force.

That doesn't prove discrimination, but the Court sets up a standard; if there is that disparity, then the employer has to show business necessity because it may not be possible and there may be very good business reasons. That sets the context of controversy which is now in the Congress. The Senate has passed a bill to change *Ward's Cove*; so has the House. The President has suggested a veto, and these issues are certain to come before the Court again.

If a person has had some experience, say, in the ghettos of a big American city, has worked with problems of delinquency, problems of young minorities trying to get a job, that experience would be very helpful. I don't say it is indispensable. I don't think you can give any litmus test or any indispensable prerequisites on these lines, but I would be interested in your evaluation as to how he would stack up on, say, the kind of an issue which would come up in the disparate impact cases or how he would stack up if he has a case like *Metro Broadcasting*.

I notice in your résumé that you are active in minority entrepreneurship, where you have a case like, set aside, *City of Richmond v. Croson* or you have *Bakke* where some consideration is to be given to race. Judge Souter did say that he would give some weight to the racial factor.

In that rather broad but very vital and important context, how would you evaluate him?

Mr. WILLIAMS. I am particularly glad that you mentioned the *Metro Broadcasting* and *Astroline* cases, because in that context I have thought a bit about this nomination and what the implications are. What you are referring to is the fact that I am chairman of the board of a minority entrepreneur, of a capital venture firm, a nonprofit firm that specializes in encouraging minority entrepreneurs in the broadcast field. *Astroline* and the *Metro Broadcasting* cases were very much directed to things that are of key interest to us.

I had to ask myself, gee, is this the kind of case that David Souter, as opposed to Justice Brennan, would have given us. I have resolved the matter in my mind as follows, and it is on this basis that I really find that I am quite comfortable in supporting his nomination.

David Souter understands. He has lived in the world. He is an observer. He has seen the terrible situation that our minority populations, including our African-American population, find themselves in. Against that backdrop and, I think, a very humane set of values, I think he is prepared to do the right thing, so to speak, in close cases. His fundamental jurisprudence would incline him to follow your lead and to do what the Congress has outlined for the courts to do.

I have in mind the fact that there is very good legislation in this area being developed in the House and Senate, and that the national legislature seems to be in very good shape on those issues. If there is one person who you can count on absolutely trying to advance your principles in a way that is faithful to the legislation that is presented to him, it would be David Souter. I think he is fundamentally fair, I think that he is lacking in prejudice, and I think that he is prepared to listen very carefully to the Congress.

Senator SPECTER. Thank you very much. My time is up. I would just like to conclude by thanking Mr. Beck and Mr. Barr for coming. Regrettably, in a short round and with so many, many witnesses, we don't have a chance to give appropriate deference to the important ideas which you have mentioned in the question-and-answer session. But I do thank you for being here.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you.

Senator Grassley?

Senator GRASSLEY. Mr. Williams, so you think that Judge Souter might rule the same way as Justice Brennan in the *Metro Broadcasting* case?

Mr. WILLIAMS. I don't know for sure. I would think that if there were a Justice Brennan to start the ball rolling, Justice Souter might be inclined to go along. But who is to tell? I would say, most importantly—and this is the key to my understanding of the situation—if the Congress were to say that that is the kind of law we would like, we could surely count on Justice Souter to support that.

Senator GRASSLEY. Mr. Chairman, I have no further questions.

Senator KENNEDY. Thank you very much. I, too, want to express our appreciation for taking the time and giving us the benefit of your judgment on the nominee. We appreciate it very much.

Mr. WILLIAMS. Thank you.

Mr. BECK. Thank you, Mr. Chairman.

Mr. BARR. Thank you.

Senator KENNEDY. Our next panel is Haywood Burns, immediate past president of the National Lawyers Guild; Christopher Ryder, a member of the advisory board of Supreme Court Watch; Paula Ettelbrick, who is the legal director of Lambda Legal Defense Fund; the next witness, Urvashi Vaid, who is the executive director of the National Gay and Lesbian Task Force; and finally, Sara Rios, staff attorney, Center for Constitutional Rights.

We want to welcome all of you. We appreciate your willingness to come here this morning and give us the benefit of your judgment. We would ask your cooperation in respecting the time constraints that the committee is under and the fact that there are a number of other witnesses as well. But we want very much to hear your testimony. So we will proceed in that order.

Mr. Burns, immediate past president of the National Guild.

**PANEL CONSISTING OF HAYWOOD BURNS, IMMEDIATE PAST PRESIDENT, THE NATIONAL LAWYERS GUILD; CHRISTOPHER F.D. RYDER, MEMBER, ADVISORY BOARD, SUPREME COURT WATCH; PAULA L. ETTTELBRICK, LEGAL DIRECTOR, LAMBDA LEGAL DEFENSE AND EDUCATION FUND; URVASHI VAID, EXECUTIVE DIRECTOR, NATIONAL GAY AND LESBIAN TASK FORCE; AND SARA E. RIOS, STAFF ATTORNEY, CENTER FOR CONSTITUTIONAL RIGHTS**

#### STATEMENT OF HAYWOOD BURNS

Mr. BURNS. Good morning, Mr. Chairman, Senator Thurmond, my name is Haywood Burns. I am the immediate past president of the National Lawyers Guild and dean of the City University of New York School of Law at Queens College. I would like to thank the committee this morning for its opportunity to, on behalf of the National Lawyers Guild, testify before you in opposition to the nomination of David Souter to the U.S. Supreme Court.

Mr. Chairman, when Senator Biden at the beginning of these proceedings on the floor of the Senate indicated that we are at a constitutional crossroads and that the work of this committee is of monumental historical importance, it is certainly an observation with which we agree. He indicated that long after the Mideast

crisis and into the next century we will be affected by what happens in this committee and in the Senate.

I must say that as we sit here in the last decade of the 20th century, on the eve of the bicentennial of the Bill of Rights, we share this view because we see how many rights of the people hang by the thread of a 5-4 vote. At this moment in history, the National Lawyers Guild urges that we need a defender of the Constitution and of the Bill of Rights. Not a negative standard, not a standard that looks for the absence of a smoking gun or a paper trail, not is he or she more confirmable than Judge Bork, we need a positive standard. We need a standard that speaks to whether or not this person, he or she, will be a true guardian of our liberties under the Constitution.

This is not a partisan issue. It transcends partisan issues. This is for the good of the Republic and its people. We should keep at it, Mr. Chairman, until we get it right.

Would that there were more constitutional scholars here to inform this process, as there were in the *Bork* hearings. It is my understanding that a number of constitutional law professors have asked to testify before this committee and were informed that they would not be able to do so, that they could, for whatever reason, only participate by way of written testimony.

So you are, therefore, forced to listen to us on this issue of human rights, and we say to you that because we all here at this table are involved on a daily basis in the issue of human rights, we feel it is very important that you not only listen but that you hear. Our message is that David Souter is not the person for this seat on the United States Supreme Court.

The record and the rhetoric do not match. There is a lack of conformity between the David Souter that we saw come here on September 13th and the David Souter whose jurisprudence is on the record for the last 20 years. We ask you to look at the record as well as listen to the testimony. He was charming, he was disarming, he spoke in terms of protection of the people's rights, but there is a record that doesn't conform to that, given his views with respect to due process and limited protections that he is prepared to give.

He talked about the first amendment. He talked about church and state. This is the same David Souter who would defend the flying of the flag at half-mast on Good Friday as not in violation of the first amendment.

He talked about his sensitivities, about his views on equal protection. Very impressive, but the record does speak about a David Souter who would obstruct the enforcement of the civil rights statutes by failing to give statistics to the EEOC; a David Souter who would disenfranchise illiterate citizens in his own State; a David Souter who would not give rights to Bosselait brothers, poor as they were, elderly as they were, who without counsel had gone before the hearing on their workmen's compensation.

He is a person who has talked about his views on civil rights, but this is the same David Souter who said in a speech, according to two newspapers in his own State, that he was against affirmative action as affirmative discrimination.

I am concerned that he has appeared before this body and said that in his State he knows of no discrimination. Now, I know New Hampshire. New Hampshire is a great State, and I spent much time there, going camping with my boys, Jeremiah and Seth. But for him to say that in his State or any State in these United States is free of racism portrays to me a lack of understanding of what racism is or what discrimination is. It boggles the mind to think that anyone in this day and time would make that assertion. It makes me very worrisome concerning his own views about what is involved in discrimination.

He has not, in my view, evinced the kind of sensitivity or knowledge or human standing that this position calls for.

Mr. Chairman, I was not prepared today to make any personal statement with respect to my own personal knowledge of David Souter. But after the last witness, let me just say that with all the respect that I have for Mr. Wesley Williams, whom I have known for many, many years, I, too, knew David Souter in this period. In fact, I knew him before Mr. Williams, and just as with Rashamon or different people who are blind, feeling the elephant, and you may get a different description of what you see, I did not have that experience with him. I did not find him mean-spirited. I did not find him biased. But certainly I did not find that he had any understanding of human rights or any concerns expressed in this very turbulent time when we were in college together, living in the same dorm, sleeping under the same roof, eating in the same dining hall for years.

I have not kept up with him over the years, and I can readily admit people change. Anyway, this is not a litmus test, but let me just say that since the committee was given one view, it is only fair, I feel, that it get another view.

Mr. Chairman, in conclusion, let me just say that it is too much to ask that we do justice to the subject of justice in 5 minutes. This is an awesome task that we have before us. As you can see, I am an African American. When my grandfather was a boy, it was against the law of the State where he lived to teach him to read, and when he was 1-year-old, the Supreme Court said that black people had no rights that white people are bound to respect.

A scant 12 years before my father was born, the Supreme Court, in *Plessy v. Ferguson*, said that separate but equal, a kind of American apartheid, was the law of the land and did not offend the Constitution. I was 14 years old and in high school before *Brown v. Board of Education* was decided to put a crack in that wall of apartheid condoned in *Plessy v. Ferguson*, so that I understand that the Supreme Court has awesome power in our national life. With that in mind, then I ask this committee to look to the entire record, not just the rhetoric.

He asked that we make a leap of faith. That is assuming too much, I think, because we have too far to fall. It is, in my view, necessary for this committee to look at 20 years of jurisprudence, not just what was said in the David Souter that was born on September 13, 1990, in this committee room.

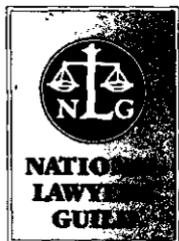
Yesterday, when I was waiting to testify, I walked 2 minutes across to First Street, to the Supreme Court, and sat outside and thought for a while and looked at "Equal Justice Under Law" en-

graved above the columns of the Supreme Court, and I wondered what that will mean for my son and all of my sons and all our sons and daughters their grandchildren into the next generation, because that is the impact of the decision that you are about to make.

I ask that you help give some real meaning to this. It has always been an aspiration, rather than a reality, but help us live in an America where we can continue to push forward together to make that reality something that comes down to the lives of each and every one of us, whether we are black or white, men or women, rich or poor, old or young.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Burns follows.]



September 18, 1990

## TESTIMONY OF THE NATIONAL LAWYERS GUILD IN OPPOSITION TO THE NOMINATION OF DAVID SOUTER TO THE U.S. SUPREME COURT

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Good afternoon. My name is Haywood Burns. I am immediate past president of the National Lawyers Guild and Dean of the City University of New York Law School at Queens College. I want to thank the Committee for allowing me to present you with the views of the National Lawyers Guild in strong opposition to the nomination of David Souter to the United States Supreme Court. On behalf of the Guild's membership in over 200 chapters across the country, I urge that, after careful consideration of David Souter's jurisprudence, as well as the testimony he has provided this committee, you withhold your consent to this nomination. I trust that you share with us a concern that any Supreme Court justice be committed to upholding the rights contained in our Constitution's Bill of Rights, and I urge that you do not accept a nominee who has not met the burden of demonstrating anything but a life long defense of those rights. Both through his testimony and the record he brought to these hearings David Souter has not met that burden.

Judge Souter's record on the bench, as well as the legacy he left behind in the New Hampshire Attorney General's office, reveal a jurisprudence of convenience which is grounded in a fundamental misconstruction of the role the Bill of Rights should play in the delicate relationship between government and the governed. What is more, Judge Souter's answers to your questions over the last few days, to the extent that he has provided answers, only confirms this view of the Constitution.

David Souter's record reveals a constitutional jurisprudence which fluctuates depending upon whether he is asked to construe the rights of government or the rights of the individual. In Richardson v. Chevrefils, State v. Denny, and Rockhouse Mountain Property Owners Assoc. v. Town of Conway, among other cases, Judge Souter expressed such an exceedingly narrow view of the due process protections contained in the Fifth Amendment, that the widest expanse of governmental conduct would be insulated from constitutional scrutiny. Indeed, in State v. Coppola Judge Souter's construction of the Fifth Amendment's privilege against self-incrimination was rejected when reviewed by the First Circuit Court of Appeals on a habeas corpus petition brought by the defendant. In a strongly worded opinion, the First Circuit wrote that Souter's interpretation of the Fifth Amendment "amounts to a rule of evidence whereby inference of guilt will trump a Fifth Amendment claim of the privilege ... Under the reasoning of the New Hampshire court any invocation of the privilege, no matter how worded, could be used by the prosecutor." Fortunately, habeas review in federal court of Judge Souter's decision allowed the Bill of Rights to prevail over prosecutorial overreaching. Ironically this is the same type of federal court habeas jurisdiction Judge Souter has testified here that he supports narrowing.

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Contrast Judge Souter's narrow construction of individual rights with his broad reading of the Bill of Rights when construing the rights of government. In United States v. New Hampshire David Souter argued that requiring the state of New Hampshire to provide racial and ethnic statistical data to the EEOC amounted to a presumption that the state was guilty of discriminatory hiring practices in violation of the state's Fourth and Fifth Amendment rights. Under David Souter's view of the Bill of Rights, the state need not produce any information without a showing of probable cause; however, individuals can be compelled to incriminate themselves and produce physical evidence on less than a mere suspicion of wrongdoing. His approach time and time again increases the burden on individuals seeking to vindicate fundamental rights, while granting wide latitude to governmental action.

The expedience of his jurisprudence is no better characterized than by his unwillingness to express an opinion with respect to cases dealing with privacy rights, while displaying no reluctance in discussing specific voting rights, unemployment compensation or establishment clause holdings.

The National Lawyers Guild is concerned that in the zeal of the search for Judge Souter's privacy beliefs, his answers in those areas of law where he has expressed an opinion have been ignored -- areas that are of equal concern to the people who, like women, are not sitting on this committee. In these answers lie plenty of cause for people of color, poor people, working people, lesbians and gay men, and unmarried people to reject this nominee.

Most notably, in response to questioning from Senator Kennedy, Judge Souter reaffirmed his argument in a voting rights case that extending the franchise to persons who could not read the New Hampshire Constitution would dilute the voting rights of those who could. He told the Committee that this was merely a question of math. This mathematical view of the rights secured in the Bill of Rights exactly mirrors the testimony of Robert Bork. Recall that in Bork's view, the recognition of rights of one group could only come about as a result of the reduction of rights of others. This closed market view of constitutional rights led to your rejection of Robert Bork; it should do no less with David Souter.

Underlying David Souter's jurisprudence is the assumption that the courts represent a level playing field -- that is, that all litigants bring to their disputes comparable resources and power. In fact, nothing could be farther from the truth. Gender, class, race, age, sexual orientation, physical or mental ability all bear upon the relative power one can exercise as a litigant. Lost in David Souter's objective and rarified approach to the law are these real people. For this reason he testified before you that the New Hampshire literacy tests did not offend the constitution because there was no evidence that they were discriminatorily applied. This view of equal protection indicates an unwillingness to recognize that justice is no less offended by policies which are discriminatory in their effect, than where it results from discriminatory application. As was recently reaffirmed by the Congress in the Civil Rights Act of 1990, that which is neutral on its face can have profoundly discriminatory implications in its application.

The National Lawyers Guild strongly urges that the Senate reject this nominee. David Souter has shown himself lacking in requisite constitutional principles and averse to upholding the rights and responsibilities contained in our cherished Bill of Rights.

Senator KENNEDY. Thank you very much.  
Mr. Ryder?

#### STATEMENT OF CHRISTOPHER F.D. RYDER

Mr. RYDER. Mr. Chairman and members of the committee, with your permission, I would like to submit Supreme Court Watch's full written testimony for inclusion in the record.

My name is Chris Ryder. I am an attorney with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, in New York City, and appear before you today on behalf of Supreme Court Watch, a project of the Nation Institute.

Supreme Court Watch is dedicated to research on and public education about decisions and trends of the Supreme Court. For many years, Supreme Court Watch has analyzed and reported on the judicial records of Supreme Court nominees, with particular attention to their dedication to the protection of civil rights and civil liberties.

Supreme Court Watch's review of Judge Souter's record and testimony leaves it with questions and concerns in the areas of due process and equal protection, fourth, fifth, and sixth amendment protections, reproductive choice, separation of church and state, and discrimination on the basis of race, gender, age, and sexual preference. Indeed, Supreme Court Watch is troubled that Judge Souter's record reflects a relatively narrow and technical regard for the law with respect to civil liberties.

Although by his record and testimony, Judge Souter appears well equipped to handle the complex, technical legal issues that confront a Supreme Court Justice, Supreme Court Watch remains concerned that he has demonstrated no clear commitment to upholding and ensuring the civil rights and civil liberties of all Americans. Consequently, Supreme Court Watch believes that the Senate should decline to confirm his nomination.

One basis for this conclusion lies in Judge Souter's judicial record. Although he has testified about his concern for the victims of crime, neither his record nor his testimony fully appreciates the distinction between effective law enforcement and upholding the constitutional guarantees implicated in criminal jurisprudence.

For example, Judge Souter dissented from a majority opinion of the Justices rejecting a proposed law permitting the disposal of blood alcohol evidence, without giving the suspect an opportunity to test the evidence independently. Judge Souter saw no due process interest in requiring that the State preserve this evidence for possible challenge.

Further, Judge Souter's views on the writ of habeas corpus, of profound importance to the Founding Fathers, are unduly restrictive. Judge Souter's view that Federal courts should not charge State courts retroactively with law which, in his words, was not there to follow at the time of the State court's judgments, does not reflect a broader vision that the same constitutional rights identified in later Federal decisions were fully present at the time of the State judgments.

In the *Colbath* case, Judge Souter limited the protection afforded rape victims by New Hampshire's rape shield law, and in so doing,

even wrote that the victim might have alleged rape as a way to excuse, his words, "her undignified predicament."

Judge Souter's due process and equal protection analysis also raises concerns about his commitment to furthering civil rights and civil liberties. In *Bosselait*, Judge Souter's cramped equal protection analysis disregarded the compelling facts of this case, and his testimony has not allayed any of Supreme Court Watch's concerns regarding that position.

Supreme Court Watch is also concerned that Judge Souter joined in an opinion refusing to follow numerous States in rejecting the use of sexual orientation as a bar to being an adoptive or foster parent.

Perhaps in his prior role, Judge Souter did not have ample opportunity to demonstrate a commitment to extending the Constitution's guarantees to each person in this Nation. However, only last week, in discussing literacy tests, he characterized the potential disenfranchisement of countless Americans as nothing more than "a mathematical statement."

Moreover, he testified that, at the time he was attorney general, he personally agreed with New Hampshire's literacy restrictions, although he now disagrees with those positions.

Supreme Court Watch fears, as should this committee and the Senate as a whole, the consequences of entrusting the guarantees of the Constitution to a man with two circumscribed divisions of the democratic process.

Indeed, now, as the Congress has felt the need to consider civil rights legislation specifically overruling certain recent Supreme Court holdings, the Senate should be particularly sensitive to this nominee's constitutional vision.

The second area of Supreme Court Watch's concern with this nomination is Judge Souter's failure to respond to a significant quantity of legitimate questioning by this committee. Where, as here, the candidate's judicial record is silent or raises concerns on important matters, the candidate's testimony becomes especially significant. Judge Souter has not been as forthcoming as necessary, and was inconsistent in his choice of subject matters about which to decline to testify.

In a concurrence, Judge Souter went out of his way to express concern for hypothetical physicians' personal feelings about abortions. However, Judge Souter has refused to express any concern about the real and present legal challenge to well-established Supreme Court precedent guaranteeing a woman's constitutional right to choose, even though he appears to be unconstrained with respect to such equally vital and unsettled areas as separation of church and state.

Judge Souter was willing to discuss *Lemon v. Kurtzman* and Judge O'Connor's views on applying its reasoning to recent cases before the Supreme Court. He expressed his approval of the result in *Employment Division of Oregon*, a case decided this year, affirmed the principles underlying that decision and specifically agreed with Justice O'Connor's concurrence.

Judge Souter gave this testimony, despite his belief at the time that a motion for rehearing in that case was pending before the Court, although we believe that that motion was denied in June.

This is inconsistent with his refusal to discuss either the constitutional principles underlying *Roe v. Wade* or the constitutionality of an intervention in the Korean conflict over 30 years ago, although it should be noted that he modified his position on the intervention on Monday, to say that he did not know whether it was constitutional.

Moreover, Judge Souter declined to discuss before this committee his personal view of the morality of the right to choose, in contrast, Justice O'Connor did so and assured the committee that it would play no role in her legal analysis.

Judge Souter has stated his personal views on other issues, such as the morality of the death penalty and white collar crime. It is difficult to reconcile his apparent willingness to discuss certain cases, constitutional principles and personal viewpoints, but not others.

Mr. Chairman, to conclude, Supreme Court Watch believes that Judge Souter's record raises numerous concerns regarding his commitment to the protection of civil rights and liberties. His testimony before this committee has not sufficiently allayed these concerns.

At a time when major constitutional issues hang in the balance, Supreme Court Watch cannot, on the available record, support this nominee.

Thank you.

[The prepared statement of Mr. Ryder follows:]

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COURT**



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**TESTIMONY OF CHRISTOPHER F.D. RYDER  
ON BEHALF OF SUPREME COURT WATCH  
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY  
ON THE NOMINATION OF DAVID H. SOUTER  
TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES**

**September 18, 1990**

TESTIMONY OF CHRISTOPHER F.D. RYDER  
ON BEHALF OF SUPREME COURT WATCH  
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY  
ON THE NOMINATION OF DAVID H. SOUTER  
TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES

Mr. Chairman, Members of the Committee:

My name is Chris Ryder. I am an attorney in private practice at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison in New York City and appear before you today on behalf of Supreme Court Watch, a project of The Nation Institute. Supreme Court Watch is dedicated to research on and public education about the decisions and trends of the Supreme Court. For many years, Supreme Court Watch has analyzed and reported on the judicial records of Supreme Court nominees, with particular attention to their dedication to the protection of civil rights and civil liberties. Beginning in 1981, a representative of the project has appeared before this Committee or submitted written testimony in connection with the nominations of Sandra Day O'Connor, Antonin Scalia, Robert H. Bork and Anthony M. Kennedy.

We are deeply grateful for the opportunity to testify before you today as you discharge your constitutional duty of advice and consent. The Senate's decision on this nominee is likely to have a profound effect on the course this country will follow well into the next century. Your decision is a matter of the utmost importance to the American people.

Our review of Judge Souter's written and oral record and of comprehensive reports prepared by other organizations leaves us with questions and concerns in the areas of due process and equal protection, Fourth, Fifth and Sixth Amendment

protections, reproductive choice, separation of church and state, and discrimination on the basis of race, gender, age and sexual preference. Indeed, we are troubled that Judge Souter's record reflects a relatively narrow and technical regard for the law with respect to civil liberties.

Although by his record and testimony Judge Souter appears well-equipped to handle the complex, technical legal issues that confront a Supreme Court Justice, we remain concerned that he has demonstrated no clear commitment to upholding and ensuring the civil rights and civil liberties of all Americans. Consequently, Supreme Court Watch believes that the Senate should decline to confirm his nomination.

\* \* \* \* \*

### **Judge Souter's Record and Testimony<sup>1</sup>**

Supreme Court Watch is troubled by several of Judge Souter's opinions in the criminal procedure area. Although he has testified about his concern for the victims of crime, neither his judicial record nor his testimony reflects a full appreciation for the necessary distinction between effective law enforcement -- a police function -- and upholding the constitutional guarantees implicated in criminal law jurisprudence.

For example, in *Opinion of the Justices*,<sup>2</sup> Judge Souter dissented from a New Hampshire Supreme Court majority rejecting a proposed law that would have allowed the state to dispose of blood alcohol evidence without giving the suspect an opportunity to

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<sup>1</sup>A copy of our preliminary report on Judge Souter's record, made public shortly after his nomination, is attached as Annex A to this testimony. We note that this report is not comprehensive and does not include analysis of his testimony before this Committee.

<sup>2</sup>557 A.2d 1355 (N.H. 1989).

test the evidence independently. Unlike the majority, Judge Souter found no due process interest in preserving this evidence for possible later challenge.

Further, Judge Souter's views on the writ of habeas corpus -- a writ of profound importance to our Founding Fathers -- will only serve to restrict its usefulness. Judge Souter's view of the current doctrine of federal collateral relief is that reviewing federal courts should not charge state courts retroactively with law which "was not there to follow at the time" of the state court's judgments. Judge Souter fails to appreciate that the same Constitutional rights, although identified only in later decisions, were in full force and effect at the time of the state judgments.

In *State v. Colbath*,<sup>3</sup> on the other hand, Judge Souter granted an accused rapist a new trial because he considered that evidence of the victim's previous sexual conduct should have been admissible where consent was a defense. Judge Souter's approach in this case limited the protection afforded by New Hampshire's "rape shield" law. In what may at best be described as insensitivity, Judge Souter suggested that the victim might have alleged rape as a way to excuse "her undignified predicament."

Judge Souter's due process and equal protection analysis also raises concerns about his sensitivity and commitment to furthering civil rights and liberties. In *Appeal of Albert & Edward Bosselait*<sup>4</sup> Judge Souter wrote the majority opinion denying a claim for unemployment compensation by two elderly workers who had shared a full-time janitorial position for 22 years. Applying the minimal level of scrutiny to the state unemployment

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<sup>3</sup>540 A.2d 1212 (N.H. 1988).

<sup>4</sup>547 A.2d 682 (N.H. 1988).

compensation statute, Judge Souter appeared to disregard the exceptional and emotionally compelling facts of this case in holding that the state could rationally conclude that it should reserve its funds solely for those seeking full-time employment. Moreover, Judge Souter's testimony last week did not allay any of our concerns regarding his position in that case.

In another area, Judge Souter joined an advisory opinion<sup>5</sup> upholding a rigid exclusion of gay and lesbian persons from adopting children or becoming foster parents under any circumstances. This opinion failed both to recognize that homosexuals should be protected from discrimination and to follow the lead of numerous states in rejecting the use of sexual orientation as an absolute factor in evaluating potential adoptive or foster parents.

Perhaps as attorney general and state court judge, David Souter has not had sufficient opportunity to demonstrate his commitment to extending the Constitution's guarantees to each and every person in this nation -- rich or poor -- regardless of race, gender, age and sexual preference. However, in discussing last week New Hampshire law that previously made literacy a condition of the right to vote, we are not comforted by his characterization of the resulting disenfranchisement of countless illiterate Americans as nothing more than "a mathematical statement."<sup>6</sup>

Moreover, in his testimony, Judge Souter affirmed that at the time he took these actions on literacy as Attorney General, he personally agreed with them, although he then

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<sup>5</sup>*Opinion of the Justices*, 530 A.2d 21 (N.H. 1987).

<sup>6</sup>*Nomination Hearings*, Friday, September 14, 1990 (response to Sen. Kennedy's questioning).

indicated he now disagrees with those positions. We fear, as should this Committee and the Senate as a whole, the consequences of entrusting the precious guarantees of the Constitution to a man with too circumscribed a vision of the democratic process. Indeed, in light of the need for the Civil Rights Act of 1990 specifically overruling certain recent Supreme Court holdings, Congress should be particularly sensitive to this nominee's constitutional vision.

#### **Judge Souter's Failure to Respond to Questioning**

Where, as here, the candidate's judicial record is silent or causes concern on important matters of federal constitutional jurisprudence, the candidate's testimony is of paramount importance. Judge Souter has not been as forthcoming as necessary. He has demonstrated wavering forthrightness in his inconsistent choice of subject matters about which to testify.

In one of Judge Souter's concurring opinions,<sup>7</sup> he went out of his way to express concern for hypothetical physicians' personal feelings in performing abortions. However, Judge Souter has absolutely refused to express concern about the real and present legal challenge to established Supreme Court precedent guaranteeing a woman's constitutional right to choose. We are troubled by Judge Souter's refusal to respond to questioning remotely relating to the constitutional principles underlying the right to choose and the President's right to wage a war not declared by Congress, while he does not appear to be similarly constrained with respect to equally vital and troubled areas such as

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<sup>7</sup>*Smith v. Cote*, 513 A.2d 341 (N.H. 1986).

separation of church and state.<sup>8</sup>

Judge Souter was forthcoming in his discussion of a number of current matters of constitutional adjudication, but refused to countenance any discussion of certain others. For example, Judge Souter was willing to discuss the *Lemon v. Kurtzman* test and Justice O'Connor's views on how to apply that test to recent cases before the Supreme Court. He expressed his approval of the result reached in one such case, affirmed the principles underlying that decision and specifically agreed with Justice O'Connor's concurrence.<sup>9</sup> Judge Souter gave this testimony despite his acknowledgement that a motion for rehearing in that case is pending before the Court. This is inconsistent with his refusal to discuss the constitutionality of President Truman's intervention in the Korean Conflict or the principles underlying *Roe v. Wade*.

Moreover, Judge Souter declined to discuss his personal view of the morality of abortion. In contrast, Justice O'Connor disclosed to this Committee her personal view of abortion and assured the Committee it would not play any role in her legal analysis. However, Judge Souter has stated some of his personal views on such issues as the morality of the death penalty. In sum, it is difficult to reconcile his apparent willingness

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<sup>8</sup>The Senate is well within the bounds of propriety to inquire into a candidate's views on even the most recent constitutional precedents and principles; only the solicitation of a commitment to vote a certain way on a particular pending case could raise a concern of prejudice or a requirement for recusal. If the Senate is unable to gain an understanding of the nominee's views in the area under inquiry, then it cannot effectively discharge its duty of advice and consent and cannot assent to the nomination.

Our views on the advice and consent process in the context of this nomination are attached as Annex B to this testimony.

<sup>9</sup>*Nomination Hearings*, Friday, September 14, 1990 (response to questioning by Senators Leahy and Specter).

to discuss certain cases, constitutional principles and personal viewpoints, but not others.

\* \* \* \* \*

Judge Souter's record as Attorney General and as Justice on the New Hampshire Supreme Court raises numerous concerns regarding his commitment to the protection of civil rights and civil liberties. His testimony before this Committee has not sufficiently allayed these concerns. At a time when major Constitutional issues hang in the balance, Supreme Court Watch cannot, on the available record, support this nominee.

# JUDGE DAVID H. SOUTER, WHERE DOES HE STAND? A Preliminary Review of his Judicial Record

President Bush's nominee for the Supreme Court, David H. Souter, has been called a "mystery man" and a "blank slate." It is likely that he was chosen precisely because he has not written or spoken out on the most controversial issues before the Court. With this preliminary report, we hope to fill in some of the blanks. As New Hampshire's Attorney General and as then-Governor John Sununu's choice for the State Supreme Court — where he served from 1983-1989 and wrote 221 opinions — Judge Souter does have a record.

Supreme Court Watch has examined Judge Souter's New Hampshire Supreme Court record in the following areas:

- **Abortion**
- **Criminal Procedure**
- **Due Process and Equal Protection**
- **Freedom of the Press**
- **Freedom of Speech**

Judge Souter's role as Attorney General in prosecutive positions of the State's public defender's office and in supporting the Governor's plan to place a flag on public buildings at half mast on Good Friday is also examined.

Supreme Court Watch raises a number of concerns about the prospect of Judge Souter sitting



**TO DESERVE A SEAT ON THE SUPREME COURT, JUDGE SOUTER MUST BE ABLE TO DEMONSTRATE TO THE SENATE AND THE AMERICAN PEOPLE A LIFELONG COMMITMENT TO EQUAL JUSTICE AND THE BILL OF RIGHTS.**

on the Supreme Court. He is described by his supporters as a "strict constructionist," a well-known euphemism for a deeply conservative strict party. His decisions generally support this conclusion and make it clear that

There is also grave concern about what we don't know. Most major Supreme Court decisions last term were decided by a 5-4 vote. Before Judge Souter is given a life term on the Supreme Court, and the chance to tip the balance of power on the current Court, the American people have the right to know Judge Souter's view of the Constitution, the function of the Supreme Court in protecting fundamental constitutional rights, and where he stands on vital constitutional questions central to American life.

The President and supporters of Judge Souter are staking out a position which suggests that the Senate does not have the right to question the nominee about these and other specific issues. We disagree. The Senate has accepted constitutional responsibility with the President to determine who sits on the Supreme Court. Before confirming Judge Souter, the Senate must insist that he provide the answers to these fundamental questions.

To deserve a seat on the Supreme Court, Judge Souter must be able to demonstrate to the Senate and the American people a lifelong commitment to equal justice and the Bill of Rights.

## ABORTION

### BY CONSENTED GUESTWORK

Constance Dalrymple is a legal intern at Supreme Court Watch and a law student at CLUJ Law School at Queen's College, New York.

The New Hampshire Supreme Court has never dealt directly with the constitutionality of restrictions on a woman's right to obtain an abortion. In Judge Souter's only state Supreme Court decision on the crucial question of abortion, he authored a special concurrence to a majority decision, which upheld a wrongful birth claim by the mother of a child born with congenital defects as a result of her exposure to German measles during pregnancy. *Smith v. Cole*, 513 A.2d 311 (NH 1986).

Here the mother's physician had failed to test for German measles and inform the mother of her exposure until the second trimester of her pregnancy. He further failed to inform her of genetic testing procedures, which could detect possible fetal defects. As a consequence, the child suffered from heart disease, blindness, motor retardation and significant hearing impairment. The mother claimed that the base element of the possible birth defects and the availability of genetic testing she would have considered the option of terminating her pregnancy by abortion. The court ruled that the physician was guilty of negligence in not asking her so that she could make an informed decision regarding whether to have the child. The mother was awarded substantial damages for the special medical and educational needs attributable to her child's impairment.

Judge Souter's concurrence raised an issue which had not been raised by the parties in the case, thus demonstrating his special concern with this issue. He said that physicians whose religious or moral principles condemn abortion should be able to avoid malpractice liability by referring their patients in a timely manner to other physicians for the testing and counseling that could lead them to decide to have an abortion. Judge Souter's ruling the issue suggests a particular solicitude for physicians who hold anti-abortion views. His result, however, balances the right of the pregnant woman to be informed with the right of physicians not to perform or counsel their patients about medical procedures which violate their religious or moral beliefs.

Judge Souter makes no direct statements in his concurrence as to whether or not he agrees with the landmark *Roe v. Wade* decision which recognized a woman's constitutional right to a safe and legal abortion. He describes this right as "necessarily protected" under *Roe v. Wade*, and goes no further than discussing the landmark decision. While this language might refer to the obligation of state courts to obey *Roe v. Wade* under the Supremacy Clause of the U.S. Constitution, it raises questions about whether he would, as a Supreme Court justice, accept the decision in *Roe v. Wade* as constitutionally proper.



## SUPREME COURT WATCH

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## CRIMINAL PROCEDURE

### BY STEVE HIGGINS

Steve Higgins is a law student at Supreme Court Watch and an attorney at Paul, Weiss, Rabinoff, Weisberg and Goldman.

Judge Souter's judicial decisions on criminal procedure raise serious concerns about his commitment to the protection of civil rights and civil liberties.

These must be addressed during the nomination process. Supreme Court Watch has not yet had the opportunity to comprehensively review Judge Souter's existing record in this area. Nevertheless, our preliminary review of dozens of opinions authored by Judge Souter suggests that he has often taken an extremely narrow view of constitutional protections guaranteed to those involved in the criminal justice system. In particular, he has written disturbing opinions analyzing *Miranda* and its progeny, the right to due process of law, the right to counsel, the right to a speedy trial and the right to searches based only upon warrants.

**MIRANDA WARNINGS.** In *Saxe v. Coppola*, 536 A.2d 1236 (NH 1987), Judge Souter's majority opinion extended several U.S. Supreme Court decisions which limit *Miranda*'s effect on the refusal of a defendant to talk to police prior to arrest and before receipt of *Miranda* warnings.

Before his arrest and before getting *Miranda* warnings the defendant told police, "If you think I'm going to confess to you, you're crazy." Judge Souter ruled that this statement was not a declaration of the defendant's right to remain silent but was admissible as evidence of a guilty conscience. The opinion unfairly penalizes a defendant who has found *Miranda* warnings before his arrest and based on the *Miranda* rules refuses to talk to police.

In *Saxe v. Robison*, 561 A.2d 505 (NH 1989), Judge Souter's majority opinion affirmed a conviction based in part on exonerating statements made by the defendant. The defendant argued that previous New Hampshire decisions regarding the Fifth Amendment and state constitutional rights protected by *Miranda* (and corresponding state decisions) should have led to suppression of the statements as improperly taken. Judge Souter limited the force of those New Hampshire decisions, struggling to diminish them so as to allow the defendant's statements to stand as apparently voluntary.

**DUPE PROCESSES.** The majority of the New Hampshire Supreme Court found a violation of the state constitutional guarantee of due process in *Saxe v. Downey*, 535 A.2d 1242 (NH 1987), and reversed the conviction. The case turned on the defendant's refusal to take a blood test for alcohol. Judge Souter dissented, claiming that the due process right asserted by the defendant and upheld by the majority did not exist.

The majority held that the defendant's refusal to submit

(continued on next page)

The Supreme Court Watch prepared this report in July 1990. It was based on preliminary research and does not include an analysis of Judge Souter's testimony at the Nomination Hearings.

to a blood test, it could not be used against a driver unless he was warned that such refusal would be admissible evidence. Judge Souter dissented, arguing that no such warning was required by due process and that, even if it were, the Miranda warning that anything said by the defendant could be used against him was sufficient.

Judge Souter dissented in another due process case which involved testing for blood alcohol. The legislature proposed to eliminate a requirement that the state preserve a sample of a DWI suspect's blood sufficient to conduct two tests and also a requirement that, as a prerequisite to the admissibility of the state's alcohol test, the state preserve a sample of a DWI suspect's breath for the suspect's independent analysis.

The majority in *Opinion of the Justices*, 557 A. 2d 155 (N.H. 1989) said that the abolition of the preservation requirement would violate the suspect's due process rights, arguing that the accused would not otherwise have an adequate alternative means of independently determining his blood alcohol content at the time of the test. Failure to preserve a second breath sample would likewise deprive a suspect of the opportunity to test the integrity and accuracy of the state's evidence against him.

Judge Souter in dissent argued that no such process rights exist. Due process only requires that the state preserve evidence that might be expected to play a significant role in the suspect's defense. Judge Souter emphasized that the chance of a second blood test proving the suspect's innocence was very low. He argued that defendants had alternative means to demonstrate their innocence, such as demonstrating the unreliability of the testing device.

**RIGHT TO COUNSEL.** The Sixth Amendment and the equivalent clause in the New Hampshire Constitution guarantee the right to counsel upon indictment for a serious offense. Cases interpreting these clauses protect this right by barring use of incriminating statements made by defendants under indictment without the presence of counsel.

Judge Souter, writing for the majority in *State v. Bruneau*, 552 A. 2d 585 (N.H. 1988) took an unfavorable view of the facts before him in order to distinguish these prior cases and uphold the use of incriminating statements made by the defendant to police and police informers without the benefit of an attorney.

**SEARCH WARRANTS.** In *State v. Holmquist*, 536 A. 2d 1252 (N.H. 1987) the court in an opinion by Judge Souter upheld a conviction that relied on the fruits of a search conducted pursuant to a search warrant. The court rejected claims that the evidence should have been suppressed because the warrant was improperly obtained even though the court admitted that the police officer's affidavit accompanying the warrant application contained several factual misstatements. There were other problems with the application as well. The court also upheld the use of "pen registers," which disclose numbers dialed from the defendant's telephone prior to the issuance of a warrant.

**WAIVER OF RIGHTS.** Judge Souter reversed and remanded criminal convictions in two cases due to the failure of the trial courts to insure that the waiver of rights by the defendants had been proper. In *Richard v. MacArthur*, 529 A. 2d 896 (N.H. 1987), Judge Souter ruled that a sole counsel plea had been entered unknowingly without effective assistance of counsel. In *State v. Hewitt*, 517 A. 2d 820 (N.H. 1986), the defendant, who remained silent when his lawyer agreed to the trial court's continuing with the trial after one

of the jurors had been excused, did not waive his right to a 12-person jury.

**JUDGE SOUTER DESERVES CREDIT FOR HIS RECOGNITION AND PROTECTION OF THOSE IMPORTANT RIGHTS.** In *State of New Hampshire v. Dufresne*, 542 A. 2d 1133 (N.H. 1988), Judge Souter, writing for a unanimous court, held that minors who commit misdemeanors in violation of motor vehicle laws will automatically be required by the criminal justice system as adults even though minors who commit felonies may be treated as adults only after judicial determination.

Using a "rational basis" standard to evaluate the equal protection claim asserted by the defendant, Judge Souter argued that the legislature had rationally concluded that the only effective deterrent to wild teenage driving is adult penalties. Incarceration of a 16- or 17-year-old with adult penalties, Judge Souter wrote, is not cruel and unusual punishment.

**SPEEDY TRIAL.** Previous New Hampshire decisions had established that a defendant's constitutional right to a speedy trial is presumptively violated if more than nine months elapse between arrest and trial. A full year elapsed in *State v. Calhoun*, 540 A. 2d 1212 (1988), but Judge Souter, writing for the majority, strove to mitigate the significance of the extraordinary delay by placing part of the blame on the defendant. The court denied the speedy trial claim, arguing that the defendant never demanded a speedy trial request, that he was out on bail and that he suffered no prejudice from the extended wait.

**RAPID-BUILD LINES.** The conviction in the Calhoun case occurred previously, was ultimately overturned for other reasons. The defendant in this case was charged with sexual assault. Judge Souter, who generally rules against defendants in criminal procedure questions, overturned this conviction on the ground that the trial judge erroneously excluded evidence about the victim's sexually suggestive behavior just prior to the attack.

The defendant had testified that the victim left a bar with him voluntarily and had consented to sexual intercourse. Judge Souter's opinion said that the state's rape shield law, intended to prevent victims from being put on trial, had to be interpreted in light of a defendant's right to a fair trial. Judge Souter wrote that "evidence of the [victim's] overtly sexually provocative behavior toward a group of men [could be taken] as evidence of her probable attitude toward an individual within the group."

In addition, he suggested that the victim could have alleged rape "as a way to excuse her undisciplined profligacy." The court found that "the outcome of the prosecution could vary well have turned on a very close judgment about the [victim's] attitude of resistance or consent." On retrial, the defendant was convicted again.

**CONCLUSION.** The importance of constitutional protections accorded to those involved in the criminal justice system cannot be overestimated. These guarantees protect citizens from abuse by the sometimes over-reaching power of the state. Any nominee to the Supreme Court should be someone who will seek to vindicate and uphold these rights.

Judge Souter's record in this area is sufficiently troubling to justify a thorough examination by the Senate of his commitment to these basic rights.

## DUE PROCESS AND EQUAL PROTECTION

By ROBERT A. SIDDIK

Robert A. Siddik is a third year student of Supreme Court Watch and a Professor of Law at Wayne State University, Detroit, Michigan.

Constitutional challenges to state legislation on the basis of due process and equal protection derive from the Fourteenth Amendment. This Amendment prohibits a state from depriving a person of his liberty or property without due process of law or equal protection of the laws. State constitutions also have due process and equal protection clauses.

Some courts challenge legislation whether, given the claimed state interest in the legislation and the individual right affected by the legislation, the legislation is valid. Equal protection claims challenge state laws on the basis that laws unfairly discriminate between comparable categories of people.

In both due process and equal protection analyses, "levels of scrutiny" or standards of review are used by the courts to scrutinize state action. They differ depending on the importance of the individual interest involved. The highest level of scrutiny applies when the law, or a classification contained in the law, discriminates on a suspect basis such as race or affects a fundamental right such as marriage and the family, a person's right to reproductive freedom, the right to vote, and the right to travel between states. In such circumstances a heavy burden is put on the state to justify the legislation. The state must show that the law or classification is the "least drastic means" of advancing a "compelling governmental interest."

The lowest level of scrutiny in both due process and equal protection analyses is the "rational basis" standard which allows legislation to stand so long as it is not completely arbitrary or unfair. A "middle level" of scrutiny seems to have evolved on the United States Supreme Court in cases of sex discrimination and discrimination against illegitimate children. The higher the level of scrutiny used by the court, the less likely it is that the legislation can withstand the constitutional challenge.

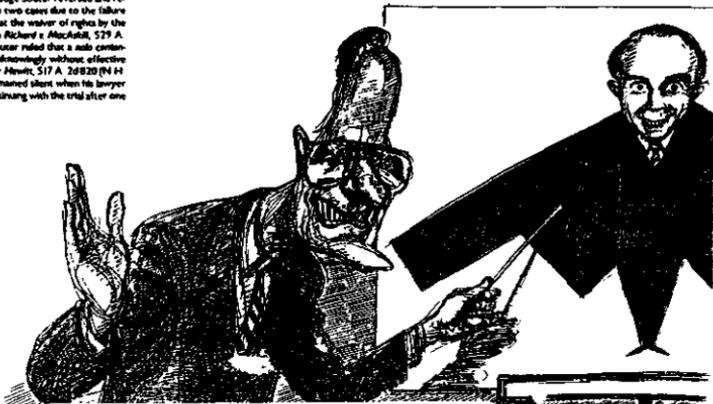
State courts can interpret state constitutions as providing greater protection for individual rights than are provided under similar provisions of the United States Constitution. States also sometimes have special provisions protecting individual rights.

New Hampshire like a number of other states has a constitutional prohibition against the legislature's levying the right of accident victims and other tort claimants to recover damages against responsible parties. In New Hampshire "middle level" scrutiny applies to legislation restricting this right to recover. "Middle level" scrutiny also applies to laws interfering with law. Use the end result is that certain actions are unconstitutional under the New Hampshire Constitution that are not unconstitutional under the United States Constitution.

Most of the due process and equal protection decisions in which Judge Souter participated as a member of the New Hampshire Supreme Court involved either challenges under the state constitution alone or challenges under both the state and federal constitutions. Looking at these decisions, the following observations can be made about Judge



**JUDGE SOUTER'S JUDICIAL DECISIONS ON CRIMINAL PROCEDURE RAISE SERIOUS CONCERNS ABOUT HIS COMMITMENT TO THE PROTECTION OF CIVIL RIGHTS AND CIVIL LIBERTIES.**



Souter's record as a member of the New Hampshire Supreme Court.

1) While Judge Souter has joined on some opinions which find due process and equal protection violations under the state constitution, he is disposed to find a due process or equal protection violation than most of his colleagues.

2) He has questioned the use of "middle level" scrutiny in cases involving the constitutionality of restrictions on tort liability and is more disposed than most of his colleagues to defer to legislative judgment.

3) He has joined in opinions in the relatively few cases where the New Hampshire court invalidated laws under the less restrictive "rational basis" standard.

4) He has not ruled on any significant case involving issues of race, gender or gender discrimination.

The Court rendered an advisory opinion, holding that it was constitutional for the state to prohibit gays and lesbians from adopting children or acting as foster parents. The court did hold, however, that it was unconstitutional to prohibit gays and lesbians from operating day care centers.

Some of the due process and equal protection cases in which Judge Souter participated on the New Hampshire Supreme Court include the following:

**PUBLIC BENEFITS** Judge Souter wrote the opinion in *Appeal of Abbott & Edward Bassett*, 547 A. 2d 821 (NH 1988), where the court unanimously upheld the denial of unemployment compensation benefits to two elderly workers who had been laid off from their part-time jobs.

For 22 years they had shared a single full-time position for job each working four hours a day. They argued that their poor health and age precluded their working full time, and challenged the provision of the state law denying unemployment compensation to persons who are not "available for and seeking permanent full-time work."

Judge Souter first rejected claims that the restriction violated the Federal Age Discrimination Act (he found it was not adequately ready) or the Federal Rehabilitation Act (their inability to work longer because of their age did not constitute a "handicap"). He then addressed the equal protection claims and found that the requirement of being available for full-time employment as a condition for receipt of unemployment compensation benefits did not deny equal protection to those persons who only worked up to or only were able to work part time.

Applying the "rational basis" test, he found that the restriction was rationally related to the state's interest in conserving available funds for those persons who needed them most—those who have no sources of income except for their paychecks. He said that the state could conclude that those who work only part time probably have another source of income. Judge Souter's opinion in this case illustrates the application of the "rational basis" test with extreme deference to legislative judgment.

**RESTRICTIONS ON TORT RECOVERY.** Under the New Hampshire Constitution, restrictions on tort re-

covery are subject to "middle level" scrutiny. Judge Souter has questioned the application of this standard of review to restrictions on tort recovery and is more deferential than the majority of his colleagues to legislative judgment in this area.

In *Opinion of the Justices*, 495 A. 2d 182 (NH 1985), Judge Souter joined his colleagues in an advisory opinion to hold that the state could not constitutionally limit recovery against the state to those who suffered death, bodily injury and property damage while denying recovery for other injuries. The court also held unconstitutional absolute immunity for the state for all intentional wrongdoing by state employees, for an assessment or collection, for detouring of goods by law enforcement officers, and for the operation of public highways across sidewalks and publicly-owned airports.

Nevertheless, in a dissenting opinion in *City of Dover v. Municipal Casualty & Indemnity Co.*, No. 89004, 1990 NH 161, 27, Judge Souter argued in favor of municipal immunity for injuries incurred while on municipal highways, streets and sidewalks. The majority, in a suit by a woman who was injured while walking on a city sidewalk, held that a state law making cities immune from such suits violated the equal protection and right to remedy provisions of the state constitution. Applying "middle level" scrutiny, the majority found that virtually complete municipal liability went too far in denying a category of citizens any remedy simply because the defendant was a municipality.

Judge Souter's dissent argued that the court should have been more deferential to legislative judgment and that the law was justified because it provided for municipal liability in some circumstances and shielded municipalities from unreasonable suits. He criticized the manner in which the majority applied "middle level" scrutiny in this case and called for a re-examination of the earlier New Hampshire Supreme Court precedent which had authorized middle level scrutiny in such cases.

Similarly, Judge Souter dissented in *Estabrook v. American Heat & Derrick*, 498 A. 2d 741 (NH 1985), where the majority found that a 1978 amendment to the state workers' compensation law barring a suit against an injured employee against another employer (and so limiting the injured employee to the lesser recovery provided under the worker's compensation law) violated the state constitution.

The case resulted from the wrongful death claim brought by the wife of a firefighter who died en route to a fire when the driver failed to negotiate a turn. The majority held that the 1978 amendment violated the due process and equal protection rights of injured workers by depriving them of their common law right to a remedy against the negligent party without giving them a substituted remedy in return. While the state provided workers' compensation in exchange for the common law tort action against the employer, it provided the injured employees with no substitute for the loss of their common law action against a co-employee.

Judge Souter argued in his dissent that it was sufficient for the injured employee to recover workers' compensation against the employer and that it did not matter that there was no substituted right against the co-employee. The majority disagreed, noting that the original workers' compensation act involved compensation for the injury caused by the employer, which was different from the right to a remedy for injury caused by a co-worker.

Judge Souter's dissent in these cases reflects his insistence on deference to legislative judgment in due process and equal protection cases, even when the legislature restricts the right to recover in tort, which is specifically protected by the New Hampshire Constitution.

**POLITICAL RIGHTS.** In *Opinion of the Justices*, 554 A. 2d 466 (NH 1987), Judge Souter joined a unanimous advisory opinion holding that a requirement that a state public have been a registered voter for three years prior to being appointed violated the equal protection clause of the state and federal constitutions, but that such a requirement for justices of the peace did not. The court was applying the "rational basis" test.

**PROPERTY RIGHTS.** In *Town of Chesterfield v. Brock*, 489 A. 2d 608 (NH 1985), the court, applying "middle level" scrutiny to requirements with property rights, held that a town zoning ordinance requiring mobile homes to be located 500 feet back from all paved roads or to be located on unpaved roads violated equal protection. Judge Souter concurred only in the result.

**CONCLUSION.** Judge Souter's decisions in due process and equal protection cases coming before the New Hampshire Supreme Court indicate that he takes a very cautious approach to the use of "middle level" scrutiny that is employed by the New Hampshire Supreme Court to deal with the constitutionality of restrictions on tort liability and is more disposed than most of his colleagues to defer to legislative judgment and to uphold restrictions in these cases. However, he is reluctant to interpret these provisions as providing greater protection than a public.

the due process and equal protection clauses of the federal constitution.

At the same time, he has joined in a number of opinions striking down state laws on due process and equal protection grounds, including those in the relatively few cases where the court has invalidated laws under the less restrictive "rational basis" standard. He appears to be operating within the constitutional framework of the New Hampshire Supreme Court, although he is clearly as the more conservative end of the spectrum.

## RIGHTS OF GAYS AND LESBIANS

BY HOWARD J. TERRELL

John Barchelor, a member of Concord Law School and Chief Justice of the New Hampshire Supreme Court.

Judge Souter joined an advisory opinion to the New Hampshire House of Representatives which rejected a proposal to prohibit gays and lesbians from running day care centers, but held that provisions to exclude gays and lesbians from adopting children or becoming foster parents were consistent with the state and federal constitutions. *Opinion of the Justices*, 550 A. 2d 23 (NH 1987).

By taking this position, Judge Souter and his colleagues failed to follow the lead of the majority of other state courts which, in the wake of the Supreme Court's decision in *Hampshire Supreme Court Justice Barchelor*, have rejected the use of special orientation as a factor in evaluating potential adoptive or foster parents. The Court refused to consider gays and lesbians as a protected class such as women or racial minorities, thus failing to change this nation's long-standing discrimination against gays and lesbians.

Judge Souter and his colleagues reasoned that the state had a legitimate interest in providing child models for children and that the exclusion of gays and lesbians from being foster and adoptive parents would further this purpose. The court's decision relied on the disputed theory that there is a "reasonable possibility" that having a gay or lesbian parent might affect a child's developing sexual identity. The rationale underlying the theory is that persons in the position of parents are the primary role models after whom children consequently unconsciously pattern themselves.

The court concluded that there have been "a number of studies that find no correlation between a homosexual orientation of parents and the sexual orientation of their children."

But the court concluded that since the source of social orientation is still inadequately understood "the state could, in the best interests of children, exclude gays and lesbians from adopting children or becoming foster parents."

Justice Barchelor, in his dissent, found that the majority of the Court provided no "rational basis" for concluding that gays and lesbians lack the skills necessary to be proper role models and parents. He further noted that the legislature had received no evidence showing that gays and lesbians parents "undermine their children's development any more than heterosexual parents."

Justice Barchelor objected to the majority's evaluation of gays and lesbians only on the basis of their sexual orientation rather than as individuals applying to adopt children or become foster parents. "The bill proposes that every homosexual is unfit to be an adoptive parent or to provide foster and day care," thus precluding gays and lesbians from demonstrating their skills as parents. Then Justice Souter and his colleagues were willing to label gays and lesbians as unfit parents, which has broad implications for the rights of gays and lesbians not only to become foster or adoptive parents, but also to retain custody of their children.

As Justice Barchelor declared, "The State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to a group of citizens because of ancient prejudices against that group."

**FREEDOM OF SPEECH, PRESS AND ASSOCIATION.** BY ALBERT J. TERRELL

Walter J. Terrell is a board member of Supreme Court Watch.

Judge Souter's record on First Amendment issues is mixed. Because he generally subscribes to a disinterested approach to the Senate, he should carefully probe his views in the area.

**FREEDOM OF THE PRESS.** Judge Souter has come down decidedly in favor of the press in two different cases. One a confidential source and one on that he has also ruled against the press in a 1981 case.

(Continued on next page)



JUDGE SOUTER HAS NOT RULED ON ANY SIGNIFICANT CASE INVOLVING ISSUES OF RACE OR GENDER DISCRIMINATION.

argued that their poor health and age precluded their working full time, and challenged the provision of the state law denying unemployment compensation to persons who are not "available for and seeking permanent full-time work."

## CIVILIAN APPLICATION OF STEALTH TECHNOLOGY



On the Superior Court Judge Souther quashed subpoenas against student reporters at the University of New Hampshire who refused to divulge confidential source material sought in connection with a murder trial. Even though New Hampshire had no statutory shield law to protect reporters, Judge Souther ruled that disclosure by reporters would be ordered only when the defendant demonstrates that the information sought is relevant and material to the defense and that he has unsuccessfully attempted to obtain the same information by all reasonable alternatives. (Associated Press, Dec. 7, 1982). Given the absence of state legislation, Judge Souther's ruling represents a strong statement of protection for the press.

Similarly, Judge Souther came down strongly in favor of the press in a libel case against *Massachusetts in Action v. Hester Magazine Inc.*, 549 A.2d 187 (N.H. 1988). Dissenting from the majority of the New Hampshire Supreme Court, Judge Souther urged that the verdict of libel should be thrown out. He wrote that the paroxysm for libel should be time barred because the did not reside in New Hampshire and had sued there only because the state had the longest statute of limitations (six years). Judge Souther based his opinion on technical issues. He did not cite First Amendment concerns. See also 882 F.2d 33 (1st Cir. 1982), rev'd 445 U.S. 770 (1984) reversing the earlier dismissal of the case on personal jurisdiction grounds.

**PROBATION OF SPEECH** Judge Souther has ruled both ways in cases involving the right to free speech. Ruling in favor of the individual exercise of free speech, Judge Souther joined an advisory opinion of the New Hampshire Supreme Court that found a law that prohibited harassment of hunters to be unconstitutional under the New Hampshire Constitution. The law prohibited someone from verbally provoking hunters to discontinue them from hunting and that represented an illegal content based regulation of speech. *Opinion of the Justices*, 509 A.2d 749 (N.H. 1986).

Also, Judge Souther wrote a concurring opinion to a decision that ruled in favor of an individual attorney who did not want to be part of the tort reform lobbying efforts of the state bar association which he was required to join. Judge Souther's separate concurrence, however, stressed the narrowness of his decision indicating that if the bar association had been lobbying on issues closer to its legal objectives he might have ruled differently. *Reason of Chapman*, 509 A.2d 753 (N.H. 1986). See also *In re Donahoe Rights Center*, 541 A.2d 208 (N.H. 1988) in which Judge Souther held that despite state statutes indicating otherwise the center could have suit prior disabled as well as prior disability on First Amendment grounds of right of association.

On the other side, Judge Souther ruled against an individual who stood on an sidewalk demonstrating support for voter registration and judicial candidates in London LaFollette by distributing pamphlets verbally advocating his views and displaying signs. Judge Souther upheld the conviction for violating a law against posting signs, seeing it as a constitutional content neutral restriction. He also restricted the conviction for violating another ordinance prohibiting sidewalk encroachments as applicable to public speech. *Site v. Heigman*, 565 A.2d 1059 (N.H. 1989).

### PROSECUTION OF SEABROOK NUCLEAR POWER PLANT PROTESTORS BY ASYLUM'S FRIENDS

While Judge Souther was Attorney General of the State of New Hampshire, his office was often the news for its prosecution of members of the Clamshell Alliance protesting at the construction site for the Seabrook Nuclear Power Plant. Nuclear power, and the Seabrook plant in particular, was a highly controversial issue in New Hampshire and the nation. Many of battles were fought on many fronts including all three branches of the New Hampshire government. Throughout, the Seabrook plant had the support of New Hampshire governors Hebburn, Thomson and John Sununu. While the prosecution of demonstrators at Seabrook for criminal trespass was unquestionably a legitimate responsibility of the attorney general's office, certain aspects of the way in which the office handled the prosecutions raises troubling questions. These questions and the extent of Judge Souther's personal involvement in the events should be explored further during the nomination process.

A few questions arise from a demonstration of approximately 200 people in August of 1976. The New Hampshire attorney general's office prosecuted several protestors for criminal contempt and sought and got jail time (six month sentences with three months suspended), a harsh punishment. Further, as in later cases, the Court ordered the defendants and one against a legal observer from the New Hampshire Civil Liberties Union who was present as a neutral witness the prosecutors sought no had pending appeal of the conviction. The New Hampshire Supreme Court eventually ordered the defendants' release, pointing out that had pending appeal was to be granted for all but the most violent and troublesome convicts pursuant to a New Hampshire statute and American Bar Association standards. The Court pointed out that was particularly appropriate in these cases because otherwise the defendants would serve their full sentences before their appeal would be heard. Indeed, in the case of

the legal observer his conviction was eventually overturned. *State v. Gross*, 363 A.2d 408 (N.H. 1976) - but *State v. Gross*, 379 A.2d 20 - 4 (N.H. 1977) - conviction overturned. *State v. Adams*, 362 A.2d 416 (N.H. 1976) - but

More questions arise from the more publicized demonstration of over 1400 protestors on May 1 and 2, 1977. While praising the lack of violence during their arrest, protestors complained of constitutional violations during arrests, bookings and arrangements. They also complained of unwholesome and unsanitary conditions in the four large armories where they were held, with one armory having only one shower for 780 people. Other protestors complained of being held for hours in military trucks with no food or water and being denied telephone calls. (Associated Press, May 2, 1977, May 4, 1977, May 6, 1977).

In addition to the complaints regarding the arrest procedures and armory holding pens, the protestors complained that Attorney General Souther's recommitment, they were being required to post bail pending trial rather than being released on their own recognizance. The protestors further charged that then-Governor Thomson interfered with the legal process and that bail was being set arbitrarily. (Associated Press, May 2, 1977, July 4, 1977).

Further, the attorney for the Clamshell Alliance argued that the seizures reported, 15 days jail time and a \$100 fine, and bail of \$500 pending appeal were unduly harsh for the misdemeanor of trespass which usually carries only a fine. The first prosecutor announced he initially received a suspended sentence, but the judge changed his mind after Attorney General Souther personally appeared in court to ask for jail time. He called the process "one of the most well-planned acts of criminal conduct in the state or nation" (Associated Press, May 5, 1977, World News Digest, May 28, 1977).

"CERTAIN ASPECTS OF THE WAY ATTORNEY GENERAL SOUTHER'S OFFICE HANDLED THE PROSECUTION OF DEMONSTRATORS AT SEABROOK RAISE TROUBLING QUESTIONS WHICH SHOULD BE EXPLORED FURTHER DURING THE NOMINATION PROCESS"

finding that Thomson and Souther had no advance knowledge of the mass arrests and that the armory conditions were due to an emergency created in part by the protestors. But, the case leaves unanswered many questions concerning the involvement of the attorney general's office in the bail process, the armory conditions and the sentencing of protestors. (Associated Press, July 6, 1977).

Judge Souther continued to be faced with issues affecting the Seabrook nuclear power plant after he was appointed to the bench. As the nuclear plant construction was delayed and became more costly, the owners of the plant repeatedly sought additional financing to avoid bankruptcy. Twice, in 1984 and again in 1986, the New Hampshire Supreme Court, including Judge Souther, approved new multimillion dollar bond issues for the plant's owners and great controversy. (United Press International, Nov. 19, 1984, The New York Times, Feb. 1, 1986). However, in 1988, the Court, in an opinion written by Judge Souther, upheld the refusal of the Public Utilities Commission to raise electric rates to consumers in the amount requested by the plant's owners, even though the refusal resulted in the bankruptcy of the owners. *Appeal of Public Service Co.*, 547 A.2d 269 (N.H. 1988).

Judge Souther was involved in additional Seabrook decisions that have not yet been reviewed.

### SEPARATION OF CHURCH AND STATE

Attorney General Souther had one major encounter with the constitutional issue of separation of church and state in 1978. He and his office supported then-Governor Thomson's proclamations to fly flags on all public buildings at half mast on Good Friday. After a U.S. District Court judge suggested that the proclamation might be permissible if the governor declared a secular context, Governor Thomson issued a declaration emphasizing "the historical impact" of the life and teachings of Jesus Christ. At one point in the fast-paced legal proceedings, Attorney General Souther filed handwritten notes to the United States Supreme Court on the issue. The United States Supreme Court eventually upheld an injunction prohibiting the proposal. (Washington Post, May 25, 1978).

Editorial assistance on this report by DAN RUBIN, legal intern at Supreme Court Watch and a law student of Pace University Law School and CONSTANCE DAMARTINO DENIS BERGER is the Project Director of Supreme Court Watch and the Executive Director of The Nation Institute

### WHAT ARE THE GOALS OF SUPREME COURT WATCH?

1. We believe that the prosecution of civil rights and civil liberties is not the exclusive province of any one political party. We work to bring public attention to these issues by examining and reporting on the judicial record of all nominees to the Supreme Court.

2. We are dedicated to the principle of raising the judicial standards currently applied to nominees to the nation's highest court.

3. We are committed to maintaining a permanent vigil over the Supreme Court's decisions on the 1990 in the area of reproductive rights, affirmative action, drug testing, the death penalty, the right to die, and other areas of potential infringements upon individual freedom.



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## **SUPREME COURT WATCH STATEMENT ON THE NOMINATION OF JUDGE DAVID H. SOUTER**

Supreme Court Watch works to focus public attention on the protection of civil rights and civil liberties by examining and reporting on the judicial record of Supreme Court nominees. It is dedicated to the principle of maintaining the highest judicial standards for Supreme Court nominees.

Analysis of Judge Souter's record does not reveal his judicial philosophy on a number of the most significant areas of individual freedom, including reproductive choice, race and gender discrimination, separation of church and state, and many aspects of freedom of speech. Furthermore, what can be discerned of his views in other areas of due process and equal protection and in criminal procedure and access to the courts raises serious concerns about his commitment to the protection of civil rights and civil liberties. Supreme Court Watch therefore is unable to endorse his candidacy at this time.

Supreme Court Watch believes that it is incumbent upon the Senate to probe Judge Souter deeply and thoroughly — perhaps more extensively than it examined Judge Bork, since so much less is known — in seeking to unearth his judicial philosophy. Only in light of the most thorough examination of Judge Souter's perspectives on fundamental rights, and the Senators' gaining the deepest confidence in his commitment to those rights, should the Senate not reject his nomination.

— September 7, 1990

The appointment of a Justice to the U.S. Supreme Court is an act of the greatest significance to the nation. The Supreme Court occupies the pinnacle of the federal judiciary and arbitrates between the legislative and executive branches. A change in its membership can thus be of comparable importance to a change in the composition of the Congress or in the occupancy of the White House, and perhaps of more enduring effect.

The Supreme Court defines our most precious rights and liberties; its pronouncements reflect not only what kind of society we are, but also what kind we want to be. Through our elected representatives, we must exercise the greatest care in choosing individuals to assume this awesome responsibility.

From the earliest days of the Republic, the Senate has vigorously examined and debated not only the fitness and qualifications of Supreme Court nominees, but also their judicial, political, economic and philosophical views.<sup>1</sup> The Senate has declined to confirm nominees of Presidents George Washington and James Madison, as well as, in more recent times, those of Lyndon Johnson, Richard Nixon and Ronald Reagan.<sup>2</sup> Nominations have been refused for reasons far beyond cronyism and mediocrity; nominees have been examined and found ill-suited for their views on such fundamental issues as federalism, slavery, discrimination, labor relations and judicial philosophy.<sup>3</sup>



**Thus, to ask whether a nominee considers that *Roe v. Wade* was correctly decided, and if not, whether it should be overturned, is neither inappropriate nor unprecedented: it is mandatory.**



**The Senate's duty of advice and consent is vitiated if it cannot gain a clear understanding of the candidate's position on the very issues that implicate the rights and liberties of all Americans.**

The decisive role of the Senate in the appointment of Justices has its roots in the framing of the Constitution. Early proposals ranged from Congressional appointment to Presidential prerogative; the compromise of the Constitutional Convention was for the President to nominate candidates, who are appointed "by and with the Advice and Consent of the Senate."<sup>4</sup> Historically, the Senate has carried out its mandate: it has not assented to nearly one in five of all Presidential nominees to the Court,<sup>5</sup> and, on more than one occasion, the Senate's "advice" to the President was that a specific candidate be nominated.<sup>6</sup>

Thus, there is no historical or legal basis for the recent outcry from certain political corners that the Senate was overstepping its bounds in its examination and rejection of nominee Robert Bork.<sup>7</sup> There, as before, the Senate was exercising its self-evident role in the appointment process: to act as a democratic counterweight to the President's initiative, thus ensuring a broader consensus and more representative process of selection.<sup>8</sup>

In fulfilling this role, there is no apparent reason why the Senate should not consider every relevant aspect of the appointment.<sup>9</sup> In reviewing Judge Bork's record, the Senate's concern about his constitutional philosophy caused it to seek a more thorough understanding of his stance on many important precedents and issues. This is no more — and no less — than it has done since the days of George Washington's first nominations to the Supreme Court.



**The Supreme Court defines our most precious rights and liberties; its pronouncements reflect not only what kind of society we are, but also what kind we want to be.**

In reviewing the Bork nomination, as in a number of previous cases,<sup>10</sup> the Senate was also legitimately concerned about the effect that his confirmation would have on the composition of the Court as a whole.<sup>11</sup> The effects of appointments to the Supreme Court can endure far beyond the tenure of the politicians making the appointments; it is appropriate for the Senate, acting as a counterbalance to the initiative of the Executive, to decline to confirm a nomination which would work too radical a change in the philosophical inclinations of the Court, or which would entrench a tendency which the Senators believe inconsistent with the national interest.<sup>12</sup> The critical importance of the Court in this country's constitutional framework, and the effect of life tenure for Justices, combine to require nothing less.

It has been said that ethical considerations and the independence of the judiciary limit the permissible scope of the Senate's inquiry into a candidate's judicial philosophy.<sup>13</sup> To be sure, it is improper to demand that a candidate commit to a position on an identified case which may be reviewed by the Court; each case must be decided in its context and on its merits.<sup>14</sup> But inquiry into a candidate's views on a specific area of the law is something different: it affords an opportunity to flesh out judicial philosophy, of concern with respect not only to that issue (versus an identifiable, pending case) but also to constitutional analysis as a whole.<sup>15</sup> Thus, to ask whether a nominee considers that *Roe v. Wade* was correctly

decided, and if not, whether it should be overturned, is neither inappropriate nor unprecedented:<sup>16</sup> it is mandatory.

Moreover, it seems clearly out of step with the Constitutional order for a candidate to take the position that propriety or the independence of the judiciary requires that he or she make no statement on any issue which may come before the Court.<sup>17</sup> The Senate's duty of advice and consent is vitiated if it cannot gain a clear understanding of the candidate's position on the very issues that implicate the rights and liberties of all Americans. Any candidate who adopts such a posture, and particularly one whose record is silent or unclear on such issues, should arouse in each Senator the greatest reservations.

Similarly, a candidate with a "blank slate" should have no place on the Court: if his or her views cannot be discerned from the record, the Senate cannot truly discharge its duty to advise and consent on the nomination.<sup>18</sup> Further, one may begin to question whether such a nominee would be appropriate to assume the critical role our Justices play in shaping this nation's course. There is an important truth in Professor Tribe's observation in 1985 on the Senate's examination of Supreme Court nominees: "A blank slate is not the sign of an open mind, but of an empty one — of immaturity and inexperience, and perhaps of indifference."<sup>19</sup>



**Historically, the Senate has carried out its mandate: it has not assented to nearly one in five of all Presidential nominees to the Court.**

The nomination of a "blank slate" candidate — as a number of commentators have characterized Judge David H. Souter,<sup>20</sup> President Bush's nominee to fill the seat vacated by Justice William J. Brennan, Jr. — should be most troublesome to the Senate. In order to discharge its duty of advice and consent, the Senate would have no record upon which to rely in assuring itself of the appropriateness of the candidate, and thus would be forced to rely upon the testimony of the candidate. Even assuming the most forthcoming of candidates, it is worrisome to consider that the candidate must, in effect, campaign for the position. Any President who proposes such a "blank slate" candidate bears the risk that the Senate reject the candidate because of its inability to determine whether the nomination truly is in the best interest of the nation.



**Nominations have been refused for reasons far beyond cronyism and mediocrity; nominees have been examined and found ill-suited for their views on such fundamental issues as federalism, slavery, discrimination, labor relations and judicial philosophy.**

*Christopher Ryder, the author of this statement on behalf of the board of Supreme Court Watch, is an attorney at Paul, Weiss, Rifkind, Wharton and Garrison. Jan Kjeeman, a board member of Supreme Court Watch and an attorney at Paul, Weiss, Rifkind, Wharton and Garrison, provided editorial assistance.*

## NOTES

<sup>1</sup>The tremendous breadth of Senatorial consideration of past nominees is examined in many of the numerous historical and analytical studies of the Senate's role in the appointment process. See, e.g., Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *Yale L.J.* 657, 663 (1970); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 *Geo. L. Rev.* 913, 944-47 (1983); L. Tribe, *God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* 77-92 (1985); Ross, *The Functions, Roles and Duties of the Senate in the Supreme Court Appointment Process*, 28 *Wm. & Mary L. Rev.* 633, 659-66 (1987) [hereinafter *Functions, Roles & Duties*]; Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Allaying the Fears of the Nominees*, 62 *Tul. L. Rev.* 109, 116-39 (1987) [hereinafter *Questioning Nominees*]; Freund, *Appointment of Justices: Some Historical Perspectives*, 101 *Harv. L. Rev.* 1146, 1146-56 (1986); Carter, *The Confirmation Mess*, 101 *Harv. L.*

*Rev.* 1185, 1189 (1988); Monaghan, *The Confirmation Process: Law or Politics?*, 101 *Harv. L. Rev.* 1202, 1202 (1988); Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 *Emory L.J.* 559, 559-61 (1988); Slinger, Payne & Gates, *The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography* 64 *Notre Dame L. Rev.* 106, 109 (1989); see generally C. Warren, *The Supreme Court in United States History* (rev. ed. 1926); J. Harris, *The Advice and Consent of the Senate* (1953); H. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (2d ed. 1985). Slinger, Payne & Gates, *supra*, is an informative review of the literature of judicial appointments.

<sup>2</sup>The details and outcome of Supreme Court nominations through 1981 are briefly summarized in L. Tribe, *supra* note 1, at 142. Considerably more extensive (and fascinating) statistics are included in H. Abraham, *supra* note 1, and a predictive model of the likely outcome of a nomination, depending upon prevailing political variables, can be found in

Watson & Stookey, *Supreme Court Confirmation Hearings: A View from the Senate*, 71 *Judicature* 186 (1988).

<sup>3</sup>For the broad variety of reasons for which nominees have been rejected, see Black, *supra* note 1, at 663; L. Tribe, *supra* note 1, at 86-89; Rees, *supra* note 1, at 945; *Functions, Roles & Duties, supra* note 1, at 643; Freund, *supra* note 1, at 1148-56; Monaghan, *supra* note 1, at 1202 ("for virtually every conceivable reason").

<sup>4</sup>U.S. Const. art. II, Sect. 2, cl. 2. The historical antecedents of this clause are examined in Black, *supra* note 1, at 661-62; *Functions, Roles & Duties, supra* note 1, at 635-42; Freund, *supra* note 1, at 1147; Slinger, Payne & Gates, *supra* note 1, at 109-10, and authorities cited therein.

<sup>5</sup>L. Tribe, *supra* note 1, at 78. See also Slinger, Payne & Gates, *supra* note 1, at 107 (28 nominees not confirmed, 104 confirmed).

<sup>6</sup>L. Tribe, *supra* note 1, at 80-81; *Functions, Roles & Duties, supra* note 1, at 643; see also Monaghan, *supra* note 1, at 1205.

<sup>7</sup>There is a broad consensus throughout the literature as to the historical and constitutional precedent supporting the Senate's actions in the Bork nomination. *Functions, Roles & Duties, supra* note 1, at 644, 659; Slinger, Payne & Gates, *supra* note 1, at 107. The desirability, as a political matter, of such a role, is almost as unanimously supported. Black, *supra* note 1, at 657, 663-64; Rees, *supra* note 1, at 923-25; L. Tribe, *supra* note 1, at 132-37; *Functions, Roles & Duties, supra* note 1, at 659, 681; *Questioning Nominees, supra* note 1, at 109; Monaghan, *supra* note 1, at 1204; Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 *Harv. L. Rev.* 1213, 1229 (1988); but see Rees, *supra* note 1, at 926-28; Fein, *A Circumscribed Senate Confirmation Role*, 102 *Harv. L. Rev.* 672 (1989).

<sup>8</sup>This counterbalancing role as a check on the initiative of the President was clearly intended by the Framers. Black, *supra* note 1, at 660-61; Rees, *supra* note 1, at 937-38, 941; L. Tribe,

*supra* note 1, at 132-33; *Functions, Roles & Duties, supra* note 1, at 644; Carter, *supra* note 1, at 1187; Monaghan, *supra* note 1, at 1204; Slinger, Payne & Gates, *supra* note 1, at 109-10. It is the obvious effect of the compromise struck at the Constitutional Convention. Black, *supra* note 1, at 661; Rees, *supra* note 1, at 937, 939; L. Tribe, *supra* note 1, at 132-33; *Functions, Roles & Duties, supra* note 1, at 639-40.

<sup>9</sup>*Functions, Roles & Duties, supra* note 1, at 659-60, 681-82; Carter, *supra* note 1, at 1199-1200; Monaghan, *supra* note 1, at 1203. Indeed, as numerous commentators have remarked, it would make little sense if the Senate, in acting as a counterbalance to the Executive, could not consider all issues taken into account by the President in making the nomination, and whatever other issues it found relevant. Black, *supra* note 1, at 658, 660, 663; Rees, *supra* note 1, at 924-26, 948-49; *Questioning Nominees, supra* note 1, at 111-12.

<sup>10</sup>See L. Tribe, *supra* note 1, at 90-91, 106-24; Ackerman, *Transformative Appointments*, 101 *Harv. L. Rev.* 1164, 1165-67, 1171-75 (1988).

<sup>11</sup>See Ackerman, *supra* note 1, at 657, 663-64; Monaghan, *supra* note 1, at 1203.

<sup>12</sup>Black, *supra* note 1, at 657, 663-64; Monaghan, *supra* note 1, at 1203. Indeed, the Senate might consider inappropriate a nominee whose views were consonant with those of the current majority of the Court, if the Senate were troubled by the potential effect of the nomination on the composition of the Court. See L. Tribe, *supra* note 1, at 90-91, 106-24.

<sup>13</sup>See Rees, *supra* note 1, at 950-66; L. Tribe, *supra* note 1, at 101; *Questioning Nominees, supra* note 1, at 110-11, 112-13, 129-30; Totenberg, *supra* note 7, at 1218; Slinger, Payne & Gates, *supra* note 1, at 113. For an interesting analysis of judicial recusal as it relates to public statement disqualification and Justice Rehnquist's confirmation hearings, see Stempel, *Rehnquist, Recusal, and Reform*, 53 *Brooklyn L. Rev.* 589 (1987);

*Questioning Nominees, supra* note 1, at 113-16.

<sup>14</sup>See Rees, *supra* note 1, at 950-65; Stempel, *supra* note 13, 596-97 & *passim*; *Questioning Nominees, supra* note 1, at 123-25, 174.

<sup>15</sup>See Stempel, *supra* note 13, at 594-97; Rees, *supra* note 1, at 949-65 & *passim*; *Questioning Nominees, supra* note 1, at 173-74.

<sup>16</sup>See, e.g., *Questioning Nominees, supra* note 1, at 125-52; Carter, *supra* note 1, at 1189 n.9. For example, Justice Stewart was specifically asked at his confirmation hearings whether he would vote to overturn *Brown v. Board of Education*. He stated he would not. L. Tribe, *supra* note 1, at 89.

<sup>17</sup>See, e.g., Rees, *supra* note 1, at 917-23, 947-49, 950-66; *Functions, Roles & Duties, supra* note 1, at 666-67; *Questioning Nominees, supra* note 1, at 111-12, 115-16, 116-23; Freund, *supra* note 1, at 1158-62; Totenberg, *supra* note 7, 15 1219-23.

<sup>18</sup>See Rees, *supra* note 1, at 919, 948; *Questioning Nominees, supra* note 1, at 111-12; Freund, *supra* note 1, at 1162-63.

<sup>19</sup>L. Tribe, *supra* note 1, at 101. In a similar formulation, then-Associate Justice Rehnquist stated that "Proof that a Justice's mind at the time he joined the court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (recusal memorandum). The relevance of this statement to public statement disqualification in confirmation hearings is discussed in Stempel, *supra* note 13.

<sup>20</sup>See, e.g., Lacayo, "A Blank Slate", *Time*, Aug. 6, 1990, at 16; Apple, "Senate's Carte Blanche vs. Souter's Blank Slate", *N.Y. Times*, Aug. 6, 1990, Sect. A, at 14, col. 5; Will, "Bush's Blank Slate", *Washington Post*, at C7; Lewis, "Souter's Blank Slate Just Won't Do", *N.Y. Times*, July 25, 1990, Sect. A, at 19, col. 1.

Senator KENNEDY. Thank you very much.  
Paula Ettelbrick, we will be glad to hear from you.

#### STATEMENT OF PAULA L. ETTELBRICK

Ms. ETTELBRICK. Thank you, Mr. Chairman. Good morning to the rest of the committee.

My name is Paula Ettelbrick. I am the legal director of Lambda Legal Defense and Education Fund, a nonprofit legal organization dedicated to enhancing and promoting the rights of lesbians, gay men, and people with AIDS in our society. I very much thank the committee for the opportunity to be heard this morning on issues of grave concern to us related to the nomination of Judge David Souter to the U.S. Supreme Court.

Lambda Legal Defense models itself in the fine tradition of our colleagues of the NAACP Legal Defense and Education Fund, NOW Legal Defense and Education Fund, Mexican-American Legal Defense and Education Fund, Asian-American Legal Defense Fund, Puerto Rican Legal Defense Fund, and others who believe that the Constitution belongs to the people, that the Constitution belongs to all of us, that the Constitution does not inherently discriminate and draw lines between those of us in society who most need its protections and who are most concerned about our ability to maintain our lives, to live our lives under the rule of majoritarian rule.

We tend to be those constituencies, those citizens of American society who most look to the courts as a protector of our rights against the majority. We tend to be those citizens in the United States who have the least ability to impact on the majority rule in our society. Lesbians and gay men, in particular, of all of those groups tend to still be people who are not able to impact on the majority, and we look to the Court and to the Constitution, with grave concern, particularly in light of a nomination to the Supreme Court.

Lambda Legal Defense opposes the nomination of David Souter, primarily because of his participation in a case while on the New Hampshire Court, called *Opinion of the Justice*, which is cited in my testimony. We believe that this committee should give very close scrutiny to this opinion. It is the one major inroad or insight into Judge Souter's view of the Constitution. In that opinion, the court dealt with equal protection, it dealt with the right to privacy, it dealt with due process, it dealt with the right of assembly, all in one decision, and we believe that this committee should look at that decision closely.

The first question I would ask Judge Souter is whether he wrote that decision. It was an advisory opinion, it went up to the court at the request of the New Hampshire Legislature, to try to determine whether or not the State might adopt a blanket exclusion of lesbians and gay men from being adoptive or foster parents or from running day-care centers.

The court, in its advisory opinion capacity, upheld the bar of foster and adoptive parenting, upheld the ban that the Legislature had imposed against lesbian and gay men being able to apply for adoption.

We feel that the opinion indicated a gross insensitivity and unwillingness to look at the evidence presented in the case. In *Advisory Opinion*, attorneys and other advocates are invited to present evidence to the New Hampshire Supreme Court, in order to persuade them one way or another, and such evidence was presented, evidence indicating that there is no connection between a parent's sexual orientation and harm to the child.

Evidence was presented not only by certain advocates, but, as well, the majority of the House Judiciary Committee of the New Hampshire Legislature. Affidavits were submitted by gay and lesbian parents in New Hampshire, criticizing the legislature's ban on their ability to provide love and support to children. The court ruled, however, that, despite the overwhelming evidence, despite the fact that the social science data does not support the notion that gay and lesbian parents per se make bad parents, per se are unfit, the court ruled that the statute was constitutional, under both the Federal and State Constitutions.

The fear, of course, of the legislature and the fear, of course, of the New Hampshire Supreme Court was that gay parents might influence the sexual orientation of their children, a totally discredited fear and one that is out of sync with the lead of the majority of States in this country.

If it were in fact true that parents had such an influence on the sexual orientation of their children, it would certainly not be the fact that I was a lesbian or that any other gay person in this country was a lesbian. I come from parents who are very dedicated to their heterosexuality, and not ones who necessarily represented role models otherwise.

Yet, Judge Souter ascribed to a view of equal protection which looked only at face value at this legislation and was willing to institute a total ban against lesbian and gay parenting. Contrary to his testimony before this committee, where he indicated his willingness and his desire to look at all of the evidence, I think his record belies his statements to this committee. Had he truly looked at the evidence, I think Judge Souter would have been persuaded by the dissent, who recognized in that case that the State is never less humanitarian than when it denies public benefits to a group of citizens, because of ancient prejudice against that group.

Judge Souter and his colleagues also ruled that gay men and lesbians are not entitled to due process of law in their applications for adoption and foster parenting, not entitled to an individual assessment, not entitled to an assessment about their ability to love and nurture children, to provide financial stability or a home life to children, education to children, and what have you, per se, gay men and lesbians, in the view of Judge Souter, are unfit to parent.

This due process ruling was made, in fact, in light of a previous New Hampshire Supreme Court decision, holding that a high school student had a due process right to be heard regarding his eligibility to compete in sports. Apparently, in New Hampshire, under David Souter and his colleagues, there is more of a right to play sports in high school than there is to take on the difficult task of parenting under the due process clause.

With regard to privacy, Judge Souter and his colleagues also ruled that the privacy claim is irrelevant, when an individual vol-

untarily requests a public benefit. By relying on the U.S. Supreme Court decision in *Bowers v. Hardwick*, decided 4 years ago, in which the Supreme Court held that lesbians and gay men have no right to privacy, no right to engage in private adult sexual conduct, the court confirmed all of our constituency's worst fears, that that privacy ruling of the U.S. Supreme Court in *Bowers v. Hardwick* would, in fact, impact on every aspect of our lives.

No longer would we just be criminals in jurisdictions such as the District of Columbia and 24 other jurisdictions throughout this country, but, in fact, that Supreme Court pronouncement would deny us rights in every facet of our lives, regardless of who we are, regardless of what facet of our life, whether we are trying to come into this country as foreigners who happen to be lesbians or gay men, whether we are trying to serve in the military and serve it well, whether we are trying to maintain a right to parent and keep our children, whether we are trying to maintain our right to keep a job in this society, all such things boil down to only one fact, that we are nothing more than people who commit crimes against nature.

Reliance on stereotype and prejudice against the great weight of the evidence cannot be tolerated on the U.S. Supreme Court.

Senator KENNEDY. We will give you just a couple more moments.

Ms. ETTLEBRICK. I am almost done, Senator. Thank you.

We believe that Judge Souter's reasoning does not affect only lesbians and gay men, but also women, racial and ethnic minorities and others for whom prejudice and the burdens of history have been used to discriminate against us. We are all affected by such a decision.

We ask respectfully that this committee consider the fact that the Bill of Rights does belong to all of us, regardless of who we are, and that this committee not find in favor of Judge Souter, and, on fact, oppose the nomination to the Supreme Court.

Thank you.

[The prepared statement of Ms. Ettelbrick follows.]

**TESTIMONY OPPOSING THE NOMINATION OF  
JUDGE DAVID SOUTER  
TO THE UNITED STATES SUPREME COURT**

**Senate Judiciary Committee  
September 18, 1990**

**Delivered by  
Paula L. Ettelbrick  
Legal Director  
LAMBDA LEGAL DEFENSE AND EDUCATION FUND**

Good afternoon. My name is Paula Eitelbrick. I am the Legal Director for Lambda Legal Defense and Education Fund, and I want to thank the Committee for allowing me the time to present Lambda's views regarding the nomination of Judge David Souter to the United States Supreme Court.

As an organization that has fought in the courts for seventeen years against discrimination and prejudicial treatment of gay and lesbian people, Lambda Legal Defense and Education Fund strongly opposes Judge Souter's nomination. Lambda decided to oppose the nomination, only the second time we have taken such a stand, primarily because of Judge Souter's participation in a decision of the New Hampshire Supreme Court barring gay men and lesbians from becoming foster or adoptive parents. Opinion of the Justices, 430 A.2d 21 (N.H. 1987).

Judge Souter joined three other New Hampshire Supreme Court justices in ruling that the state's goal of providing a "healthy environment and role model for our children" was a rational basis upon which to bar all individuals who are gay or lesbian, or who engage in homosexual sexual conduct, from becoming foster or adoptive parents.<sup>1</sup> While we do not argue with the state's goal in this regard, we strongly object to the court's view that gay people, per se, undercut such goals. On upholding the law, Judge Souter and three of his colleagues relied on the discredited theory that lesbian and gay parents do not provide appropriate role models because there is a "reasonable possibility" that they may influence a child's "developing sexual identity."

Several briefs were submitted to the court presenting evidence to refute the legislature's

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<sup>1</sup> The Court did not uphold the provision of the law which would bar gay people from being licensed to run day care centers on the grounds that the applicant may in fact be a corporation, not a person, and that day care operators do not have continuous contact with children to justify the role model rationale. Oddly enough, the court found that licensing authorities should subject cases to individual review, an option not pursued or questioned with regard to the exclusion of gay people from foster or adoptive parenting. Thus, applicants for day care licenses which would allow businesses to operate, have greater process rights than individuals wishing to nurture and love children in need.

role model theory. Most notable was a brief from the Majority of the House Committee on the Judiciary opposing the constitutionality of the statute in its entirety. Judge Souter and his colleagues conceded that the evidence before it consisted of "a number of studies that find no correlation between a homosexual orientation and the sexual orientation of their children." *Id.* at 25. Yet, the court rejected these studies. Instead, the majority found that since the "source of sexual orientation is still inadequately understood," the state is allowed to bar the entire class of lesbians and gay men from these state controlled parenting options. The majority's only support was one reference to an article noting that environmental conditioning may be one of several factors in the development of sexual orientation.

This decision met with the clear disapproval of one dissenting judge, Justice Batchelder, who was provoked to remind the court that the "State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to a group of its citizens because of ancient prejudices against that group." *Id.* at 28. Most importantly, Justice Batchelder exposed the fact that the legislature "received no meaningful evidence to show that homosexual parents endanger their children's development of sexual preference...any more than heterosexual parents. The legislature received no such evidence because apparently the overwhelming weight of professional study on the subject concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents." *Id.* at 28.<sup>2</sup>

As the most substantial constitutional decision in which Judge Souter took part on the New

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<sup>2</sup> In support of his statement, Justice Batchelder cited five authoritative studies, including the study relied upon by the majority in upholding the exclusion.

Hampshire Supreme Court, Opinion of the Justices deserves close scrutiny and study with regard to Judge Souter's approach to individual rights and constitutional guarantees of equal protection, privacy, due process, and right of assembly. We are deeply concerned about a Supreme Court nominee who would rely on his own personal outmoded prejudice in order to uphold the state's rationale for treating gay people as a class different from others, thereby excluding them from parenting options.

We are deeply concerned about a judicial nominee who would accept the legislature's justification of this unequal treatment on the basis of Bowers v. Hardwick, the Supreme Court decision allowing states to criminalize homosexual sexual conduct. As pointed out by the dissent, New Hampshire does not even criminalize homosexual conduct, though it does outlaw heterosexual adultery. We are gravely concerned about a Supreme Court nominee who would deny an opportunity for an individual determination of fitness to parent in a state where the courts have found due process rights for high school students denied the chance to compete in the school sports program. We are concerned about a nominee who would not look behind an unsupported, and immediately disprovable, presumption that gay people are unfit to parent in order to allow at least an individual assessment within a foster care and adoption system which has already instituted a process for review of all applicants.

The majority opinion is unsettling, not simply because of its anti-gay result, but because of its blithe disregard of the evidence before the court in favor of hazy stereotypes and outright prejudice. Judge Souter and his colleagues opted not to follow the lead of the majority of other state courts which, like the dissent by Judge Batchelder, reject the use of sexual orientation as a factor in evaluating parental rights. In joining the opinion, or writing it if that is the case, Judge

Souter indicated his willingness to irrefutably exclude an entire class of people from the rights, joys, and benefits based on nothing more than legislators' and individual justices' fears and stereotypes.

This kind of judicial reasoning does not just affect the 25 million gay men and lesbians in this country. It will harm all racial and ethnic minorities, women, and others who are alienated or meet with wide-spread social disapproval. These groups, who in combination represent the majority of people in this country, depend on the courts for protection and enforced fairness. If Judge Souter was willing to rely on his own stereotypes of gay people in this case, there is no assurance that he will not reject other evidence and rely again on prejudice or preconceptions when reviewing cases involving other groups of people.

If courts will not stand up to such state prejudice, and will not vindicate the rights of minorities and individuals, then the liberty of all is threatened. Certainly gay people need the protection of courts willing to give real scrutiny to anti-gay discrimination, rather than declining to apply the evidence and deferring instead to social hostility, ignorance, and bigotry.

Lambda Legal Defense believes that the indispensable qualification for an Associate Justice of the Supreme Court is a vigilance on behalf of individual rights and equal justice. Judge Souter's record makes clear that, by that basic standard, he is unqualified.

*Lambda is the nation's oldest and largest lesbian and gay legal rights advocacy organization. Founded in 1973 as a not-for profit public interest law firm, Lambda works to establish legal rights and to promote justice and equality for lesbians and gay men through litigation and education. Lambda is based in New York, with a regional office in Los Angeles.*

Senator KENNEDY. Thank you very much.  
Urvashi Vaid. Is that the right pronunciation?

#### STATEMENT OF URVASHI VAID

Ms. VAID. Actually, it is Urvashi Vaid, but you join an honorable tradition of people who mispronounce the name.

Senator KENNEDY. I apologize. Thank you very much.

Ms. VAID. Thank you very much, Mr. Chairman and members of the committee. My name is Urvashi Vaid, and I am executive director of the National Gay and Lesbian Task Force.

On behalf of millions of gay and lesbian Americans, I want to thank you for this opportunity to testify in opposition to the nomination of Judge David Souter to the U.S. Supreme Court.

Founded in 1973, the National Gay and Lesbian Task Force is a membership organization, whose mission is to educate, organize and advocate for full equality for the 10 percent of the American population that is estimated to be lesbian and gay.

The gay and lesbian community seeks from a Supreme Court nominee nothing more or less than other Americans. We seek a nominee committed to the concept that the rights embodied in the Constitution are meant to be inclusive of all Americans.

Unfortunately, in recent years, the Supreme Court has taken an increasingly restrictive view of the Constitution's reach in protecting minorities. The Court today fails to countenance the claims of gay and lesbian Americans who seek basic equal rights that most Americans take for granted.

The gay and lesbian plaintiffs who will come before the Supreme Court in the coming years to vindicate their rights bring stories of stark and unjust discrimination. I think many on this committee know better than perhaps some of your colleagues the issues that we are talking about, pervasive violence, pervasive prejudice, documented employment discrimination, housing discrimination.

The plaintiffs who will come before the Supreme Court from my community will petition for justice, for freedom from unwarranted governmental intrusion into our private adult lives, for equal protection, for due process, for the freedom of association that we all cherish, for the freedom of expression that allows me to sit here before you, for privacy rights and for other basic constitutional freedoms that are still denied to gay men and lesbians in this country.

Perhaps the most poignant question of constitutional equal protection I believe the Court will face in the near future will involve the long-standing efforts of gay and lesbian veterans and members of the U.S. Armed Forces to end the unjust policy banning openly gay people from serving our country.

These courageous men and women are even today stationed on the front lines in the Middle East, yet we are hunted like criminals at our home bases in this country, persecuted by our own country, because of an outdated and needless ban on service by openly gay and lesbian Americans, which forbids us from contributing our valor and our talent.

With this backdrop of interests and concerns, we have considered Judge Souter's record, in the hope of finding comfort that his defi-

nition of American society and his definition of the Constitution will be inclusive and unbiased.

We have listened expectantly to his testimony this past week, to glean hope that the constitutional rights of gay and lesbian Americans will be honored by the nominee, and we have come to the painful conclusion that Judge Souter's record indicates that his confirmation by this body would not only continue the shameful denial of equal justice under which gay and lesbian Americans live, but will do great harm by tilting the Court to the right in critical areas of civil rights and privacy.

I want to focus on the foster care and adoptive parenting decision that my colleague Paula Ettelbrick referred to. Millions of lesbians and gay men today are parents of children. Whether it is natural birth parents, adoptive parents, parents by foster care or by guardianship, lesbian and gay Americans strive to be parents for the same reasons as our heterosexual counterparts do, and we have submitted for the record as part of our testimony an excellent article which outlines the rights and the lack of rights that gay and lesbian families encounter in our society.

This issue is of great concern to my organization and to the broader gay community. We are very troubled by the fact that Judge Souter joined in the majority opinion of the New Hampshire Supreme Court in a decision barring gay and lesbian applicants from adopting or foster parenting in all circumstances. Again, the decision is appended as part of our testimony for your consideration.

The case, as Ms. Ettelbrick pointed out, centered on the constitutionality of a proposed New Hampshire law that would have banned all gay people from becoming adoptive or foster parents and from operating child care agencies.

The majority of the State court held that the exclusion of gay people from parenting was a reasonable legislative response to the bill's stated concern of providing "appropriate role models for children." While the court struck down the portion of the law banning us from operating child care agencies, the proposed ban on all parenting through adoption or foster care programs was passed by the New Hampshire Legislature.

We are very concerned that Judge Souter ignored the record in that case. It was an extensive record. I was pleased to hear Senator Heflin ask the question on Monday afternoon of Judge Souter about the record in that case, and contrary to Judge Souter's assertion that there was not enough evidence, indeed there was in the written submissions made by a variety of parties and in the conclusion of the House Judiciary Committee itself.

The dissenting judge noted that, indeed, the overwhelming weight of the professional study on the subject concludes that there is no difference in psychological and psychosexual development between children raised by heterosexual parents and children raised by homosexual parents.

I know that my time is short before you, so I want to switch focus from Judge Souter's ignoring of the record and participating in a biased holding in that foster care case, to some privacy concerns that we also share with our colleagues.

Like other constituencies concerned about the future Supreme Court's handling of the tested constitutional right to privacy, we have considered his record on testimony and privacy doctrine with great interest, and again, these confirmation hearings have offered little solace to gay and lesbian Americans concerned with securing our freedom from inappropriate and discriminatory State regulation of our private lives.

In his testimony before this committee, the Judge commented that he believes in a constitutional right to privacy, a fundamental right to privacy for married couples. As I am sure you know, this narrow statement would be a step backward from the current status of the privacy doctrine, where the Court has recognized the broadest right in situations involving unmarried persons, as well.

Judge Souter's testimony on privacy also contained his repeated claim to listen to the other side. We respectfully submit that listening without any willingness to change one's position is not helpful to those of us who seek a more expansive interpretation of privacy.

Mr. Chairman, the coming decades will continue to witness the further advancement toward equality of lesbian and gay Americans. We believe that we and all Americans will benefit from a Supreme Court committed to just and equitable application of basic constitutional principle, and a court committed to extending the reach of the Constitution to encompass all segments of society.

For these reasons, we respectfully urge you to vote against the nomination of Judge Souter.

Thank you for your consideration.

[The prepared statement of Ms. Vaid follows:]

N A T I O N A L  
**NGLTF**  
G A Y & L E S B I A N  
T A S K F O R C E

TESTIMONY ON THE NOMINATION OF  
JUDGE DAVID SOUTER

Senate Judiciary Committee  
September 18, 1990

by  
Urvashi Vaid  
Executive Director  
National Gay & Lesbian Task Force  
Washington, D.C.

Mr. Chairman, members of the committee, my name is Urvashi Vaid and I am executive director of the National Gay & Lesbian Task Force. On behalf of millions of gay and lesbian Americans, I want to thank you for this opportunity to testify in opposition to the nomination of Judge David Souter to the U.S. Supreme Court. Founded in 1973, the National Gay & Lesbian Task Force is a membership organization whose mission is to educate, organize and advocate for full equality for the 10 percent of the American population that is lesbian and gay.

The gay and lesbian community seeks from a Supreme Court nominee nothing more or less than other Americans: we seek a nominee committed to the concept that the rights embodied in the Constitution are meant to be inclusive of all Americans.

Unfortunately, in recent years, the Supreme Court has taken an increasingly restrictive view of the Constitution's reach in protecting minorities. The Court today fails to countenance the claims of gay and lesbian Americans who seek basic equal rights which most Americans take for granted. The gay and lesbian plaintiffs who come before the Court bring stories of stark and unjust discrimination. They petition for justice, for freedom from unwarranted governmental intrusion into private, consensual adult sexual expression, for equal protection, due process, freedom of association, freedom of expression, privacy, and for the basic constitutional freedoms guaranteed to all other Americans.

Perhaps the most poignant question of constitutional equal protection the Court will confront in the near future involves the long-standing efforts of gay and lesbian veterans and members of the U.S. Armed Forces to end the unjust policy banning openly gay and lesbian people from serving our country. These courageous men and women are even today stationed on the front lines in the Middle East, yet they are hunted like criminals at their home bases; persecuted by their own country because an outdated and needless ban on service by gay and lesbian Americans forbids us from contributing our valor and talent.

With this backdrop of interests and concerns, we have considered Judge Souter's record in the hope of finding comfort that his definition of American society and the Constitution is inclusive and unbiased. We have listened expectantly to his testimony this past week to glean hope that the Constitutional rights of gay and lesbian Americans will be honored by the nominee. And we have come to the painful conclusion that Judge Souter's record indicates that his confirmation by this body will not only continue the shameful denial of equal justice under which gay and lesbian Americans live, but will do great harm by tilting the Court to the right in critical areas of civil rights and privacy.

In our written submission to this committee, we have addressed our concerns about privacy rights, and the impact of this nomination on the future Court's reconsideration of the anti-gay, Bowers v. Hardwick Georgia sodomy law decision. Hardwick constricted the freedom from inappropriate government regulation of private sexual and reproductive decisions which all Americans cherish.

Also in our written submission to this committee, we have drawn your attention to a New Hampshire case which gravely, and we believe unconstitutionally, restricted opportunities to qualified gay and lesbian applicants seeking to become parents through adoption or foster care. We have submitted for the record an analysis of the legal status of lesbian and gay families today

prepared by highly respected author and attorney, Roberta Achtenberg.

I want to focus my testimony today on the New Hampshire case in which Judge Souter, sadly, joined a majority in denying constitutional due process to gay and lesbian residents of the state of New Hampshire by upholding a law that barred gay and lesbian applicants from adopting or foster parenting in all circumstances. The case was entitled Opinion of the Justices, 525 A.2d 1095 (N.H. 1987).

In 1987, the New Hampshire legislature sought an advisory opinion from the state supreme court on the constitutionality of a bill that would have banned all lesbian and gay applicants from becoming adoptive or foster parents and from operating child care agencies. The majority of the state court, of which Judge Souter was a part, held that the exclusion of all gay and lesbian prospective parents from foster parentage and adoption programs was a reasonable legislative response to the bill's stated concern of providing "appropriate role models for children." Id., at 1099. While the Court struck down the portion of the law that would have forbidden gay or lesbian persons from operating child care agencies, the proposed ban on parenting options was subsequently passed by the legislature.

As dissenting Judge Batchelder noted, the majority opinion was reached despite the fact that there was no evidence in the record to support it. Indeed, there was evidence in the record which contradicted the majority's conclusion.

We are deeply concerned that Judge Souter participated in a holding based on no substantial record, but on prejudicial and stereotyped myths about gay men and lesbians. Significant court precedent from other jurisdictions in custody cases and other parenting cases involving foster care and adoption exists to challenge the legal reasoning and holding in the New Hampshire Supreme Court case.

In addition, Judge Souter's participation in a holding not based on the record leaves us uncomfortable with his repeated assertions during his testimony before this committee, assertions that he would be an open-minded judge, who will listen to both sides before he acts, and who will base his decisions on the facts and not on his personal views.

Finally, Judge Souter and the majority's holding in the case denied constitutional due process to gay and lesbian plaintiffs by upholding a law whose sole standard for allowing access to adoption or foster care rights was the applicant's sexual orientation.

The next two decades will witness the continued advancement towards equality of lesbian and gay Americans. We believe that we and all Americans will benefit from a Supreme Court committed to just and equitable application of basic Constitutional principle, a Court committed to extending the reach of the Constitution to encompass all segments of society.

In light of the record we have presented for you in our testimony, and in the absence of convincing evidence that he will equitably apply constitutional principles to gay and lesbian plaintiffs and respondents he would encounter as a Supreme Court justice, we respectfully urge you to vote against Judge Souter's confirmation.

Thank you for your consideration.

Senator KENNEDY. Thank you very much.  
Sara Rios?

**STATEMENT OF SARA E. RIOS**

Ms. RIOS. With your permission, Senators, I offer for entry into the record the report of the Campaign for a Just Supreme Court, of which the Center for Constitutional Rights is a member.

Senator KENNEDY. We will have that included in the record.

Ms. RIOS. Thank you.

[The above-mentioned report follows:]

**Why Not the Best?  
David Souter Fails to Meet  
Minimal Standards for the Supreme Court**

**A Report Compiled By  
The Campaign for a Just Supreme Court  
666 Broadway, 7th floor  
New York, NY 10012  
(212) 614-6464**

**Co-Convenors:**

**Center for Constitutional Rights  
National Lawyers Guild**

**Members:**

**ACT-UP**

**C.W.A.-Local 1180**

**Lambda Legal Defense and Education Fund**

**National Alliance against Racist and Political Repression**

**National Organization for Legal Services Workers**

**NOW--New York City**

**NOW--New York State**

**Students Organizing Students**

**U.A.W.-Local 259**

**Women's Health Action Mobilization**

### Introduction

The Coalition for a Just Supreme Court emphatically rejects the nomination of David Souter to the Supreme Court of the United States. David Souter is unfit for the nation's highest court: his performance as judge and Attorney General<sup>1</sup> demonstrates an inherent hostility and insensitivity to the rights of most Americans -- namely, working people, women, people of color, gay men and lesbians, immigrants, poor people, and criminal defendants.

Moreover, David Souter is hostile to the Constitution itself, and to the precious doctrine of "liberty and justice for all." Unlike Justice Brennan, David Souter does not regard the Constitution as a "living, breathing document" through which the conditions of our changing and diverse society must be examined. Rather, David Souter would further constrict fundamental rights: to him, what comes first are the needs of a few, and what is sacrificed are the needs of many. Time and time again, Souter has protected the interests of the wealthy over the needs of the

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<sup>1</sup> David Souter's tenure as Attorney General of the State of New Hampshire is an appropriate area of inquiry because the attorney general does not serve at the pleasure of the Governor in New Hampshire. Indeed, there is a significant precedent in the state for the attorney general to refuse to defend or enforce the Governor's agenda in the case of a political or legal disagreement. For this reason, the New Hampshire Governor has his or her own counsel. Significantly, David Souter's predecessor in the attorney general's office, now-Senator Warren Rudman, frequently refused the direction of then-Governor Peterson. Consequently, David Souter's performance as attorney general is not shielded from inquiry on the theory that he was only acting as an agent of the governor; rather he bears accountability for his actions during that period.

poor; time after time, he has championed the destructive notion of "reverse discrimination" rather than sought to redress the impact of racism. His record demonstrates a proclivity to identify only with the litigant most similar to himself. As such, he identified exclusively with anti-choice physicians rather than the right of women to control their bodies. Souter is hardly a "blank slate": his record shows ample evidence of a judicial activist bent on subjugating the Constitution to the will of a privileged few.

As a judge, David Souter has forged a "jurisprudence of convenience", in which he blows in one judicial direction and then quite nimbly in another. When it serves his end, he is a strict constructionist as in the case of In Re Dionne, where he rejected a constitutional challenge to court fees on the basis of a reading of the New Hampshire Constitution as it was understood in 1784, yet in U.S. v. N.H. he invoked a radical theory of the right to privacy in order to withhold demographic information from the EEOC. When push comes to shove, however, when the rights of individuals are weighed against those of the State, the State wins.

Judge Souter has also demonstrated a jurisprudence inimical to the Constitution. Whenever possible, he has avoided the affirmation of constitutional rights by shifting the focus of attention from public to private actors, and by construing constitutional claims as "mere" statutory rights. In so doing, he has shown himself unwilling to recognize that the rights

secured in the Constitution are paramount to the will and whim of particular legislatures.

Our analysis reveals that Souter has little idea what the courts have to do with justice. To him, adept legal phrasing and esoteric arguments mean more than the conditions of real people's lives. Like many conservatives, he appears to believe that all litigants come to court on a level playing field, despite different life experiences. He does not recognize the differences between the experiences of men and women, between people of color and white people, between gay men and lesbians and the heterosexual majority, between the poor and the wealthy, between the able bodied and the disabled, and between the young and the elderly. Rather than viewing diversity as something which enriches society, his record shows that at best he views equal opportunity as a burden and an inconvenience, and that affirmative action in his eyes is affirmative discrimination. Rather than using law to implement a truly humane vision of justice, he manipulates legal theory to mete out a desiccated intellectual notion of "justice" as if it were unrelated to social conditions. At best, he is insensitive; at worst, he furthers the limitations of a society steeped in many unacceptable biases. We deeply object to Souter's approach to the law, which is dehumanizing and out of touch with the complexities of our society.

We urge the Senate to reject David Souter. We need not await artful dodging of tough questions; we have enough

information to know where this man stands.

#### WOMEN'S RIGHTS

Souter's record in areas that directly and uniquely affect women's lives is cause for great alarm. In cases involving economic rights, abortion, family law, and constitutional equal protection, David Souter has distinguished himself with a penchant for stereotype, arcane notions of gender and a laissez-faire notion of justice. Indeed, Souter's myopic view of the Constitution inevitably leads to a world outlook where women are unequal players to men because they are invisible or inconsequential. This makes perfect sense given his insistence upon construing the Constitution in terms that were relevant in the 1790's -- a time when the interests and concerns of women were never brought to the table. This philosophy is not acceptable in a judge who will sit on the court into the twenty-first century.

This hostility to recognizing the oppression of women was made quite clear in Helgeos v. Meloon, in which he asked the U.S. Supreme Court to reduce the standard under which laws that discriminate against women are examined under the Constitution. Souter argued that the intermediate scrutiny standard developed by the Supreme Court in Craig v. Boren would "permit subjective judicial preferences and prejudices." In other words, the courts should not impose a constitutional check on the judgments of legislators even if that legislative judgment amounted to

flagrant sex discrimination.

With respect to reproductive rights, Souter has made it quite clear that in considering the issue, the interests of women will be far from his mind. In Smith v. Cote and in a letter he authored to the legislature when he was on the Superior Court regarding judicial by-pass provisions of a parental consent law, Souter was concerned not with the hardships faced by pregnant young women, or women who have received inadequate prenatal care, but rather with the problems faced by anti-choice judges or doctors -- that is, the people on the periphery of these issues, who happen to be the people with whom he could most identify with personally.

His insensitivity to women's lives was made further manifest in New Hampshire v. Colbath, a rape case in which Souter found that the defendant had a right to have the jury consider the victim's "sexually provocative behavior" toward other men present just prior to the rape, which he considered relevant to the issue of consent. He held that perhaps the victim falsely accused the defendant of rape as a way to excuse her "undignified predicament."

Souter is more than a conservative judge. He is a judge who apparently believes that some of the most perplexing constitutional issues of our time should be decided solely by reference to the thinking of men in 1784. This posture has dramatic negative implications for equal protection, due process and privacy rights. Most importantly, this record demonstrates

that Judge Souter is wholly unfit to sit on the U.S. Supreme Court.

#### RIGHTS OF LESBIANS AND GAY MEN

In a decision that is steeped in stereotype and draconian notions of family, David Souter joined an advisory opinion of the New Hampshire Supreme Court which upheld the legislature's declaration that gay men and lesbians are per se unfit to be foster care or adoptive parents. In Opinion of the Justices, a majority of the court found that the proposed law did not run afoul of the due process, equal protection, privacy and freedom of association provisions of the federal and state constitutions.

By taking this position, Judge Souter and his colleagues ignored the majority of legal precedent on this issue which has rejected the use of sexual orientation as a factor in evaluating parental rights. The opinion in which Souter joined reasoned that the state has a legitimate interest in assuring heterosexual role models for children, and that the exclusion of lesbians and gay men from foster or adoptive parenting would further this purpose. The court's decision relied on the universally discredited theory that there is a "reasonable possibility" that having a gay or lesbian parent might affect a child's "developing sexual identity." The court conceded that there have been "a number of studies that find no correlation between a homosexual orientation of parents and the sexual orientation of their

children." Nevertheless, the court rejected these studies and concluded that since the "source of sexual orientation is still inadequately understood," the state could exclude lesbians and gay men from these parenting options because they are not appropriate role models.

While this opinion represents a profound assault on the rights of lesbians and gay men, its constitutional analysis is equally troublesome for all people, regardless of sexual orientation. In finding that the proposed law did not run afoul of the state and federal constitution, the court found that it deserved only a minimal level of scrutiny because there is no fundamental right to parent. Souter and his colleagues reasoned that the "mere expectation" of parenting created by the state's foster care and adoption laws did not rise to the level of a right protected by either the due process or equal protection clauses of the federal and state constitutions. The offensiveness of this argument is made manifest by Judge Batchelder's dissent, in which he observed that existing New Hampshire constitutional law recognized a liberty interest in access to interscholastic sports sufficient to trigger constitutional due process protections, while the Souter majority refused to find that "parenting is so ingrained in our culture that to deny the opportunity to adopt or provide foster care is a deprivation of liberty." Indeed, the majority opinion was so insensitive that it provoked Justice Batchelder to write that "the state is never less humanitarian than when it denies public

benefits to a group of citizens because of ancient prejudices against that group."

#### CIVIL RIGHTS AND LABOR

Of one thing we can be sure -- once on the Supreme Court, David Souter would roll back much of the gains of the Civil Rights and labor movements by gutting Title VII and the rights of working people.

U.S. v. State of New Hampshire, Souter led a challenge to a federal requirement that public employers provide the Equal Employment Opportunity Commission (EEOC) with annual reports setting out the racial and ethnic make-up of their employees. These reports were mandated as part of the EEOC's monitoring of compliance with Title VII's non-discrimination in employment provisions.

In his 1st Circuit Court brief Souter insisted that the collection of statistics was irrelevant to the enforcement of rights under Title VII and argued, instead, that the reporting requirements could only result in the "enforcement of racial quotas." In essence, Souter believed so little in the state's ability to employ non-discriminatory hiring practices, that resort to racial quotas would be the only way to avoid a racially imbalanced workforce.

Most surprisingly, Souter put forward a radical privacy theory in defense of the state's resistance to reporting the racial and ethnic makeup of its workforce. He argued that the collection of this information was just as offensive to the

employee's privacy rights as inquiring of employees about the "frequency with which [they] have psychiatric treatment or the frequency with which they have sexual relations." Further, Souter had the gall to invoke the Constitution's anti-slavery protections by arguing that the classifications required by the EEOC constituted "badges and incidents of slavery" contrary to the mandates of the 13th Amendment.

Finally, in a shameful display of insensitivity and ignorance, Souter presented complicated theories of racial identity in an attempt to obscure the need to gather racial/ethnic data essential to the successful enforcement of the law's anti-discrimination provisions. For example, Souter asks hypothetically, how do you classify a Mexican-American woman who looks Caucasian but identifies herself as Chicana? Or a Native-American man who does not appear Caucasian but identifies with his own Caucasian parent more than with his Native American parent?

Perhaps most interesting about this case is the fact that after losing in the 1st Circuit, Souter petitioned for certiorari to the U.S. Supreme Court; and the petition was opposed by none other than Robert Bork, the Solicitor General at the time.

#### DAVID SOUTER IS ANTI LABOR

If David Souter's nomination to the United States Supreme Court is confirmed, he will undoubtedly assist big business in its campaign to roll back the New Deal and to destroy employees'

gains in wages, hours, working conditions and the ability to organize.

Just as in other areas of the law, Judge Souter's jurisprudential vision naively or disingenuously assumes that litigants are equally equipped to compete in the courtroom and in society. His judicial philosophy is a product of Adam Smith's 18th century economics with its fiction that we enter the job and consumer arenas as equals. Souter can be viewed as a neutral arbiter only in the context of the hypothetical world of the "level playing field."

His New Hampshire judicial opinions indicate that he is either covertly pro-employer or dangerously unaware of the realities of the job market and the workplace.

When Judge Souter denied unemployment compensation benefits to two elderly disabled brothers who had been laid off after 22 years of employment, he wrote an opinion that reveals the depth of his insensitivity to people who enjoy less privilege than he does. Souter refused to consider whether the state's unemployment compensation law discriminated against disabled and elderly workers because the brothers had not raised the discrimination issues at the trial. Souter resorted to this procedural escape valve to avoid considering the discrimination claims even though the brothers had no legal assistance at the trial, and the statute was discriminatory on its face. Appeal of Bosselait, 130 N.H. 604, 547 A.2d 682 (1988), cert. denied, \_\_\_ U.S. \_\_\_, 109 S.Ct. 797 (1989).

Souter has perpetuated the doctrine that at-will employees (those without a contract) have no job protection. Richardson v. Chevrefils, 131 N.H. 227, 552 A.2d 89 (1988).

He has endorsed an extremely restricted view of employees' rights in his dissent from a decision which recognized the contractual rights of a non-tenured teacher. Appeal of City of Nashua, School District #42, \_\_\_ N.H. \_\_\_, 571 A.2d 902 (1990).

He has conveniently forgotten his supposedly principled deference to the legislative branch and his aversion to judicial activism in a case involving the arbitrability of a labor contract. He raised an issue that neither party had presented, and created, without prior legislative or judicial basis, a new unfair labor practice: the union's wrongful demand to arbitrate. School District #42 of the City of Nashua V. Murray, 128 N.H. 417, 514 A.2d 1269 (1986).

David Souter's judicial philosophy is a disaster for the average American. He will redress only the most technical of grievances, he elevates procedure over substance and exhibits no commitment to real justice.

#### VOTING RIGHTS

In 1970, while Souter was Assistant Attorney General to Warren Rudman he argued U.S. v New Hampshire, a case he recently singled out as one of the most gratifying cases in which he had ever been involved. In that case the United States, pursuant to the provisions of the Voting Rights Act of 1965, sought to enjoin

New Hampshire's use of a literacy test mandated by the state constitution and statutes which conditioned the right to vote on one's ability to read and write the New Hampshire constitution in English. Unlike many states that stopped using literacy tests and other devices once notified by the U.S. Department of Justice of the illegality of such tests after passage of the Voting Rights Act, David Souter, on behalf of New Hampshire, vigorously fought for the right to continue using the literacy test.

In his brief, Souter argued vehemently that the rights of the State to determine voter qualifications and the rights of literates are constitutional, while the rights of illiterates<sup>2</sup> are "merely legal." He maintained that because illiterate people "can claim...no more than that they are the fortuitous and incidental beneficiaries of a legal, rather than a constitutional, right to vote" and because "the claims of the State and hence of its literate voters, are of constitutional proportions," the risk of harm is greater to the State and its literate voters. In fact, he argued that since it was virtually impossible for the state to provide a means whereby illiterate voters could vote "intelligently," their votes would result in "watering the value of every literate citizen's vote ...."

Given the history of limited access to and inadequate education as well as the social oppression of the poor and people

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<sup>2</sup>Note that "illiterate" for these purposes means all persons who cannot read and write the New Hampshire Constitution. Such an overbroad definition of the term may very well draw within its scope a majority of residents of the state.

of color in this country, Souter's attempt to prevent "illiterates" from voting amounts to an attempt to prevent the poor and people of color from voting. At best, his argument indicates either an unacceptable insensitivity to U.S. socio-economic conditions, while at worst it represents an unacceptable racist and classist ideology.

Although the brief in this case had both Rudman and Souter's names on it, the fact that Souter argued it is a strong indication that he wrote it too. What is more alarming is that in his Senate Judiciary Committee Questionnaire, Souter wrote that "participation in the argument of that case [was] one of the most gratifying events of my life" because "the argument included a genuinely dialectical exchange between the great jurist [Judge Gignoux] and me." He sees the case as a mere intellectual exercise and has no sense for the erosion of civil rights that the views expressed in his brief represent.

#### **SOUTER'S RECORD ON CRIMINAL JUSTICE AND THE RIGHT TO DISSENT**

An examination of Souter's judicial record reveals a man who belittles the rights of the accused and is oblivious to the courts' role in guarding against police misconduct.

Under New Hampshire law, if the police take blood or breath or urine samples from someone accused of drunken driving, the police must make an identical sample available to the accused for independent testing. In 1989, the legislature asked for the state Supreme Court for an advisory opinion as to whether it would be

constitutional to repeal the two-sample law.

The majority of the Supreme Court said that repealing the two-sample law would turn DWI arrests into unconstitutional violations of suspects' due-process rights.

Souter and another judge joined in a dissent, which concluded that the proposed change would be constitutional. Their dissent turns the presumption of innocence on its head by stating that the chances are "extremely low" that a second sample would be helpful to the defendant because the police would not take any samples if they did not have good reason to believe that the accused was drunk. The dissent also asserted, without explanation, that two samples were not necessary because the accused could have a second sample taken at his/her own expense. Opinion of the Justices, 557 A. 2d 1355 (N.H. 1989).

In another Supreme Court decision, Souter wrote a majority opinion that seriously undermines the Miranda protection against involuntary self-incrimination. Souter wrote that when a defendant refused to answer questions by declaring "...if you think I'm going to confess to you, you're crazy," the refusal itself was admissible as evidence of a guilty conscience. State v. Coppola, 536 A. 2d 1236 (N.H. 1987). The 1st Circuit reversed Souter in a strongly worded opinion which observed that Souter's interpretation of the Fifth Amendment "amounts to a rule of evidence whereby inference of consciousness of guilt will trump a fifth amendment claim of the privilege ..." Under the reasoning of the New Hampshire court any prearrest invocation of the

privilege, no matter how worded, could be used by the prosecutor.

When Souter was New Hampshire Attorney General, he exhibited extreme antipathy for the rights of political dissenters in his treatment of the environmental protesters at the Seabrook nuclear power plant construction site. Beginning in 1976, when Souter was Attorney General and New Hampshire's chief law enforcement officer, the State Police initiated a full-time undercover operation against the Clamshell Alliance, which continued at least until 1981. State police agents and paid informers regularly attended Clamshell meetings and reported their observations to the police, in apparent violation of the Clamshell members' First Amendment rights.

Souter has stated he had no knowledge of the undercover operation, but the chief of undercover operations for the police has testified in a deposition that he sent his reports on the operation to the Attorney General's office. Whatever the state of Souter's knowledge of the police spying on the Clamshell Alliance, his behavior raises grave doubts about the judgement of a high official who would give the police unbridled authority to prejudice the First Amendment rights of political protesters.

Similar doubts are raised about the judgement of Attorney General Souter in May 1977, during large-scale civil disobedience actions at Seabrook. As a result of a series of decisions by Souter, more than 1400 demonstrators were arrested and held, contrary to normal New Hampshire practice, without the opportunity to be released on their personal recognizance. Since

Souter had made no preparations to hold so many prisoners, the protesters were detained in grossly substandard conditions in makeshift jails.

#### CONCLUSION

Although David Souter has been presented to the American public as a "blank slate" and a brilliant jurist, the facts demonstrate otherwise. He is no blank slate, and his jurisprudence betrays a startlingly limited vision. Whether Souter is brilliant or dull, what is at issue is his approach to the Constitution and the liberties it protects. Souter's record as Attorney General and judge displays an aversion to those rights which are the cornerstone of a healthy, diverse, and just society.

Ms. Rios. Good morning. My name is Sara Rios and I speak here today on behalf of the Center for Constitutional Rights. The center is a civil rights organization, with a 24-year history of litigating constitutional issues to protect the rights of the poor and the oppressed, and to check excesses of government power.

Standing on that record, Senators, we urge you today to resoundingly reject David Souter's nomination to the Supreme Court.

Senators, the decision you are about to make is the single most significant decision to affect people's rights in decades. We believe that a consolidation of a conservative majority on the Court has seriously eroded individual rights, and that there is great danger that the U.S. Supreme Court will no longer stand as the insurer of equal justice for all.

With so much hanging in the balance, we urge you to focus on whether the nominee's life experience and legal record affirmatively demonstrate a concrete commitment to equal justice. You must apply a positive standard for justice and liberty, not a negative standard, framed around the ideological brashness of Robert Bork. You must apply a positive standard to reflect the role of the Supreme Court, as contemplated by the Bill of Rights and the civil rights amendments, that of a champion of minority rights over majoritarian oppression and inequitable legislation.

David Souter's history is clear, when it comes to civil rights: One need not look very deeply into his writings and the now famous literacy test case and title VII case, to see that Souter has no understanding of the experiences of people different from himself. It is outrageous and it is offensive to suggest that, after confirmation, David Souter visit an Indian reservation to raise his consciousness about racial diversity.

One need not look very deeply into his advisory opinion on gay and lesbian parenting, to see Souter's repressive traditionalism vis-a-vis the family and civil rights. We caution you to beware of the confirmation conversion which David Souter has skillfully tried to exhibit in the past few days. David Souter has succeeded in not answering most of your questions, but he has bandied about liberal rhetoric with great facility, as if the mere use of the words such as "privacy" and "affirmative action," or even his apparent support for *Miranda* rights, can undo 20 years of attacking civil rights from the bench and as attorney general.

Unfortunately, the debate about Judge Souter's fitness has been framed not by his record, but by a negative standard set by the nomination of Robert Bork. It is not enough that a nominee merely agree with the landmark *Brown v. Board of Education* decision, for example. A nominee must demonstrate nothing less than a lifelong commitment to an involvement in making this country a safe and welcoming environment for those who are most oppressed. David Souter has no such history.

Let us not think that this man is a friend of women's rights, because David Souter refers to marital privacy as a liberty. This is especially so, since he has not been pressed on its implications for marital rape and men's attempts to control women's reproductive freedom within marriage.

Let us not be fooled by his characterization of himself as a hired gun for the Governor, when he was attorney general. Our research

shows unequivocally that the New Hampshire attorney general can play a role which is entirely independent from the Governor.

Let us not be fooled by David Souter's testimonial utterances that he abhors discrimination, when in the same breath he also said that there is no longer any discrimination in New Hampshire, a remark which bespeaks the insensitivity with which he has handled these issues throughout his career.

It is not enough for David Souter to simply deny that he ever referred to affirmative action as affirmative discrimination, when in his title VII brief he freely quoted from a book entitled "Affirmative Discrimination" to advance his arguments that the State should not be compelled to collect statistics for the EEOC.

Seventeen years after *Roe v. Wade*, it is untenable for David Souter to avoid stating his position on that landmark case, just as in 1971 it would have been unthinkable for a nominee to be uncertain or secretive of the wisdom of the 1954 *Brown* decision.

Moreover, it is unacceptable for a nominee to be uncertain of his feelings about cases he handled as attorney general in which he demonstrated particular disregard for civil rights.

Many vital cases will be decided soon by the Supreme Court. For example, the *Johnson Controls* case, a discriminatory employment policy directed against women in that case and masquerading as an occupational health policy, threatens to set a dangerous precedent for the elimination of women from the industrial workforce.

Additionally, the Court will no doubt address the recently passed Americans With Disabilities Act and the regressive sections of the McCarran-Walter Act, which exclude people from this country, simply on the basis of their political affiliations.

Most frightening, Senators, that Court will review your deliberations on the 1990 Civil Rights Act. Negative decisions in these cases will have dire and direct consequences on your constituencies and will have a disproportionate effect on people of color and the poor, signalling a retreat from progress and equal justice.

Senators, the U.S. Supreme Court is at a critical juncture. We submit to you that the current conservative majority on the Court—and David Souter, the nominee currently before you—are out of touch with the profound aspirations of people of color, of women, and of many others to attain the fundamental rights that are guaranteed them by the Bill of Rights.

The Senate possesses a grave duty to examine thoroughly the qualifications and mindset of this nominee to the Supreme Court. Because Judge Souter has betrayed himself in these hearings as a jurist whose positions are inimical to the Bill of Rights, we strongly urge you to reject him and to press for a nominee who stands tall enough to hold high the banner of equal justice. We urge you to take on this fight and to engage in this heroic battle. History will not forgive us if we do not try. Otherwise, it will be said that on the eve of the bicentennial of the Bill of Rights, you, the elected representatives of the people, forgot that freedom must be won anew, and by extraordinary efforts, in every generation.

[The prepared statement of Ms. Rios follows.]

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**TESTIMONY OF THE  
CENTER FOR CONSTITUTIONAL RIGHTS  
on the  
NOMINATION OF DAVID SOUTER  
to the  
UNITED STATES SUPREME COURT**

**Presented to:** The Senate Judiciary  
Committee

**Presented by:** Sara E. Rios  
Staff Attorney  
September 18, 1990

Good afternoon. I am Sara E. Rios, speaking on behalf of the Center for Constitutional Rights, a civil rights organization with a 24-year history of litigating constitutional issues to protect the rights of the poor and the oppressed, and to check excesses of government power. We urge the Senate to resoundingly reject David Souter's nomination to the Supreme Court.

Senators, the decision you are about to make is the single most significant decision to affect peoples' rights in decades. We believe that the consolidation of a conservative majority on the Court has seriously eroded individual rights, and that there is great danger that the United States Supreme Court will no longer stand as the insurer of equal justice for all.

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David Souter's history is clear when it comes to civil rights: one need not look very deeply into his writings in the now-famous literacy test case and Title VII case to see that Souter has no understanding of the experiences of people different from himself. One need not look very deeply into his advisory opinion on gay and lesbian parenting to see Souter's repressive

traditionalism vis a vis the family and civil rights.

We caution you to beware of the "confirmation conversion" which David Souter has skillfully tried to exhibit in these past few days. Souter has succeeded in not answering most of your questions; but he has bandied about liberal rhetoric with great facility, as if the mere use of words such as "privacy" and "affirmative action" undoes thirty years of attacking civil rights from the bench and as Attorney General. Unfortunately, the debate about Souter's fitness has been framed not by Souter's record, but by the negative standard of Robert Bork. It is not enough that a nominee merely agree with the landmark Brown v. Board of Education decision, for example; a nominee must demonstrate nothing less than a lifelong commitment to and involvement in making this country a safe and welcoming environment for those who are most oppressed. David Souter has no such history.

Let us not think that this man is a friend of women's rights because David Souter refers to "marital privacy" as a liberty, when he has not been pressed on its implications for marital rape and men's attempts to control women's reproductive freedom within marriage. Let us not be fooled by his characterization of himself as a hired gun for the governor when he was Attorney General. Our research shows unequivocally that the New Hampshire Attorney General plays a role which is entirely independent from the governor. Let us not be fooled by Souter's testimonial utterances that he abhors discrimination, when he also said that there is no longer any discrimination in New Hampshire -- a remark which bespeaks the insensitivity with which he has handled these issues

throughout his career. It is not enough for Souter to simply deny that he ever referred to affirmative action as "affirmative discrimination," when in his Title VII brief, he freely quoted from a book entitled Affirmative Discrimination, to advance his arguments that the State should not be compelled to collect statistics for the EEOC.

Seventeen years after Roe v. Wade, it is untenable for Souter to avoid stating his position on that landmark case, just as in 1971 it would have been unthinkable for a nominee to be uncertain of the wisdom of the 1954 Brown decision. Moreover, it is unacceptable for a nominee to be uncertain of his feelings about cases he handled as Attorney General in which he demonstrated particular disregard for civil rights.

Many vital cases will be decided soon by the Court. For example, in Rust v. Sullivan, if the government regulations are upheld, restrictions on abortion counseling in Title X clinics will limit women's freedom of reproductive choice by enforced ignorance of the alternatives available to them and repression of precious First Amendment rights. In the Johnson Controls case, a discriminatory employment policy directed against women and masquerading as an occupational health policy threatens to set a dangerous precedent for the elimination of women from the industrial work force.

The Court will no doubt address the recently passed Americans With Disabilities Act, and the regressive sections of the McCarran-Walter Act which exclude people from this country simply on the basis of their political affiliations. And most

frighteningly it will review Congress' final deliberations on the 1990 Civil Rights Act.

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The CHAIRMAN. Thank you very much. Since I came in late, I will recognize Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. I just have a few questions.

First, I would like to ask Haywood Burns, I wonder if you are familiar with the materials that were submitted yesterday by Mr. Rauh, a series of articles and incidents, not only in New Hampshire papers but other national newspapers, that talked about various incidents involving racial unrest in New Hampshire.

Mr. BURNS. Senator, I believe I am familiar with those materials, as well as other materials that would speak to the issue of the presence of discrimination in that State.

Senator KENNEDY. Have you formed any opinion whether you think that those new reports are consistent with Judge Souter's opinion that he presented to the committee that there are no racial problems in New Hampshire?

Mr. BURNS. Senator, as I tried to indicate in my testimony, I find it very difficult to understand how anyone in this day and time could make that statement with regard to any State. I am not picking on New Hampshire. I know you are not either, but after seeing that material and understanding the extent to which there are evidences all around him of racial discrimination, it is hard for me to know how he could not be aware of them or sensitive to them.

The Klan is marching in Portsmouth in full uniform regalia, in Dover and Exeter, town after town in New Hampshire, this year, not some time in the distant past. His own representative in the State legislature has been called on the carpet for his racist remarks with regard to black people. The supreme court in his own State has made rulings with respect to the rights of black workers who were discriminated against in his State. So it is hard for me, sir, seeing that material and looking at other material, to understand how he could feel that there is no discrimination in his State.

Time after time, the debate has gone on in the State about Martin Luther King's birthday being a holiday, and the kind of racist statements that have been made around that particular debate would seem to me to be something that any person who was sensitive, aware, intelligent, in contact, would know about and have some reaction to.

Senator KENNEDY. Of course, the principal locations of blacks in New Hampshire, in Portsmouth, along the coast, that tradition actually goes back to the Revolutionary War. It is one of the oldest communities of blacks in any part of New England. Manchester is somewhat different, and so the significance of a Ku Klux Klan marching in Portsmouth in a small State is not something that people would miss for those obvious reasons. Portsmouth, to my knowledge, has been relatively free—a number of incidents that have been raised yesterday by Mr. Rauh—of a lot of tension, but there is no question that it is an important tradition. Although small in percentage numbers, there is an important tradition in New Hampshire involving blacks more recently.

We heard testimony earlier, again, Mr. Burns, that you were in school with Judge Souter and that your impression of his sensitivity to the issues of the time differs from that expressed by a previous witness. Could you be any more specific?

Mr. BURNS. I would be glad to, Senator. As I indicated, I had no intention of addressing this committee on that matter when I came in this morning, but when I saw my friend here, Mr. Williams, giving his view, I thought I owed it to the committee, since I saw the truth through a different prism, to share my view.

It is not to come before you and to say that the David Souter I knew at that time was a mean-spirited person—he was not—or to say that he was biased. I saw no indication of that. But I think that is too low a standard when we are talking about this seat on the Supreme Court. I think it is too low a standard when we should be concerned with a person's views with respect to the protection of rights.

I was in the same house or dormitory with David Souter as a student. I believe he was 1 year ahead of me. For 2 years we lived in the same house; we ate in the same dining room; and he was a person that I did know at that time. I have not continued my contact with him over the years, and so I am not in a position to comment on how he has changed. But the person that I knew was very different than the one that Mr. Williams described.

Senator KENNEDY. In what respect?

Mr. BURNS. Although I saw no bias nor mean-spiritedness, I did not see any particular compassion or particular concern about the rights of the poor or people of color. This was a time in the 1960's, Senator, when I was in college and he was in college, and the whole country was in an uproar. Our very college and the very house I lived in, Lowell House, was one where we had a lot of concern about those issues. David Souter never did. Or at least he never expressed it or showed it, in fairness.

Senator KENNEDY. Were you involved in any of those meetings, either on the issues involving civil rights or poverty issues?

Mr. BURNS. Yes, Senator.

Senator KENNEDY. As I remember, there was a good deal of activity in most universities, and certainly Harvard is no exception. Hardly an evening goes by when there was not some meeting, some engagement, some discussion, some discussion group. In the earlier exchange, I think the chairman was asking whether there had been any activity by either attending any of these meetings that were talking about these issues or any other rallies involved in sort of the life of the university that was focusing attention or discussion or debate on any of these questions. I think the answer was that he might have attended, but it was more of an official function to try and ensure that order was secured.

Mr. BURNS. Yes, I believe that Mr. Williams was testifying about a time slightly later in time. He was testifying, I think, about a point when they were both at Harvard Law School, and they were in some way involved as freshmen proctors.

Senator KENNEDY. I see.

Mr. BURNS. The time I am testifying about is slightly before that when Mr. Souter and I were both undergraduates. I did not see him at any of those meetings. I did not see him involved in any of those activities.

Now, I hasten to say I don't make this a litmus test, but I just think that, in fairness, if you heard one point of view, you should hear the experience of another person who is appearing before you.

Senator KENNEDY. Well, you had a lot of students that came on down to the march on Washington, Martin Luther King's great speech in the summer of 1963, I believe.

Mr. BURNS. August 28, 1963.

Senator KENNEDY. Let me, if I could, turn to Ms. Ettelbrick and Ms. Vaid, in your written opinion you focus on Judge Souter's joining an opinion that prohibited homosexuals becoming foster adoptive parents. That opinion in itself is troubling, but I would be interested in hearing what implications that opinion has in your view for other issues involving minorities in our society. Ms. Ettelbrick?

Ms. ETTELBRICK. Well, I think the implications are one of—well, let me say this, contradictory to what Judge Souter has testified to in terms of listening to both sides and looking at the evidence and making important constitutional decisions based on the evidence before him. I think the opinion of the justices in the foster parent adoption case belies that view of his. I think that if Judge Souter was willing to totally disregard, as the majority opinion in that decision indicated explicitly—they said, "We note that there are many articles and many social studies, social science studies to the contrary"—to the contrary meaning proving that lesbians and gay men do not per se make bad parents. "We note that all those studies are to the contrary. However, we still think that they are bad role models." That is essentially what this court said.

Obviously, the court disregarded the gross majority of the evidence. The dissent pointed out and reminded the court that most of the social science data and, in fact, the lead of other States was contrary to the court's decision; that, in fact, social science data has pointed out that lesbian and gay parents are no better or no worse than heterosexual parents.

I think the implication for other minorities is that if Judge Souter was willing to totally disregard the evidence presented to the Court in that case, there is no indication I would have that he wouldn't disregard contrary evidence regarding women, people of color, the poor, other kinds of people who are usually not able to impact in the majoritarian process.

Ms. VAID. The only thing I would add to that is that there is another implication. The refusal to recognize that gay and lesbian prospective parents had due process was another troubling part of that decision. Constitutional due process is a broad concept, and I think that the law created an irrebuttable presumption, that any prospective applicant who is gay or lesbian was unfit to parent. It allowed the prospective application absolutely no opportunity to present the merits of their petition, to present the merits of their situation. There was no exception made. That, according to the dissenting judge and in our view, denied due process. So a broader interpretation needs to be made of this decision about Judge Souter's views on the appropriateness of due process.

Senator KENNEDY. My time has just about expired. But if I could ask, Mr. Ryder, in your prepared statement you comment that Judge Souter in his testimony before the committee discussed some questions of constitutional interpretation but not others. Do you want to elaborate on that?

Mr. RYDER. Well, most specifically and the most obvious is, of course, a number of Senators' efforts to get some response even as to the constitutional principles underlying *Roe v. Wade*. That is plainly the most obvious. The War Powers issue is the other most notable instance. This is talking about an action 30 years ago that is dusty history. I think that to have entered into some discussion of the constitutional principles, the issues, is radically different from discussing the outcome of the specific case.

That distinction is fundamental, and as was noted even by those favorable to Judge Souter's confirmation, if there were reasons of propriety, if there were an interpretation of the code of judicial conduct that would have said that one may not comment on issues—not cases, issues—likely to come before the Supreme Court, then I think we would all be subject to disbarment.

Senator KENNEDY. Thank you very much, Mr. Chairman. I thank the panel.

The CHAIRMAN. Thank you.

Senator THURMOND?

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome the members of this group to the committee. I have no questions.

The CHAIRMAN. Thank you.

Senator SIMON?

Senator SIMON. Yes, I apologize for not being here for your statements. I have been involved in a meeting on the Middle East situation that Senator Biden has also been involved in.

Let me just make a note that I think is appropriate at this occasion, Mr. Chairman. Someone who ordinarily has been here who would be testifying today, Althea Simmons, the lobbyist for the NAACP, died the other day. Her funeral service is tomorrow. She made a great contribution over the years to this committee for all kinds of good causes, and I think we should note in the record that this committee has suffered a loss, the NAACP has suffered a loss, and the Nation has suffered a loss from the death of Althea Simmons.

Let me ask just one general question of you. I have been trying to read your testimony here quickly. As I examine the record of Judge Souter—the record being not simply the formal record but also newspaper clippings and other things—I confess I had a considerable amount of unease. Frankly, his testimony reveals a more enlightened Judge Souter. The question is, I guess—and this is a subjective thing that each of us has to consider, and I would be interested in any reactions you may have—is this modification growth or is it political adaptation before the Judiciary Committee? Any reflections?

Ms. VAID. My grandfather always said you are measured by your deeds, not by your words, and I urge this committee to look at the nearly 20 years, I think, of public service that the nominee has. There is a record. There are opinions. The extensive schooling and training and study that he has, indeed, by admission, put in in the last couple of months to prepare for this forum are reflected in his brilliant performance, but we are not here to measure a stylistic performance, I think, as I am sure you acknowledge. We are here to evaluate how he will handle the Constitution.

I hope that answers your question. I think you measure him by his words and his deeds over time.

Senator SIMON. Any other reflections?

Ms. RIOS. I would agree that he has to be measured by his record, and I think it is also telling that his record is consistent up until the time that these hearings began to take place. As we indicated in our testimony, we believe he has gone through a confirmation conversion.

I also think that even in his answers throughout this hearing and throughout the questioning, he has indicated a lack of commitment to equal justice and to liberty. His refusal to answer many questions, his speaking in very vague and ambiguous generalities has indicated to me that he has no change of heart with regard to his previous record of 20 years.

Senator SIMON. I would hasten to add, while I said his testimony showed greater enlightenment, a major exception was when he said there was no discrimination in New Hampshire. Obviously there are problems in every one of our 50 States, I regret to say.

Mr. BURNS. Senator, I, too, agree that there is a great gap between the rhetoric and the record with respect to Judge Souter. I am not in a position, of course, to say whether he had some kind of road to Damascus conversion in the last 3 months, but I do think that what we have to depend upon, if we are going to make a judgment as somber as the one that you have to make, is what the person has done over the last two decades. The Supreme Court of the United States is one in which in the last 2 years the person sitting in the seat that Judge Souter seeks to occupy was the deciding vote, and more than 20 times, on issues that are fundamental to the people of this country: civil rights, civil liberties, Federal-State relations, and so forth. We can't afford to make a leap of faith over that gap that I am talking about. I think we have to read the record and go on the record.

Ms. ETTLEBRICK. Senator Simon, I think there is probably no other panel than this one and the panel of women's groups who testified yesterday who would love to see that conversion as being a matter of growth. I think when I look at the record—and I have listened to a good part of Judge Souter's testimony—I am more disturbed than I was even coming into this on some level. I feel I know less about the man than I did before.

We all read his record. We all had a good sense where he was. We thought long and hard about our decision to oppose this nominee. The reason that there were no groups that came out immediately opposed to Judge Souter is that all of us were looking very closely at all facets of his record.

I feel I know him less now, and, No. 1, I think that that question might be best delivered to him and asked of him. In support of that, I think that he needs to be brought back to this table and asked some of those questions in light of some of the other views that we have presented to this committee.

Mr. RYDER. If I may, Supreme Court Watch's concern is principally the analysis of the record, and that is the history of the institution. On that basis, we have that broad range of concerns that we share with you.

On the other hand, his words even in his testimony had exceptions above and beyond, and I cited the mathematical statement as really a very, very strong statement and quite an unfortunate one. Also, the inconsistency even within the testimony is now record, and that as well evinces, I think, some very troubling concerns. I share this notion that one should perhaps explore these issues yet further. That, of course, was our stated position before the hearings, that the Senate must explore this candidate extremely, extremely carefully.

The upshot of this is really the basis of our position beforehand. Now it is more important to get a clear view from the testimony since the record was silent or unclear. In part, that is our concern with the nominee after the testimony.

Ms. RIOS. I would like to add one more thing, if I might, and I add this most respectfully to all of you. I think that if the nominee had been questioned as rigorously and in as exacting a manner as the panel of feminist women who were here yesterday, perhaps we would know a little bit more about him at this point than we do.

Senator SIMON. I thank all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Ryder, you testified, and your written statement is the same, to the effect about the *Colbath* case, where you say that, "In *State v. Colbath*, on the other hand, Judge Souter granted an accused rapist a new trial because he considered that evidence of the victim's previous sexual conduct should have been admissible where consent was a defense." Then you go on to say, "In what may at best be described as insensitivity, Judge Souter suggested that a victim might have alleged rape as a way to excuse 'her undignified predicament.'"

When you testify that Judge Souter suggested that the victim might have alleged rape as a way to excuse her undignified predicament, I would raise the question with you as to whether he made that suggestion or whether he said that the evidence should have been submitted to a jury so that they could come to a conclusion. They are two very, very different things as to whether Judge Souter is stereotyping or drawing any conclusions as to the alleged victim, or whether he is saying that these are probative and relevant for a jury to consider.

In that case—and I read now from the opinion—"Before they"—referring to the defendant charged with rape and the woman who said that she was raped. "Before they left the trailer, the two of them were joined unexpectedly by a young woman who lived with the defendant, who came home at an unusual hour suspecting that the defendant was indulging in faithless behavior. With her suspicion confirmed, she became enraged, kicked the trailer door open, and went for the complainant, whom she assaulted violently and dragged outside by the hair."

Then the opinion goes on further on an analysis of the factual allegations. "The companion's furious behavior had a further bearing on the case as well, for the jury could have regarded her attack as a reason for the complainant to regret a voluntary liaison with the defendant and as a motive for the complainant to allege rape

as a way to explain her injuries and excuse her undignified predicament.”

Now, in your testimony, you refer to “her undignified predicament.” But isn’t the context of this case really a conclusion by the court, a unanimous court, that the jury should have been able to consider these facts as relevant—these allegations or this testimony as relevant testimony to decide whether there was consent or force in the admitted sexual intercourse, as opposed to any suggestion by Judge Souter as to what the woman did?

Mr. RYDER. Senator, I believe Supreme Court Watch recognizes the gravity of the conclusion we draw from this case. Put it its simplest, he didn’t have to use those words. He could have said, as you just said and ably paraphrased, this case should be sent back, this evidence should be discovered.

Judge Souter has said he is open, and he has further added, in describing his refusals to testify, that he could be wrong. We all go wrong. I think that sensitivity, which is the word that we used, requires that he be cognizant of the fact that just maybe he was wrong, just maybe the facts were different. Just maybe. In that event, I think it was very important to a rape victim, as she reads this opinion at another time, that she not be characterized in that fashion.

It is that simple. I agree with you entirely that there was discussion of whether it should be sent back, fact, et cetera. It is the words, and the words evince a temperament that we believe raises the gravest concerns about whether Judge Souter should be on the Supreme Court at this crucial time for our society.

Senator SPECTER. Mr. Ryder, aside from what you characterized as inappropriate selection of words, do you agree with Judge Souter’s legal conclusion for the unanimous court that this evidence should have been before the jury so that the jury could have considered the defendant’s testimony on the question as to whether there was consent or force?

Mr. RYDER. To be fair, I would want to have reviewed truly the record in that case and the briefs—I am sorry, I am certainly no judge—to come to that conclusion, and the history above all of the rape shield law. We believe strongly that a limitation of the rape shield law needs to be considered with the greatest care, but I really cannot sort of say up or down whether that decision was rightly decided, a majority though it might have been.

I must repeat our focus is on the fact that the record is so slim. We must grasp at every straw just to understand one or another way, and the language bespeaks something fearsome.

Senator SPECTER. Well, Mr. Ryder, if you find it necessary to review the record—that is, the actual testimony—to make a determination as to whether the court was correct in saying the jury should have considered this testimony as a jury issue on the question of consent versus force, wouldn’t it be equally necessary for you to review the record to make a decision as to whether Judge Souter used unnecessarily harsh language?

Mr. RYDER. I do not believe so.

Senator SPECTER. Why not?

Mr. RYDER. He stated those facts which he found necessary to support his conclusions, or he relied on those facts, let us say, in

the opinion. Excuse me. He relied on those facts stated in the opinion to use that choice of words. And I think on the face of that—and at least then one can read the opinion within its own four corners—one has the insensitivity.

And I must be frank. With all respect, I cannot see any circumstances, frankly, in which that use of language would be appropriate. I realize it is a very small point. It is one of many, many, many points in his record, hard points, which really come together to put us in the position of the conclusion that we draw in the end. But it is one of many, and I must say it is sadly eloquent.

Senator SPECTER. Well, I agree with you that it is only one. This has unusual context for us to really get at hard facts on judging Judge Souter and evaluating your conclusion of insensitivity. It is very hard on a lot of this to sink your teeth into something really tangible because there is so much which is unanswered and so much is speculative and so much is a matter of personal predilection. But when you have a case like this, it gives us a unique opportunity to really see if the charge of Judge Souter's being insensitive is accurate. Within the four corners of the opinion, you have objected in your testimony to his statement or his conclusion about "her undignified predicament," which arises from the facts within the four corners of the opinion that the defendant's live-in companion kicked the trailer door in, went for the complainant, assaulted her violently, dragged her outside by the hair, and it took the intervention of the defendant and a third woman to bring the melee to an end.

If that is not modestly described as an undignified predicament, how would you describe that?

Mr. RYDER. I wish I could summon some of our greatest Supreme Court Justices on the most basic subject that I believe every member of this committee would agree with, and that is judicial restraint. This is unrestrained language and he could be wrong. He has told us that we must all be wrong. We cannot all be wrong. It seems to me absolutely vital that one must not use—and I am sorry, we are dealing only with three words, I suppose, or two, but one must not use that kind of language, to my view, under any circumstance, unless he was there in the melee, then maybe, but—and not even that, I do not think, but certainly not in a situation where he is dealing with allegations and counter-allegations.

Please, Senator, I feel extremely uneasy and I am certain my organization would, as well, in focusing so exclusively on two or three words, and they have dwelt on at great length. There is more where they came from and it was in a reading, as best we could, of all the record available, slim it is in substance, voluminous it is, nevertheless.

This is not out of character. It is the most egregious or among the most egregious, and we should not apologize for choosing that.

Senator SPECTER. Well, I think it is an important point, because it is very tangible, it is a legal opinion, there are well prescribed limits for deciding what is relevant and what goes before a jury, and I think I have your point, Mr. Ryder.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I have several questions, if I may. Let me begin where Senator Specter left off.

I see the point that you made, Mr. Ryder, and the point that was made yesterday by one of the witnesses relative to the language in this case, but I, quite frankly, have always looked to your organization, among others, when I have needed help on matters relating to equal rights—

Mr. RYDER. I am flattered.

The CHAIRMAN. Well, you know that to be true—on individual rights and basic civil liberties, and I hope you are not leaving the impression that there are not circumstances where conflicting rights of an individual under the Constitution might not be put in jeopardy, if they were not considered in tandem with the rape shield law.

Can you give me an example for the record, so the record is not left that way by someone representing an organization such as yours, can you give me an example where the conduct of a complainant would be relevant, notwithstanding the existence of a rape shield law, or is there none at all ever?

Mr. RYDER. Well, States have seen fit to adopt their rape shield laws and they do so variously. One of the most obvious examples, of course, is conduct of the defendant with the accuser is most obvious of examples. Generally, the rape shield—

The CHAIRMAN. If you would be more specific.

Mr. RYDER. Well, it is clear that rape shield goes from the first position, which is to argue that we must counteract stereotypes by refusing to admit irrelevant evidence, evidence going to the victim's sexual conduct totally extraneous to the case.

We do not disagree that the rape shield laws are in one of the toughest intersections—I think this is your point—between the victim's rights to privacy, to be shielded from unfair characterization, to make the process for the terrifying situation of a rape victim easier and more acceptable, to avoid being dragged over the coals in court is the core notion of rape shield. It is a line-drawing problem, though, absolutely, and we do not support and do not deny the defendant in such a case has a right to bring in relevant testimony.

The CHAIRMAN. Would you give me an example of any type of relevant testimony.

Mr. RYDER. That, of course, was my most specific example, the core is those actions that are directly relevant to the defendant's sexual conduct with the victim.

The CHAIRMAN. Give me an example. Give me an example, not a description, an example. What would be an example of relevant conduct?

Mr. RYDER. Of course, consent, that is—

Ms. VAID. A witness' statement that the woman said yes.

Mr. RYDER. I would like to defer.

Ms. VAID. That would be relevant.

The CHAIRMAN. Is there any circumstances where the woman's conduct would be relevant, without any reference by a third party as to whether or not it was the words "consent" came out?

Mr. RYDER. You have now switched to the victim's conduct.

The CHAIRMAN. Well, that is the issue here.

Mr. RYDER. Right, but the victim's conduct independent of actions with the plaintiff.

The CHAIRMAN. No, any conduct.

Mr. RYDER. Any time.

The CHAIRMAN. I am the author of a bill here that wishes to make rape a civil rights violation, I am the coauthor of the rape shield law, I am a strong supporter, but as someone who is also characterized as a civil libertarian in taking positions where many times I am only one of three, four, five, seven votes in the Senate, I found myself in a difficult position, because there are times where the rights of an individual defendant to be presumed innocent until proven guilty, as opposed to being presumed guilty, require there to be evidence admissible to a jury relative to the conduct of the complainant.

Mr. RYDER. Plainly, the victim's consent is the central issue—

The CHAIRMAN. Well, if the—

Mr. RYDER [continuing]. And the rape shield laws often specifically state that it is only where—and this is the problem with this case—the line is perfectly drawn, there is an allegation of consent.

The CHAIRMAN. Right.

Mr. RYDER. Then it becomes relevant. There is the line drawn. Is it relevant? How relevant, and—

The CHAIRMAN. And that is a question in most cases for the jury, is it not?

Mr. RYDER. Absolutely.

The CHAIRMAN. So, if a defendant said, "I allege that Mary X consented and was not raped, and as evidence to prove my point that it was consent, I want to show and introduce into evidence that Mary Smith and I, within full view of other people, prior to leaving to the scene of the alleged rape, were engaged in conduct that I believe most people would read as consensual," is that a circumstance under which that is arguably admissible, whether the conduct was—I do not want to be graphic—you know, conduct that related to a willingness to engage in sexual intercourse, is that admissible evidence?

Mr. RYDER. If it strictly goes to consent—

The CHAIRMAN. Yes.

Mr. RYDER [continuing]. Then plainly it is the defendant's right to attempt to adduce evidence of consent.

The issue in this case was much broader, and I realize that you are not questioning that specifically—

The CHAIRMAN. No, I am not questioning on that case.

Mr. RYDER [continuing]. But you have actually just reiterated the facts.

The CHAIRMAN. I just do not want to leave the impression here, coming from an organization such as yours, that there are no circumstances ever where the conduct of the complainant is not relevant, when the issue is consent.

Mr. RYDER. I see the point. I missed your point at the outset.

The CHAIRMAN. That is all.

Mr. RYDER. Absolutely, this is the defendant's right to a fair trial, for pity sake, and the defendant's rights to exculpate. The problem is the intersection and our principal problem is that duly

passed rape shield laws should only be circumscribed with the greatest of care.

The CHAIRMAN. As I understand your problem—

Mr. RYDER. I am sorry, if I may, I am not strictly expert in this situation.

The CHAIRMAN. Surely.

Mr. RYDER. I wanted to yield to my colleague for just an instant, if I could, as she also wanted to address your question.

The CHAIRMAN. Please, I welcome the—

Ms. VAID. Well, I do not know if I am walking into a lion's den here. This has been a line of questioning for two panels, and I will not claim to be an expert on rape shield laws. I think you had actually an expert in Ms. Holtzman and many other people, and I urge my colleagues to—

The CHAIRMAN. Some of us think we are.

Ms. VAID. Yes, as a former civil liberties lawyer myself, I share your concerns about the sanctity of the process of insuring a fair trial for everybody who is accused of a crime.

However, I think your questions and Senator Specter's questions, with respect, are best addressed to Judge Souter, as to what his views of the rape shield laws were, as to why he, you know—and if these concerns have come up as a result of our past study—

The CHAIRMAN. Well, they were.

Ms. VAID [continuing]. Again, we urge you to redirect them to him.

The CHAIRMAN. We do not need to, they were and they are on the record.

The problem I have with the law, with Judge Souter, is not so much the conclusion that he reached—I do not know enough, I did not go back and read the entire transcript of the trial, to make that judgment. I am concerned, as I thought Mr. Ryder was saying he was concerned, and I know Ms. Holtzman was concerned, in the use of certain adjectives connoting and giving to the alleged conduct a status that is one that the rape shield law is designed to avoid.

Mr. RYDER. Precisely.

The CHAIRMAN. And that is the only point I want to make here. I do not necessarily agree with my colleague from Pennsylvania. But what happens in this discussion, my concern has been it has gotten very blurred, and I just want to make sure that (a) you are not unintentionally overstating your concern, and (b) that the real problem, alleged problem, the real concern, at least the one I have, is identified, and that is the insensitivity in the use of certain adjectives to describe the condition or actions of the complainant. That is the issue.

I do not want to leave the impression for the public at-large listening to this that, on the issue of consent, conduct is never admissible, notwithstanding a rape shield law.

Mr. RYDER. Conduct that does go to consent, absolutely.

The CHAIRMAN. And does not always go to consent. For example, I have gotten myself in a little bit of trouble in drafting my Violence Against Women Act. I pointed out that there is no circumstance, no matter what, no matter how, no matter what the circumstances, no matter whether a woman is—whatever her prior

conduct is or her present conduct is, no woman, no woman ever gives up her right not to be raped, never.

Ms. VAID. Right. That is exactly correct, and I am so glad you said that, Senator, because——

The CHAIRMAN. I have been saying it and I have been criticized.

Ms. VAID. I have been on the edge of my seat.

The CHAIRMAN. I have even used the analogy that I have gotten letters from constituents not liking. If I walked out of here with a \$1,000 bill in my hand and walked through one of the most economically depressed sections of town waving it and someone grabbed it from me, and then they were apprehended the next block and they went to trial, they could not offer as a defense they were tempted.

If a woman walked out of here and walked across, from here to the Capitol, stark naked, she is guilty of violating certain laws, but no one, no one, no one has a right to go up and rape her, and it is no defense to say that she was being provocative in that context.

But what we are missing here, in my humble opinion, is that when there is a direct nexus between the alleged conduct of the complainant and the civil liberties and constitutional rights of the defendant to argue that that conduct went to consent, and juries should be able to determine whether or not it went to consent, that is a different issue.

And there is a third issue, and then I will drop this, but it is important, I think, we not misrepresent what is at stake here. The third issue is, in describing the alleged conduct of a complainant, whether or not it is admissible or inadmissible, whether or not it goes to consent, there is the question of sensitivity and pejorative terms that carry with them in the psyche of juries something that goes beyond what is being alleged, and that is, it seems to me, the central debate here, that this man, whether or not he was right on the facts, used language to describe the alleged facts in ways that would lead juries to suspect, to lean against, to not be sympathetic to, to lose their impartiality in the process.

That is the only point I want to make and I would be delighted if I never hear about this case again in my whole life.

Now, having said that, Mr. Burns, on a different matter, I must tell you that there are a number of things that Judge Souter has said that allayed some of my concerns. And ultimately, by the way, when a man or woman is before us, I give the benefit of the doubt to someone under oath, and that unless there is compelling evidence to the contrary, to say that this is now my view, to say that it is not their view, absent some evidence of that person not being trustworthy in the past, is a difficult thing.

So, there are certain things that the Judge has said that have allayed my concerns, but one that really has stuck in my craw, and I will just say it now, because you have raised it, and it goes to whether or not—not whether or not he believes whether there is a right of privacy, what his view on civil rights are, specifically, whether or not he believes the equal protection clause should be employed to the 14th amendment very narrowly or broadly, all those are still questions, but this goes to a different issue, and that is a sense that I have observed in my public and private life, as an

attorney, of certain people who may not have a racist bone in their body, but have an elitist attitude about democracy.

When he said that if there was—I am paraphrasing—no evidence of racial discrimination in the application of a test for voting, a literacy test, that the conduct was constitutional and had been ruled to be such, which is correct.

But the fact that he used the term “mathematical” and the precedent terms that he used, which came across to me as saying the following: “You know, smart people, educated people, they are the folks who should be able to vote, and as long as you are not discriminating based on race, sex or religion, I worried,” the implication was, it may not be a bad idea to keep dumb people from voting,” sort of this, you know, Plato’s philosopher king, which I think is anathema to what our government, our form of government stands for.

Now, what I would like to discuss here, because my time is up, I would like to discuss with you very briefly, give me your views again, since you stated them and I was not here or you did not state them, about the extent of your concern relative to the literacy test issue. Was it that it evidenced racism, or was it that it evidenced a sense of elitism, or was it that it was unconstitutional and he did not know it was, or was it that it was constitutional, but, nonetheless, he should have gone a step further? Describe it for me, please.

Mr. BURNS. Gladly, Senator. It is my view, as I take it is yours, from your question, that law is not mathematics, so to say that it is a simple matter of math really leaves out values, and it was really a question of values that I was addressing, primarily, the idea that some people, because they cannot read, cannot participate in the democratic process. If that were the standard, I think many people at the beginning of the country perhaps would not have been able to participate in the democratic process.

I would not even go so far as to equate people who cannot read as being dumb.

The CHAIRMAN. Neither would I, but that, in the elitist view, that tends to be how it is equated, in my view. I am not sure that is his, but that is my concern.

Mr. BURNS. No, what came across from the arguments made was, in my view, a real lack of understanding and appreciation for the democratic process and respect for the citizen, and that was the base and the gravamen of my complaint. It was not that it was necessarily a racist position—

The CHAIRMAN. All right. That is the only point I was trying to make.

Mr. BURNS [continuing]. But I do feel that is an undemocratic position, it is a position that reflects an insensitivity to the operation of our democracy, and that is one of the primary concerns that I bring to these hearings.

The CHAIRMAN. I appreciate that, and then we have the same concern, as I understand your position, the same basic concern.

Now, let me ask—my time is way up and I will yield to the Senator from Alabama?

Senator HEFLIN. I only have one or two questions.

The CHAIRMAN. I am sorry, Senator, I did not know you came in.

Senator HEFLIN. In the case that was remanded, do either of you know what was the ultimate outcome? Was there a jury trial, was the defendant found not guilty, guilty, or was there a plea bargain? Does anyone know what happened in this particular case after the remand occurred?

Mr. RYDER. I am afraid we must confess we do not, and I must add—

Senator SPECTER. Is that the rape case?

Mr. RYDER. Yes.

Senator HEFLIN. The *Colbath* case.

Senator SPECTER. The *Colbath* case was remanded, retried, and there was a conviction.

Mr. RYDER. Conviction. I think, nevertheless, sir, that that decision as to the trial of facts does not go in the slightest to the determination of the sensitivity of the words used and the views that they bespeak, with all due respect, Senator.

Senator HEFLIN. Well, if the conviction occurred, it may indicate that you are right.

Mr. RYDER. Perhaps.

Senator HEFLIN. I do not know. I do not know, one way or the other. Those are all the questions I have.

The CHAIRMAN. The Senator was asking me what the schedule would be from this point on, and my intention is, again, because Rosh Hashanah and the celebration thereof begins at sundown today, we are going to not break for lunch. I know that the press is delighted with that decision on my part, I can see them shaking their heads. But if we do, we will not finish the witness list today, and I promised the witnesses we would try to get all of them, as they went out of their way to be here on today.

So, I guess with that, what I should do is I should follow my own advice and not ask any more questions, and thank the panel very much.

Mr. Burns, if it is not a soliloquy and it is just a brief closing statement, we would be delighted to hear it.

Mr. BURNS. It will be very brief, Senator. I am just not sure that you were present when I made this remark, and I wanted to make sure that, as the Chair, you do hear it, and that is I expressed a concern in my presentation about the response that a number of my colleagues in legal education have received when they requested to appear before this body, and I think that they played a very important role in the previous hearings before this committee.

I was particularly offended at a remark that was made yesterday about how it was that those who participated in that process had hung Mr. Bork from a cottonwood tree. I actually do not think that is what happened. I think what happened was as democratic process and the majority of the people in this body voted democratically not to confirm him.

So, I believe that constitutional scholars and other law professors, people whom my colleagues have asked to appear before the body, even though it will take more time, have a lot to contribute, and I ask that it be reconsidered, sir.

The CHAIRMAN. Well, as you well can imagine, if you are offended by the characterization of how the Bork hearings were run, you can imagine how I feel, but I suspect that battle will continue, but

it will not be any longer with my participation. I think the facts speak for themselves, and so do these hearings and I—

Mr. BURNS. It was a particularly odious reference, however, I think.

The CHAIRMAN. Well, you think that is odious, you ought to read several of the books and just look in the back and find the name Biden and then go tell me whether it is not odious. We all have to be accustomed to some odious descriptions, on occasions. It is part of the democratic process.

Mr. BURNS. We are proud of our participation and of the result.

The CHAIRMAN. Not only should you be proud of it, as you will I hope acknowledge, that the participation was in large part because of the Chairman, and so I thank you very much and I appreciate your taking the time to be here, I really do.

Mr. BURNS. Thank you, Mr. Chairman.

The CHAIRMAN. Now, we are now on our tenth panel, again a very distinguished group of Americans, representing a wide array of interests on the next panel, panel number 10:

Mr. John Bellizzi, Mr. Edmund Mosca, Mr. Johnny Hughes, Bob E. Rice, and Dewey Stokes, would you come forward and, as you are, I am going to read your very short description of who you represent and what you will be doing.

Mr. Bellizzi is the Executive Director of the International Narcotics Enforcement Officers Association, representing 10,000 drug enforcement officers in the United States and 50 foreign nations; Mr. Mosca is with the International Association of Chiefs of Police, representing more than 14,000 chief law enforcement officers in the United States and 68 foreign countries; Johnny Hughes is the Director of Legislative Affairs of the National Troopers Coalition, and the coalition represents 45,000 State troopers and highway patrol officers throughout the country, and Mr. Hughes is a 20-year veteran with the Maryland State Police, and I am sure we passed one another on I-95 many times; Mr. Bob E. Rice is the president of the National Sheriffs' Association, representing more than 35,000 sheriffs, and deputy sheriffs across the country, he is from Des Moines, IA; and Mr. Dewey Stokes is the National President of the Fraternal Order of Police, and the FOP is the largest law enforcement group in the country, representing 216,000 police officers in 48 States, and Mr. Stokes is a police officer in Columbus, OH.

Before you begin, gentlemen, I have two things to say: Number one, your participation on my efforts and the President's efforts with regard to a national drug strategy and the crime legislation has been absolutely invaluable. Without your participation and, I might add, active and engaging participation, I do not think we would have made one-fifth the progress that we have made, and I want to publicly acknowledge that.

Second, Senator Thurmond, as you know would very much want to be here, he is in a meeting with the majority leader, in a leadership meeting, and he regrets that he will not be present, but will review the testimony, and he extends a special welcome to all of you, and I know you all know Senator Thurmond well and know him personally and know that his regret at not being here is heart-felt.

Gentlemen, I was going to say let us start with Bellizzi, but Bellizzi is not here, and if he can do it from there, we have a little problem. Let us start with you, Mr. Mosca, and go to Mr. Hughes—well, he is here, I guess he figured the leadership meeting was not as important as you all—and then go to Mr. Rice and then go to Mr. Stokes.

Did you want to make a statement, Senator, at this point?

Senator THURMOND. I am just glad to have them here.

The CHAIRMAN. Then we will begin with you, Chief.

**PANEL CONSISTING OF EDMUND MOSCA, CHAIRMAN, LEGISLATIVE COMMITTEE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE; BOB E. RICE, POLK COUNTY SHERIFF'S DEPARTMENT, DES MOINES, IA, AND PRESIDENT, NATIONAL SHERIFFS' ASSOCIATION; JOHNNY L. HUGHES, DIRECTOR, LEGISLATION AND CONGRESSIONAL AFFAIRS, NATIONAL TROOPERS COALITION, ACCOMPANIED BY JAMES J. DOYLE; AND DEWEY R. STOKES, NATIONAL PRESIDENT, FRATERNAL ORDER OF POLICE**

#### STATEMENT OF EDMUND MOSCA

Mr. MOSCA. Thank you, Mr. Chairman.

If I may, by way of housekeeping, on the witness list they have me listed as Old Saybrook, MA, and the residents of my community may be a little distressed, knowing they have been members of the State of Connecticut since 1635, so just to correct the record, it should be Old Saybrook, CT.

The CHAIRMAN. Well, it must have been some southerner on my staff who did that, or westerner or midwesterner, but I apologize for that. I did not even realize that it was listed that way.

Mr. MOSCA. Thank you, Mr. Chairman.

Good morning, Mr. Chairman and Senator Thurmond and members of the Judiciary Committee. My name is Ed Mosca, and I am Chief of Police in Old Saybrook, Connecticut, and Chairman of the Legislation Committee of the International Association of Chiefs of Police.

On behalf of Chief Charles Gruber, of Elgin, IL, our President and our entire membership, I thank you for affording us the opportunity to briefly add our voice to those numerous others who have come before you in support of Judge Souter's nomination to the Supreme Court.

The IACP's governing body carefully reviewed the background and the experience of Judge Souter. We were deeply moved by the man, highly impressed with his legal training and greatly swayed by his record as a jurist.

We believe him to be extremely well qualified to serve on the highest court in the United States. Our governing body voted unanimously to endorse his nomination.

In determining our endorsement of judicial nominees, we rely heavily on the input of our affiliated State associations. IACP members from New Hampshire are highly vocal and most enthusiastic in their support for Judge Souter. They know him to be a common-sense jurist, with a deep respect for the values of law and order in our society.

His opinions concerning search and seizure laws, *Miranda* rights, fifth amendment prohibitions against self-incrimination, speedy trials, and due process—with which, by this point, you are probably more familiar than I—all exhibit his intellectually rigorous yet reality-based common-sense approach to the role of judging. It is this approach that we, as law enforcement executives, find very compatible with our societal role as defenders and preservers of public safety.

When President Bush nominated Judge Souter, he described the nominee as one who would “interpret” the law rather than “legislate from the bench.” We believe this to be the correct approach, and we believe that Judge Souter does, indeed, warrant this description. We find him to be a careful jurist, who takes a narrow view of his role of judge. We think it important to respect precedent, to decide cases based on facts without reaching unnecessary issues, and without announcing rules broader than necessary to the task at hand. Judge Souter’s opinions embody these same values, but at the same time reflect flexibility and an understanding of the many diverse constituencies and situations that face judges in our society.

For these reasons, the International Association of Chiefs of Police gives Judge Souter our unqualified endorsement and support. We urge the Members of the Senate to speedily confirm his nomination, and we thank you again for affording us this opportunity.

[The prepared statement of Mr. Mosca follows:]

**TESTIMONY**

**ON BEHALF OF**

**JUDGE DAVID H. SOUTER'S**

**CONFIRMATION TO THE UNITED STATES SUPREME COURT**

**INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE**

**CHIEF EDMUND MOSCA, CHAIRMAN  
IACP'S LEGISLATION COMMITTEE**

**SEPTEMBER 18, 1990**





The International Association of Chiefs of Police is a professional organization comprised of over 14,500 top law enforcement executives from the United States and 76 nations. IACP members lead and manage several hundred thousand law enforcement officers and civilian employees in international, federal, state, and local governments. Members direct North America's largest police departments including New York City, Los Angeles, Toronto, Chicago, Detroit, Montreal, and Houston, and head the national police forces of Israel, Denmark, the Phillipines, Korea, and Liberia, among others. Thousands of suburban and rural police agencies throughout the world are also represented.

Since 1893, the IACP has facilitated the exchange of important information among police administrators and promoted the highest possible standards of performance and conduct within the police profession. This work is carried out by functionally oriented committees consisting of police practitioners with a high degree of expertise that provide contemporary information on trends, issues, and experiences in policing for development of cooperative strategies, new and innovative programs, and positions for adoption through resolution by the association.

Throughout its existence, the IACP has been devoted to the cause of crime prevention and the fair and impartial enforcement of laws with respect for constitutional and fundamental human rights.



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**EDMUND H. MOSCA IS CHIEF OF POLICE OF THE OLD  
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D.C.**



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GOOD MORNING CHAIRMAN BIDEN AND JUDICIARY COMMITTEE MEMBERS. I AM EDMUND MOSCA, CHIEF OF POLICE IN OLD SAYBROOK, CONNECTICUT AND CHAIRMAN OF THE LEGISLATION COMMITTEE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP) . ON BEHALF OF CHIEF CHARLES GRUBER OF ELGIN, ILLINOIS, OUR PRESIDENT, AND OUR ENTIRE MEMBERSHIP, I THANK YOU FOR AFFORDING US THE OPPORTUNITY TO BRIEFLY ADD OUR VOICE TO THOSE NUMEROUS OTHERS WHO HAVE COME BEFORE YOU IN SUPPORT OF JUDGE SOUTER'S NOMINATION TO THE SUPREME COURT.

THE IACP'S GOVERNING BODY CAREFULLY REVIEWED THE BACKGROUND AND EXPERIENCE OF JUDGE SOUTER. WE WERE DEEPLY MOVED BY THE MAN, HIGHLY IMPRESSED WITH HIS LEGAL TRAINING, AND GREATLY SWAYED BY HIS RECORD AS A JURIST. WE BELIEVE HIM TO BE EXTREMELY WELL-QUALIFIED TO SERVE ON THE HIGHEST COURT IN THE UNITED STATES. OUR GOVERNING BODY VOTED UNANIMOUSLY TO ENDORSE HIS NOMINATION.

IN DETERMINING OUR ENDORSEMENT OF JUDICIAL NOMINEES, WE RELY HEAVILY ON THE INPUT OF OUR AFFILIATED STATE ASSOCIATIONS. IACP MEMBERS FROM NEW HAMPSHIRE ARE HIGHLY VOCAL AND MOST ENTHUSIASTIC IN THEIR SUPPORT FOR JUDGE SOUTER. THEY KNOW HIM TO BE A COMMON SENSE JURIST WITH A DEEP RESPECT FOR THE VALUES OF LAW AND ORDER IN OUR SOCIETY. HIS OPINIONS CONCERNING SEARCH AND SEIZURE LAWS, MIRANDA RIGHTS, FIFTH AMENDMENT PROHIBITIONS AGAINST

SELF-INCRIMINATION, SPEEDY TRIALS, AND DUE PROCESS - WITH WHICH, BY THIS POINT, YOU ARE PROBABLY MORE FAMILIAR THAN I - ALL EXHIBIT HIS INTELLECTUALLY RIGOROUS YET REALITY BASED AND COMMON SENSE APPROACH TO THE ROLE OF JUDGING. IT IS THIS APPROACH THAT WE, AS LAW ENFORCEMENT EXECUTIVES, FIND VERY COMPATIBLE WITH OUR SOCIETAL ROLE AS THE DEFENDERS AND PRESERVERS OF PUBLIC SAFETY.

WHEN PRESIDENT BUSH NOMINATED JUDGE SOUTER, HE DESCRIBED THE NOMINEE AS ONE WHO WOULD 'INTERPRET' THE LAW RATHER THAN 'LEGISLATE FROM THE BENCH.' WE BELIEVE THIS TO BE THE CORRECT APPROACH, AND WE BELIEVE THAT JUDGE SOUTER DOES INDEED WARRANT THIS DESCRIPTION. WE FIND HIM TO BE A CAREFUL JURIST, WHO TAKES A NARROW VIEW OF HIS ROLE OF JUDGE. WE THINK IT IMPORTANT TO RESPECT PRECEDENT, TO DECIDE CASES BASED ON THE FACTS WITHOUT REACHING UNNECESSARY ISSUES, AND WITHOUT ANNOUNCING RULES BROADER THAN NECESSARY TO THE TASK AT HAND. JUDGE SOUTER'S OPINIONS EMBODY THESE SAME VALUES, BUT AT THE SAME TIME REFLECT FLEXIBILITY AND AN UNDERSTANDING OF THE MANY DIVERSE CONSTITUENCIES AND SITUATIONS THAT FACE JUDGES IN OUR SOCIETY.

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FOR THESE REASONS, THE IACP GIVES JUDGE SOUTER OUR UNQUALIFIED ENDORSEMENT AND SUPPORT. WE URGE THE MEMBERS OF THE SENATE TO SPEEDILY CONFIRM HIS NOMINATION. THANK YOU AGAIN FOR AFFORDING US THIS OPPORTUNITY.

Senator THURMOND [presiding]. We are pleased to have you here, Sheriff Rice.

#### STATEMENT OF BOB E. RICE

Mr. RICE. Mr. Chairman, it is a distinct honor and a privilege to come before you and the members of this committee to share with you reasons why the National Sheriffs' Association wholeheartedly supports the nomination of Judge David Souter for the U.S. Supreme Court.

I am Bob Rice, Sheriff of Polk County, Des Moines, IA. I am a career law enforcement professional with a background in police and sheriff's departments dating back to 1956. For the last 14 years, I have held the office of sheriff. I have been president of the Iowa State Sheriffs' and Deputies' Association, and it is my pleasure this year to serve as president of the National Sheriffs' Association. The National Sheriffs' Association was established in 1940, representing the Nation's sheriffs, deputy sheriffs, police executives, corrections personnel, and other criminal justice officials. The National Sheriffs' Association, with its 25,000 members, represents the 3,096 sheriffs of this country. Because of my background in law enforcement and because of the concerns of the association's members, I am especially grateful for the chance to address you today.

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.

We believe that Judge Souter's distinguished career as a trial court judge and his fine background in law enforcement makes him an excellent choice.

Sheriff Wayne Vetter of Rockingham County, NH, has known Judge Souter for 17 years, since Judge Souter's term as attorney general for the State. He states that Judge Souter is very articulate—something we have all observed—and he cites Judge Souter's outstanding track record, both while attorney general and when sitting on the bench. Sheriff Vetter goes on to say, "Judge Souter puts a great deal of effort into interpreting laws correctly. Because of his high level of intelligence and his knowledge, he can recite case laws from the top of his head. Judge Souter is already an asset to law enforcement, and sitting on the Supreme, he will be even more so."

Sheriff Chester Jordan of Merrimack County, NH, who has known Judge Souter for many years, states emphatically that he is very knowledgeable, "in fact, the best just to come along in a long time." High words of praise.

Police Chief Thomas King of the Manchester Police Department, who also knows Judge Souter professionally and personally, states that, "Judge Souter brings a balanced, scholarly approach to the bench. He is unfailingly fair and objective. The judge seems to be totally lacking in prejudice."

You hear these words from law enforcement executives to whom a person of the highest caliber, an anticrime man, a judge who recognizes the tough job facing law enforcement professionals today is critically important. Those who know him and those who read of

his credentials are equally enthusiastic. Our Nation's sheriffs shoulder their position of responsibility in the criminal justice system with pride. They fully recognize and hope for the invaluable assistance of a man of Judge Souter's acknowledged talents and qualifications. Frankly, we need and we want a man like Judge Souter and what he has to offer the entire criminal justice system.

Never in our Nation's history have we needed more desperately to add to our highest judicial body a totally fair, impartial, brilliant new Justice. Unquestionably, now is the hour for this man. He has our admiration and our respect. On behalf of our Nation's sheriffs and the National Sheriffs' Association, let me urge you to proceed with all due haste to see that Judge Souter is seated on that bench.

Once again, I thank you for the opportunity to appear before this distinguished panel and voice the views of the Nation's sheriffs. Thank you very much.

[The prepared statement of Mr. Rice follows:]



# NATIONAL SHERIFFS' ASSOCIATION

1450 DUKE STREET • ALEXANDRIA, VIRGINIA 22314 • 703-836-7827

CHARLES "BUD" MEEKS  
EXECUTIVE DIRECTOR

TESTIMONY OF  
SHERIFF BOB RICE  
PRESIDENT OF THE NATIONAL SHERIFFS' ASSOCIATION  
BEFORE THE U.S. JUDICIARY COMMITTEE OF THE U.S. SENATE  
ON THE NOMINATION OF  
JUDGE DAVID SOUTER  
FOR  
THE U.S. SUPREME COURT

September 18, 1990

Mr. Chairman: It is a distinct honor and privilege to come before you and members of this committee to share with you reasons why the National Sheriffs' Association wholeheartedly supports the nomination of Judge David Souter for the United States Supreme Court.

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Thank you.

Senator THURMOND. Thank you very much.  
Captain Hughes?

#### STATEMENT OF JOHNNY L. HUGHES

Mr. HUGHES. Good afternoon, Senator Thurmond. It is good to see you and Duke Short here again. Good to be here again.

One housecleaning chore, sir. Jim Doyle, who is accompanying me as part of my testimony, he was inadvertently left off the panel. I have him right here with me. Would it be okay to have him come up and sit in John Bellizzi's seat?

Senator THURMOND. OK.

Mr. HUGHES. Fine. Thank you.

Mr. Chairman, honorable members of this distinguished committee, I would like to thank the committee for giving me the opportunity to speak on this matter of great public interest.

The National Troopers Coalition, an organization representing State troopers in 44 States, strongly endorses the nomination of Judge David Souter to Justice of the U.S. Supreme Court. Judge Souter's background as New Hampshire attorney general—that State's chief law enforcement officer—as a trial judge, and as a member of his State's highest court, well qualifies him to be appointed to our Nation's highest Court. The National Troopers Coalition has reviewed Judge Souter's criminal law opinions and knows him to be a tough law enforcement justice who, at the same time, will protect the constitutional rights of the accused.

Law enforcement officers, like the vast majority of citizens throughout this country, are particularly interested in a nominee's qualifications in the area of criminal law. Our organization believes that in this area, which occupies a large percentage of cases that reach the Supreme Court, Judge Souter has demonstrated throughout his career a clear understanding of the challenges facing police officers in combating crime. Judge Souter has, we believe, struck the appropriate balance between protecting the rights of society to enforce its laws on the one hand and upholding the constitutional rights of an accused on the other. We could not support a nominee who would sacrifice either of these interests for the sake of the other.

More than others, police officers know of the evil and tragic side of life: crack houses, senseless and brutal killings, the carnage caused by the drunk driver. These deeply concern millions of Americans and need to be dealt with effectively by our criminal justice system. We view the nomination of Judge Souter as evidence of the President's strong commitment to effective law enforcement.

Far too often our legal system breaks down after an arrest is made. Prosecutors are handcuffed by legal rulings that turn a trial away from a search for the truth into an exercise in legal gymnastics and technicalities. *Miranda* rulings and the exclusionary rule may turn a criminal proceeding into a trial more of the police officer than of the defendant. Officers who act in good faith in conducting a search or interrogating a suspect may find highly relevant evidence inadmissible because a court, sitting with 20/20 hindsight, finds a technical violation of a legal right.

Throughout his judicial career, Judge Souter has applied sound legal principles and common sense reasoning to protect the rights of society through effective law enforcement. He has refused to expand the *Miranda* doctrine beyond its present bounds and has admitted confessions that were voluntarily given by a defendant.

He has been supportive of drug enforcement measures by upholding the use of pen registers on the telephones of drug suspects. In other cases, he has rejected the hypertechnical interpretation of the scope of search warrants, and has protected the identity of confidential informants from disclosure at trial where the presence of the informant was not necessary for a fair trial.

In the area of drunk driving enforcement, he has supported the use of sobriety checkpoints to detect drunk drivers and has upheld the introduction at trial of evidence of a driver's refusal to take a breathalyzer test when arrested for drunk driving.

We strongly endorse Judge Souter and urge an early confirmation by the Senate.

It is good to see both of you again, and at this time I would like to introduce James J. Doyle III, who is accompanying me here today. He is a former Maryland assistant attorney general and former counsel to the Maryland State Police.

Senator THURMOND. James C. Doyle, is that it?

Mr. DOYLE. James J. Doyle.

Senator THURMOND. James J. Doyle.

Mr. DOYLE. Yes, sir.

Senator THURMOND. For the record, I want to be sure we got that down. Mr. Doyle, do you have any statement to make?

Mr. DOYLE. Just very briefly, Senator. I certainly would join in everything that the other members of the law enforcement community have said here today about Judge Souter in terms of the judge being a tough law enforcement judge. I would, though, like to add one other thing and emphasize one other point, having read the majority of Judge Souter's criminal law opinions.

I think the thing that I would like to emphasize more than anything else is the fact that this judge, it is obvious, enjoys the intellectual challenge of the law. His opinions in the criminal law area have been scholarly, I think, very well reasoned. I have presented written testimony to the committee which points out a number of opinions which I think were very well done by Judge Souter.

So simply the point that I would like to make is not only has he been an effective law enforcement judge in terms of supporting legitimate police practices and the actions of prosecutors, but in addition the opinions that he has written in the criminal law area have been very well researched, very scholarly, and very well reasoned, in my opinion.

Senator THURMOND. Thank you very much.

[The prepared statement of Mr. Hughes follows.]



**NATIONAL TROOPERS COALITION**

112 STATE STREET, SUITE 1312, ALBANY, N.Y. 12207 518-463-7448

BEFORE  
THE UNITED STATES SENATE  
JUDICIARY COMMITTEE

CONFIRMATION HEARING  
FOR  
THE HONORABLE DAVID SOUTER  
AS  
ASSOCIATE JUSTICE  
OF THE UNITED STATES SUPREME COURT

SPEAKING IN FAVOR OF THE NOMINATION  
THE NATIONAL TROOPERS COALITION  
JOHNNY L. HUGHES  
DIRECTOR, LEGISLATIVE AND  
CONGRESSIONAL AFFAIRS  
JAMES J. DOYLE III, ESQUIRE

PARTICIPATING MEMBER, NATIONAL LAW  
ENFORCEMENT COUNCIL

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

September 18, 1990

Confirmation Hearing  
David Souter  
For Associate Justice of the  
United States Supreme Court

TESTIFYING: Captain Johnny L. Hughes  
MARYLAND STATE POLICE  
1201 Reisterstown Road  
Pikesville, Maryland 21208  
(301) 653-4343 (301) 679-6276

Captain Hughes is a twenty three year veteran of the Maryland State Police. He is director of Legislative and Congressional Affairs for the National Troopers Coalition. The National Troopers Coalition is composed of state police and highway patrol agencies throughout the United States and has a membership of approximately 45,000 troopers.

Mr. Chairman, Honorable members of this distinguished committee. I would like to thank the committee for giving me the opportunity to speak on this matter of great public interest.

The National Troopers Coalition, an organization representing State Troopers in forty-four states, strongly endorses the nomination of Judge David Souter to Justice of the United States Supreme Court. Judge Souter's background as the New Hampshire Attorney General, that state's chief law enforcement officer, as a trial judge, and as a member of his state's highest Court well qualifies him to be appointed to our nation's highest Court. The National Troopers Coalition has reviewed Judge Souter's criminal law opinions, and knows him to be a tough law-enforcement judge who, at the same time, will protect the constitutional rights of the accused.

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Throughout his judicial career Judge Souter has applied sound legal principles and common sense reasoning to protect the rights of society through effective law-enforcement. He has refused to expand the Miranda doctrine beyond its present bounds, and has admitted confessions that were voluntarily given by a defendant.

He has been supportive of drug enforcement measures, by upholding the use of pen registers on the telephones of drug suspects. In other cases, he has rejected the hypertechnical interpretation of the scope of search warrants, and has protected the identity of confidential informants from disclosure at trial where the presence of the informant was not necessary for a fair

trial.

In the area of drunk driving enforcement, he has supported the use of sobriety check points to detect drunk drivers, and has upheld the introduction at trial of evidence of a driver's refusal to take a breathalyzer test when arrested for drunk driving.

We strongly endorse Judge Souter, and urge confirmation by the Senate.

**TESTIFYING:** James J. Doyle III, Esquire  
DOYLE & CRAIG, P.A.  
25 South Charles Street  
Suite 1910  
Baltimore, Maryland 21201  
(301) 332-0520

Mr. Doyle is a former Maryland Assistant Attorney General and former Counsel to the Maryland State Police.

I would like to thank the committee for taking the time to hear the views of the law enforcement community on the nomination of Judge David Souter to the United States Supreme Court.

I share the view taken by law enforcement agencies that Judge Souter has taken effective positions that support police and prosecutors in their efforts to combat crime.

Beyond that, however, it is important to emphasize the scholarly and well reasoned approach that Judge Souter has consistently taken in his criminal law opinions. While a member of the New Hampshire Supreme Court, Judge Souter has authored a number of criminal law opinions that are impressive for their logic and analysis, even though some of his decisions have resulted in reversals of convictions.

Many of Judge Souter's opinions display these qualities, but only three will be briefly mentioned here. In State v. Valenzuela, 536 A.2d 1252 (N.H. 1987), the defendant was arrested on numerous drug charges after the execution of a search and

seizure warrant. The warrant had been based, in part, on information gathered through the use of a pen register, a device which records outgoing telephone numbers dialed from the telephone line to which it is attached. The court order authorizing the use of the pen register had not been supported by probable cause. Defendant argued that the use of the device violated his right against unreasonable search and seizure, as guaranteed by the New Hampshire Constitution.

In rejecting defendant's claim and affirming his conviction, Judge Souter referred to an earlier Supreme Court decision, Smith v. Maryland, which had held that the use of a pen register without a warrant did not violate the Fourth Amendment to the U.S. Constitution.

What is impressive about Judge Souter's opinion in this case is that he did not simply adopt the reasoning of the U.S. Supreme Court, but performed his own analysis and followed his own route to his own conclusion. While the U.S. Supreme Court, in its opinion, had spent considerable time in concluding that a defendant did not have a subjective expectation of privacy in dialed numbers, since he must have realized that the telephone company in some fashion recorded those numbers, Judge Souter thought that issue to be irrelevant. For that reason he did not rely on the portion of the U.S. Supreme Court analysis concerning a defendant's subjective beliefs in privacy.

The only relevant issue for Judge Souter was whether society would recognize as objectively reasonable the privacy of dialed numbers. Relying on a number of decisions that held that no Fourth Amendment protection attached to information voluntarily conveyed to third persons, Judge Souter concluded that the use of a pen register in this situation would not violate the principle against unreasonable searches and seizures.

In State v. Koppel, 499 A.2d 977 (N.H. 1985) Judge Souter filed a dissenting opinion concerning the operation of sobriety check points set up to catch drunk drivers. The majority opinion

had concluded that the procedure violated a defendant's rights under the New Hampshire and United States Constitutions. Judge Souter dissented.

Judge Souter believed that the intrusion faced by a motorist during a sobriety check point stop was minimal, and outweighed by society's significant interest in apprehending intoxicated drivers.

It is significant and a favorable reflection on Judge Souter's analysis that in 1990 the Supreme Court of the United States upheld the use of sobriety checkpoints in Michigan State Police v. Sitz, employing essentially the same reasoning as Judge Souter.

Finally, Judge Souter's dissent in State v. Denney, 536 A.2d 1242 (N.H. 1987) is also an excellent example of his logical and well reasoned analysis in criminal cases. Judge Souter persuasively argued that the due process clause did not require that police inform a drunken driver of the evidentiary consequences of refusing to submit to a blood alcohol test, where there was no evidence of police deception or misconduct in failing to advise the driver of those consequences.

In conclusion, Judge Souter's criminal law opinions have consistently been scholarly and well written. His legal reasoning has been impressive. He has been extremely supportive of legitimate police procedures and of society's right to effective law enforcement. The National Troopers Coalition urges confirmation of Judge David Souter by the Senate.

Senator THURMOND. Mr. Stokes, we will be glad to hear from you.

#### STATEMENT OF DEWEY R. STOKES

Mr. STOKES. Mr. Chairman and members of the Senate Judiciary Committee, it is, indeed, an honor and a privilege to testify before you today on what is perhaps the most important single subject this distinguished panel will have to consider during this session of Congress: the nomination of Judge David H. Souter by President Bush to the Supreme Court of the United States.

My name is Dewey Stokes. I am the national president of the Fraternal Order of Police, representing 216,000 police officers in some 48 States. The FOP represents "the cop on the street"—the police officer most likely to be the first line of defense between the criminal element and the society at large.

The nature and the background of those that I have been elected to represent confers upon me a special obligation whenever I appear before an elected representative group. And I have testified before this committee on a variety of legislative topics. But perhaps in appearing today to speak on the nomination of an individual to the highest Court in this great country, my responsibility to law enforcement everywhere has never been any greater.

Mr. Chairman, you and your colleagues have heard a variety of witnesses, all of them experts in one field or another. Some are lawyers recognized for their professional achievements, and others are scholars in constitutional law. Still others are representative of certain organizations, like the FOP, with a legitimate interest in the workings of the Supreme Court. But very few of the witnesses appearing before you on this subject will feel the daily and direct impact of the decisions of Justice Souter as will the members of my profession. The typical law enforcement officer is charged with the awesome responsibility of enforcing the laws of this Nation, especially as they are interpreted by our courts. Lawyers and scholars may debate the fine points of law, but the police officers place their lives on the line each day carrying them out and don't have the luxury of the time to discuss or research when making those split-second decisions.

With my perspective viewed in such a clear context, let me formally state for the record that the National Fraternal Order of Police endorses the nomination of Judge David H. Souter to the Supreme Court and has so acted in a resolution passed this weekend at our national board meeting.

Knowing that the time of the committee is a valuable commodity, Mr. Chairman, I will not attempt to engage either you or your colleagues in a scholarly discussion on the legal subtleties of Judge Souter's previously authored opinions or on the arcane points of constitutional law. I will leave that task to the lawyers and the other professors. I will, however, try to tell you in simple terms why the FOP believes very strongly that Judge Souter's nomination to the high Court will benefit the law enforcement community as well as the country as a whole.

Today, every 24 minutes, a citizen dies in a violent act. Yet a law enforcement officer is killed every 57 hours. So I, along with the

FOP executive committee and our general counsel, have had the opportunity to review a number of over 200 opinions which Judge Souter authored during his 7 years on the New Hampshire Supreme Court dealing with the issues important to the police community. Whether that subject at issue involved criminal procedure, due process, *Miranda* warnings, search and seizure or sentencing, I was repeatedly impressed with the striking clarity of his reasoning and his dedication to applying a given rule of law in a common sense manner to the case at hand. In doing so, I believe that Judge Souter possesses a unique ability to posit a question of law in terms of the principal purpose of a given statute versus its specific intent. In this way, Judge Souter has demonstrated an appreciation for the application of the black letter of the law to fact patterns and situations faced daily by the police officers of this country in the course of discharging their sworn duties that do not always lend themselves to tidy, legalistic conclusions.

The FOP is supportive of Judge Souter not just because of his work on the bench, but also because of his impressive track record while in the office of attorney general for the State of New Hampshire. During his rise through the ranks from an assistant attorney general in the criminal division to deputy and finally to attorney general, Judge Souter consistently demonstrated an appreciation for those of us serving on the front lines of the war on crime.

Why is it that everyone is concerned about equal representation on the Court? So, therefore, I ask you, why not a prosecutor on the Court? Why fill the Court with defense attorneys and corporate lawyers? We would appreciate someone on the Court who understands and can feel what we in law enforcement go through on a daily basis.

Just as important as any other one specific opinion authored by the nominee is, however, the suggestion of a common thread woven throughout the fabric of Judge Souter's legal writings. I believe that common thread or theme to be a strong devotion to the integrity and independence of the judicial branch of the Government and the vital role that it must play in our form of Government. The very validity of our judicial branch of Government rests upon the cornerstone of a fundamental commitment to established rules of law completely divorced of all political or personal dynamics. What my fellow law enforcement officers want in a judge, in any judge, is a consistent, impartial, concise and fair adjudication of the fact and law that helps us do our job in a professional as well as efficient manner. In this regard, I strongly believe that there is no question but that Judge Souter embodies these qualities.

I cannot help but to be dismayed by certain elements, across the ideological spectrum, at work here today who seek to elicit the "right" or the "correct" answer from the nominee on a variety of constitutional law subjects prior to the rendering of an endorsement. The 1988 Democratic nominee for President was fond of framing the central issue of that election as being "not of ideology, but of competence." Leaving aside the validity of that observation in that particular context, I wonder whether that statement might be more topical to today's proceedings instead.

At our recent national board meeting, our trustees presented that resolution in a unanimous form, and we, therefore, strongly support and urge that you confirm Judge Souter.

Mr. Chairman and members of the committee, I urge you to move the nomination forward as rapidly as possible and for confirmation, not just for the protection of law enforcement but for the benefit of all Americans.

I thank you for the opportunity to express the views of law enforcement and our concerns and our position on this issue.

[The prepared statement of Mr. Stokes follows:]



**GRAND LODGE  
FRATERNAL ORDER OF POLICE**

DEWEY R. STOKES • 520 S. HIGH ST. • COLUMBUS, OHIO 43215  
NATIONAL PRESIDENT 614-221-0180

TESTIMONY OF  
DEWEY R. STOKES  
NATIONAL PRESIDENT  
FRATERNAL ORDER OF POLICE  
ON  
NOMINATION OF  
JUDGE DAVID H. SOUTER  
TO  
UNITED STATES SUPREME COURT  
BEFORE THE  
SENATE COMMITTEE ON THE JUDICIARY  
SEPTEMBER 18, 1990



MR. CHAIRMAN, MEMBERS OF THE SENATE JUDICIARY, IT IS INDEED AN HONOR AND A PRIVILEGE TO TESTIFY BEFORE YOU TODAY ON WHAT IS PERHAPS THE SINGLE MOST IMPORTANT SUBJECT THIS DISTINGUISHED PANEL WILL HAVE CONSIDERED DURING THIS SESSION OF CONGRESS -- THE NOMINATION OF JUDGE DAVID H. SOUTER BY PRESIDENT BUSH TO THE SUPREME COURT OF THE UNITED STATES.

MY NAME IS DEWEY STOKES. I AM THE NATIONAL PRESIDENT OF THE FRATERNAL ORDER OF POLICE (FOP), THE LARGEST ORGANIZATION OF LAW ENFORCEMENT PROFESSIONALS IN THE UNITED STATES AND REPRESENTING OVER 216,000 POLICE OFFICERS IN SOME FORTY-EIGHT STATES. THE FOP REPRESENTS "THE COP ON THE STREET" -- THE POLICE OFFICER MOST LIKELY TO BE THE FIRST LINE OF DEFENSE BETWEEN THE CRIMINAL ELEMENT AND SOCIETY AT LARGE.

THE NATURE AND BACKGROUND OF THOSE THAT I HAVE BEEN ELECTED TO REPRESENT CONFERS UPON ME A SPECIAL OBLIGATION WHENEVER I APPEAR BEFORE OUR ELECTED REPRESENTATIVES -- AND I HAVE TESTIFIED BEFORE THIS COMMITTEE ON A VARIETY OF LEGISLATIVE TOPICS. BUT PERHAPS, IN APPEARING TODAY TO SPEAK ON THE NOMINATION OF AN INDIVIDUAL TO THE HIGHEST COURT IN THIS GREAT COUNTRY, MY RESPONSIBILITY TO POLICE EVERYWHERE HAS NEVER BEEN GREATER.

MR. CHAIRMAN, YOU AND YOUR COLLEAGUES HAVE HEARD A VARIETY OF WITNESSES, ALL OF THEM EXPERTS IN ONE FIELD OR ANOTHER. SOME ARE LAWYERS RECOGNIZED FOR THEIR PROFESSIONAL ACHIEVEMENTS AND OTHERS ARE SCHOLARS IN CONSTITUTIONAL LAW. STILL OTHERS ARE REPRESENTATIVES OF CERTAIN ORGANIZATIONS, LIKE THE FOP, WITH A LEGITIMATE INTEREST IN THE WORKINGS OF THE SUPREME COURT. BUT VERY FEW OF THE WITNESSES APPEARING BEFORE YOU ON THIS SUBJECT WILL FEEL THE DAILY AND DIRECT IMPACT OF THE DECISIONS OF A JUSTICE SOUTER AS WILL THE MEMBERS OF MY ORGANIZATION, THE TYPICAL POLICE OFFICER CHARGED WITH THE AWESOME

RESPONSIBILITY OF ENFORCING THE LAWS OF THIS NATION -- ESPECIALLY AS INTERPRETED BY OUR COURTS. LAWYERS AND SCHOLARS MAY DEBATE THE FINE POINTS OF THE LAW, MR. CHAIRMAN, BUT POLICE OFFICERS PLACE THEIR LIVES ON THE LINE EACH DAY CARRYING THEM OUT.

WITH MY PERSPECTIVE VIEWED IN SUCH A CLEAR CONTEXT, LET ME FORMALLY STATE FOR THE RECORD THAT THE NATIONAL FRATERNAL ORDER OF POLICE IS PROUD TO ENDORSE THE NOMINATION OF JUDGE DAVID H. SOUTER FOR THE U.S. SUPREME COURT.

KNOWING THAT THE TIME OF THE COMMITTEE IS A VALUABLE COMMODITY, MR. CHAIRMAN, I WILL NOT ATTEMPT TO ENGAGE EITHER YOU OR YOUR COLLEAGUES IN A SCHOLARLY DISCUSSION OF THE LEGAL SUBTLETIES OF JUDGE SOUTER'S PREVIOUSLY AUTHORED OPINIONS OR ON ARCAINE POINTS OF CONSTITUTIONAL LAW -- I WILL LEAVE THAT TASK TO THE LAWYERS AND THE LAW PROFESSORS. I WILL, HOWEVER, TRY TO TELL YOU IN SIMPLE TERMS WHY THE FOP BELIEVES VERY STRONGLY THAT JUDGE SOUTER'S NOMINATION TO THE HIGH COURT WOULD BENEFIT THE LAW ENFORCEMENT COMMUNITY AS WELL AS THE COUNTRY AS A WHOLE.

I, ALONG WITH THE FOP'S EXECUTIVE COMMITTEE AND OUR GENERAL COUNSEL, HAVE HAD THE OPPORTUNITY TO REVIEW A NUMBER OF THE OVER TWO-HUNDRED OPINIONS WHICH JUDGE SOUTER AUTHORED DURING HIS SEVEN YEARS ON THE NEW HAMPSHIRE SUPREME COURT DEALING WITH ISSUES IMPORTANT TO THE POLICE COMMUNITY. WHETHER THE SUBJECT AT ISSUE INVOLVED CRIMINAL PROCEDURE AND DUE PROCESS, "MIRANDA" WARNINGS, SEARCH AND SEIZURE OR SENTENCING, I WAS REPEATEDLY IMPRESSED WITH THE STRIKING CLARITY OF HIS REASONING AND HIS DEDICATION TO APPLYING A GIVEN RULE OF LAW IN A COMMON SENSE MANNER TO THE CASE AT HAND. IN DOING SO, I BELIEVE THAT JUDGE SOUTER POSSESSES THE UNIQUE ABILITY TO POSIT A QUESTION OF LAW IN TERMS OF THE PRINCIPLE PURPOSE OF A GIVEN STATUTE VERSUS IT'S SPECIFIC INTENT. IN THIS WAY, JUDGE SOUTER HAS DEMONSTRATED AN APPRECIATION FOR THE APPLICATION OF BLACK LETTER LAW TO FACT

PATTERNS AND SITUATIONS FACED DAILY BY POLICE IN THE COURSE OF DISCHARGING THEIR SWORN DUTIES THAT DO NOT ALWAYS LEND THEMSELVES TO TIDY, LEGALISTIC CONCLUSIONS.

THE POP IS SUPPORTIVE OF JUDGE SOUTER NOT JUST BECAUSE OF HIS WORK ON THE BENCH, BUT ALSO BECAUSE OF HIS IMPRESSIVE TRACK RECORD WHILE IN THE OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF NEW HAMPSHIRE. DURING HIS RISE THROUGH THE RANKS FROM AN ASSISTANT ATTORNEY GENERAL IN THE CRIMINAL DIVISION TO DEPUTY AND FINALLY TO ATTORNEY GENERAL, JUDGE SOUTER CONSISTENTLY DEMONSTRATED AN APPRECIATION FOR THOSE OF US SERVING ON THE FRONT LINES OF THE WAR ON CRIME.

JUST AS IMPORTANT AS ANY ONE SPECIFIC OPINION AUTHORED BY THE NOMINEE IS, HOWEVER, THE SUGGESTION OF A COMMON THREAD WOVEN THROUGHOUT THE FABRIC OF JUDGE SOUTER'S LEGAL WRITINGS. I BELIEVE THAT COMMON THREAD OR THEME TO BE A STRONG DEVOTION TO THE INTEGRITY AND INDEPENDENCE OF THE JUDICIAL BRANCH OF GOVERNMENT AND THE VITAL ROLE THAT IT MUST PLAY IN OUR FORM OF GOVERNMENT. THE VERY VALIDITY OF OUR JUDICIAL BRANCH OF GOVERNMENT RESTS UPON THE CORNERSTONE OF A FUNDAMENTAL COMMITMENT TO ESTABLISHED RULES OF LAW COMPLETELY DIVORCED OF ALL POLITICAL OR PERSONAL DYNAMICS. WHAT MY FELLOW POLICE OFFICERS WANT IN A JUDGE -- ANY JUDGE -- IS A CONSISTENT, IMPARTIAL, CONCISE AND FAIR ADJUDICATION OF FACT AND LAW THAT HELPS US DO OUR JOB IN A PROFESSIONAL AS WELL AS EFFICIENT MANNER. IN THIS REGARD, I STRONGLY BELIEVE THAT THERE IS NO QUESTION BUT THAT JUDGE SOUTER EMBODIES THOSE QUALITIES.

I CANNOT HELP BUT TO BE DISMAYED BY CERTAIN ELEMENTS, ACROSS THE IDEOLOGICAL SPECTRUM, AT WORK HERE TODAY WHO SEEK TO ELICIT THE "RIGHT" OR "CORRECT" ANSWERS FROM THE NOMINEE ON A VARIETY OF CONSTITUTIONAL LAW SUBJECTS PRIOR TO THE RENDERING OF AN ENDORSEMENT. THE 1988 DEMOCRATIC NOMINEE FOR PRESIDENT WAS

FOND OF FRAMING THE CENTRAL ISSUE OF THAT ELECTION AS BEING "NOT OF IDEOLOGY, BUT OF COMPETENCE." LEAVING ASIDE THE VALIDITY OF THAT OBSERVATION IN THAT PARTICULAR CONTEXT, I WONDER WHETHER THAT STATEMENT MIGHT BE MORE TOPICAL TO TODAY'S PROCEEDINGS INSTEAD.

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I URGE YOU TO VOTE FOR JUDGE SOUTER AND TO MOVE HIS NOMINATION TO THE U.S. SUPREME COURT FORWARD IN AN EXPEDITIOUS FASHION.

I THANK YOU FOR THE OPPORTUNITY TO TESTIFY AND I WOULD BE PLEASED TO ANSWER ANY QUESTIONS AT THIS TIME.

The CHAIRMAN. The Senator from Alabama—I beg your pardon. I am really sorry. How I could have made that mistake is beyond me.

The Senator from South Carolina. I was distracting myself by asking the staff a question, and I hope you will forgive me, Senator. That is a big mistake to make with this gentleman.

Senator THURMOND. Oh, not at all. We all make mistakes. It is a minor thing. Forget it.

Mr. Chairman, I have another meeting I have got to go to. I went to this meeting for a while, but I came back especially to hear this particular group. There is no group in this country I have greater respect for than the law enforcement officers. Just as our soldiers protect us against external enemies, the law enforcement officers protect us from internal enemies. That is the criminal. I commend you for your great work. I congratulate you for taking time to come here today and testify.

Now, I am just going to ask you one question. Is it your opinion that Judge Souter has the integrity, the professional competency, the judicial temperament, the courage, the compassion, the understanding of the majesty of our system of Government, and the fairness to be a Justice of the Supreme Court of the United States? We will start right on in, Mr. Doyle.

Mr. DOYLE. Yes, Senator. Having read Judge Souter's opinions, I think there is no question that he is so qualified to be Associate Justice of the U.S. Supreme Court.

Senator THURMOND. Chief Mosca?

Mr. MOSCA. Yes, Senator. I have spoken to a number of my colleagues, particularly from New Hampshire, and they would certainly embody those qualities that you describe.

Senator THURMOND. I am not too sure that our positions have been entered on the record. Mr. Doyle represents the International Narcotics Enforcement Officers Association.

Mr. DOYLE. No, Senator. I am representing the National Troopers Coalition. I am an attorney.

Senator THURMOND. Oh, you are with Captain Hughes.

Mr. DOYLE. Yes, Senator. That is correct.

Senator THURMOND. I see. And Chief Mosca is with the International Association of Chiefs of Police.

Mr. MOSCA. Yes, Senator.

Senator THURMOND. And, Sheriff Rice, what is your answer to that question?

Mr. RICE. Yes, sir, very much so.

Senator THURMOND. You represent the National Sheriffs' Association.

Mr. RICE. Yes, sir.

Senator THURMOND. Captain Hughes represents the National Troopers Coalition. And what is your answer, Captain Hughes, to that question?

Mr. HUGHES. Yes, sir, without a doubt.

Senator THURMOND. Mr. Stokes is the national president of the Fraternal Order of Police. What is your answer to that question?

Mr. STOKES. Sir, we have looked at all of his opinions, and we believe that based on the written opinion and some of the remarks that he has made in those written opinions, he will provide this

country with the type of leadership that law enforcement would desire on the Supreme Court. So my answer is emphatically yes.

Senator THURMOND. Again, I want to thank all of you for coming here and testifying. I appreciate your doing so. I am in accord with the statements you made.

I am going to have to leave now to go to another hearing. I just want to say to the chairman before I go that my position on this nomination is just the same as these able and distinguished law enforcement officers have given here today. I think that Judge Souter does possess the integrity, the professional competency, the judicial temperament, the courage, the compassion, the understanding of the majesty of our system of Government, and the fairness and the dedication to make an excellent Supreme Court Justice of the United States.

Mr. Chairman, before I leave, I want to take this opportunity again to express to you my appreciation for the fairness with which you have conducted this investigation, the courtesies you have extended to everyone, especially to the ranking member, and we appreciate all that you have done in connection with this investigation.

The CHAIRMAN. Thank you very much, Senator. It is always—and I mean this literally—always a pleasure to work with you. You are always fair as well.

The Senator from Illinois. I got it right this time.

Senator SIMON. Thank you, Mr. Chairman.

I have no questions. I simply want to thank all of you for your testimony, and also to note with pleasure that the police organizations have become more active on Capitol Hill in speaking up. I don't think there is any question that your speaking up played a decisive role in the passage of the DeConcini amendment, for example. If one of these days we pass a waiting period for handguns so that we don't have police officers killed once every 57 hours, I don't think there is any question that the police officers of this Nation are going to be playing the critical role. I think your influence on Capitol Hill has been a good one, and I simply want to take this opportunity to commend all of you.

Thank you, Mr. Chairman.

Mr. STOKES. Thank you, Senator, and I hope that the people who view these hearings will contact their Congressmen, their Representatives, and get our crime bill moving over on the House side, as effectively as you did in the Senate.

Senator SIMON. That is why you are a pretty good lobbyist, Dewey Stokes. You get those licks in wherever you can.

Mr. STOKES. Absolutely.

The CHAIRMAN. The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I join in thanking you men for appearing here today and for all of your hard work and effective service. There are a lot of things we could talk about on *Miranda* and retroactivity and many, many issues, but the hour is growing very late. As the chairman has already said, we are anxious to conclude. But I think your testimony is very helpful, and I join in thanking you.

The CHAIRMAN. Gentlemen, I have a couple questions, if I may.

We always are, when we look at judicial nominees—and, quite frankly, nominees in the Foreign Service and other committees I sit on, whomever is nominated for a position in the judicial branch or the administration—we always are focusing on their judicial temperament, how they treat people in the system with whom they have to deal. And when it comes to judicial nominees who are prosecutors, in my view we do not put enough focus on how they treat the people with whom they have to interact the most; that is, police officers.

I will not name names, but I know several of you very well, and I know if I asked you to name off the top of your head five or six prosecutors you have dealt with who you thought did not treat you with respect, you could do it in about one-tenth of a second. Am I wrong? I am not going to ask for names, but I suspect you could. I won't even ask you that, but I would be willing to bet you lunch anywhere that you could.

And so we have had a good deal of testimony about the degree to which Judge Souter has been sensitive in dealing with the people in his office and how he has treated litigants before him, and I want to ask you this. There was some reference by Chief Mosca to this effect, but I would like you to elaborate on it, if you can. Did you inquire of your colleagues in New Hampshire as to how Judge Souter treated your colleagues, local police officers, State police officers, with whom he had to deal as a prosecutor in New Hampshire. And if so, what response did you get?

Mr. MOSCA. If I may, Senator, I did speak with chiefs from New Hampshire, particularly Chief Walcek from Concord, and Chief Reynolds, our immediate past president, from Dover, New Hampshire. Both of them were highly motivated in making sure that Justice Souter was named, and they said his reputation across the board with law enforcement was absolutely great.

One of the things that seemed to come forward, aside from his thoroughness and thoughtfulness, was the fact that they always used the word that he had common sense. And if I can relate to you, that means an awful lot to those of us that are on the street, on the front lines. We really look to common sense. In all of my inquiries, common sense was always a part of the description of Judge Souter.

The CHAIRMAN. I am looking for something a little bit different; that is, to me, it makes a difference whether or not a prosecutor—if I can be illustrative—is the kind of man or woman who gets you in on your day off to testify in a case but fails to have the courtesy to tell you that the case has been pled, fails to have the courtesy to tell you that they are not going to trial that day. We all know prosecutors like that.

I can think of as many prosecutors who are disliked by police officers as I can public defenders who are disliked by police officers because they are not treated well. That is what I mean by being treated well, consideration being shown for the difficulty of your job. Most Americans don't know that you make an arrest, you may very well find on your day off you are sitting in the attorney general's office for 7 hours waiting for a prosecutor to decide whether or not they are going to go or not go, call you as a witness, not call

you as a witness. And those things are matters of extreme discourtesy, as well as courtesy extended.

Is there any input on how he treated not the law, not the cases, but the individual officers?

Mr. MOSCA. Nothing negative was volunteered at all.

The CHAIRMAN. I am not suggesting there—

Mr. MOSCA. You can bring up certain prosecutors' names in police circles, and you know the responses that that will elicit.

The CHAIRMAN. I know in Delaware.

Mr. MOSCA. But that did not happen in this case at all.

Mr. STOKES. Senator?

The CHAIRMAN. Yes, Dewey.

Mr. STOKES. We were recently in New Hampshire doing some recruitment, and we asked—

The CHAIRMAN. Taking them out of New Hampshire to Chicago?

Mr. STOKES. We got 276 of the troopers to affiliate with us. We have had an opportunity to talk to some of the officers up there about some of their problems. Not specifically did we get into Judge Souter, but overall we did not find anyone up there that came out from the law enforcement ranks that said anything negative about Judge Souter or the way he treated them.

The only thing I can say is sometimes when prosecutors or attorneys general get into these situations, because of previous court rulings, they must bring you in to testify and give the defendant the last second to make his or her decision, so, consequently, to safeguard the rights of the citizenry, it is necessary to pull the police officer in on his or her day off to be there.

The CHAIRMAN. I know that. All I am saying is that it is one thing to pull you in on your day off and while you are sitting there, offer you a cup of coffee, and when you do not go to trial, say, gee, I am sorry you had to sit here all day, and it is another thing to not talk to you. That is what I mean by respect.

Mr. STOKES. Well, we have not heard that complaint from any of the officers that we had the occasion to speak with.

The CHAIRMAN. Nor have I. I think people should know in the record, that as we are worried about how criminal defendants are treated, as we are worried about how plaintiffs are treated in civil cases by the judge sitting on the bench, as we are worried about how deputy attorneys general are treated by the attorney general and when they work with them, one of the things that is always left out of the equation, that always surprises me, is one of the places where they deal the most with, the people that they deal the most, and sometimes you are treated like you are an appendage and is just there, even though you are central to the case and you made the case, and other times you are treated with great respect.

That is all I am suggesting and I heard nothing to the contrary, but I just wanted to get it on the record, because it is a question that I ask, because I think it is important.

Mr. RICE. Mr. Chairman?

The CHAIRMAN. Yes?

Mr. RICE. About the same that came out of the group so far, we did talk to a couple of sheriffs and the chiefs of police, as I mentioned in my testimony, and I assure you that the things that you are asking, if they would have happened to either one of these

sheriffs of these chiefs, that would have been at the top of the list when we asked the questions.

The CHAIRMAN. I agree with you, that is why I asked the question.

Now, fellows, one last question. You have praised the decisions that the Judge has rendered, as evidencing a thread of common sense and a concern for the victim, as well as the defendant, without violating any of the defendant's constitutional rights.

Now, I am going to ask you a question that you may not like me to ask you, but when pushed during the hearing, Judge Souter pushed on *Miranda* and *Miranda* warnings, was asked about (a) how he felt at the time, and (b) how he felt now about *Miranda* warnings. And to paraphrase his statement, he gave the rationale for *Miranda* warnings and basically that he thought they worked fine and that they were a good thing.

Now, I will let the record stand and be corrected, if I am wrong, if anyone would like to suggest otherwise, but I think—let me be more precise, I have the record here, to be more precise, my staff has the record here.

I am quoting, "People of good will could disagree about that, but the fact is that the time the *Miranda* decision came down, it created a lot of problems for a lot of people who did not know how to respond to it." These problems are over and done with today. I think that most law enforcement officers can respond to it, and anyone who wants to attack *Miranda* today has got, I think, the same kind of pragmatic burden which those who had argued for *Miranda* in the first place.

At any rate, do you have any problem with his view on the *Miranda* warnings?

Mr. RICE. None whatsoever.

Mr. STOKES. Senator, I think that the two important cases that we reviewed—and there were several dealing with *Miranda*—was the *Lewis* case and the *Jones* case, out of New Hampshire, and I think that it is important to reflect that police officers since 1966, when the Arizona *Miranda* case came out in 1966, that those officers since 1966, in the past 24 years, is again alluding to—and I cannot speak for Judge Souter and what was in his mind, but at the time he was alluding to, more than likely, that the educational process and the professionalism of law enforcement has drastically increased in the last 24 years, and hopefully will continue on that pattern.

I believe what he was alluding to at that point is that the law enforcement officers in the last 24 years have adapted to the *Miranda* warning as just a protection of the individual or the accused, if you will, of their constitutional rights. So, I think we have adjusted to that in our training and our philosophy, so I would believe that, reading his decisions as they reflect—and I cite those two cases, the *Jones* and *Lewis* case—I believe that is probably what he was alluding to.

The CHAIRMAN. I do not disagree with that. I think it was. I just want it on the record that the fact that he believes that *Miranda* makes sense now is not inconsistent with what I know from what you have all told me personally before, that there is not a hue and cry out there by police officers to overrule *Miranda* and the fact

that he thinks it is a solid decision now is not something that gives you reason for difficulty.

Mr. DOYLE. No, and if I could add one thing: Judge Souter has had the opportunity to pass on many types of *Miranda* cases on the New Hampshire Supreme Court and he has shown no inclination to overrule the doctrine. At the same time, I think it is fair to say he has shown no inclination to extend it beyond its present bounds. So, I think, speaking for law enforcement, we all feel comfortable with the position that he has taken on *Miranda*.

Mr. STOKES. I think in the *Jones* cases, where he had the opportunity or was seeking to expand it, and Judge Souter felt that it went to that point, as was approved by the courts.

The CHAIRMAN. Senator Humphrey.

Senator HUMPHREY. No questions.

The CHAIRMAN. Gentlemen, as always, your testimony is helpful and I think it is always important for the public to be enlightened about how enlightened you guys are, and the women that you represent, as well, and I thank you for being here and thank you for your help.

As you said, Dewey, I am going to be needing to talk with you on a completely different talk very soon when these hearings are over, because I would like to revive my crime bill that you worked so hard to help get passed here, and that is another question.

Thanks for being here. I know that some of you stayed very late last night. I apologize for not being able to get you on late last night, but I suspect you would have not gotten on until midnight, had we kept going, so I want to thank you all very much.

Mr. STOKES. Thank you.

Mr. MOSCA. Thank you, Senator.

Mr. RICE. Thank you.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. DOYLE. Thank you.

The CHAIRMAN. Now, our final witness is very well read and very well known and very persuasive, the Chairman of The Conservative Caucus, Inc., Mr. Howard Phillips.

Is Mr. Phillips here? Thank you for being here. As I know you know, it was not intentional to have you last. We tried very hard to see what best panel would you fit in with, and it was your choice to be in this circumstance. I respect that and I think it makes sense. I hope you understand that we just did not decide to make you last.

#### STATEMENT OF HOWARD PHILLIPS, CHAIRMAN, THE CONSERVATIVE CAUCUS, INC.

Mr. PHILLIPS. I appreciate the opportunity to be here and I recognize that the perspective which I am bringing to this nomination is, from my standpoint, unfortunately unique. I know that everyone is anxious to move on and—

The CHAIRMAN. No, we have time.

Mr. PHILLIPS. Thank you.

The CHAIRMAN. Go right ahead. We are here to listen.

Mr. PHILLIPS. Mr. Chairman, my name is Howard Phillips and I am Chairman of The Conservative Caucus, a nonprofit, public-policy advocacy organization based in Vienna, VA.

The Declaration of Independence asserted that "we are endowed by our creator with certain inalienable rights, and that, among these are life, liberty, and the pursuit of happiness." The declaration rested on the assumption that there exists "the laws of nature and of nature's God."

Our law system is necessarily rooted in and legitimated by that fundamental recognition of higher authority.

In considering David Souter's suitability to cast what, in many cases, will be the deciding opinion on the Supreme Court of the United States, it is necessary to go beyond Mr. Souter's intellectual capacity and his stated opinions, and to assess his character and moral courage in their relationship to the responsibilities of a Supreme Court Justice.

One moment of truth for Mr. Souter came in February 1973, when, as a member of the board of trustees of Concord Hospital, he participated in a unanimous decision that abortions be performed at that hospital.

Advocacy of, or even acquiescence in, such a decision is morally distinguishable from the judicial conclusion, profoundly incorrect, in my view, that women have a constitutional right to destroy their unborn children.

It is also distinguishable from and far more troubling than the political argument by politicians who maintain that they are "personally opposed" to abortion, even as they advocate its decriminalization.

It is one thing to intellectually rationalize the case for permitting legal abortions, while still opposing the exercise of such legal authority; it is quite another—something far more invidious, morally—to actually join in a real world decision to cause abortions to be performed, routinely, at a particular hospital.

Those abortions whose performance was authorized by David Souter were not mandated by law or court opinion. In fact, laws have remained to this day on the books in New Hampshire which provide criminal penalties for any "attempt to procure miscarriage" or "intent to destroy quick child." Indeed, section 585:14 of the New Hampshire Criminal Code establishes the charge of second degree murder for the death of a pregnant woman in consequence of an attempted abortion, nor were those abortions which Mr. Souter authorized performed merely to save the life of the mother, nor were they limited to cases of rape or incest.

If the unborn child is human, and if innocent human life is to be defended and safeguarded, why did Mr. Souter acquiesce in those abortions? Why did he not speak out against them? Why did he, through 12 years on the Concord Hospital board, in a position of responsibility, help cause those abortions to be performed, and invest his personal reputation in clearly implied approval of those abortions?

The overreaching moral issue in the political life of the United States in the last third of the 20th Century is, in my opinion, the question of abortion. Is the unborn child a human person, entitled

to the protections pledged to each of us by the Founders of our Nation?

The issue is much more than one of legal or judicial philosophy. There are men and women in the legal profession, in elected office, and on the bench who acknowledge abortion to be morally repugnant, but who assert that, in present circumstances, it cannot be constitutionally prohibited.

Whatever Mr. Souter's legal and judicial philosophy may be—and, on the record, it seems to be one which rejects the higher law theories implicit in the Declaration of Independence—it is a chilling fact which the Senate must consider that Judge Souter has personally participated in decisions resulting in the performance of abortions, where such abortions were in no way mandated or required by law or court decision.

By his own account, Mr. Souter served as a member of the board of trustees for the Concord Hospital from 1971 until 1985. Following service as board secretary, he was president of the board from 1978 to 1984.

In 1973, shortly after the Supreme Court's January 22 *Roe v. Wade* decision, the Concord Hospital trustees voted to initiate a policy of performing abortions at Concord Hospital.

Similarly, Dartmouth Hitchcock Hospital, which is associated with the Dartmouth Medical School, of which Judge Souter has been an overseer, has performed abortions up to the end of the second trimester.

During the period of Mr. Souter's tenure as a decision-maker of these two institutions, many hundreds of abortions were performed under his authority, with no indication that he ever objected to or protested the performance of these abortions. Even though the *Roe v. Wade* decision did, in fact, authorize abortions through the ninth month of pregnancy, nothing in the Supreme Court's decision required or obliged any hospital to conduct abortions, whether in the ninth month, the sixth month, or even in the first month of pregnancy.

If Judge Souter is confirmed as a Justice of the Supreme Court, he will, in all likelihood, be given the opportunity to address not only the issue of *Roe v. Wade*, but broader issues involving the sanctity of innocent human life.

Justice John Paul Stevens wrote in the 1986 *Thornburgh* case, "There is a fundamental and well-recognized difference between a fetus and a human being. Indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the State legislatures."

Justice Stevens was wrong in a very deadly way. If an unborn child is not human, I would ask Justice Stevens, what is he, what is she. But at least Mr. Stevens was logical in defending his support for the majority opinion in *Roe v. Wade*.

In the *Roe v. Wade* decision, the Supreme Court indicated that if the unborn child is a person, the State could not allow abortion, even to save the life of the mother. In fact, in the majority opinion deciding *Roe v. Wade*, the Supreme Court said that, "If the personhood of the unborn child is established, the pro-abortion case collapses, for the fetus' right to life is then guaranteed specifically by the Fourteenth Amendment."

As Notre Dame law professor Charles Rice has pointed out, "This is so, because the common law does not permit a person to kill an innocent non-aggressor, even to save his own life."

Does David Souter believe that the unborn child—the fetus in the mother's womb—is a human person, deserving of all the protections which are guaranteed to human beings after the moment of birth?

Seemingly, Mr. Souter's answer is an unequivocal "no." By agreeing that abortions be performed at institutions under his authority, Mr. Souter established clearly that he did not recognize the personhood of the unborn child, for surely, if he did acknowledge the unborn child to be a human person, Mr. Souter would not have agreed to authorize the extinguishment of so many precious lives at medical facilities, for which he bore responsibility.

One must conclude that either Mr. Souter accepts the view that the life of the unborn child is of less value than the convenience and profit of those who collaborate in the killing of that child, or that, despite his recognition of the fact that each unborn child is human, a handiwork of God's creation, he lacked the moral courage or discernment to help prevent the destruction of so many innocent human lives, when he had the authority, indeed the responsibility, to do so.

Either way, in such circumstances, unless there are mitigating factors or extenuating considerations which have not yet been brought to public attention, it is difficult to regard Mr. Souter as one suitable for participation in judicial decisions at the highest level of our Nation.

If, during his years of responsibility at Concord Hospital and Dartmouth Hitchcock Hospital, Mr. Souter believed each fetus to be a human person, and failed to act against the performance of abortion, he was morally delinquent.

If, on the other hand, he justified himself by denying the human qualities of the unborn child, then he placed himself in the ambit of those who have argued against the very philosophy which his sponsor, President George Bush, purported to embrace during his 1988 Presidential campaign.

On the basis of the information now available, Mr. Souter, in my opinion, should not be confirmed.

The CHAIRMAN. I thank you very much, sir. Let me ask you a couple of questions, before I yield to my colleagues from Pennsylvania and New Hampshire.

In his testimony, Judge Souter defended his vote to allow abortions to be performed at Concord Hospital, by saying, among other things, that he was acting as a trustee of the hospital. He said that it would not be proper—and I am not quoting, I am paraphrasing—he said that it would not be proper to allow his personal views about abortion to determine how he performed the office of trustee, any more than it would be proper to allow his personal views about moral issues to affect how he did his job as a judge.

Obviously, you are not persuaded by that explanation. Can you tell me why you believe that explanation is flawed? I assume you are persuaded by that explanation?

Mr. PHILLIPS. No, sir. As a matter of fact, I regard that explanation as profoundly damning of Judge Souter's case, because, in

effect, what Judge Souter is saying, that because something is legal, it should, therefore, be permitted, that because abortion, in the view of those who accept *Roe v. Wade* as the law of the land, is appropriate, that, therefore, Concord Hospital should perform it.

In fact, there is no legal requirement and there was no legal requirement at that time that Concord Hospital should perform abortions. In fact, I am advised that there was a case in 1977, *Plelker v. Doe*, which affirmed this and which said that, even more so, private hospitals are under no obligation, and never have been, to perform abortions.

I would also point out that, while *Roe v. Wade* was permissive about the kinds of abortions which could be performed, that in no way did it require private or public hospitals to perform convenience abortions.

Judge Souter, prior to being a judge, in his role as a trustee at Concord Hospital, did not limit abortions to rape or incest or the life of the mother. There were many hundreds of convenience abortions performed at Concord Hospital, and for Judge Souter at that point, as an adult, to have permitted that to go forward, indeed, to have concurred in that decision and, apparently, to have advocated that decision, can only lead me to conclude that he does not regard the unborn child as a human being, because as I indicated in my testimony, if he regarded the child as human, he could not, in conscience, have authorized those convenience abortions.

The CHAIRMAN. So, you have reached two conclusions, that this is not merely a case of non-feasance, it is a case of Judge Souter being pro-abortion?

Mr. PHILLIPS. It is clear that Judge Souter, having been given the opportunity to vote on the question of abortion, voted for abortion at Concord Hospital, and that as a trustee of Dartmouth Hospital, he oversaw a situation where abortions were performed, reportedly until the end of the second trimester, and that there were numerous abortions performed that were not performed for the sake of protecting the life of the mother or dealing with rape or incest.

Let me say that I would oppose such abortions, as well, but even if you take the George Bush position, he went well beyond that. One can only conclude that, as a Justice of the Supreme Court, there is no possibility, unless he has a change of heart, that he would accept the concept of the personhood of the unborn child and that, beyond that, because he rejected the concept of the person as a human being, his decisions about when and whether abortions might be performed would be based on entirely pragmatic considerations.

The CHAIRMAN. I cannot resist asking you this next question.

Mr. PHILLIPS. Please.

The CHAIRMAN. I hope this will not ruin your reputation. I read what you write, I think almost all of what you write. You mentioned President Bush. Do you think President Bush is committed to a position of overruling *Roe v. Wade*?

Mr. PHILLIPS. You know, President Bush once said that he was a conservative, but he wasn't a nut about it, and I think that is a fair way of describing his view on abortion, that he is against abortion, but he is not a nut about it.

The CHAIRMAN. OK. I accept that answer. I admit, it is beyond the scope of this hearing, other than tangentially.

Mr. PHILLIPS. But it seems to me that the President did have a greater duty of care than that which he exercised in the selection of Judge Souter, given the kinds of commitments which he made during the 1988 presidential campaign and given the kinds of commitments that were in the Republican Platform.

Let me say also, responding to your question, that while Justice O'Connor—and this has been pointed out by other witnesses—while Justice O'Connor was careful not to preview her vote on *Roe v. Wade*, when she was up for confirmation, she made it quite clear that she found abortion to be morally repugnant.

I found it rather chilling that Judge Souter was not even willing to say that. I know there are many liberal democratic United States Senators who vote for a “pro-choice” position, who still find abortion morally repugnant, but Judge Souter was not even willing to say that.

The CHAIRMAN. That is an interesting observation.

The Senator from Pennsylvania.

Mr. SPECTER. Thank you, Mr. Chairman.

Mr. Phillips, on this question, you and Mr. Joseph Rauh, the leader of the Civil Rights Committee, are in total agreement, that is, on the rejection of Judge Souter.

Mr. PHILLIPS. Well, let me say, with respect to Mr. Rauh, who is an estimable warrior for his views, that I believe he and his colleagues have gotten far more than they deserved in Judge Souter and that those on my side of the aisle have gotten far less.

I would also say that the conservatives in America have a lot to learn from the civil rights movement, because if President Bush or President Carter had named to the Supreme Court a man who is a trustee of a country club, had voted to exclude blacks, that man or woman would, ipso facto, have been disqualified from service on the Supreme Court. I would have voted, had I been a Senator, against a prospective Justice who, as the member of the board of a country club, had voted to exclude blacks from membership.

But here is a man who voted for policies which resulted in the death of many hundreds of unborn children, and I profoundly regret that there are not right-to-life organizations and conservative organizations standing up and at least expressing profound concern about that fact.

Senator SPECTER. Mr. Phillips, I start with the proposition of you and Mr. Rauh in agreement, because it illustrates the difficulty of the committee, a Senator or the Senate in pleasing everyone or perhaps in pleasing anyone.

Mr. PHILLIPS. Senator, with respect, I do not expect you to please everyone, I expect you to do what your conscience directs you to be correct.

Senator SPECTER. Well, I will do it, I have in the past and will here.

I think your testimony is really very important, because you and the National Organization of Women come to the same conclusion, that Judge Souter should not be confirmed, that the Senate should not give its consent, because he displeases you on the abortion

issue, just as he displeases illustratively the National Organization of Women.

I think your testimony is very important here, because it shows the very strong feelings which are held by those who are opposed to abortion. The testimony by the panels yesterday who opposed Judge Souter's confirmation, because they insist on a commitment that *Roe v. Wade* be sustained, was very powerful on the other side. They did not all insist on that commitment. Some drew a lesser line, saying they would be satisfied with a commitment to a liberty principle, and then would be satisfied with the strict scrutiny test, in coming to the conclusion.

But I think it is very important for America to know that there are those who feel very, very strongly on the principles which you have just articulated. I had some questioning yesterday about the sense of where our majority stood and, although the public opinion polls consistently show that a majority of people do not want an elimination of abortion. As soon as you start to put qualifications on it, should there be an abortion by a married woman, married for a long period of time, the first child conceived, without the husband's consent, then the picture starts to show, for whatever value the public opinion polls have.

So, I thank you for your testimony and I just have really one question for you—

Mr. PHILLIPS. Senator, before you ask the question, may I respectfully disagree with your analysis.

Senator SPECTER. Certainly.

Mr. PHILLIPS. I would say that there is a fundamental distinction between the groups such as NOW and NARAL and Planned Parenthood and so forth which urge a "no" vote on Judge Souter. Their position is that they are not absolutely certain that Judge Souter is going to be with them to their satisfaction. I, on the other hand, am absolutely certain on the basis of the record that Judge Souter does have a permissive view toward abortion.

The implication of your prefatory remark was that this is a single-issue concern, and perhaps it may be for NOW or Planned Parenthood. I will let them speak for themselves. To me, this transcends any single issue. To me, the heart of the law is—and I speak as a layman. The heart of the law is that the system of justice is to prevent the shedding of innocent blood. The purpose of the system of justice is to protect the innocent.

The predicate to the Constitution is the Declaration of Independence which says we are endowed by our Creator, which talks about a firm reliance on Divine Providence. I believe we all are created beings and that the unborn child is a created being. And if the rights of that created being are denied by a person appointed to the Court, denied in more than a theoretical way, but denied in the sense that he has actually been complicit in the performance of abortion, I think you have got something very serious.

Now, the next statement that I have could be regarded as inflammatory, and let me make clear that I am not saying that David Souter is Adolph Eichmann. That is not what I am saying. But listen to what I am saying—

Senator SPECTER. You are not saying he is what?

Mr. PHILLIPS [continuing]. Adolph Eichmann. But it would be no more convincing for an Adolph Eichmann to say that his personal views on gas chambers had no bearing on legal decisions he might make as a member of a Nazi high court than it is now plausible for a David Souter to argue that his role as an accomplice to abortion has no bearing on his suitability to be a Justice of the U.S. Supreme Court.

Now, different people have different views on whether, in fact, we have had an abortion holocaust in the United States. I believe we have. And I believe that it is a profound moral disgrace that this has been permitted to occur. But I don't think it is enough to say that this is just another issue. I think it goes to the very heart of David Souter's character and moral philosophy.

Senator SPECTER. Well, as a result of what you have just said, I have a second question.

Mr. PHILLIPS. Yes, sir.

Senator SPECTER. I will ask first, you say that you believe that in what Judge Souter has done he has shown a sympathy for abortion. Is it your personal view—I couldn't ask this of Judge Souter, but I can ask it of you. Is it your personal view that Judge Souter will vote to uphold *Roe v. Wade*?

Mr. PHILLIPS. Senator, it would be speculation. Because Judge Souter approaches legal questions from a positivist perspective rather than from any theory of natural law, even the kind of theory which Senator Biden has endorsed, and as he very articulately put forward during the Bork hearings, it is a matter of guesswork.

Senator SPECTER. Do you have a guess?

Mr. PHILLIPS. No, sir, I don't.

Senator SPECTER. Last question. If you were sure, had a commitment from Judge Souter that he would vote to reverse *Roe v. Wade*, flat commitment that he would reverse *Roe v. Wade* and adopt the position that you articulate that abortion ought to be outlawed, would you change your opposition to his nomination? Or would you recommend that we not consent on the basis that his character is fatally flawed by what he did in permitting abortions in the hospital, as you referred to?

Mr. PHILLIPS. Well, if he said that he thought abortion should be outlawed, then he would be changing his view, and I would recommend his appointment. But merely repealing *Roe v. Wade* will not necessarily prevent the continuation of massive abortions, conceivably in every one of the 50 States. All that that will do is return the process to the State legislatures.

Senator SPECTER. But if he agreed to reverse *Roe*, you would recommend that we consent to his confirmation?

Mr. PHILLIPS. I would take that into account with other factors. The focus of my testimony today and the reason that I decided to request the opportunity to testify relates to his record in authorizing the performance of abortions. But I have to tell you that I am troubled by his answers to other questions.

Frankly, I found his most troubling answer one which he gave to Senator Thurmond at the very beginning of the hearings, when he said that the power of the law comes from the people. I don't believe that. I believe it comes from God. And having read and reread

two or three times David Souter's senior honors thesis, it seems to me that he still believes many of the things that were very much implied as reflecting his beliefs in that senior honors thesis at Harvard. It seems to me that this is a man who totally rejects higher law authority and that he is purely a legal technician.

Now, I would not have come here to testify against him but for the fact that he had been complicit in the performance of abortion because there are many others far more knowledgeable about the law than I, and the issues would have been better addressed by others. But even had he given that assurance concerning which you inquired of me, I still would have been troubled in the context of his other statements.

Senator SPECTER. Well, I thank you, Mr. Phillips, for your very profound testimony.

Mr. PHILLIPS. Thank you, sir.

The Chairman. The Senator from New Hampshire, Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

Welcome, Mr. Phillips.

Mr. PHILLIPS. Thank you, Senator.

Senator HUMPHREY. I, too, am disturbed about Judge Souter's participation in the decision by the Concord Board of Trustees to commence the performance of abortions at that facility. I am disturbed by his view that members of such a board should exercise no moral judgment in overseeing a hospital. A hospital of all places, it seems to me, should be subject, its operations should be subject to moral judgment.

But I am not sure it is dispositive. I am not sure of anything, frankly, about Judge Souter. I don't think anyone is. I think he soft-pedaled his views before this committee. That would only be human after what happened to Judge Bork. Anthony Kennedy certainly soft-pedaled his views and turned out to be far better than his testimony indicated to conservatives, at least, that he would be. So I am hoping that is the case with Judge Souter.

Mr. PHILLIPS. I hope you are right.

Senator HUMPHREY. I will tell you another reason I don't think it is dispositive. You and I have a friend in this very body who, as a State legislator back in the mid-1970's, supported pro-abortion legislation. Why? Because he hadn't really given much thought about it. But once he had, he came to a completely different conclusion. I think you know about whom I am speaking.

It is my experience that a lot of adults, intelligent, thinking adults, have not really thought an awful lot about this because it is human nature not to think about something as ghastly and as grisly as chopping up little babies. And the pro-choice slogan is very appealing. No doubt it was designed by pollsters and consultants. It is very effective. The Americans are for choice. It is democratic to be for choice. But when you think about what the choice is, then you have to come to another conclusion.

My opinion is that Judge Souter, because he has never faced this kind of case, has never really given it deep thought—and I hope I am right on that—he at least indicated with regard to the decision at the Concord Hospital that it did not indicate that he views—that he rules out personhood for the unborn child. I am paraphrasing

him now. He said that should not be taken as an indication. So I am not sure, but I am more inclined to be optimistic on that point than I think you are.

However, I do wholeheartedly agree with your views on natural law. It is just mind-boggling that in this country, of all countries, we should be splitting hairs to determine who is a person and who isn't. I mean, in the Soviet Union, at least until recent times, it was fairly routine for there to be a class of humans who were nonpersons, officially designated—at least, in any event, officially treated by that government as nonpersons. But in the United States to invent by splitting hairs a class of nonpersons, a class of human beings who are nonpersons is one of the great shames in our history, one of the great tragedies of our history.

You referred to Justice John Paul Stevens' statement in the *Thornburgh* case. You quoted him saying, "There is a fundamental and well-recognized difference between a fetus and a human being. Indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the State legislatures."

Did he say more on this subject, or did he just posit that as a given and move on, that there is a fundamental and well-recognized difference between a fetus and a human being?

Mr. PHILLIPS. I don't believe he went into detail. If he did, I am not aware of it.

Senator HUMPHREY. Well, it is true, out of ignorance in some parts of our history, a lot of people have probably believed that there is a difference between a fetus and a human being. But, likewise, during other shameful parts of our history, a lot of people thought there was a difference between Afro-Americans and citizens of the United States, including Chief Justice Tanney.

Mr. PHILLIPS. That is right.

Senator HUMPHREY. And at other times in our history, there have been a lot of people who thought there was a fundamental and well-recognized difference between enfranchised males and females who didn't have the franchise. And just because we did things wrong for a long period of time didn't mean that women should go without the vote forever, didn't mean that black Americans could be enslaved, and shouldn't mean that unborn human beings are treated as so much property that can be disposed of at will.

Mr. PHILLIPS. Senator, President Lincoln agreed with you. He was politically active during the period following the *Dred Scott* decision.

Senator HUMPHREY. Yes.

Mr. PHILLIPS. And he refused to accept the *Dred Scott* decision as applying to anything more than the parties to the case. And that is my view of the *Roe v. Wade* decision.

Senator, if I may, I pray that your optimism is well founded. It is entirely possible that Judge Souter will only now begin to think seriously about abortion. I think, however, his statements indicated that he still felt that his earlier decision was justified.

Now, you tried to ask him a question at the very end of your initial interrogation of him about his contact with that young couple when he was a Harvard law student counseling a young Harvard

student and the girlfriend of that student, who had indicated to him that the young lady was contemplating a self-induced abortion. And Judge Souter in response to your inquiry and that of other Senators was very reluctant to reply.

I find that reluctance to reply in and of itself very troubling. You know, young people throughout the country look to the Supreme Court of the United States, not just as the guardian of liberty but as the guardian of law. And if Judge Souter was unwilling to say that, yes, he told that young woman to obey the law and to reaffirm now that, yes, he told them to obey the law, or that if he told them to break the law and procure an illegal abortion he was wrong—if he today is unwilling to say that, then I don't think the right example will be set for our country if he serves on the Supreme Court of the United States.

Mr. Rauh, speaking for the Leadership Conference on Civil Rights, suggested that Mr. Souter be recalled to consider other questions. I would suggest he be recalled until it be determined whether as an adult, as a student at Harvard Law School, he advised a young woman whom he had taken under his professional care as a proctor to break the law. I think the people are entitled to know that. And if he did advise her to break the law, the people are entitled to know whether he now regrets that decision and would change it.

Senator HUMPHREY. I think that is a fair observation.

Well, I want to go back and briefly follow up on the points I attempted to make a moment ago about natural rights and the ridiculousness and the tragedy of trying to construe a distinction between a human being and a person. With regard to fetology, the study of the fetus, we have only recently emerged from the dark ages. The most eminent scientists and jurists thought for a long time that there was no life until at some moment it was infused and the mother felt the child move. Quickening used to be the accepted standard. Now we know that quickening has no particular significance; that, in fact, the infant is moving well before the mother can begin to feel it; and that quickening is just one day in the whole stretch of days of development from conception until death.

We have come through a lot of ignorance. That the argument should be raised in favor of abortion that we should continue to do things because we have done them this way for a long time, we have regarded—some people, at least, have regarded the fetus as something less than human, that we should continue, even though fetology and medical science have advanced greatly in recent years, is just preposterous. Just because we used to have slavery doesn't mean we should continue to have slavery; just because we used to deny the women the franchise and many other rights doesn't mean we should continue to do so. Just because out of ignorance people didn't understand fetology and human development and acquiesced and practiced abortion doesn't mean we should continue to do so.

In any event, it ought to be self-evident that the offspring of human beings are human beings, and under natural law one is endowed—not at birth or some moment convenient to modern society, but one is endowed when one is created. Otherwise, the Declaration of Independence is just so much rubbish. If it has no operative

status, then let's just declare it rubbish, something we summon up on the 4th of July. But if it does have operative status, then that means all of us are endowed by our Creator when we are created, not at some moment convenient to modern society. And, therefore, abortion is an abomination and ought to be made an unlawful act, as it once was.

Thank you.

The CHAIRMAN. Thank you very much, Senator.

I thank you, Mr. Phillips.

Mr. PHILLIPS. Thank you, sir.

The CHAIRMAN. Particularly for agreeing to be the clean-up hitter here.

Mr. PHILLIPS. I appreciate the opportunity.

The CHAIRMAN. With that, Mr. Phillips, we excuse you. We appreciate your being here.

[The prepared statement of Mr. Phillips follows:]

Testimony of:

HOWARD PHILLIPS

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450 Maple Avenue, East  
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before the Senate Judiciary Committee  
Dirksen Senate Building  
Washington, D.C. 20515

Tuesday, September 18, 1990

Mr. Chairman, my name is Howard Phillips. I am chairman of The Conservative Caucus, a non-profit, public-policy advocacy organization based in Vienna, Virginia.

The Declaration of Independence asserted that "We are endowed by our Creator with certain inalienable rights, and that, among these are life, liberty, and the pursuit of happiness." The Declaration rested on the assumption that there exist "the laws of nature and of nature's God."

Our law system is necessarily rooted in and legitimated by that fundamental recognition of higher authority.

In considering David Souter's suitability to cast what in many cases will be the deciding opinion on the Supreme Court of the United States, it is necessary to go beyond Mr. Souter's intellectual capacity and his stated opinions, and to assess his character and moral courage in their relationship to the responsibilities of a Supreme Court justice.

One moment of truth for Mr. Souter came in February, 1973, when, as a member of the board of trustees of Concord Hospital, he participated in a unanimous decision that abortions be performed at that hospital.

Advocacy of, or even acquiescence in, such a decision is morally distinguishable from the judicial conclusion, profoundly

incorrect in my view, that women have a constitutional right to destroy their unborn children.

It is also distinguishable from and far more troubling than the political argument by politicians who maintain that they are "personally opposed" to abortion even as they advocate its decriminalization.

It is one thing to intellectually rationalize the case for permitting legal abortions while still opposing the exercise of such legal authority; it is quite another---something far more invidious morally---to actually join in a real world decision to cause abortions to be performed, routinely, at a particular hospital.

Those abortions whose performance was authorized by David Souter were not mandated by law or court opinion. In fact, laws have remained to this day on the books in New Hampshire which provide criminal penalties for any "attempt to procure miscarriage" or "intent to destroy quick child". Indeed, section 585:14 of the New Hampshire Criminal Code establishes the charge of second degree murder for the death of a pregnant woman in consequence of an attempted abortion.

Nor were those abortions which Mr. Souter authorized performed merely to save the life of the mother. Nor were they limited to cases of rape or incest.

If the unborn child is human, and if innocent human life is to be defended and safeguarded, why did Mr. Souter acquiesce in those abortions? Why did he not speak out against them? Why did he, through 12 years on the Concord Hospital board in a position of responsibility, help cause those abortions to be performed, and invest his personal reputation in clearly implied approval of those abortions?

The overarching moral issue in the political life of the United States in the last third of the Twentieth Century is the question of abortion.

Is the unborn child a human person entitled to the protections pledged to each of us by the founders of our nation?

The issue is much more than one of legal or judicial philosophy. There are men and women in the legal profession, in elected office, and on the bench who acknowledge abortion to be morally repugnant, but who assert that, in present circumstances, it cannot be constitutionally prohibited.

Whatever Mr. Souter's legal and judicial philosophy may be (and, on the record, it seems to be one which rejects the higher law theories implicit in the Declaration of Independence), it is a chilling fact which the Senate must consider that Souter has personally participated in decisions resulting in the performance of abortions where such abortions were in no way mandated or required by law or court decision.

By his own account, Mr. Souter served as a member of the board of trustees for the Concord Hospital from 1971 until 1985. Following service as board secretary, he was president of the board from 1978 to 1984.

In 1973, shortly after the Supreme Court's January 22 *Roe v. Wade* decision, the Concord Hospital trustees voted to initiate a policy of performing abortions at Concord Hospital.

Similarly, Dartmouth Hitchcock Hospital (which is associated with the Dartmouth Medical School of which Judge Souter has been an overseer) has performed abortions up to the end of the second trimester.

During the period of Mr. Souter's tenure as a decision-maker of these two institutions, many hundreds of abortions were performed under his authority with no indication that he ever objected to or protested the performance of these abortions. Even though the *Roe v. Wade* decision did in fact authorize abortions through the ninth month of pregnancy, nothing in the Supreme Court's decision required or obliged any hospital to conduct abortions, whether in the ninth month, the sixth month, or even the first month of pregnancy.

If Judge Souter is confirmed as a justice of the Supreme Court, he will, in all likelihood, be given the opportunity to address not only the issue of Roe v. Wade, but broader issues involving the sanctity of innocent human life.

Justice John Paul Stevens wrote in the 1986 Thornburgh v. American College of Obstetricians and Gynecologists case: "There is a fundamental and well recognized difference between a fetus and a human being. Indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."

Mr. Stevens was wrong in a very deadly way.

If an unborn child is not human, I would ask Justice Stevens, "What is he?" "What is she?" But at least Mr. Stevens was logical in defending his support for the majority opinion in Roe v. Wade.

In the Roe v. Wade decision, the Supreme Court indicated that, if the unborn child is a person, the state could not allow abortion even to save the life of the mother. In fact, in the majority opinion deciding Roe v. Wade, the Supreme Court said that "if the personhood of the unborn child is established, the pro-abortion case 'collapses', for the fetus's right to life is then guaranteed specifically by the Fourteenth Amendment."

As Notre Dame law Professor Charles Rice has pointed out, "This is so, because the common law does not permit a person to kill an innocent non-aggressor, even to save his own life."

Does David Souter believe that the unborn child---the fetus in the mother's womb---is a human person, deserving of all the protections which are guaranteed to human beings after the moment of birth?

Seemingly, Mr. Souter's answer is an unequivocal "no". By agreeing that abortions be performed at institutions under his authority, Mr. Souter established clearly that he did not recognize the personhood of the unborn child, for surely, if he did acknowledge the unborn child to be a human person, Mr. Souter

would not have agreed to authorize the extinguishment of so many precious lives at medical facilities for which he bore responsibility.

One must conclude that either Mr. Souter accepts the view that the life of the unborn child is of less value than the convenience and profit of those who collaborate in the killing of that child, or that, despite his recognition of the fact that each unborn child is human, a handiwork of God's creation, he lacked the moral courage or discernment to help prevent the destruction of so many innocent human lives when he had the authority---indeed the responsibility---to do so.

Either way, in such circumstances, unless there are mitigating factors or extenuating considerations which have not yet been brought to public attention, it is difficult to regard Mr. Souter as one suitable for participation in judicial decisions at the highest level of our nation.

If, during his years of responsibility at Concord Hospital and Dartmouth Hitchcock Hospital, Mr. Souter believed each fetus to be a human person, and failed to act against the performance of abortion, he was morally delinquent.

If, on the other hand, he justified himself by denying the human qualities of the unborn child, then he placed himself in the ambit of those who have argued against the very philosophy which his sponsor, President George Bush, purported to embrace during his 1988 presidential candidacy.

On the basis of the information now available, Mr. Souter should not be confirmed.

The CHAIRMAN. Let me make a few very brief closing statements. I would like to personally thank the nominee and the witnesses who appeared before this committee, and my colleagues. As I indicated at the outset of this hearing, I have never imposed and I will not impose a gag rule on any Senator asking any questions. And there were some questions asked that I am sure the nominee would rather have not had asked. And there were some questions asked, in my view, of some of the witnesses that became very contentious, and I am sure from the standpoint of the witnesses they had reason to believe that and found them offensive.

Nonetheless, I think the witnesses and all those who testified conducted themselves with a great deal of decorum and respect. And I hope that on those occasions when they felt that any member of the committee was being overzealous that they put it in the same context in which they were giving their testimony.

This is a nomination that has obviously stirred a great deal of interest and concern. It would not matter, quite frankly, who was nominated by the President at this moment in our history, for this is one of those crossroads, one of those crossroads in American jurisprudential history, because, to state the obvious, whomever is put on the Court in the near term will determine by himself or herself the course of action, the policy this Nation will follow in the near term on some extremely important issues. That seldom happens so graphically, so clearly, and, quite frankly, without any ability to be refuted—the statement, that is, that the course of America will be affected by whomever we put on the bench.

There are so many split decisions, and when you take Justice Brennan off the bench, there are a number of significant decisions that, in fact, are now 4 to 4. And what this Justice, whomever he or she may be, does—the next Justice—will impact in a way that few other nominations have in our history. And so the emotion, the intellectual curiosity and concern, sometimes the anger, always the commitment of those who spoke before us over these last days in my view are totally and completely understandable.

I hope the witnesses and the public feel that they have had every opportunity to make their case and have not in any way been curtailed in expressing their emotion. As I said, I want to thank the witnesses because they have, quite frankly, contained themselves. You can see in the eyes of some of the witnesses who testified here today, not only a concern but a fear—a fear that that which they hold dear is now in jeopardy, from both sides of the spectrum. And that is understandable.

Again, I want to thank my colleagues—notwithstanding the moment being the exception—for their incredible attendance during this process. And I want to thank the staffs, of the minority and the majority. As I know the professionals in this room who follow these processes know, an incredible amount of work goes in to setting up the mere logistics as well as the intellectual framework within which this debate, discussion, and inquiry takes place. Hundreds and hundreds of hours, and I want to thank you all, all of you, on both sides of the aisle, for the phenomenal job that you did.

And I want to thank the stenographer. She is always, I think, when she sees me—and we have more than one stenographer, obvi-

ously—but when she sees me or when most of them see me, they see Biden, they say, oh, my God, I suspect you might think there is Old Ironpants, he is going to just keep going and going and going until it gets done. And so I want to thank you today for staying through lunch, and I know it is not easy.

And I want to thank the photographers because, in fact, I did initiate something that they pray will not become a practice, and that is, by not allowing any photographer anywhere here in the well when the primary witness was here, when the nominee was here. And I hope they will forgive me, but we will soon know in time whether or not how many pictures you see with me with my finger pointed and my mouth open, compared to those which you do not see that way. But, all kidding aside, ladies and gentlemen, photographers, I want to thank you very much. You were gracious about it. Although you were persistent, you were gracious.

And, lastly, I want to indicate that, as has been my practice as chairman—and not only my practice, I suspect. I think it goes back further than that. Several of my colleagues have questions that they wish to submit to Judge Souter, colleagues who are not on the committee. And I have indicated in the past, as I do now, as long as they are not questions designed to delay the process, I will submit those questions. Senator Levin has submitted some questions, and there are a few others. There are not more than half a dozen questions, some of which I may submit as well, that will be submitted. And we will give the nominee plenty of time to answer them prior to this consideration before the committee.

[The questions follow:]

JOSEPH R BIDEN JR DELAWARE CHAIRMAN

EDWARD M KENNEDY MASSACHUSETTS  
 EDWARD M METZENBAUM OHIO  
 ENNIS DECONCINI ARIZONA  
 ATRICK J LEAHY VERMONT  
 OWELL HEFLIN ALABAMA  
 ALUI SIMON ILLINOIS  
 ERBERT KOHL WISCONSIN

STROM THURMOND SOUTH CAROLINA  
 ORRIN G HATCH UTAH  
 ALAN K SIMPSON WYOMING  
 CHARLES E GRASSLEY IOWA  
 ARLEN SPECTER PENNSYLVANIA  
 GORDON J HUMPHREY NEW HAMPSHIRE

RONALD A KLAN CHIEF COUNSEL  
 DIANA HUFFMAN STAFF DIRECTOR  
 JEFFREY J PECK GENERAL COUNSEL  
 TERRY L WOOTEN MINORITY CHIEF COUNSEL  
 AND STAFF DIRECTOR

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

September 19, 1990

The Honorable David Souter  
 Noble Drive  
 Concord, New Hampshire 03301

Dear Judge Souter:

As I stated at the close of hearings on your nomination, the committee's practice in the past has been to allow Senators who are not members of the Judiciary Committee to submit written questions to Supreme Court nominees. Accordingly, I am enclosing several questions, on behalf of Senator Levin.

1. You testified that the Fourteenth Amendment protects a right to privacy. Aside from the issue of reproductive rights, do you believe that the privacy right of an individual, as protected by the Fourteenth Amendment, is affected by his or her marital status?

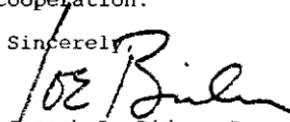
2. It's my understanding that you are an admirer of Justice Holmes. Would you give your comments on the aphorism from Holmes' Common Law: "the life of the law has not been logic; it has been experience"?

3. Which two U.S. presidents and which two Supreme Court justices of the last fifty years do you most admire, and why?

4. Senator Biden asked you whether you agreed that procreation is a fundamental right, as the Supreme Court decided in Skinner in the 1940's. You replied that the right to procreate would be at the heart of any core concept of marital privacy. Putting marital status aside, do you believe that procreation is a fundamental right?

I would appreciate receiving your answers as soon as possible. Thank you for your cooperation.

Sincerely,

  
 Joseph R. Biden, Jr.  
 Chairman

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUITCHAMBERS OF  
DAVID H SOUTER

September 24, 1990

FEDERAL BUILDING  
35 PLEASANT STREET  
P.O. BOX 2319  
CONCORD, NH 03302-2319

Dear Mr. Chairman:

Thank you for your letter of September 19 with four questions from Senator Levin. My responses follow.

1. I testified that the liberty protected by the Fourteenth Amendment includes a right of privacy, and I spoke of a concept of marital privacy as clearly falling within the protected right. Because the concern for privacy has thus far focused so significantly on reproductive choice, and because cases implicating such choice by married and by unmarried individuals will probably come before the Supreme Court in the near future, I respectfully declined to speak on the likely weighting of privacy interests in such a matter. I believe that I must continue to take this position, lest I comment inappropriately on an issue that could call for my ruling if my nomination is confirmed.

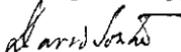
2. Holmes's aphorism speaks to a central truth about our law: it is not a closed system of neatly consistent rules, but a set of principles derived from human experience, with claims to legitimacy that may come into conflict with each other. What a theorist might criticize as an objectionable untidiness is in fact the law's reflection of the divergent human needs and aspirations that call it into being.

3. As for the two most admirable justices of the past fifty years, I will exclude anyone living from consideration. Of those who are now gone, I most admire Justices Harlan and Frankfurter. Neither was without a flawed decision, but each has taught us lessons about the proper scope of the judicial function within the tripartite division of governmental power in a constitutional democracy. Justice Harlan repeatedly spoke to the need for a disciplined search for constitutional values independent of our merely personal preferences, and Justice Frankfurter's concurrence in the Court's unanimous opinion in Brown v. Board of Education reminded us that a proper sense of judicial restraint should be no counsel against the forthright enforcement of clear constitutional principle. As to admirable presidents of the past half-century, a response would take me into a sphere of political comment that I think would be inappropriate for me to make, given that I am a member of the judiciary.

4. I think this question about the significance of the procreative choice outside the marital context arguably might raise some of the same issues raised by question one. The same concern that led me to believe that I must decline to respond

further to that first question applies here as well, and I ask to be excused from speaking to this question beyond the analysis that I gave to the Committee in my earlier testimony. Let me mention again, Mr. Chairman, my appreciation of the many kindnesses that you and your colleagues have shown to me. Thank you.

Yours respectfully,



David H. Souter

The Honorable Joseph R. Biden, Jr.  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The CHAIRMAN. I also want to point out that Senator Thurmond, who, as we said, is necessarily absent at this moment, would like to have statements allowed to be submitted for the record, and I will allow that to occur, by any member of the committee who wishes to make a closing statement here.

Last, I know the question because I have been fastidious in making sure not to speak to the press or attend any press conferences or hold any—and I have no intention of doing that at the close of this process either. One of the questions that you will have and the public may have is: When is this nomination likely to be voted on in the committee? It is my hope and expectation—since tomorrow we have our executive sessions on Thursday. That is a fancy phrase for the public to say that is when in committee we meet and we vote on things like nominations. It is my expectation, although there is no final judgment made, that the executive session at which time we would begin to consider for purposes of vote in this committee the nomination of David Souter would be probably sometime the end of next week, which would be in the normal course of events. We seldom ever that I can think of have an executive session immediately upon the close of a hearing. And so it will probably be next Thursday, but I will work out with the minority leadership what date that will occur.

With that, I thank you all for your intense interest and concern, and once again mostly thank the witnesses for their courtesy.

There is one other thing. There are statements that have been submitted by individuals who wish to testify, but they were not given the time to testify, which, again, is the practice of the committee. They are written statements that have been submitted for the record. They will be entered in the record along with the witnesses' testimony so that we are sure that we have the view of all those who wish to express a view, whether it be in writing or orally before the committee.

[Please see appendix for additional statements.]

The CHAIRMAN. With that, thank you all for your patience. The committee is adjourned.

[Whereupon, at 2:18 p.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

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ADDITIONAL SUBMISSIONS FOR THE RECORD

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TESTIMONY PRESENTED BY

JOHN J. BELLIZZI  
EXECUTIVE DIRECTOR  
INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION

BEFORE THE SENATE JUDICIARY COMMITTEE

CONSIDERING THE NOMINATION OF

JUDGE DAVID SOUTER

AS JUSTICE OF THE SUPREME COURT

As in my previous appearance before this committee, I wish to express my appreciation for granting me the opportunity to appear before you today to testify in these important hearings considering the nomination of Judge David Souter.

My name is John J. Bellizzi. Currently I serve as the Executive Director of the International Narcotic Enforcement Officers Association (INEOA) which is an organization composed basically of narcotic enforcement officers from all levels of government and from throughout the United States and 50 other countries.

I appear here today on behalf of 12,000 members and thousands of other drug enforcement officials throughout the United States.

Recently drug traffickers have suffered some serious setbacks as a result of an intensified and concentrated effort by law enforcement.

The impact of the multitude of seizures of drugs, money and other assets brought about by successful investigations, arrests and prosecutions has put such a dent in the illegal trafficking operations that by furious retaliation the traffickers are committing assaults, violence and murder on our drug agents and other officials responsible for drug enforcement.

Narcotic law enforcement agents have always operated under high risk conditions, but recent events have created a situation where their lives are at stake constantly and these men and women deserve to be recognized for their dedicated service.

The thousands of drug enforcement agents who risk their lives each time they set out on a drug investigation are dedicated. Notwithstanding the imminent risk they face, they are not the least dissuaded from performance of duty.

These officers and their family members are very much concerned that they receive the same equal protection, the same constitutional rights, the same constitutional protection afforded to any suspect, defendant or prisoner charged with the commission of the crime.

I wish to make it clear that by this endorsement we do not seek to ingratiate ourselves with Judge Souter or the court. We seek no favor, we seek no special privileges. What we do seek is protection of the constitutional rights of the accused and we also seek protection of the constitutional rights of our law-abiding citizens and of our law enforcement agents.

I submit that by his record Judge Souter has demonstrated that he is capable and indeed willing to do just that - ensure equal protection to all regardless of race, color, sex, religious or social background.

The matter of Judge Souter's nomination and record was reviewed by the 50 members of the Board of Directors of INEOA representing the general membership.

The board has found that Judge Souter is an outstanding nominee for the Supreme Court.

Judge Souter is a tough, anti-crime judge. Prior to his appointment to his state's Supreme Court, he served as a hands-on trial court judge, and a New Hampshire's Attorney General -- the state's chief law enforcement official. Because of this experience, he has a practical understanding of the problems that face prosecutors and police, and takes a common-sense approach to questions of criminal law and procedure.

In society's battle against drug traffickers, he has supported the constitutional use of "pen registers," a highly effective law enforcement tool that's enabled police to track down kingpins by identifying the phone numbers of those who supply street-level drug dealers. (State v. Valenzuela, 536 A.2d 1252 (N.H. 1987)).

Protecting the lives and safety of citizens who act to assist the police, he has, in appropriate circumstances, shielded the names of police informants from unnecessary disclosures. (State v. Svoileantopoulos, 543 A.2d 410 (N.H. 1988); State v. Cote, 493 A.2d 1252 (N.H. 1985)).

Early on, Judge Souter took a common sense, constitutional stand to protect our citizens from what the President has called "one of the most deadly scourges ever to strike modern times" -- drunk driving.

Judge Souter has resisted the arguments of those who would tip the scales of justice further in favor of criminal wrong-doers. He has been reluctant to impose new, judgemade requirements that would be tougher on police than they would be on criminals.

Judge Souter's approach to criminal law issues is informed both by his considerable experience as a public law enforcement officer and his deep understanding of the community's interest in combatting crime.

He has consistently demonstrated a strong willingness to defer to the decisions of legislators, prosecutors and police so long as those decisions do not infringe on the constitutional rights of criminal defendants.

After careful consideration, the 50 member Board of Directors, representing the general membership of INEOA, unanimously endorsed and supports the nomination of Judge David Souter as Justice to the United States Supreme Court.

(Statement of Frank Brown, professor of economics, DePaul University, and Chairman, National Association for Personal Rights in Education (NAPRE) to the U.S. Senate Judiciary Committee on the nomination hearings on Judge David Souter to the U.S. Supreme Court, Washington, D.C., September, 1990).

#### THE SCHOOLING RIGHTS OF FAMILIES

In presenting this statement to the U.S. Senate Judiciary Committee on the confirmation of Judge David Souter to the U.S. Supreme Court, the National Association for Personal Rights in Education (NAPRE), a parental group, wishes to concentrate on its main purpose, namely, the attainment of the personal civil and constitutional rights of parents, guardians, and children to equitable shares of the education taxation to enroll in the elementary and secondary schools, state or private, including church-related, of their choice.

We have not been able to uncover the views of Judge Souter on this matter, but, hearing that he is a scholar willing to listen, we here summarize for his consideration some ways by which the personal rights of millions of parents and children to education tax equity have been denied over the past 150 years by legislatures and courts, including the U.S. Supreme Court. We ask four questions.

##### A. WHAT PRINCIPLES SHOULD PREVAIL IN THE SCHOOLING OF CHILDREN?

First, the family, as prime educator of its children, has the right to enroll them in schools in accord with their academic and religious convictions and, if taxed for schooling, the right to direct a share to schools of choice. Second, the state may assist parents to elect schools, public or private, through reasonable taxation but may not take control of schooling. Third, other educators, including churches, have the right to conduct schools and to be recipients of the tuition grants provided to families by the state.

##### B. WHERE DID THE AMERICAN STATE GO WRONG?

All the other democracies of the West have generally respected these principles but the American state has violated them by taking a monopoly of the education taxes for its own schools, by denying shares to parents seeking schooling elsewhere, and by economically undermining private educators, including churches.

The prototype of this new institution was the Massachusetts system engineered in the mid-19th century by Horace Mann and his Unitarian allies. About this time many other state school systems were developed by the dominant Protestants of the time, as in Illinois in 1855, with help from Know-nothingism.

Protestants had heretofore largely relied on the church as the school-teacher of their children, but, having split into many sects, hit upon the scheme of uniting behind a tax-supported Protestant public school, with dissenters being told that they could go elsewhere, but of course without any of the education tax, including their own.

In his The Lively Experiment: The Shaping of Christianity in America Professor Sydney Head, a champion of the new arrangement, concluded that the public school is the American established church. The church-state tie-ins were presumably avoided by describing the new school as nonsectarian and therefore entitled to a monopoly of the education tax, while Catholic and Lutheran schools were branded as sectarian and therefore ineligible for tax

benefits. Unfortunately this distinction based on political muscle rather than on constitutional logic still prevails in U.S. Supreme Court thinking.

This early public school had many good things---such as the intellectual traditions of the West, formation of moral character rooted in religious principles, and development of the human capital---to offer those who accepted its Protestant orientation.

But this school is not the public school of today, because sweeping educational reversals have undermined its original purposes, with two heading the list, first, the psychological behavioristic teachings of Wundt, Hall, Dewey, Skinner, Watson and others and, second, the expansion of secular humanism. Many observers contend that such changes have contributed greatly to intellectual and moral decline in this society. Still the public school is the established church.

(Readings: Arons, Stephen, Compelling Belief; Blumenfeld, Samuel, Is Public Education Necessary? and NEA: Trojan Horse in American Education; Everhart, Robert B., The Public School Monopoly; Jorgenson, Lloyd P., The State and the Non-Public School; Klass, Lance J., The Leipzig Connection; McCarthy et al., Society, State and Schools; Ravitch, Diane, The Great School Wars; and Schlafly, Phyllis, Child Abuse in the Classrooms.)

#### C. WHERE DID THE U.S. SUPREME COURT GO WRONG?

The U.S. Supreme Court has done some laudable things in defense of parental choice, with two examples being the Pierce case (1925), which struck down an Oregon law designed to coerce all children into the state public schools and Mueller v. Allen (1983), which upheld an income tax deduction applicable to families in both public and private schools. In addition, Justices Rehnquist, White, and Burger have struck many blows for parental choice.

But in general the Court record has been disastrous, starting with the "obiter dictum" of Justice Hugo Black in the Everson case (1947) in which he said, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can aid. . . all religions. . . "

Through this statement, which effectively outlawed state nonpreferential aid to religion, Black created new constitutional doctrine to block education tax equity to children in church-related schools and more broadly to justify separation of state and religion, both goals rooted in his personal belief that the state should not aid religion in any way.

He did not consult two crucial First Amendment sources that would have destroyed his interpretation, first, the Annals which reported on the congressional hearings on the Bill of Rights, and, second, Elliot's Debates, which gave the reports of the various state conventions on the adoption of the Federal constitution and which demonstrated that establishment means government preference for one church or religion.

We are outraged that the U.S. Supreme Court has honored the First Amendment distortions of Hugo Black, a man who joined the Ku Klux Klan as a thirty-seven year old lawyer and profited politically from its and his religious intolerance. We are outraged that before the question of tax equity for all children could come to the Court for a hearing Justice Black was lobbying in the U.S. Senate for federal aid to education only for public schools and citing a leading principle of the Masonic order upholding "the

American school, non-partisan, non-sectarian, efficient, democratic, for all of the children of all the people." (Fisher, Paul A., Behind the Lodge Door).

(Readings: Hugo Black, Jr., My Father, A Remembrance; Brady, Joseph H., Confusion Twice Confounded; Cord, Robert L., Separation of Church and State; Hamilton, Virginia Van der Veer, Hugo Black; Malbin, Michael J., Religion and Politics; and O'Neil, J.M., Religion and Education Under the Constitution.)

D. WHERE DO WE GO FROM HERE?

We respectfully submit the following thoughts:

A. The respective schooling rights of families, the state, and private educators, including churches, must be clarified and asserted.

B. The concept of one state public school was not an outgrowth of American democracy, which had rather given great impetus to private education, but was imported from the Prussian state system by Horace Mann.

There is no neutral state public school. Every school, whether called public or private, is both public and private, public in teaching academic content and private in offering its own educational environment.

It is not necessary to have one state public school for all children. The goal of public education can be achieved through a combination of state and private schools, with families allowed choice through parental grants (tuition vouchers, tuition reimbursements, tuition tax credits with refundability provisions, etc.).

C. The First Amendment should be thoroughly reexamined, especially by the U.S. Supreme Court. Hugo Black should not be allowed to get away with his distortions of this national asset.

Keep in mind that when the state moves into the field of schooling it moves into the field of religion, because for many families schooling is an integral part of their religious beliefs.

Distinctions must be made between a tax to support a private matter like the building of a church and a tax to pursue a public purpose such as schooling, which for many citizens through conscience can be achieved only within a religious environment.

The personal civil and constitutional rights of parents and children to academic freedom, religious liberty, property, and equal protection of the laws stand on their own constitutional merits and may not be diminished or destroyed by reason of any relationship between the state and any church or school.

NAPRE  
Box 1806,  
Chicago, Ill. 60690  
1-708-333-2019

Frank Brown,  
Professor of Economics,  
DePaul University,  
and  
Chairman, NAPRE

Box 689, Falmouth MA 02541

August 29, 1990

Ms. Sally Shafroth, Chief Clerk  
Senate Judiciary Committee  
Dirkson Senate Office Building  
Washington DC 20510

14 Sept 90

Dear Ms. Shafroth:

The following affidavit is forwarded at the request of Mr. Ted Hoff, for use in the confirmation hearings concerning Judge David Souter:

My first experience with David Souter's acts and policies was in connection with my work as a Registered Professional Engineer in solar energy and the ecology and as a Constitutional Consultant. In early 1977, I was asked to assist 3 people who had been arrested for soliciting signatures for antinuclear, pro safe energy petitions in New Hampshire, on the street outside a state liquor store, while state employees in state business hours in the state liquor store solicited signatures for pro nuclear power petitions to be sent to Washington to support the efforts of a private enterprise, Public Service Company of New Hampshire, (PSCo) now bankrupt, and then Governor Mel-drin Thomson to obtain licenses from the NRC and sell stock in the construction of 2 privately-owned nuclear power plants, Seabrook I and II, on a public road in Seabrook. I recommended that a petition for writ of habeas corpus be presented to a state judge, and if that didn't work, to a federal judge, because the 3 people were being held on unconstitutional charges. I was told that the 3 arrestees were being moved from jail to jail, thwarting any effort to serve the writ, once obtained. A federal civil rights complaint prepared later was successful; the 3 were awarded \$1,300 each for violations of their rights of free speech and petition and the unconstitutional imprisonment. See clipping, enclosed (Ex. A).

My next experience with the leadership of then Attorney General Souter was on April 30-May 2, 1977, when I and approximately 2,000 other peaceful pro solar, antinuclear power

pollution protestors in a walk from Salisbury Mass. to Seabrook, along Route 1. When we arrived outside the Seabrook nuclear site, we were ordered off the road and onto a rough parking area on the site by Col. Paul Doyon, NH State Police. This took about 3 hours, total.

The next day, several hundred state troopers from 5 states and NH National Guardsmen started to occupy the exit from the parking lot. We were informed by bull horn that we would be arrested for trespass if we did not collect our gear and leave the site and disperse. (This was a physical impossibility, even for those of us who had marched 5 miles per hour with full field packs under arms in the infantry in WWII.) Col. Doyon stood alone in the parking area, facing us, for some time, so I went out and talked with him. Col. Doyon stated he had ordered us off the road and onto the site the day before for the purposes of public safety and to speed up traffic on Route 1. We were arrested. The next day, May 2, I was taken in one of the bus loads of protestors, photographed and fingerprinted, and brought before a local (District) judge. None of us had committed any violent acts, or offered any resistance.

We were not informed of any rights, nor were we given counsel of our choice when we asked. I stated I wished to "stand mute" and not make any plea; the judge entered a plea of "not guilty" to "Trespass." I later asked for bail, which had been set at \$100 for all those from out-of-state but was told I would have to get it "later" and was taken to Manchester National Guard Armory. I was without food all day; the conditions were unsanitary. In the evening I finally obtained bail at \$46 for a \$100 bond, and left Manchester.

Since there were serious constitutional questions involved, I prepared a report and gave it to the Hyannis FBI agent, with a copy to the Falmouth Enterprise. A copy of the May 10, 1977 article, from microfilm, is enclosed. (Ex. B.)

At my trial in District Court, I attempted to raise the defenses of competing harms and entrapment, and question the ownership of the land on which the power plant was to be built. I was found guilty, and appealed "de novo." Two years later, the charges were dismissed against the 800 of us not tried in the Superior Court.

I filed suit in the U S District Court in Concord (Denman v. Thomson, et al). The U S

District Judge ordered that the question of ownership of the land on which the reactors were to be built be determined in the New Hampshire courts. I then intervened in PSCoNH's civil case for restraining orders in the Rockingham County Superior Court, since PSCoNH had claimed ownership of the land at issue in that case. I was pro se; an Assistant Attorney General of New Hampshire helped defend the private corporation, PSCoNH. I had the restraining order dissolved in 1980.

In most states, it is not customary to sentence a first-time offender with no previous record to the maximum sentence (30 days), but to suspend the sentence or "file" the case without finding. I am informed that AG Souter, representing the Executive Branch of the New Hampshire government, invaded the Judicial Branch's responsibilities by urging the District Judges sentence the Seabrook protestors to the maximum period. He did not urge the judges to enforce the U S Constitution and laws, or enforce the "competing harms" statute, nor did he prosecute PSCoNH officials for false statements in the selling of stock and "shares" of Seabrook future power about the safety and cheapness of nuclear power.

Although then Attorney General Souter knew, or could have known, of previous atomic power disasters at Idaho Falls, Chalk River, Canada, Lagoona Beach, Michigan, and Windscale, (now named Sellafield) England, as anyone with an honest interest in safe, cheap power could determine, he made no effort to control, limit, or prevent these breaches of Constitutional rights and federal laws in the construction of Seabrook, but instead, by his actions, showed that he was operating the Attorney General's office as lawyers for a private corporation, PSCoNH, and used the State Police, and Rockingham County and local police as private security guards for this private profit endeavor. He made no effort to stop Gov. Thomson's environmental department officials in their dynamiting of hydroelectric dams in order to create more "demand" for Seabrook's nuclear power, a clear violation of the US antitrust laws.

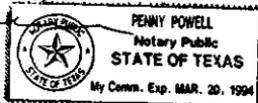
Since David Souter violated the US Constitution and laws to promote a dangerous and expensive private nuclear power project, he should not be confirmed.

Respectfully submitted,

*David Souter*  
 Nathaniel Perman

Subscribed to and sworn before me, this date, Sept. 14, 1990.

My commission expires March 20 1994



*Penny Powell*  
 Notary Public

NATHANIEL DENMAN

Box 689  
Falmouth, MA 02541  
508-548-3295STATEMENT OF ENGINEER NATHANIEL DENMAN RE FITNESS OF DAVID SOUTER  
TO SERVE ON THE SUPREME COURT

The following statement is made under the penalty of perjury, this date, Sept. 7, 1990, in accordance with the laws of Massachusetts concerning affidavits:

In early 1977, in connection with my work as a Registered Professional Engineer and Constitutional Consultant, I was asked to assist three people who had been arrested for soliciting signatures for antinuclear, pro safe energy petitions in New Hampshire on the sidewalk outside a state liquor store. State officials, during state office hours in the state liquor stores were soliciting signatures for pro nuclear power petitions to be sent to Washington in support of a private enterprise, Public Service Company of New Hampshire (PSCo), now bankrupt, and then Governor Meldrim Thomson to obtain licenses from the NRC and sell stock in 2 privately-owned nuclear power plants being built on a public road in Seabrook, all under the supervision of David Souter, then Attorney General of New Hampshire.

I recommended a petition for writ of habeas corpus be presented to a state judge, and, if not honored, to a federal judge, as the 3 people were being held on unconstitutional charges while the state liquor employees illegally solicited signatures. I was told the 3 arrestees were being moved from jail to jail thwarting efforts to serve the writs. A later federal civil rights suit was successful; the 3 were awarded \$1,300 each for violations of free speech and petitioning rights and unconstitutional imprisonment. (See clipping below.)

The next encounter with David Souter's leadership was on April 30-May 2, 1977, when I and 2,000 other peaceful pro solar, antinuclear power pollution protestors walked 3 miles from Salisbury Mass. to Seabrook in about 3 hours along Route 1. When we arrived outside the nuclear site, we were ordered off the road and onto a rough parking area on the site by Col. Paul Doyon of the NH State Police.

The next day, May 1, several hundred state troopers from 5 states and NH National Guardsmen blocked the exit from the parking lot without warning. We were told by bull horn that we would be arrested for trespass if we did not pack our gear and leave the site and disperse in 30 minutes. (A physical impossibility, even for those of us who had marched 5 miles per hour with full field packs under arms in WWII.) Col. Doyon stood alone in the parking area facing us, so I went out and talked to him. He said he ordered us off the road and onto the site for the purpose of public safety and to speed up traffic on Route 1. We offered no resistance; we were arrested. Some of us were seized and dragged over rocks and 18" logs in the parking lot at a dead run. Reporters and TV cameramen were detained or arrested.

Early in the morning of May 2, I was taken in a busload of protestors, photographed and fingerprinted, and brought before a local judge. We were not informed of any rights, nor given counsel of our choice. I asked to "stand mute" without a plea; the judge entered a plea of "not guilty" to "trespass." I later asked for bail, set at \$100 for those from out of state, and was told I would get it "later." I was taken to the Manchester National Guard Armory by Guardsmen with their name tags covered over who refused to give their names. I was without food all day; the conditions were unsanitary. In the evening I finally obtained bail at \$41 for the \$100 bond.

Since there were serious constitutional and antitrust violations, in this state effort to promote atomic power at the expense of other energy sources and the environment, I prepared a report for the Hyannis, Mass. FBI agent, with a copy to the Falmouth Enterprise.

At my trial in the NH court, I attempted unsuccessfully to raise the defenses of "competing

harms" and entrapment and question the ownership of the land involved. I was found guilty without a jury, and appealed "de novo." Two years later, the charges against 800 of us were dismissed, I filed suit in the US District Court in Concord, NH, (Derman v. Thomson, et al) and the US District Judge ordered that the question of ownership of the land be tried in the NH courts. I then intervened in PSCO's petition for restraining orders in the Rockingham County Superior Court, and moved to have the restraining order dissolved. I was pro se; An Assistant AG of New Hampshire helped defend the private Corporation. The restraining order was dissolved.

In most states, it is unusual to sentence a first-time trespassing offender to the maximum sentence, 30 days, but to suspend sentence or "file" the case without findings. I am informed that Souther, representing the Executive Branch of the NH government, invaded the Judicial Branch's responsibilities and authority by urging the NH judges to sentence the Seabrook protestors to the maximum sentence. He did not urge the judges to enforce the US Constitution and laws; he did not protect the people and ecology of NH; he did not prosecute PSCO officials for false statements in the selling of Seabrook and PSCO stock and "shares" in future Seabrook power re safety and cheapness of nuclear power. He made no effort to stop Gov. Thomson's environmental officials in the smashing of hydroelectric dams to create more "demand" for Seabrook's nuclear power, a clear violation of US antitrust laws, and an unusual reaction by a self-proclaimed "environmentalist."

Attorney General Souther knew about previous atomic power disasters at Idaho Falls in Nov. 55 (EBR-1 reactor) and Jan. 61 (SL-1 reactor, 3 men died), Chalk River, Canada (NRI reactor) in Dec 52, the Fermi reactor near Detroit in Oct 66, and Windscale (now called Sellafield), England in Oct 57, but he made no effort to control, limit, or prevent these breaches of Constitutional rights and federal laws in the construction and licensing of Seabrook, but instead, by his actions, showed that he was operating the Attorney General's office as a law firm and private prosecutors and the State Police and National Guard and local police as private security guards for this private profit endeavor. His behavior paralleled the actions of Nazi SS officers when Hitler rose to power in Germany in the 1930's.

Since David Souther violated the US Constitution and laws when sworn to preserve, protect, and defend them as Attorney General of New Hampshire, and failed to protect the people and ecology of New Hampshire and New England, he should not be confirmed.

Dated Sept. 7, 1990 at Falmouth, Mass.

  
Nathaniel Derman

## Nuke protestors win \$1300 each

These Massachusetts residents have won average awards of \$1300 each in their suit against the state of New Hampshire for alleged deprivation of civil rights. The case arose out of an incident Jan. 31, 1977, when John Chase and Anne and Cynthia F. Williams, all of Wrentham, tried to pass out leaflets opposing construction of Seabrook nuclear power plant. Leaflets were seized and the defendants arrested. Leaflets were taken to Concord, N.H., the three had gone to lower state court in Wrentham and asked permission to pass out leaflets after New Hampshire's state liquor stores began displaying petitions from that persons were asked to sign. The petitions were to have been sent to Washington to ask that the federal government expedite construction permits for the controversial plant.

The three applicants of the nuclear plant were denied permission to dispense the leaflets and, after consulting with the state's attorney, the state liquor commission. Governor John H. Thompson, Wrentham police arrested them and held them in jail overnight.

Defendants in the case were the store manager, Frank Millette, who was found guilty by the state liquor commission court jury, state liquor commission Charles Yonke, who was found guilty of depriving the three of their civil rights and of conspiracy and who was ordered to pay \$1300 to each plaintiff, and safety commissioner Richard M. Flynn, who was also found guilty and was ordered to pay \$250 to each defendant.

Former Gov. Thomson had originally been a defendant, but Judge George Devine presiding in the case, against him. Dec 1979, 67-10-103

## Justice David Souter's Criminal Justice Cases

Joseph D. Grano\*

At the request of Thomas L. Jipping, Legal Affairs Analyst, Coalitions for America, I have reviewed 72 New Hampshire Supreme Court opinions written by Justice David H. Souter in the areas of substantive criminal law and criminal procedure. I also have examined a few cases not on the list provided me. I chose these additional cases either because the issue presented was related to criminal justice or because Justice Souter wrote a separate opinion. My analysis of this body of case law follows.

## I. Overview

Justice Souter is a knowledgeable and conscientious judge who seeks to identify precisely the issues before the court and to treat these issues fairly in accordance with applicable precedent. When statutes are involved, he seeks to ascertain the intended meaning of the provision at issue rather than to achieve his own policy objectives. Indeed, because he refrains from reaching out to decide issues not presented by the parties and from offering gratuitous remarks, Justice Souter's opinions give little insight into his personal values or politics. Clear,

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always well-reasoned, and concise, his opinions contain little, if any, dicta.

In analyzing Justice Souter's opinions, one must keep in mind the nature of the cases that came before him. Because New Hampshire lacks an intermediate appellate court, its Supreme Court decides many appeals that the highest courts of other states would not bother to review. One would expect, therefore, a relatively high affirmance rate in criminal cases, similar to that usually found in the intermediate appellate courts of other states. By the same token, one would expect a lower reversal rate than usually found in state supreme courts that are free to choose, on the basis of difficulty or importance, the cases they will review. One also would expect to find less complexity in, and fewer dissents from, the opinions of such a court. Although I have not done a statistical analysis, my impression from reading the cases is that these expectations are accurate.

Justice Souter's decisions on federal issues in criminal cases were potentially reviewable by the United States Supreme Court on direct review and by the lower federal courts and again by the United States Supreme Court on habeas corpus review. Independent of any actual review, of course, Justice Souter was bound by oath to apply applicable federal case law, an obligation that he took seriously. I can cite no case from my list in which Justice Souter "cheated" in reading the precedent. This obligation, however, especially when combined with Justice Souter's honesty in applying precedent and his reluctance to offer ex-

traneous remarks, makes it difficult to predict with confidence how Justice Souter would decide cases were he free to define the applicable law. Nevertheless, some insights are possible.

Justice Souter is a "conservative" judge in the criminal justice area in the sense that he does not reverse criminal convictions lightly. While he treats precedent fairly, he does not indulge the facile presumption that controversial precedents, particularly those that departed from historical understandings in imposing limits on law enforcement, should be extended even further. Rather, he places the burden of persuasion where it belongs -- on those who seek such extensions. Moreover, Justice Souter seems to believe that cogent arguments must precede use of the state constitution to impose restrictions on the prosecution that are not required by federal law. That is, he does not regard the so-called "new federalism" as a justification, by itself, for making law enforcement more difficult. When he finds error, Justice Souter is not willing to reverse convictions to achieve a speculative deterrent effect or merely to make a point. Rather, if the error is truly "harmless," -- and again, he is honest in evaluating this -- he will affirm the conviction. One may surmise, therefore, even though his opinions do not contain philosophical excursions, that Justice Souter firmly believes that the interest in ascertaining truth in criminal cases should be sacrificed only for compelling reasons. In this regard, he is considerably different from the justice whom he has been nominated to replace.

From what already has been said, it should come as no surprise that Justice Souter's criminal justice opinions disclose no agenda, other than one to apply the governing law honestly and with common sense. For those who seek a bold judge willing to undo past "mistakes," there may be cause to anticipate some disappointment. One can foresee, for example, Justice Souter failing to supply the necessary vote to overrule a questionable precedent because the case at bar can be decided on a narrower ground.<sup>1</sup> To cite one instance that perhaps supports this assessment, Justice Souter was offered an opportunity to overrule a 1978 state court decision that requires the prosecution to prove the validity of Miranda waivers beyond a reasonable doubt -- a standard subsequently rejected as too high for federal constitutional purposes by the United States Supreme Court. Justice Souter declined the opportunity because the issue was not, in his view, properly before the court and because the state, in any event, satisfied the heavier burden.<sup>2</sup> While some may see in this cause for concern, such caution, restraint, and commitment to procedural propriety may be what the country most needs given the politicized atmosphere that recently has surrounded both the

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<sup>1</sup> One is reminded of Justice White objecting in Illinois v. Gates, 462 U.S. 213 (1983), to the overruling of Spinelli v. United States, 393 U.S. 410 (1969), because, in his view, the case could have been decided favorably to the state under Spinelli.

<sup>2</sup> State v. Derby, 561 A.2d 504 (1989). In State v. Rathbun, 561 A.2d 505 (1989), however, Justice Souter refused to extend the earlier case to other Miranda issues.

judicial confirmation process in the Senate and the public evaluation of Supreme Court opinions.

From the cases I reviewed, I can find no legitimate basis for either side of the political spectrum opposing this intelligent jurist. Of course, for those who want politics rather than law from the Supreme Court, Justice Souter is not the right person. For those who know better, it should be evident that President Bush has made an excellent selection.

## II. Review of Particular Cases

I have not attempted to discuss all, or even most, of Justice Souter's criminal justice opinions. What follows is an analysis of some cases in areas that might provoke particular interest. The discussion, though limited, should prove adequate to reveal the kind of jurist that Justice Souter is.

### A. Police Interrogation Issues

Justice Souter wrote two opinions reversing convictions on the basis of issues that pertain to the use of confessions. One involved a challenge to police interrogation. The other, although not turning upon an issue of police interrogation as such, is discussed here because the defendant's response to the police during interrogation gave rise to the issue before the court.

Justice Souter also wrote several opinions affirming convictions in cases that raised police interrogation issues.

In State v. Lamb,<sup>3</sup> Justice Souter concluded that the trial judge failed to find, as required by a 1978 state case, that the validity of the defendant's Miranda waiver had been proved beyond a reasonable doubt. Because Lamb was decided before the United States Supreme Court applied the lower preponderance of the evidence standard to Miranda waivers,<sup>4</sup> it provided no occasion to review the earlier state court holding. (As discussed above, Justice Souter for procedural reasons declined a subsequent opportunity to review the 1978 decision.) Justice Souter's analysis of the record and treatment of precedent was honest and appropriate. While the reversal arguably turned on a "technicality," the technicality was not one of Justice Souter's making.

In State v. Jones,<sup>5</sup> the second reversal, Justice Souter actually concluded that Miranda had not been violated. Correctly anticipating a later Supreme Court case,<sup>6</sup> he first ruled that Miranda does not require the police to tell the suspect the crime he is suspected of having committed. He next ruled, again correctly, that the defendant's refusal to sign the statement he gave the police did not invalidate his previous waiver. Never-

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<sup>3</sup> 484 A.2d 1074 (1984).

<sup>4</sup> Colorado v. Connelly, 479 U.S. 157 (1986).

<sup>5</sup> 484 A.2d 1070 (1984).

<sup>6</sup> Colorado v. Spring, 479 U.S. 564 (1987), a 7-2 decision in which only Justices Brennan and Marshall dissented.

theless, Justice Souter deemed it necessary to reverse the defendant's conviction for attempted murder because the trial judge had answered "no" to the jury's question of whether the defendant's refusal to sign the statement meant that he completely denied its truth. Noting that lawyers would assume that the judge's answer meant only that the refusal was subject to more than one interpretation, Justice Souter nevertheless concluded that a lay jury probably would have taken the judge's unequivocal answer as a resolution of the factual issue. Because the issue of fact was for the jury, a reversal was necessary. Demonstrating both fairness to defendants and judicial integrity, Justice Souter properly concluded that this kind of error could not be deemed "harmless."

In State v. Lewis,<sup>7</sup> on the other hand, the facts presented a close issue as to whether the police had misled the defendant when they responded to his question about the meaning of waiver. Observing that the court would have agreed with the defendant if it had limited its review to the portion of the record he isolated, Justice Souter concluded that the entire record supported the trial judge's findings that the police did not mislead the defendant and that the defendant had a correct understanding of what it meant to waive his rights. Justice Souter observed, as he did in numerous other cases, that the trial judge's findings should stand unless they are contrary to the manifest weight of

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<sup>7</sup> 533 A.2d 358 (1987).

the evidence. After dismissing other Miranda arguments that posed less difficulty, Justice Souter also rejected the defendant's claim that it was fundamentally unfair for the police to wire his acquaintance and use him as an informant. Referring to the defendant's argument as "obscure," Justice Souter remarked that fundamental unfairness for due process purposes does not occur "simply because a defendant places himself at a disadvantage under circumstances in which there are no substantive constitutional violations."<sup>8</sup>

State v. Bruneau<sup>9</sup> perhaps is one of the better cases for revealing Justice Souter's reluctance to reverse criminal convictions on the basis of strained constitutional arguments. The defendant, who previously had confessed to his friend about murdering his wife, continued to contact his friend by phone after he had been formally charged with the murder. When the friend informed the police of this, they neither encouraged nor discouraged him to take the long distance calls. The friend took the calls and later informed the police of the defendant's incriminating remarks and threats to witnesses. The defendant argued that this violated his right to counsel under both the state and national constitutions. Rejecting both claims, Justice Souter held, first, that the friend was not acting as an agent of the state at the time of the calls, his private "hopes" of

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<sup>8</sup> Id. at 365.

<sup>9</sup> 552 A.2d 585 (1988).

benefit not being equivalent to police inducement, and the police "readiness to receive" information not being equivalent to "importunity to obtain" information. Second, Justice Souter held that the friend did not interrogate or deliberately elicit incriminating remarks from the defendant. With regard to another statement admittedly taken in violation of Miranda, Justice Souter held, in accordance with United States Supreme Court precedent, that the statement could have been used, as the trial judge had ruled, for impeachment purposes. Because the defendant failed to make the argument in the trial court, and because, in any event, the defendant had not opened himself to impeachment by actually taking the stand, Justice Souter declined to consider whether a different impeachment rule should govern statements obtained in violation of either the sixth amendment or the state constitution's right to counsel provision rather than in violation of Miranda.

Bruneau came on the heels of (1) a 1983 decision, in which Justice Souter did not participate, that suggested, without holding, that the state constitution's right to counsel provision might give broader protection to defendants than the sixth amendment<sup>10</sup> and (2) a 1984 opinion in which Justice Souter noted in passing that state precedent interpreting the state constitution required the prosecutor to prove an explicit waiver of the

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<sup>10</sup> State v. Tapply, 470 A.2d 900 (1983) (reversing defendant's conviction; Justice Souter not sitting).

right to counsel.<sup>11</sup> The dictum in these cases notwithstanding, Justice Souter declined in Bruneau to use the defendant's invocation of the state constitution as an excuse to impose further and questionable restraints on the use of a defendant's reliable admissions at trial.

B. Fifth Amendment Issues Not Related to Police Interrogation

Contrary to popular belief, the fifth amendment prohibits not self-incrimination but only "compelled" self-incrimination,<sup>12</sup> and then only self-incrimination of a testimonial or communicative nature. A defendant has no constitutional protection from being compelled to produce physical evidence, such as a handwriting sample or fingerprints, no matter how incriminating such evidence may be.<sup>13</sup> With their roots in the same common law background, self-incrimination clauses in state constitutions presumably are no broader. At the very least, the burden should be on those who would contend otherwise.

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<sup>11</sup> State v. Elbert, 480 A.2d 854 (1984) (finding no violation of the fifth or sixth amendments because the defendant initiated conversations about the crime with the police even though he earlier had invoked the right to counsel).

<sup>12</sup> United States v. Washington, 431 U.S. 181, 187 (1977).

<sup>13</sup> Gilbert California, 388 U.S. 263, 265-67 (1967); Schmerber v. California, 384 U.S. 757, 760-65 (1966).

Justice Souter's opinions evidence a keen appreciation that the protection against compulsory self-incrimination was not intended to protect the defendant from doing anything that harms his chances of acquittal. State v. Cormier<sup>14</sup> perhaps is his best reasoned opinion in this area. In Cormier, Justice Souter's opinion followed South Dakota v. Neville,<sup>15</sup> which had interpreted the fifth amendment, and held that the state's use of the defendant's refusal to take a chemical test for blood alcohol content did not violate the self-incrimination clause in the state constitution. Justice Souter concluded both that the refusal to take the test was not evidence of a "testimonial" nature and that the state did not "compel" the refusal. He reasoned that under governing case law, the legislature simply could have compelled the chemical test, because such a test produces evidence that is physical in nature. What the legislature did here was to give motorists a choice to refuse to take the test -- a choice it did not have to give -- but to impose a cost on the exercise of this choice. Without this cost, the legislature would have emasculated its testing law. Surprisingly, two justices declined to follow Neville and Justice Souter's reasoning.<sup>16</sup>

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<sup>14</sup> 499 A.2d 986 (1985).

<sup>15</sup> 459 U.S. 552 (1983).

<sup>16</sup> See also State v. Frederick, 566 A.2d 180 (1989) (again following Neville). In State v. Denney, 536 A.2d 1242 (1987), Justice Souter dissented from a holding, based on the state constitution's due process clause, that the defendant's refusal to take the test cannot be used as evidence if the police fail to advise the defendant that his refusal can be used against him. Justice Souter argued, first, that Miranda warnings provided the

In other opinions, Justice Souter held that neither the national nor the state constitution protects against compulsory disclosures in civil commitment proceedings.<sup>17</sup> He also held that a prosecutor's comment at trial about the defendant's trying to pull the wool over the eyes of the police and the jury was not a comment on the defendant's failure to testify.<sup>18</sup> Two other cases raised comment on silence issues. Affirming an attempted murder conviction, Justice Souter concluded that the prosecutor could ask the victim at trial whether the defendant apologized after the shooting, which the defendant claimed was accidental; Justice Souter reasoned that because neither the national nor the state constitution gives self-incrimination protection against private parties, such as the victim, the defendant could not invoke the rule that bars evidentiary use of post-arrest silence following

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defendant all the advice that was necessary. More fundamentally, Justice Souter disagreed that any warning pertaining to the evidentiary consequences of refusing to take the test was required. He charged the majority with transforming "the familiar and specific requirement of [Miranda] into a general rule of evidence, unlimited by any reference to the constitutional privilege that Miranda was intended to serve." Id. at 1247 (Souter, J. dissenting). He also faulted the majority for failing to distinguish fundamental unfairness "from what the defendant finds unfortunate." Id. at 1249. In terms of statutory and constitutional construction and the treatment of precedent, the dissent reveals Justice Souter at his analytic best.

<sup>17</sup> State v. Mercier, 509 A.2d 1246 (1986).

<sup>18</sup> State v. Merrill, 484 A.2d 1065 (1984). Griffin v. California, 380 U.S. 609 (1967), prohibits comment on the defendant's failure to testify.

Miranda warnings.<sup>19</sup> In a related ruling, Justice Souter concluded that the prosecutor's evidentiary use at trial of the defendant's boast to the police that he was too sophisticated to confess constituted proper use of a statement rather than impermissible use of the defendant's invocation of his right to silence.<sup>20</sup> None of these holdings should be deemed controversial.

### C. Search and Seizure

Because of the exclusionary rule, perhaps no one area of criminal procedure produces more litigation, and more hair-splitting, than search and seizure. Though sensitive to constitutional protection, Justice Souter demonstrated a disinclination to engage in the kind of technical Monday morning quarterbacking that too often has brought the criminal justice system into disrepute.

Most searches and arrests require probable cause. Although the United States Supreme Court has cautioned that probable cause is a practical, nontechnical concept that requires an exercise of common sense,<sup>21</sup> some appellate judges approach the issue as legal

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<sup>19</sup> *State v. Brown*, 517 A.2d 831 (1986). The defendant had invoked the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976).

<sup>20</sup> *State v. Coppola*, 526 A.2d 1236 (1987).

<sup>21</sup> *Illinois v. Gates*, 462 U.S. 213 (1983); *Brinegar v. United States*, 338 U.S. 160 (1949).

technicians, giving no deference either to the often hurried judgments the police must make or to the evaluations of magistrates who issue warrants. Not Justice Souter.

In State v. Davis,<sup>22</sup> for example, Justice Souter upheld a warrant issued on the basis of a tip from an informant who had agreed to provide information to the police in return for favorable treatment with regard to his own criminal charge. Following Illinois v. Gates,<sup>23</sup> Justice Souter applied a totality of circumstances test to the issue of probable cause. He concluded that "participation in plea bargaining imposes no automatic disqualification of an informer." Looking at the police corroboration of the tip, Justice Souter reasoned that no special insight was needed to understand that the defendant was planning to sell drugs.

In State v. Baldic,<sup>24</sup> Justice Souter upheld a finding of probable cause based upon a robbery victim's not too detailed description. "On otherwise deserted streets, and within minutes of a late evening robbery in a small town, the officer saw an individual who matched the victim's description of the perpetrator as a male with bushy hair, and who was wearing a jacket that appeared to be consistent with the victim's description."<sup>25</sup>

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<sup>22</sup> 575 A.2d 4 (1990).

<sup>23</sup> 462 U.S. 213 (1983).

<sup>24</sup> 551 A.2d. 977 (1988).

<sup>25</sup> Id. at 978.

Justice Souter also found significant the defendant's failure to respond to the officer's spotlight. While the defendant, of course, could have been innocent of the robbery, Justice Souter's opinion implicitly recognized both that police often must act on the basis of the evidence they have -- not on what we might wish that they had -- and that police failure to act promptly after a crime often will mean that the crime goes unsolved. Justice Souter's opinion evinces an understanding that probable cause requires the common sense judgments of reasonably cautious police officers.<sup>26</sup>

State v. Faragi<sup>27</sup> provided an interesting twist on the probable cause issue. The defendant appealed a first degree murder conviction alleging, among other things, that his counsel was ineffective for failing to attempt to suppress the murder weapon on grounds of an allegedly illegal search of his home. Justice Souter concluded that the defendant could not possibly have been prejudiced by the lawyer's decision because the warrant that authorized the search was valid. Relying on a lower federal court opinion,<sup>28</sup> the defendant argued that it was not reasonable to assume that he kept the murder weapon in his home. Justice Souter opted for a "different generalization": "where the object

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<sup>26</sup> For similar holdings by Justice Souter, see State v. Chaloux, 546 A.2d 1081 (1988); State v. Maya, 493 A.2d 1139 (1985) (finding reasonable suspicion for a Terry stop after a store burglary).

<sup>27</sup> 498 A.2d 723 (1985).

<sup>28</sup> United States v. Charest, 602 F.2d 1015 (1st Cir. 1979).

of the search is a weapon used in the crime . . . the inference that the item is at the offender's residence is especially compelling."<sup>29</sup> Once again evidencing his appreciation of probable cause as a practical concept, Justice Souter concluded that the warrant application unquestionably established probable cause.

State v. Valenzuela,<sup>30</sup> a 3-1 decision, must rank as one the better, and most important, search and seizure opinions written by Justice Souter. The defendants challenged the use of pen registers by the state police that had been installed pursuant to federal court order. (A pen register records the numbers dialed from a phone but does not intercept conversations.) Although the United States Supreme Court in Smith v. Maryland<sup>31</sup> had held that the use of pen registers was not a "search" for fourth amendment purposes, the defendants claimed that the use of these devices was a search under the state constitution, and an illegal search in this instance because probable cause was lacking. Justice Souter's opinion declined to interpret the state constitution more broadly than the United States Supreme Court had interpreted the fourth amendment.

Justice Souter began by observing that both parties ironically had assumed that the reasonable expectation of privacy test

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<sup>29</sup> 498 A.2d. at 727, quoting 1 W. LaFave, Search and Seizure 709 (1978).

<sup>30</sup> 536 A.2d 1252 (1987).

<sup>31</sup> 442 U.S. 735 (1979).

from Katz v. United States<sup>32</sup> defined the scope of the state constitution's search and seizure provision. He suggested at least the possibility that the state constitution was intended to have a narrower scope than that defined by Katz. Nevertheless, proceeding on the assumption that the Katz privacy test controlled for state constitutional purposes, Justice Souter agreed with the analysis in Smith that pen registers do not fall within the scope of this test. Justice Souter carefully reviewed, argument by argument, the criticisms leveled at the Smith opinion, and he found each criticism lacking in merit. Demonstrating his legal acumen, he refused to rely on the weaker segments of the Smith opinion -- those dealing with subjective privacy expectations and "assumption of the risk." Nevertheless, he reasoned that to reject the Smith analysis in toto would be to cast doubt on a substantial body of search and seizure jurisprudence. The following is just one segment of a lengthy and thorough analysis:

The defendants' position would redefine Katz's privacy by converting it from a defendant's right to be secure against certain means of non-consensual access to his communications and possessions, into a defendant's right to control the use of evidence without regard to how the defendant may have disclosed that evidence to

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<sup>32</sup> 389 U.S. 347 (1967):

another. It would empower the defendant to enforce a kind of evidentiary copyright, by precluding the government's use of information for a purpose that the defendant did not intend when he communicated with another. Suffice it to say that we could not accept the defendants' position without a wholesale overruling of the agent-informer cases . . . which stand together as an integral limit to Katz's concept of privacy.<sup>33</sup>

A few other search and seizure decisions warrant passing comment. In State v. Stiles,<sup>34</sup> Justice Souter rejected an argument that a search warrant was tainted by illegal tape recording under a state statute; Justice Souter correctly observed that the agent's own recollection, not the tape recording, was the source of information for the warrant. Those more eager to apply exclusionary rules may not have perceived this distinction. In State v. Cimino,<sup>35</sup> Justice Souter rejected a similar "fruit of the poisonous tree" argument, concluding that even if the seizure of pills from a car was illegal, the pills played no role in the

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<sup>33</sup> 536 A.2d at 1261. Justice Souter also disposed of several other search and seizure issues. Deserving special commendation is his analysis showing that the defendants had confused stale probable cause and stale information that is used to establish current probable cause: "If such past fact contributes to an inference that probable cause exists at the time of the application, its age is no taint."

<sup>34</sup> 512 A.2d 1084 (1986).

<sup>35</sup> 439 A.2d 1197 (1985).

probable cause that subsequently developed. In State v. Cote,<sup>36</sup> Justice Souter rejected a hair-splitting argument that a search warrant for the defendant's restaurant did not permit a search of the restaurant's basement. In State v. Cannata,<sup>37</sup> he upheld a conviction by applying harmless error analysis to the search and seizure claim. Finally, in State v. Koppel,<sup>38</sup> Justice Souter dissented from an opinion that invalidated sobriety checkpoint stops as unreasonable searches and seizures under the state constitution. Just this year, Justice Souter's position on this issue was adopted for fourth amendment purposes by the United States Supreme Court.<sup>39</sup>

#### D. Admissibility of Eyewitness Identification Testimony

For some kinds of crimes, such as robbery and rape, eyewitness identification testimony can be crucial. The admission of such testimony was viewed entirely as a matter of state evidentiary law until the late 1960's, when the Supreme Court created new exclusionary rules stemming from its application of the sixth amendment right to counsel and the due process clause to pretrial police identification procedures.

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<sup>36</sup> 493 A.2d 1170 (1985).

<sup>37</sup> 543 A.2d 543 (1988).

<sup>38</sup> 499 A.2d 977 (1985).

<sup>39</sup> Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990).

In State v. Humphrey,<sup>40</sup> Justice Souter rejected a due process challenge to a pretrial photo display. Carefully examining the record, he demonstrated that the display was not unnecessarily suggestive. In State v. Prisby,<sup>41</sup> Justice Souter refused to consider such a challenge because the defendant had failed to make a timely objection. Perhaps most significantly, however, Justice Souter in State v. Cross<sup>42</sup> rejected an argument that eyewitness identification evidence should be suppressed, even absent police misconduct, simply because of the danger of unreliability. The federal constitutional exclusionary rules are based on the view that the state has no legitimate interest in contributing to the risk of mistake, as it might do, for example, by conducting an unnecessarily suggestive lineup. While the risk of mistake is inherent in human perception and recall, the additional risk created by unnecessarily suggestive identification procedures is gratuitous. When the police have not engaged in such misconduct, however, the rule is, as it always has been, that the weight, if any, that should be given to a witness's identification is for the jury or trier of fact to decide. Justice Souter in Cross adhered to the common law rule by refusing to create yet another, and even more novel, exclusionary rule

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<sup>40</sup> 531 A.2d 329 (1987).

<sup>41</sup> 500 A.2d 89 (1988).

<sup>42</sup> 519 A.2d 272 (1986).

that would make judges, rather than juries, the ones to evaluate witness credibility.

E. Guilty Pleas and Trial by Jury

In Richard v. MacAskill,<sup>43</sup> Justice Souter reversed a lower court order dismissing the defendant's habeas corpus challenge to a nolo contendere plea to shoplifting. The defendant alleged that his plea taking procedure did not comply with the procedural requirements of Boykin v. Alabama.<sup>44</sup> Justice Souter concluded that although a technical Boykin violation requires reversal on direct appeal, the defendant cannot prevail on collateral attack (i.e., habeas corpus) unless his plea was unknowingly or involuntarily made. If the defendant has shown a Boykin violation, however, the state has the burden of demonstrating the plea's validity. On the facts presented, Justice Souter concluded both that Boykin had been violated, in that the record did not show the defendant was aware of the rights she was relinquishing, and that the state failed to carry its burden of showing that the defendant understood she had the right to go to trial. Justice Souter remanded the case to give the state an opportunity to carry its burden.

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<sup>43</sup> 529 A.2d 898 (1987).

<sup>44</sup> 395 U.S. 238 (1969).

Richard is not wholly satisfactory in that it is difficult to believe that the defendant was not aware of what rights she was relinquishing when she entered her plea. Moreover, much can be said for a rule that presumes defense counsel has communicated with the client. Nevertheless, the United States Supreme Court has mandated procedures that will make evident on the record that the defendant explicitly waived his rights and entered a knowing plea, and there is no disputing that such a record did not exist in this case. Indeed, Justice Souter criticized the trial court because this was the second case in recent years to reveal that the court had made "neither a taped nor a written record." The clear message is that whatever one may think of Boykin, these errors are easy to avoid.

In State v. Hewitt,<sup>45</sup> Justice Souter similarly applied a rigorous standard to the issue of waiver of trial by jury. During the defendant's trial for forgery, the trial judge decided both to dismiss one of the jurors who might have known the defendant and to continue the trial with eleven jurors, no alternative jurors having been selected. The judge announced his decision to counsel in chambers and again in open court. On the latter occasion, defense counsel, in front of the defendant, responded, "That's fine." With new counsel on appeal, the defendant claimed that the waiver was invalid because the trial judge did not

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<sup>45</sup> 517 A.2d 820 (1986).

follow a "Boykin" procedure to determine that he, the defendant, personally wanted to waive this right.

Relying on the state constitution's jury trial provision, Justice Souter agreed and reversed the conviction. Starting from the premise that "the right to trial by jury is one of central and fundamental importance," Justice Souter concluded that acquiescence in the loss of fundamental rights will not be presumed. Recognizing that a number of federal decisions had permitted the waiver of constitutional rights to be implied, Justice Souter found those decisions inapposite: first, the right at issue here was fundamental; second, the court knew that the right in question was being waived; third, the trial judge could have engaged in a waiver inquiry without requiring the defense to reveal strategic or confidential information. Justice Souter found the right at issue no less important because only one juror was dismissed: "twelve means twelve, and concessions can develop momentum."<sup>46</sup>

Among Justice Souter's opinions, Hewitt stands virtually alone in revealing a willingness to reverse a conviction for an arguably technical reason when there was a choice. As Justice Souter conceded, some federal cases specifically have held that defense counsel's stipulation to a jury of less than twelve is enough to bind the client. Moreover, the likelihood in this case that the defendant would have disagreed seems insubstantial. In

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<sup>46</sup> Id. at 822.

addition, Justice Souter's "slippery slope" concern about allowing any concessions is not fully persuasive. On the other hand, the right to trial by jury is fundamental in an historical sense, waiver of this right not even being permitted at common law and in the early days of this republic. If there are any rights the defendant personally must waive, trial by jury seems an obvious candidate for inclusion. Finally, as in MacAskill, the trial judge easily can avoid posttrial disagreements over waiver simply by asking the defendant whether he knows what he is relinquishing and wants to proceed. The Hewitt holding, that is, imposes no real burden on the criminal justice system.<sup>47</sup>

State v. O'Leary,<sup>48</sup> which involved both guilty plea and trial by jury issues, demonstrates Justice Souter's unwillingness, even in these two areas, lightly to overturn reliable convictions. Writing for the Court, Justice Souter first held that due process under the state constitution does not prevent the prosecution from rescinding a plea agreement before the defendant has pleaded or otherwise relied upon the agreement.<sup>49</sup> Second, Justice Souter held that the trial judge did not violate the defendant's right to trial by jury when he told the jury that they need not be concerned with proof of penetration because the

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<sup>47</sup> See also State v. Bailey, 503 A.2d 762 (1985) (due process requires a record to be made of the judge's conferences with jurors; on these facts, failure to make a record was harmless error).

<sup>48</sup> 517 A.2d 1174 (1986).

<sup>49</sup> Accord, Mabry v. Johnson, 467 U.S. 504 (1984).

defendant had admitted this element of the crime in his testimony. Sounding a cautionary note, however, Justice Souter added that "[t]here is a quantum difference of constitutional significance between a fact admitted under the conditions present here and a fact merely uncontested." Justice Souter also warned that judges should not assume that the defendant has made an admission if there is any doubt about the matter. Though concurring on harmless error grounds, two justices disagreed with Justice Souter's view that the trial judge did not violate the defendant's right to trial by jury.<sup>50</sup>

#### F. Ineffective Assistance of Counsel

Ineffective assistance of trial counsel quite understandably is a favorite allegation for disappointed defendants seeking to overturn their convictions either on direct appeal or collateral attack. If not approached realistically, such allegations can play havoc with the strong interest in finality in criminal prosecutions. An appellate judge aware of his or her limited role in this area knows that Monday morning quarterbacking is to be avoided. Legal assistance is ineffective not when the judge disagrees with strategic defense choices but only when those choices, one, are outside the bounds of reasonable disagreement

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<sup>50</sup> See also State v. Elliot, 574 A.2d 1378 (1990) (plea is not unknowing because defendant not told conviction would make him liable to be declared a motor vehicle habitual offender).

and, two, prejudice the defendant. Justice Souter's opinions in this area reflect a proper awareness of the appellate court's role.

Justice Souter's opinion in State v. Faragi already has been discussed.<sup>51</sup> Justice Souter used a similar analytic approach in State v. Allegra,<sup>52</sup> affirming the defendant's forgery conviction but remanding for reconsideration of the sentence. The defendant alleged ineffective assistance of counsel because of counsel's failure to file a motion to quash the indictment on the ground that it charged a misdemeanor, not a felony as it claimed. Agreeing that the indictment incorrectly described the defendant's offense as a felony, Justice Souter disagreed that counsel was ineffective for failing to file a motion to quash. He pointed out that the indictment validly charged the misdemeanor offense, and that felony courts could assume jurisdiction over misdemeanors and probably would have done so in this case. Hence counsel's decision was not the product of professional incompetence. Moreover, because the defendant's sentence did not exceed what a misdemeanor conviction would have authorized, Justice Souter also concluded that the prejudice prong of the ineffective assistance of counsel test was not satisfied.

That Justice Souter approached ineffective assistance of counsel claims with common sense does not mean that he was cava-

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<sup>51</sup> See notes 27-29, supra, and accompanying text.

<sup>52</sup> 533 A.2d 338 (1987).

lier in rejecting such claims. In the same Allegra case, he agreed that reconsideration of the sentence was necessary because the sentence imposed, though within what the misdemeanor statute authorized, may have been influenced by the judge's belief, not corrected by counsel, that the crime was a felony. Although this conclusion did not justify reversal of the sentence under the prejudice prong of the test, Justice Souter, demonstrating his fairness, used the court's supervisory power over the trial courts to order a reconsideration of the sentence. Showing his disinclination for wasting scarce judicial resources, however, Justice Souter observed that the trial judge simply could let the original sentence stand if in fact he had been aware that the offense was only a misdemeanor.

Justice Souter also found in Allegra that counsel was incompetent for failing to object to certain jury instructions. He avoided reversing the conviction outright only by concluding that the prejudice prong of the ineffective assistance of counsel test was not satisfied: the defendant failed to demonstrate a probability that the verdict would have been different.<sup>53</sup> Indeed, he thought it highly unlikely that the outcome would have been different. Justice Souter reached this conclusion only after carefully reviewing and analyzing the record. Finally, finding, as in Faragi, that the search warrant at issue was valid, Justice

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<sup>53</sup> The prejudice prong was imposed in Strickland v. Washington, 466 U.S. 668 (1984).

Souter absolved defense counsel of an additional charge of incompetence for not filing a motion to suppress.

Allegra reveals a judge without a "knee-jerk" response to issues that come before him. Although the temptation is great to become cynical about ineffective assistance claims, Justice Souter proceeded to consider and to address seriously each of the defendant's arguments in Allegra with regard to this issue. He found some of the arguments wholly lacking in merit, some only partially lacking in merit, and one -- that regarding the sentencing -- deserving of some appellate relief. Demonstrating fairness and care, he also eschewed precipitous and reckless use of the "reversal" club that an appellate court carries. More could not be asked of an appellate judge.<sup>54</sup>

#### G. Rape Shield Law

Loose talk has suggested that the only conviction Justice Souter ever reversed involved the state's rape shield statute. Presumably such hyperbole is supposed to convey a sense of a prosecution judge who is not sensitive to the interests of women. If this is the intended message, it is wrong on both counts. Justice Souter's willingness to reverse convictions when neces-

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<sup>54</sup> See also Hopps v. State Bd. of Parole, 500 A.2d 355 (1985) (rejecting an ineffective assistance of counsel claim predicated on an alleged conflict of interest).

sary already has been demonstrated. Attention here will focus on his decisions applying the rape shield statute.

New Hampshire's rape shield statute bars evidence of "prior sexual activity between the victim and any person other than the defendant."<sup>55</sup> In State v. Colbath,<sup>56</sup> the defendant was charged with felonious sexual assault. Having met the complainant at a bar and associated with her there during the afternoon, the defendant took her to his trailer, where sexual intercourse occurred. According to the complainant, the intercourse was forcible; according to the defendant, it was consensual. The defendant claimed that the complainant directed sexually provocative attention not only to him but also to several other men in the bar on the afternoon in question, and there was substantial evidence of this. The trial judge first permitted the defense to produce testimony to this effect, then ruled that such evidence was inadmissible, and then acquiesced nevertheless in the introduction of such evidence. In his instructions, however, the judge explicitly told the jury that the complainant's activities with other men on the day in question was not to be considered on the issue of consent. He relied, at least in part, on the rape shield law.

Justice Souter observed that the instruction could be upheld only if the evidence was excludable. Despite the apparently

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<sup>55</sup> RSA 632-A:6.

<sup>56</sup> 540 A.2d 1212 (1988).

absolute terms of the statute, earlier cases had held that the statute had to be construed so as not to violate the defendant's constitutional right to confrontation. In particular, State v. Howard,<sup>57</sup> decided before Justice Souter joined the court, had held that a defendant must be given an opportunity to show that the probative value of such evidence "in the context of [the] particular case outweighs its prejudicial effect on the prosecu-  
trix." Justice Souter concluded that this was such a case.

First, the evidence at issue referred to public acts at the bar, not to private acts of an intimate nature: "evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners." Second, the evidence was particularly strong given that the acts in question occurred closely in time to the alleged assault. Third, in this case, a motive to lie was presented in that the defendant's living companion had caught the defendant and the complainant in his trailer and violently assaulted the latter. "With the sex act thus admitted, with the evidence of violence subject to exculpatory explanation, and with a motive for the complainant to make a false accusation, the outcome of the prosecution could well have turned on a very close judgment about the complainant's attitude of resistance or consent." Furthermore, because the

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<sup>57</sup> 426 A.2d 457 (1981).

privacy interest underlying the statute was virtually absent here, there was little to outweigh the defendant's need for the evidence.<sup>58</sup> Given that no one has a legitimate interest in mistaken convictions, it should come as no surprise on facts such as these that no justice dissented.

In State v. Baker,<sup>59</sup> decided before Colbath, Justice Souter showed that application of the principles employed in that case has nothing whatsoever to do with the gender of the complainant. The defendant was convicted of felonious sexual assault of a thirteen year old boy. Writing for a unanimous court, Justice Souter reversed the conviction because the trial court had failed to provide the defendant the hearing required by Howard on the possible admissibility of sexual conduct evidence.

In State v. Goulet,<sup>60</sup> a case involving a female complainant, the prosecutor commented on the defendant's failure to show that the victim was sexually promiscuous. The trial judge overruled defense counsel's objection on the ground that such evidence could have been admissible despite the rape shield statute. Justice Souter concluded that the term "promiscuity" was broad enough to cover conduct not admissible under the Howard rule. He added, moreover, that Howard did not provide an automatic rule of admissibility; rather, the complainant's claim of personal priv-

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<sup>58</sup> 540 A.2d at 1217.

<sup>59</sup> 508 A.2d 1059 (1986).

<sup>60</sup> 529 A.2d 879 (1987).

acy cannot be defeated unless the defendant offers facts demonstrating that probative value outweighs prejudice. Justice Souter construed the Howard rule fairly and narrowly, thus demonstrating his sensitivity to the privacy interests of female complainants. In addition, by concluding that the defense had invited the prosecutor's comment, he also affirmed the defendant's conviction for a brutal sexual assault.<sup>61</sup>

#### H. Miscellaneous

As previously indicated, Justice Souter wrote too many criminal justice opinions to review even most of them. This is somewhat unfortunate, because numerous cases outside the areas already discussed confirm both his intellectual honesty and his intelligence. A few worth reading are mentioned here.

In State v. Springer,<sup>62</sup> Justice Souter rejected a construction of the state's restitution statute that would have permitted restitution to be ordered to the victim's insurance carrier. Justice Souter carefully reviewed the text of the statute and its legislative history in reaching this conclusion. To the state's argument that such an interpretation would produce an absurd

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<sup>61</sup> See also State v. Johnson, 564 A.2d 444 (1989), not involving the rape shield statute, but holding that the judge erred in sequestering the fourteen year old male complainant and, therefore, did not err in permitting him to testify in rebuttal.

<sup>62</sup> 574 A.2d 1381 (1990).

result, Justice Souter responded that such an argument should be redirected to the legislature. "[W]hen the intent is consistent with the language employed, this court has no interpretive right to disregard it in disparagement of the legislative choice it reflects." Obviously, this is a judge inclined to interpret rather than legislate the law.

In State v. Dufield,<sup>63</sup> Justice Souter rejected an argument that voluntary intoxication could be a defense to second degree murder based upon reckless indifference to human life. His reasoned opinion demonstrates keen ability to grapple with some of the difficult jurisprudential issues on the substantive side of the criminal law. In State v. Allen,<sup>64</sup> Justice Souter similarly wrote an insightful opinion explaining why an indictment for attempted murder need not allege the degree of the murder attempted. Particularly revealing of his judicial outlook was this comment: "We are dealing, after all, with a code of basic human conduct, not with a system of esoteric rules designed to guide specialist professionals."<sup>65</sup> Were it only true that all judges shared this view.

Finally, numerous decisions show appropriate deference to the findings of the trial judge. Among these are State v. Hart-

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<sup>63</sup> 549 A.2d 1205 (1988).

<sup>64</sup> 514 A.2d 1263 (1986).

<sup>65</sup> Id. at 1267.

ford,<sup>66</sup> upholding a hung jury mistrial challenged on double jeopardy grounds; State v. Cochran,<sup>67</sup> upholding a judge's evidentiary decision that probative value outweighed possible prejudicial effect; and State v. Knowles,<sup>68</sup> deferring to the trial judge's decision to invoke the catch-all exception to the hearsay rule.

### III. Conclusion

The above review of Justice Souter's opinions should confirm the assessment of him set forth in the overview section of this analysis, and little would be served by repeating that assessment here. Suffice it to say that in a day when legal issues tend to be examined from the perspective of competing "sides," Justice Souter's opinions reflect that he is neither a "pro-prosecution" nor a "pro-defense" judge. Rather he is a fair and intelligent jurist who, while not inclined to indulge frivolous arguments for reversal, treats serious issues with the seriousness they deserve. He is a judge who believes in "neutral principles," meaning that his decisions are dependent upon the issues in the particular case rather than upon the identity of the parties before the court. Thus, in one case, an application of the rape

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<sup>66</sup> 567 A.2d 577 (1989).

<sup>67</sup> 569 A.2d 756 (1990).

<sup>68</sup> 562 A.2d 185 (1989).

shield statute may favor the defendant, in another it may favor the male or female complainant; in one case, an examination of guilty plea requirements may favor the prosecutor, in another it may favor the defendant. Always, however, Justice Souter is wary of reversing convictions for insubstantial reasons. That some may view such a "conservative" approach to reversing convictions as proof of a bias for the prosecution reflects more on the times we live in, and on those who would make such a charge, than it does on Justice Souter's impartiality and legal ability.

## JUDGE DAVID SOUTER'S CRIMINAL LAW OPINIONS

- State v. Tucker, 575 A.2d 910 (N.H. 1990)  
State v. Davis, 575 A.2d 4 (N.H. 1990)  
State v. Cartier, 575 A.2d 347 (N.H. 1990)  
State v. Springer, 574 A.2d 1381 (N.H. 1990) - reversing  
 restitution order  
State v. Monsalve, 574 A.2d 1384 (N.H. 1990)  
State v. Elliott, 574 A.2d 1378 (N.H. 1990) - affirming order  
 denying motion to withdraw guilty plea  
State v. Cochran, 569 A.2d 756 (N.H. 1990)  
State v. Stanley, 567 A.2d 575 (N.H. 1989)  
State v. Hatford, 567 A.2d 577 (N.H. 1989) - affirming order  
 declaring mistrial  
State v. Hodgkiss, 565 A.2d 1059 (N.H. 1989)  
State v. Frederick, 566 A.2d 180 (N.H. 1989)  
State v. Johnson, 564 A.2d 444 (N.H. 1989)  
State v. Grondin, 563 A.2d 435 (N.H. 1989)  
State v. Knowles, 562 A.2d 185 (N.H. 1989)  
State v. Rathbun, 561 A.2d 505 (N.H. 1989)  
State v. Tucker, 561 A.2d 1075 (N.H. 1989)  
State v. Derby, 561 A.2d 504 (N.H. 1989)  
State v. Hood, 557 A.2d 995 (N.H. 1989)  
State v. Baldic, 551 A.2d 977 (N.H. 1988)  
State v. Breneau, 552 A.2d 585 (N.H. 1988)  
State v. Duffield, 549 A.2d 1205 (N.H. 1988)  
State v. Prisby, 550 A.2d 89 (N.H. 1988)  
State v. Chaloux, 546 A.2d 1081 (N.H. 1988)  
State v. Cannata, 543 A.2d 421 (N.H. 1988)  
State v. Svoleantopoulos, 543 A.2d 410 (N.H. 1988)  
In re \$207,523.46 in U.S. Currency, 536 A.2d 1270 (N.H. 1987) -  
 affirming decree ordering asset  
 forfeiture  
State v. Valenzuela, 536 A.2d 1252 (N.H. 1987)  
State v. Coppola, 536 A.2d 1236 (N.H. 1987)  
State v. Jordan, 534 A.2d 378 (N.H. 1987)  
State v. Allegra, 533 A.2d 338 (N.H. 1987)  
State v. Therrian, 533 A.2d 346 (N.H. 1987)  
State v. Lewis, 533 A.2d 358 (N.H. 1987)  
State v. Rollins, 533 A.2d 331 (N.H. 1987) - affirming order  
 granting defendant motion to dismiss citizen's  
 criminal action  
State v. Humphrey, 531 A.2d 329 (N.H. 1987)  
State v. Murray, 531 A.2d 323 (N.H. 1987)  
State v. Pugliese, 529 A.2d 925 (N.H. 1987)  
Richard v. MacAskill, 529 A.2d 898 (N.H. 1987) - vacating dismissal  
 of petition to vacate conviction because plea  
 not knowing or voluntary  
State v. Goulet, 529 A.2d 879 (N.H. 1987)  
State v. Heath, 523 A.2d 82 (N.H. 1986)  
State v. Cross, 519 A.2d 272 (N.H. 1986)  
State v. Beede, 519 A.2d 260 (N.H. 1986)

- State v. Brown, 517 A.2d 831 (N.H. 1986)  
State v. O'Leary, 517 A.2d 1174 (N.H. 1986)  
State v. Hewitt, 517 A.2d 820 (N.H. 1986)  
State v. Allen, 514 A.2d 1263 (N.H. 1986)  
Baker v. Cunningham, 513 A.2d 956 (N.H. 1986) - affirming dismissal  
of petition for habeas corpus  
State v. Deflorio, 512 A.2d 1133 (N.H. 1986)  
State v. Dominguez, 512 A.2d 1112 (N.H. 1986)  
State v. Mercier, 509 A.2d 1246 (N.H. 1986) - affirming order  
committing defendant found not guilty by reason  
of insanity to state hospital  
State v. Stiles, 512 A.2d 1084 (N.H. 1986)  
State v. Baker, 508 A.2d 1059 (N.H. 1986)  
Hopps v. State Board of Parole, 500 A.2d 355 (N.H. 1985) -  
affirming denial of petition for  
writ of habeas corpus  
State v. Dukette, 506 A.2d 699 (N.H. 1986)  
State v. Bailey, 503 A.2d 762 (N.H. 1985)  
State v. Cormier, 499 A.2d 986 (N.H. 1985)  
State v. Campbell, 498 A.2d 330 (N.H. 1985)  
State v. Faragi, 498 A.2d 723 (N.H. 1985)  
State v. Cavanaugh, 498 A.2d 735 (N.H. 1985)  
State v. Batchelder, 496 A.2d 346 (N.H. 1985)  
State v. Wright, 496 A.2d 702 (N.H. 1985)  
State v. Cimino, 493 A.2d 1197 (N.H. 1985)  
State v. Maya, 493 A.2d 1139 (N.H. 1985)  
State v. Cote, 493 A.2d 1170 (N.H. 1985)  
State v. Allison, 489 A.2d 620 (N.H. 1985)  
State v. Sefton, 485 A.2d 284 (N.H. 1984)  
State v. Alcorn, 484 A.2d 1176 (N.H. 1984)  
State v. Crossman, 484 A.2d 1095 (N.H. 1984)  
State v. Merrill, 484 A.2d 1065 (N.H. 1984)  
State v. Jones, 484 A.2d 1070 (N.H. 1984)  
State v. Lamb, 484 A.2d 1074 (N.H. 1984)  
State v. Cook, 481 A.2d 823 (N.H. 1984)  
State v. Elbert, 480 A.2d 854 (N.H. 1984)

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Sept. 10, 1990

Dear Committee Members:

Judge David H. Souter is remarkably well-suited for confirmation to the United States Supreme Court. During his years as a New Hampshire Supreme Court judge he always demonstrated a profound reverence for our venerable State and Federal constitutions. His judicial decisions were never driven by any personal social or political philosophy.

As a former member of the New Hampshire House of Representatives when Judge Souter was a sitting New Hampshire Supreme Court judge and a continuous member of the New Hampshire Bar since 1978, I can attest to the immense respect he has for each branch of government. He did not, and will not, allow one branch to encroach upon the responsibilities and powers of the others.

In my capacity as a law professor (University of Lowell, Lowell, Ma.), I have had an opportunity to review and analyze a number of his New Hampshire Supreme Court decisions, and Advisory Opinions directed to specific legislatively crafted constitutional inquiries. His writings reveal a scholarly, competent and objective judge who communicates with clarity, logical consistency and an emerging literary flair. Judge Souter has never forced a judicial opinion based on some pre-ordained or intended result. His decision making process seeks to correctly balance competing constitutional principles and interests. For example, his dissenting view in State v. Koppel (127 N.H.286) shows a judge strongly aware of an extremely serious public problem (drunk driving) and even willing to break ranks with the majority by allowing non-overly intrusive roadblocks to protect the public interest in safe highways. He would have decided Koppel based on a Fourth Amendment U.S. Supreme Court case (Delaware v. Prouse, 440 U.S. 648). One might reasonably conclude from Koppel that his deep respect for stare decisis ensures a commitment to impartiality.

Like so many lawyers from the Granite State, I have known Judge Souter on a professional and personal level since my first days practicing before him when he was a New Hampshire Superior Court judge and from joining him at Bar Association meetings and other events. I have found him to be sincere, friendly and courteous. He is recognized as a judge who has always been very fair to members of the Bar.

In my opinion, Judge Souter's professional accomplishments, judicial temperament and intellect make him exceptionally well qualified to serve as a distinguished member of the U.S. Supreme Court. I respectfully ask that you confirm his nomination.

Michael E. Jones

STATEMENT OF JUDITH L. LICHTMAN,  
PRESIDENT OF THE WOMEN'S LEGAL DEFENSE FUND,  
URGING THE SENATE JUDICIARY TO RECOMMEND AGAINST  
THE CONFIRMATION OF JUDGE DAVID SOUTER  
AS A JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

September 18, 1990

Three full days of hearings on the nomination of Judge David Souter to the Supreme Court have now been completed. Last week, as the hearings opened, we were seriously concerned that he does not possess the bottom-line qualification for confirmation to the Supreme Court: a meaningful commitment to protecting the legal rights of women. We had reviewed Judge Souter's record on women's constitutional and legal rights and were not assured by it that he subscribes to key constitutional and legal principles that protect women against discrimination and guarantee their fundamental rights to privacy and reproductive freedom.<sup>1</sup>

We listened to Judge Souter's responses to the questions of the Judiciary Committee with hope that they would answer our questions and resolve our concerns. But we did not receive the assurances that we had hoped for, and that Judge Souter could have given. To the contrary, Judge Souter avoided answering the very questions about women's rights that would have assured us of his commitment; he did not even state the principles against which he would test violations of women's rights. For this reason, after having listened to and analyzed his responses as well as his record, we reluctantly conclude that we must oppose his confirmation as a Supreme Court Justice.

Our bases for this conclusion are several. First, despite extensive discussion of the law governing the constitutionality

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<sup>1</sup> A copy of our report, "Judge David Souter's Record on Women's Constitutional and Legal Rights: Cause for Serious Concern" (September 10, 1990), is attached and submitted for the record.

of sex discrimination, Judge Souter never expressed his commitment to the protections against sex discrimination that current Supreme Court cases afford. Nor did he affirm his support of the rights of women and of people of color to equal employment opportunity by approving of current Supreme Court precedent upholding affirmative action in certain circumstances. Finally, and most important, Judge Souter refused to acknowledge a fundamental right to privacy that protects women's rights to procreative choice. In fact, he refused to give any indication of how he would rule on restrictions on women's right to choose whether and when to bear children.<sup>2</sup>

Throughout the hearings, he was given opportunity after opportunity to demonstrate his understanding of women's rights, his commitment to the constitutional principles that protect women's rights. He consistently failed to explain what those principles might mean, in practice, to real women's lives. In contrast, when discussing other areas of the law, he did, more than once, express his opinions about legal principles and explain their effect.<sup>3</sup>

By failing to affirm women's rights principles, Judge Souter puts the country in an untenable position. He is asking the American people to support his nomination to the Supreme Court without assurances that he will protect our rights once on that Court.

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<sup>2</sup> These concerns are discussed in depth below.

<sup>3</sup> For example, Judge Souter expressed both his personal views on and his understanding of prevailing law in the area of the first amendment's guarantees of freedom of religion -- an area of the law no more settled than women's rights. He went on to discuss the analysis that he would apply to cases alleging infringement of these guarantees. Tr. at 42-48 (Sept. 14, 1990).

What's at stake is not some mere theoretical principle. The freedoms and fundamental rights of all Americans are at stake. The livelihoods, the health, and even the lives of millions of American women are at stake. With so much hanging in the balance, Americans need to know that those who are "to make the provisions of the Constitution a reality for our times, and to preserve that Constitution for the generations that will follow"<sup>4</sup> are also committed to protecting their legal rights.

I. Judge Souter failed to articulate a firm commitment to eliminating invidious sex-based classifications under the Equal Protection Clause.

For women, the only constitutional protection against laws that discriminate against them on the basis of gender is found in the supreme court's interpretations of the Equal Protection clause of the Fourteenth Amendment. Under these Fourteenth Amendment cases, gender-based laws and regulations are unconstitutional unless they meet the following test: that the government can show that they are "substantially related to an important government interest." This test is called "heightened" or "intermediate" or "mid-level" scrutiny.<sup>5</sup> Under this test, which the Court adopted in the 1970's, laws and regulations that discriminate on the basis of sex have generally been held unconstitutional. Prior to development of the "intermediate scrutiny" test, on the other hand, the court relied on a lower level of scrutiny under the equal protection clause, called "minimal scrutiny" or the "rational basis test." Under that lower level of review, the Court virtually always upheld sex discrimination.

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<sup>4</sup> Testimony of Judge Souter, Tr. at 99 (Sept. 13, 1990).

<sup>5</sup> "Intermediate" scrutiny is not as high as the "strict" scrutiny that is given to classifications on the basis of race or that affect fundamental rights, but it is higher than the "minimal" scrutiny that is given to other classifications, such as commercial classifications.

In several briefs and one opinion, Judge Souter had criticized mid-level scrutiny, and in one brief even argued that sex-based classifications should be evaluated under the rational basis test. We were very eager to hear Judge Souter's explanation of these writings.

Judge Souter explained more about his views on equal protection analysis in the context of sex discrimination, but his explanation left a major question unanswered. He agreed that gender-based discrimination should be subject to more than the lowest level of scrutiny afforded economic classifications. Further, he testified that he thought the middle-tier scrutiny for reviewing sex-based classifications is "too loose" -- that it is "not a good, sound protection" -- that such classifications should be reviewed under a "less flexible" standard than the mid-level scrutiny test now employed.<sup>6</sup> Similarly, he testified that he did not necessarily reject application of the strict scrutiny standard to sex discrimination.

These comments suggest that Judge Souter thinks that sex discrimination is deserving of a more exacting standard of review than that afforded by the current mid-tier level of scrutiny. Yet despite repeated invitations from Senators to discuss the appropriate test, Judge Souter gave no assurances that he would afford at least as much protection from sex discriminatory rules as such rules currently receive. For him to have made the simple affirmative statement that that standard should be at least as exacting as the current test would have been so simple that its omission is startling. Judge Souter never articulated a firm

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<sup>6</sup> Tr. at 157 (September 13, 1990).

commitment to eliminate invidious sex-based classifications under the Equal Protection clause.<sup>7</sup>

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<sup>7</sup> Judge Souter's mischaracterization of the Supreme Court's approach in Cleburne v. Cleburne Living Center further calls into question his understanding of the invidious nature of sex-based distinctions under the equal protection clause.

In an exchange with Senator DeConcini, Judge Souter inaccurately described Cleburne as explaining why sex-based classifications were only entitled to middle-tier scrutiny -- as opposed to the more rigorous strict scrutiny: First, "the likelihood that a [sex-based] classification might really have a legitimate reason behind it, a legitimate basis, and the case law, the experience with the cases coming up in the Court's view has simply been that there is a greater chance that there may be a legitimate basis for some sex classification, in other words that it may not amount to invidious discrimination than would be the case in the racial area." And second, "in the area of sex discrimination, there was more likely to be some political responsiveness than our history has shown in racial discrimination, so that is why they put it in the middle." Tr. at 211-12 (Sept. 13, 1990).

In fact, Cleburne clearly stated that sex-based distinctions are generally not legitimate. Discussing why sex-based classifications deserved a heightened standard of review, Justice White wrote that "[rather] than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985).

In contrast, the Cleburne Court discussed the two considerations mentioned by Judge Souter -- the likelihood of the classification's legitimacy and the history of political responsiveness -- in explaining why it felt classifications based on mental retardation should not be entitled to middle-tier scrutiny and why the much more deferential rational basis test should be applied instead.

Judge Souter's failure to acknowledge that Cleburne -- and the Court's equal protection jurisprudence generally -- stand for the proposition that sex-based distinctions are presumptively unconstitutional further fuels our concern.

II. Judge Souter failed to articulate a firm commitment to affirmative action to enforce the rights of women and of people of color to equal employment opportunity.

Fundamental to the achievement of equal employment opportunity for women and for people of color is the use of affirmative action -- including sex- and race-conscious efforts -- to overcome the barriers of years of discrimination in employment. While Judge Souter discussed affirmative action in generally approving terms, he stopped short of endorsing it in a number of contexts. Thus, he did not give the full commitment to affirmative action that American women need.

For example, Judge Souter did not fully explain the speech in which he is reported to have stated that affirmative action is "affirmative discrimination;" to the contrary, his "explanation" -- that he was talking about "discrimination in the sense that benefits were to be distributed according to some formula of racial distribution" -- makes no sense. His disapproval of that kind of affirmative action program suggests that the "affirmative action" of which he does approve is much more limited than the full breadth of affirmative action that the courts have upheld.

Similarly, Judge Souter never expressed agreement with or approval of another settled principle of affirmative action law: that voluntary affirmative action, including gender- or race-based initiatives is permissible.

III. Judge Souter failed to acknowledge a fundamental right to privacy that fully protects women's rights to procreative choice.

Judge Souter's failure to endorse women's rights is most glaring in the area of reproductive rights. It is true that he acknowledged that he believes that the Constitution protects a right of marital privacy from governmental intrusion. But he rendered this statement almost meaningless when he absolutely

refused to say whether he thought that right was "fundamental" or to discuss in any way what governmental interests might be sufficiently compelling to override it. For example, when asked by Senator Biden whether women have a fundamental right to privacy after conception, Judge Souter replied,

"[I]n the spectrum of possible protection that [interest] would rank as an interest to be asserted under liberty, but how that interest should be evaluated, and the weight that should be given to it in determining whether there is in any or all circumstances a sufficiently countervailing governmental interest is a question, with respect, I cannot answer."<sup>8</sup>

His failure to say whether the right is a fundamental one is crucial. If the right to privacy is not fundamental, then even if a state law -- such as a law restricting abortions -- infringes on it, Judge Souter could find that that state law is constitutional. In other words, he would not follow one of the essential legal principles underlying Roe v. Wade.

Furthermore, Judge Souter's articulation of the right to privacy that he does accept was extremely crabbed. He was not even willing to say that the constitutionally protected privacy right extends to unmarried people's right to purchase contraceptives.<sup>9</sup> Nor was he willing to accept the rationale of

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<sup>8</sup> Tr. at 120 (Sept. 13, 1990).

<sup>9</sup> When Senator Biden asked Judge Souter whether he believes the privacy right extends to the right of unmarried people to purchase contraceptives, Judge Souter said he didn't know, that he would have to carry out an inquiry that he had not yet engaged in: "I don't know the extent an answer to that question can be given in the abstract without the kind of Harlan inquiry I'm talking about. It was not made and I have not made it. . . . [E]xactly the same kind of analysis that Harlan would have used and did use in his concurring opinion should be used to address the same issue of non-marital privacy." Tr. at 27 (September 17, 1990).

Judge Souter did say that he agreed with the holding in Eisenstadt v. Baird, the Supreme Court case striking down a

Griswold, even though he agreed with its result -- and even though the Griswold principles are as well settled as the principles in other cases, such as Brown v. Board of Education, that Judge Souter did accept.

Even when Judge Souter did give substantive answers relating to women's right to reproductive freedom, his answers did not evince a commitment to that right. More than one Senator asked Judge Souter to assess the effects of overruling Roe v. Wade. In response to Senator Kennedy, he acknowledged that "thousands of lives will be affected."<sup>10</sup> This statement is ambiguous: whose lives would be affected? Indeed, this statement could have been made as easily by an anti-choice as by a pro-choice proponent.

When Senator Leahy asked him this question on the morning of September 17, Judge Souter said that if Roe were overturned, the practical effect would be that the issue would become a matter for different judgment in every state, which would pose complicated issues of federalism.<sup>11</sup> Senator Leahy responded by describing a heart-rending example of a case of a botched abortion, which he had prosecuted before Roe legalized abortion. Senator Leahy's real-life story demonstrates his compassion and understanding of the effect of Supreme Court rulings on real people -- a demonstration that Judge Souter never succeeded in

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state's restriction on the purchase of contraceptives by unmarried people, but that he based his agreement not on extension of the right of privacy but on application of equal protection principles, because the Court had already held that states cannot restrict the purchase of contraceptives by married people in Griswold v. Connecticut. Tr. at 25-26 (Sept. 17, 1990).

<sup>10</sup> Tr. at 216 (September 17, 1990).

<sup>11</sup> Judge Souter said, "The issue of federalism would be a complicated issue." Tr. at 113 (September 17, 1990).

making, despite his repeated expressions of concern about those effects.

It is true that Judge Souter said that he "has not made up his mind" -- that he has "not got any agenda on what should be done with Roe v. Wade, if that case were brought before [him]."<sup>12</sup> This statement is a far cry, however, from demonstrating a commitment to the underlying constitutional principles that protect women's right to procreative choice.

#### Conclusion

The United States Supreme Court is at a crossroads. At this time in history, any appointee to that Court must have a demonstrated commitment to the law's most basic guarantees of individual rights and equality -- for women and for all people. David Souter has failed to demonstrate that commitment. For that reason, we urge the Senate Judiciary Committee not to recommend him, and the full Senate to reject him, as a Supreme Court Justice.

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<sup>12</sup> Tr. 128 (Sept. 14, 1990).

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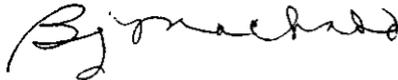
Sept. 7, 1990

To Chairman Senator Biden,

I received a telephone call from your office today Sept. 7, 1990 at about 10:00 Hawaiian time, informing me that the oral testimony for the hearing for Judge Suddier for the United States Supreme Court was all filled, But if I mailed in my testimony it would be included in the testimony. This call was made by Tom Hoepf.

Enclosed you will find one copy of my testimony to be included in the testimony at the hearing of Judge David Suddier for Judge for the United State Supreme Court on Sept. 13, 1990.

Thank You,



Barbara Jean Machado  
P.O. Box 1406  
Kapaa, Kauai, Hi.  
96746

Phone: (808) 822-4433

THANK YOU AGAIN



I have documents that will prove that the Supreme Court of the United States is corrupt, and to appoint Judge David Sudder to this court is like sending a new agent to the Honolulu P. B. I. Office, where an inspector from the San Francisco P. B. I. Office says that a new agent sent to the Honolulu office has 6 months to turn corrupt or they weed him out. It was this inspector and Charles Marsland a Honolulu Attorney and former Honolulu Public Prosecutor who both said that Hawaii is corrupt from the top all the way down to the bottom. This I found out for my self in my search for justice years before they came out publicly, the only thing I did not know was that the Honolulu P. B. I. office was corrupt too.

In my search for justice I found that the Grass Root Japanese of Hawaii was in full control of Hawaii the whole State of Hawaii. I learned that this control of the grass roots Japanese of Hawaii started while the Japanese were in concentration camps during World War II. Its very clear in a documentary made by Pasty Mink who was the Hawaii Representative to Congress, and is today is trying to regain that seat. This documentary tells that the first thing was to marry and reproduce while in these camps. The first thing after getting out was to take over the schools, which <sup>in Hawaii they did,</sup> The Japanese spread throughout the islands but the most Japanese went to Kauai. Making Kauai there strong hold. After taking over the schools the next step was to take over the law making presses, once they did that then they were ready to take over all of the Hawaiian Islands, and that's when the push for statehood started. Because the only way the Japanese could take over all the Hawaiian Islands was through the Governor's chair. Which under a territory the governor was appointed by the president of the U.S.. And so far only white men were appointed, But with Kauai as a strong Japanese hold they knew they could control any State elections. And so in reality Hawaii was not ready for statehood but the Japanese were ready to take control of all of the Hawaiian Islands. This leaves the 442 Go For Broke Battalion, were they really Go For Broke or were they willing to go for broke to make the United States think they were on our side. But for another time today is for Judge Sudder.:

In my search for justice I found that the grass roots Japanese controlled the newspapers, T.V. Stations and politics <sup>the whole state of</sup> in Hawaii. And that with the signature of just one Japanese on a fraud piece of paper is a warning to attorneys you try to hire, politicians you appeal to for help, judges of higher courts if you try to handle your own case because no attorney will take it, these higher courts include Hawaii <sup>State</sup> Intermediate court of appeals, Hawaii State Supreme Court, Ninth Circuit Court Of San Francisco and the Supreme Court of the United States. I have documents signed and stamped

by all of the above courts. There are documents signed by Disciplinary Counsel, Judiciary Committee, Judiciary Committee of the 13 and 14 Hawaii State Legislature you name it I've been there and have documents to prove it. Senator Dan Inouye, Senator Edward Kennedy and Senator George Mitchell all have copies of many of the documents, but they have chose to do nothing about these corrupt judges. Just mere cover up because they knew the Hawaii Federal Court Judges are also involved. You see one of these two case I will be mentioning was filed in Hawaii Federal Court, the other went first to Hawaii State Courts and then to Hawaii Federal Court. But both cases went all the way through the Federal Court system.

I was surprised when Senator Inouye did not do anything when he knew of a mayor stealing money from the Kauai County Government, and he didn't try to find out who the union business agent was who caught that mayor and used that information for his own benefit, but I was more shocked to see that Senators Inouye, Kennedy and Mitchell did not even care about who the man was that fit the description of the Peipu Rapist, the man who raped over eight mainland college girls. I believe that's because Senator Inouye knows who all these people are not only because Hawaii is so small but because I believe that Senator Inouye is the top man that controls all of the State of Hawaii, and now it looks like he did enough favors for some Senators in Congress to control them. So I honestly believe that the grass roots Japanese also controls the Senate of the United States Congress.

It's very important here to remember that the type of case I will be mentioning is <sup>not</sup> important to this confirmation hearing, it's the judges' action, it's proof that the State of Hawaii is under the control of one person and the racial group of that one person is in full control, and the group is the grass roots Japanese.

It is very important to remember that there are signed and stamped documents by the courts etc.

I'll make the first case as short as possible keeping only to court decisions. This case is about Ronald Caldeira's termination from the County of Kauai (Ronald is my son). Ronald was terminated on Oct. 30, 1983, the case went to the Hawaii Public Employment Board known as HPERB, .. No. CE-03-97. It went into Arbitration on Dec. 15, 1984. On Jan. 15, 1985 the Award of Arbitration was signed. A complaint of fraud was filed with HPERB on April 8, 1985 case no. CU-03-50. The Chairman of HPERB said if Ronald wanted to break that award he had to go to Federal Court. The case was filed in Federal Court on July 16, 1985. One week before it was to go to trial in Sept. 1987 the Union & County of Kauai

saw it wasn't signed and stepped the case to have it signed in a state court. That's over 2 years of the time allowed to have it signed. The state judge signed it. So the Federal judge through it out. That's when it started its climb to higher courts. To cut this short these cases should not have left HPERB because the complaint of fraud was filed before it was signed and because the name of the arbitrator came from an HPERB list. This case should have been heard even <sup>if</sup> it was signed in time because any time a complaint for fraud is filed it's the courts duty to hear the case and decide if it's fraud. Just because the judge signed it that does not mean it's not a fraud. As for the United States Supreme Court is corrupt is that they did not review the case they left that up to the court clerk. If this case can not go through a civil trial then it must go through a criminal trial because the fraud etc. is still there to defame the working ability of Ronald, not <sup>to</sup> mention his reputation and his social life. But what State, County or Federal Dept. do you report it to when you know they are all tied together in corruption, that's controlled by the Japanese. In the State of Hawaii if you are not Japanese you can not get an appointed position unless you pay <sup>your</sup> dues to the Japanese.

Racial discrimination in the State of Hawaii is so thick you can cut with a knife. But on Kauai the Hawaii State Government and the County of Kauai Government also practice employment discrimination, they hire and appoint only people who are born and raised on Kauai.

Now to go into the second case, again I remember you that it's not the type of case it the court system that this testimony is about. This second case is a Family Court or divorce case #196. These two cases have gone to the Honolulu F.B.I. once and this divorce case has been to the Honolulu F.B.I. twice. And it was the F.B.I. who after they investigated said that these two cases are tied together. This Family Court case was the first case to start, 1978. After refer to over 20 attorneys, Disciplinary Counsel, Judicial Committee, American Civil Liberty's union and none of them every told me I was wrong and none of them would tell me what was wrong with my papers on my docket. It was quite by accident I learned that I had a half contested and a half non-contested divorce. And because it was all signed by a Japanese Judge no one would touch my cases instead every body I went to for help turned into judges. So I had no choice but to take my own cases and that's how I found out of the corruption in Hawaii and how the grass roots Japanese have a strong hold on Hawaii. Remember I have not told you <sup>all</sup> the places I went to for help like the ombudsman who told me that no one would help me my only

chance for help was if I could get the newspapers or T.V. station to help, and that's how I made my rounds to the newspapers & T.V. stations. I would like to say here that even an attorney from Senator Inouye's office who called me would tell me I did not have a case what he said was it's too late for me to collect my damages. I told him who did he think he was feeling my constitutional rights to a fair trial was violated and that have no time limits. The fact is after 12 years I honestly believe I am still married. All the paper on file is fraud all the court systems knew this, but again the Japs in Hawaii control the Federal courts too all the way to the United States Supreme Court.

Two federal court judges I knew for sure that the Japanese in Hawaii control are Hawaii's federal judge Fong the other is Judge Robert Aguilar who was charged with racketeering in 1989. Aguilar sat on my case in Hawaii when I sued <sup>many of</sup> the Hawaii State judges and all the senators on the 13 and 14 judiciary committee and many others 78 defendants in all.

One point I'd like to make here is that when every I filed papers in the courts that when the Kauai County would falsify charge and suspend Ronald. And because I would not step that when he fired him. It is my belief that they thought we would move off Kauai.

There are documents to prove what I have been saying, Senators Inouye, Kennedy and Mitchell all have copies of many of these documents.

I would like to end by reading a letter I wrote to Senator Akaka while he was with the house. But most important is his reply to that letter which will give you a very good picture of politicians in Hawaii, the Japanese in Hawaii and white collar crime in Hawaii. In my search for justice I found that all politicians in Hawaii is the same.

February 20, 1990

U.S. Rep. Daniel Akaka  
c/o The White House  
Washington D.C. 20535

Mr. Akaka,

In the Feb. 2, 1990 issue of the Kauai Times there was a copy of a letter sent to you by Brent Carter of Kauai. After reading that letter I felt I had to speak out on something.

You see Mr. Akaka I believe that before you can accuse me of switching you have to start with government. Are you Mr. Akaka and your fellow politicians really to switch or cover up fraud, conspiracy or wrong doing? Right here on Kauai there was a labor union business agent who caught a Kauai mayor and Kaula County, comes to my door himself and all his family to go to Disneyland etc. along with his wife and 13 by week-end. I can guess what the business agent said to that mayor, "we'll keep it under the table but you owe me one."

and what about the mayor, all the Poipu Baptist, and all the other people who fit the description of the Poipu Baptist that is back in Hawaii, with a college degree in one hand and a teaching position right here on Kauai in his other hand.

In a letter I received from Senator Inouye in Dec. 1989 he says I insulted the American of Japanese Ancestry in a letter I wrote (not to the Senator) dated Nov. 6, 1989. He didn't say in his letter what I had said that was insulting, but all I need are two guesses (1) I said in my Nov. 6, 1989 letter to the other race in Hawaii caught by the Hawaii State Government appointed politician without first giving your dues to the grass root Japanese and (2) I said there is one person who is being supported (not a civil service worker) by the Hawaii State Government because this person not only paid his dues to the grass root Japanese but this person also paid his dues to the Japanese investors from Japan so now he will always be supported by the Hawaii State Government no matter who the Governor.

I'll tell you what's insulting to me, and that's all you politicians in Congress who voted to pay the Japanese 200,000 dollars for being in those camps or II internment camps and made no amendments to that bill to stop payment to those Japanese who caught as spies. I believe that if Congress believes they should be paid then they should be paid but now there is enough evidence to investigate the Japanese in those camps. Theresa documentary made by Patty Wint called "100 Years of Japanese in Hawaii" that tells of how they plan to take over Hawaii while in those camps. How they trained and reproduced to become the largest race in Hawaii while in those camps. That documentary also tells of how their mission was to take over the school set.

This documentary leaves questions like what about the 442 Battalion was that a fraud outfit conspired by those Japanese in those camps, just to make the United States think they were on our side? So what is congress waiting for Senator Inouye has all this information and more sent to him from Senator Kennedy. If that documentary is true and I believe it to be true than who is going to pay the grass roots people of Hawaii for the 40 years of Japanese take over of Hawaii. And remember we are not talking about 4 years (time the Japanese spent in those camps) we are talking about the 40 years they took over Hawaii. So if 4 years is worth 200,000 dollar then 40 years is worth a lot more. And don't forget I for one want a letter of apology to go along with that money. There's no question here that documents don't prove history will prove.

You know what I thought was even more insulting was when movie actor Pat Morita came out in 1983 on the day that bill

was signed and called it all... and said he would not touch one penny of that money. Yet P... stated in the... after the war, that a U.S. education... if that wasn't enough he went to look for the U.S. ... before...

... Charles... was the first but not the last... say "The... in Honolulu is corrupt from the... all the way to the top and Hawaii is the most corrupt... all 50 states." Who's going to take on the investigation of our P... Honolulu.

Our Hawaii State Judiciary is not only the most corrupt Hawaii State Department but it is the most controlled department by the grass roots Japanese. I can not go into the corrupt Hawaii State Judiciary for reason I can not go into now. But if you are interested in judicial corruption then here are some court cases you can go into yourself FD-3746 and before you ask me that is a divorce case the other case I don't have the case no. at my finger tips right now so I'll give the Plaintiff and defendant names if RONALD R. CALDEIRA vs KAUAI COUNTY & H.G.E.A. Uno. Both of these case can be found in Lihue Court. See how Japanese judges own the courts. They have no regards for laws, rules, court processes. If you want to see how the grass roots Japanese control our Hawaii State Legislature and at the same time get your answer to no. 1 on a copy of this letter about prying your eyes to the grass roots Japanese the you would have to go the Federal Courthouse in Honolulu and read case 56-0528. Also look at the judges name who heard that case then get the Star Bulletin dated June 14, 1966... you will not only see his picture but you will see he has been charged with racketeering. This is not even the beginning of the Hawaii State Judiciary corruption, I have't started on cutting tapes yet. But that's for later.

All of this grass roots Japanese take over of Hawaii could only be done when Hawaii became a STATE. There is no way the grass roots Japanese could control each island, a controlling them as through they were one mass of land like the other 49 states, without first getting into the Governor's Chair. And the only way they could get into that chair was for Hawaii to become a State. That's where John Burns came in, there's no question here the grass roots Japanese owe him to this day. That's how his son became a judge and how he is still a judge after getting inside information on the closing of Manoa Finance and then withdraw his million dollar saving account and still be a judge.

So history shows that Hawaii became a State not because it was ready but because the Japanese was ready.

It would take me to the end of 1990 to go into government corruption, so to end it here I'll make it as simple as possible.

President Bush did not switch on his semi-law, his daughter did not switch on her business and the God city's did not switch on their... daily, neighbor or... You... skaka can start... that controls... so I...

Barbara Jean Machuga  
P.O. Box 1496  
Kauai, Hawaii 96746

Date: 07-22-83

cc: Kauai Times

DANIEL K. AKAKA  
Second District Hawaii

COMMITTEE  
APPROPRIATIONS  
SUBCOMMITTEES  
RURAL DEVELOPMENT,  
AGRICULTURE AND RELATED  
AGENCIES  
TREASURY,  
POSTAL SERVICE  
TOURISM CAUCUS

**Congress of the United States**  
**House of Representatives**  
Washington, DC 20515

March 28, 1990

WASHINGTON OFFICE  
2301 RAYBURN HOUSE OFFICE  
BUILDING  
WASHINGTON, DC 20515  
TELEPHONE (202) 225-4906

DISTRICT OFFICE  
5104 PRINCE JOHAN KUMHO  
KAAHANAOLA FEDERAL BUILDING  
P.O. Box 50144  
HONOLULU, HI 96850  
TELEPHONE (808) 541-1986

Ms. Barbara Jean Machado  
P.O. Box 1406  
Kapaa, Hawaii 96746

Dear Ms. Machado:

This is in response to your correspondence regarding reparations for Japanese Americans interned during World War II.

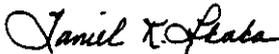
The internment of Japanese Americans during World War II is one of the most tragic events in America's history. This nation has recognized the grave injustice that was inflicted on both citizens and permanent resident aliens of Japanese ancestry. The evacuation, relocation, and internment of these civilians during World War II were largely motivated by racial prejudice, wartime hysteria, and a lack of political leadership. As a result, this nation has extended a formal apology and token restitution to those who were denied their individual rights.

The issue of redress deals with the denial of justice and racism. No person of Japanese ancestry was ever convicted of spying for Japan. In fact, between 1942-44, 18 Caucasians were charged with spying, at least ten were convicted. Nevertheless, Japanese Americans were forced into internment camps and denied their constitutional rights.

The 100th Infantry Battalion and the 442 Regimental Combat Team, which included Senators Inouye and Matsunaga, were the most highly decorated military units during World War II. Hundreds lost their lives and many more were wounded--they were not a "fraud outfit". On the contrary, these soldiers were loyal citizens who fought bravely for their country and their families.

On July 15, 1946, President Truman presented the Presidential Distinguished Unit Citation to the 100/442 RCT. He stated, "You fought not only the enemy, but you fought prejudice--and you won. Keep up that fight, and we will continue to win--to make this great Republic stand for just what the Constitution says it stands for." It is tragic that the fight against prejudice still continues today.

Aloha pumehana,



DANIEL K. AKAKA  
Member of Congress

DKA:dsw

703-898-8074

SEP 12 1990

JOHN B. MINNICK

The Honorable Joseph R. Biden, Jr., Chairman  
Senate Committee on the Judiciary  
SD 224, Dirksen Senate Office Building  
Washington, DC 20510-6275

Subject: Hearing on the nomination of Judge Souter

Dear Mr. Chairman:

Thank you for your kind letter of September 6, 1990.

A member of your staff notified me by phone September 11, 1990, of your decision to deny my request to be heard and to question the nominee on separation of powers. He also told me that I would be permitted to file a statement for the record. Accordingly, please accept this letter as my statement and include it in the official public record of the confirmation hearing on the nomination of Judge Souter to become an Associate Justice of the Supreme Court.

At the outset, Constitution, Article III, section 2, paragraph 2, second sentence provides that the Supreme Court shall have appellate jurisdiction in all other cases, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Pursuant to that constitutional provision, Congress made the rules governing the practice and procedure in the Supreme Court for 160 years.

In 1949, the rule making power prescribed by the Constitution was transferred by Congress to the Supreme Court. Act of May 24, 1949, Chap. 39, section 102, 62 Stat. 104, amending 28 USC 2071.

While Congress was making the rules pursuant to the Constitution, the rules governing the practice and procedure in the Supreme Court were an integral part of the supreme Law of the land by constitutional definition under Article VI, 2d paragraph.

When the Court was given the rule making power by Congress, the old rules including the rules relating to evidence were discarded. New rules were promulgated by the Court in 1954 substituting oral argument for the old rules relating to evidence.

11509 STURBRIDGE CT. FREDERICKSBURG, VA 22401

Senator Biden

The Congressional transfer of the rule making power was not then nor is now sanctioned by any substantive provision of the Constitution of the United States. In any case, the new rules governing the practice and procedure in the Supreme Court do not qualify as part of the supreme law of the land because they were not made pursuant to the Constitution.

The 1949 technical amendment to the Judicial Code of the United States not only violated the principle of separation of powers, but also destroyed one of our most important constitutional checks and balances. Besides destroying the last vestige of our constitutional system of checks and balances, the 1949 amendment opened the door to unprecedented judicial legislation by the Court.

If you had allowed me to speak, I would have questioned the nominees along the following lines:

1. What provisions for separation of powers are made in our State Constitutions and Bills of Rights?
2. Where do such provisions come from?
3. What provisions for separation of powers are made in the Constitution of the United States?
4. Where do such provisions come from?
5. What happens when one branch exercises the powers or performs the functions of the other ~~two~~ or either of them?
6. What does the principle of separation of ~~powers~~ mean?
7. Do you agree with the position take by John Marshall during Virginia's ratifying convention that the Constitution, if ratified, would ensure a regulated democracy?
8. What was the basis for Marshall's position?
9. Do you agree with the position taken by James Madison on the floor of the first Congress that the principle which separates our powers of government is the most sacred principle of the Constitution, indeed of any free constitution?
10. What was the basis for Madison's position?

Senator Biden

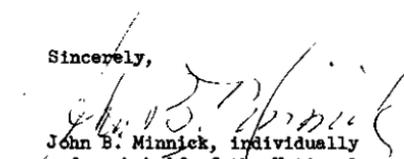
11. Do you agree that Congress made the rules governing the practice and procedure in the Supreme Court for 160 years pursuant to the second sentence of the second paragraph of section 2 of Article III of the Constitution?
12. Do you agree that Congress transferred the rule making power to the Supreme Court in 1949 by a technical amendment to the Judicial Code?
13. What substantive provision of the Constitution sanctioned the transfer of the rule making power to the Court?
14. Do you agree that the old rules made by Congress pursuant to the Constitution qualified as an integral part of the supreme law of the land by constitutional definition under Article VI, 2d Paragraph?
15. What happened to the old rules relating to evidence?
16. What did the Court substitute for the rules relating to evidence?
17. Do the new rules promulgated by the Court without constitutional sanction qualify as part of the supreme law of the land under Article VI, 2d paragraph?
18. If confirmed, how can you in good conscience and without reservation give your oath to support and defend the Constitution of the United States when the rules governing the practice and procedure in the Supreme Court are not sanctioned by the Constitution?

Please acknowledge receipt and confirm inclusion of my letter of August 30, 1990 and this letter in the official public record of the confirmation hearing on the nomination of Judge Sotomayor to become an associate Justice of the Supreme Court.

Please also send me a copy of the Committee rules governing confirmation hearings as requested in my letter of August 30, 1990.

Thank you again for your courtesy and consideration.

Sincerely,



John B. Minnick, individually  
and on behalf of the National  
Committee for Constitutional  
Integrity

703-898-8074

Constitution Day, September 17, 1990

JOHN B. MINNICK

The Honorable Joseph R. Eiden, Jr., Chairman  
Senate Committee on the Judiciary  
SD 224, Dirksen Senate Office Building  
Washington, DC 20510-6275

Subject: Hearing on the nomination of Judge Souter

Dear Mr. Chairman:

I wish to file objections to the general line of questions being asked of Judge Souter.

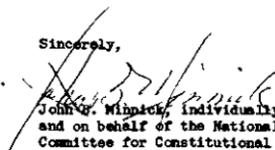
1. The questions are designed to preserve judicial legislation not sanctioned by the Constitution.
2. The questions are designed to cover up flagrant violations of the principle of separation of powers.
3. The questions are designed to cover up the destruction of our constitutional system of checks and balances.

In support of my objections, I am attaching a copy of my 1974 report to the Virginia State Bar.

Please include this letter and the attached exhibit in the official public record of the confirmation hearings on the nomination of Judge Souter to become an Associate Justice of the Supreme Court.

Thank you very much for your courtesy and consideration.

Sincerely,

  
John B. Minnick, individually  
and on behalf of the National  
Committee for Constitutional  
Integrity

Attachment: Copy of 1974 report to the Virginia State Bar

11509 STURBRIDGE CT. FREDERICKSBURG, VA 22401



JUL 15 1990

*Carol*  
*See my report*  
*page 36*  
*It is still a burning*  
*dash in the mind -*

# ANNUAL REPORTS ISSUE

**Reports Commence on Page 22**

*It was filled with*  
*appropriate congressional*  
*committee and*  
*is on file with*  
*the House*  
*July 15 1990*  
*CM*



# Annual Reports 1973-74

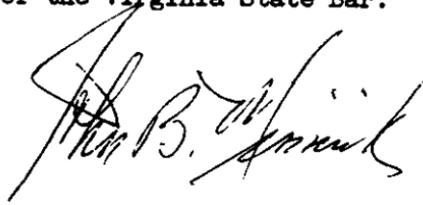
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DISCLAIMER

The following report is the product of my personal experience and basic research. The findings of fact and conclusions of law are mine and do not necessarily represent the views, opinions or conclusions of the officers and members of the Virginia State Bar.



## SPECIAL COMMITTEE ON FEDERAL JURISDICTION RULES AND PROCEDURE

### Foreword

#### *Purpose*

This report is designed to uncover the destruction of our constitutional system of checks and balances by prior Congresses of the United States and to expose the current cover up effort of the 93d Congress.

#### *Scope*

The Special Committee on Federal Jurisdiction Rules and Procedures focused primarily on rules of evidence, division of jurisdiction, executive privilege, impeachment, and separation of powers. Five relevant legislative proposals were selected out of many for discussion.

#### *Effect*

Hopefully, the practical effect of this report will be to strip off the double standard of conduct enshrouding "Watergate" and related matters including the current impeachment proceedings. The beneficial effect will be to shed new light on fundamental principles of constitutional law once taken for granted and long since forgotten.

### Background

#### *Thirty-fifth Annual Meeting*

This report is directly attributable to the splendid presentation by the panel on the proposed Federal Rules of Evidence at the 35th annual meeting of the Virginia State Bar. The panel recommended the appointment of a committee to study the proposed rules and to make suggestions on or before July 30, 1973.

#### *Committee*

By letter dated June 22, 1973, President Howard created the Committee to

Study Federal Rules of Evidence and named John B. Minnick as chairman and Gregory U. Evans and Plato Cacheris as members to serve with him.

The committee immediately secured copies of the hearings, bill, and related materials on H.R. 5463 on the proposed Federal Rules of Evidence.

#### *Preliminary Report*

A preliminary report was submitted July 23, 1973, to point out among other things that the proposed rules, hearings, and related materials raised serious constitutional questions under the doctrine of separation of powers.

#### *Enlargement*

In the meantime, S. 1876 on the proposed division of jurisdiction between State and Federal courts was referred to the committee for study and comment. Additionally, the committee was redesignated the Special Committee on Federal Jurisdiction Rules and Procedure and its functions were enlarged to include monitoring Congress. The work and plans of the Special Committee were outlined and reported at the fall conference in Staunton.

#### *Preliminary Report*

In a preliminary report dated September 26, 1973, the Special Committee pointed out that the principal question raised by the proposed Federal Rules of Evidence involved the doctrine of the separation of our powers of government under the first three articles of the Constitution; and that the big question raised by the proposed division of jurisdiction between State and Federal courts involved the concept of the equal protection of the law under the Fourteenth Amendment as applied to both State and Federal Governments by the courts. The Special Committee also announced that it planned to ask for hearings on the constitutional questions raised by both bills, and requested that the announcement be circulated. The announcement was published in the November-December 1973 issue of the Virginia Bar News.

#### *Monitoring Service*

The monitoring services of the Special Committee picked up information on several legislative proposals including H.R. 12135 and H.R. 12462 on amendments to the Freedom of Information Act, S. 2803 to insure the separation of constitutional powers by establishing the Department of Justice as an independent establishment of the United States, and S. 2978 to establish a special commission to study the establishment of an independent permanent mechanism for the investigation and prosecution of official misconduct and other offenses committed by high Government officials. The particular relevance of these legislative proposals determined the thrust of this report.

### **The Legislative Proposals**

#### *H. R. 5463 Proposed Federal Rules of Evidence*

This legislative proposal originated in a suggestion made by former Chief Justice Warren; but the suggestion was caused by the so-called "enabling acts" which gave the Court the power to prescribe the rules, and in particular by the last one contained in the Act of May 24, 1949, Ch. 39, section 103, 63 Stat. 104. The provisions of that Act gave the Supreme Court the power to make its own rules and constituted a grant of the legislative power reserved to the Congress as one of our checks and balances under Article III of the Constitution.

After the Court was given the power to make its own rules, it proceeded to

**Erratum:** The citation above should read Act of May 24, 1949, Ch. 39, section 102, 62 Stat. 104.

adopt its own rules and of course threw out the old rules including the rules relating to evidence. Since the new rules do not constitute part of the supreme law of the land under Article VI of the Constitution, the suggestion by former Chief Justice Warren appears to have been made in an obvious effort to cover up the destruction of one of our constitutional checks and balances.

After the suggestion was made by the Chief Justice, a special committee was appointed to study the feasibility of establishing uniform rules of evidence for the Federal judicial system. The special committee determined that it was feasible. An Advisory Committee on Rules of Evidence was appointed and H.R. 5463 is the result of the work of the Advisory Committee. When that committee commenced its work, however, it established several criteria, one of which was the avoidance of constitutional issues. Hearings, page 91; Congressional Record for Wednesday, January 30, 1974, page H 307.

H.R. 5463 encountered a stormy reception in Congress and the rules as proposed by the Advisory Committee were rejected. Pub. L. 93-12, March 30, 1973, 87 Stat. 9; see also, 119 Cong. Rec., No. 22, February 7, 1973, S 2241-2242; 119 Cong. Rec., No. 40, March 14, 1973, H 1721-1731; 119 Cong. Rec., No. 42, March 19, 1973, S 4493-5009; Federal Bar Journal, Evidence, Part I, Volume 32, Number 4, Fall 1973.

While the debates were going on in Congress, the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary was holding hearings on the proposed rules of evidence. Those hearings demonstrate the failure to account for fundamental principles of constitutional law despite some self serving statements seemingly to the contrary. Thus it appears that "Constitutional issues would be avoided to the extent possible, on the theory that the formulation of rules was not in general an appropriate method of resolving them." Hearings, page 91; see also, Hearings, page 35; and the Congressional Record for Wednesday, January 30, 1974, page H 307.

As a result of the 1973 hearings and mark up session, most of the controversial provisions of the proposed rules were eliminated, and a much modified version of H.R. 5463 was reported to the House November 15, 1973. H. Rept. No. 93-650, 93d Cong., 1st Sess. The proposed rules as revised by the House Committee on the Judiciary were passed by the House with floor amendments, February 6, 1974, 120 Cong. Rec., No. 12, page H 570; and referred to the Senate. H.R. 5463 as modified by the House was read twice in the Senate and referred to the Committee on the Judiciary. 120 Cong. Rec., No. 13, February 7, 1974, S 1552.

The Special Committee has requested a hearing on the constitutional issues.

There are other defects in the proposed Federal Rules of Evidence. The Advisory Committee's notes, the hearings, the committee report and related materials do not establish a need for black letter statutory rules of evidence. The danger of a black letter statutory rule on presumptions is glossed over under the guise of labelling the rule a technical matter. The treatment of evidence generally and hearsay in particular fails to account for the fundamental rule of exclusion where the evidence is not competent to prove the truth of the matter asserted.

#### *S. 1876 Proposed Division of Jurisdiction between State and Federal Courts*

As in the case of the proposed rules of evidence, the proposed division of jurisdiction arose out of a suggestion by former Chief Justice Warren. In proposing the study, he stated:

"It is essential that we achieve a proper jurisdictional balance between Federal and State court systems, assigning to each system those cases most appropriate in light of basic principles of federalism."

The American Law Institute acted upon his suggestion and made a ten-year study of the jurisdiction of Federal Courts. S. 1876 is the result of that study and covers six broad areas of Federal jurisdiction: diversity of citizenship; Federal question jurisdiction; jurisdiction of the United States as a party; admiralty jurisdiction; jurisdiction of three-judge courts; and multi-party-multi-state litigation.

The initial suggestion by the Chief Justice did not account for the fact that the judicial power of the United States under the Constitution does not extend to the assignment of the jurisdiction of the State courts; and neither does the legislative power in the absence of a proper amendment.

Aside from the ramifications of the American Law Institute proposal, the bill is described at the very outset as "lawyers' law." Hearings, page 98. As such, the proposal is reduced to an effort to impose a set of arbitrary standards for the benefit of the legal profession without regard to the rights of the people to the equal protection of the law guaranteed by the Fourteenth Amendment. Accordingly, the proposal may be classified as a rule of men and not of law.

The Special Committee on Federal Jurisdiction Rules and Procedure has requested a hearing on the constitutional aspects of the proposed division of jurisdiction.

*H. R. 12135 and H. R. 12462 To Amend the Freedom of Information Act.*

H.R. 12462 is the result of executive mark ups of H.R. 12135. The basic proposal to amend the Freedom of Information Act, 5 U.S.C. (1970 ed.) section 552, originated in the efforts of the courts and Congress to get information from the executive branch and involves the executive privilege concept. Additionally, the hearings, bills and related materials manifest an effort to lay a foundation for contempt proceedings in order to lend some color of criminality to possible impeachment charges. See particularly, the provisions of the bills for filing law suits in the United States District Court for the District of Columbia; see also, Hearings, pages 6113 et seq.

Of course the difficulty with the proposal lies in the fact that 5 U.S.C. section 552 is part of the Administrative Procedure Act of 1946, 60 Stat. 237, as codified and enacted into positive law in 1966, 80 Stat. 378, 381-388, now 5 U.S.C. (1970 ed.) sections 551-559. By the express terms of the Administrative Procedure Act, the executive branch and the so-called "independent agencies" were given the power to "prescribe law or policy". 5 U.S.C. (1970 ed.) section 551. The grant of legislative power by Congress to the executive branch is not only inconsistent with our great American doctrine of separation of powers, it also destroys our constitutional system of checks and balances. Additionally, the grant of legislative power to the executive branch is the proximate cause for the recent assertions of executive privilege.

*S. 2803 To Insure the Separation of Constitutional Powers by Establishing the Department of Justice as an Independent Establishment of the United States*

This legislative proposal is the product of the constitutional confusion generated by the destruction of our constitutional system of checks and balances by prior Congresses of the United States; and, as such, manifests an effort in the 93d Congress to cover up that destruction.

*S. 2978 To Establish a Special Commission to Study the Establishment of an Independent Permanent Mechanism for the Investigation and Prosecution of Official Misconduct and other Offenses Committed by High Government Officials.*

This proposal arises out of the same problem, namely, "Watergate," that produced S. 2803 and H.R. 12462. As such, it represents another layer in the attempted cover up of the destruction of our constitutional system of checks and balances.

### Discussion

The Special Committee on Federal Jurisdiction Rules and Procedure has uncovered two of the specific Acts of Congress which have destroyed our constitutional system of checks and balances. In addition, the Special Committee desires to point out that there is nothing in the Constitution to prevent one branch of government from exercising the power of the other two branches. Accordingly, the only constitutional way to insure the separation of our powers of government is not to give any of them away.

By the act of giving away constitutional powers, the Congress of the United States has not only made it impossible to maintain the separation of powers, it has also reduced us to a government of men and not of law.

"Watergate" is merely the manifestation of the constitutional confusion of the rules generated by the "giveaway" acts of Congress. The impeachment proceedings stand on no better footing. Those proceedings are the direct result of the confusion and reflect the charges and countercharges generated when one branch of government compounds the mistakes and errors of another branch.

Since the problem is essentially a question of the rules, the Special Committee on Federal Jurisdiction Rules and Procedure desires to furnish a brief analysis of the real reason for the separation of our powers of government.

The Legislative Branch operates under the rules of parliamentary procedure.

The Executive Branch operates under administrative rules and regulations including executive orders.

The Judicial Branch operates under the rules of court subject to the rules of evidence.

The rules of parliamentary procedure do not work in the Executive and Judicial Branches.

Administrative rules, regulations and executive orders do not work in the Legislative and Judicial Branches.

Rules of court and evidence do not work in the Executive and Legislative Branches.

The reason why the rules of one branch do not work in the other two branches is essentially a matter of functions.

The legislative function is essentially a policy making function.

The executive function is essentially a policy keeping function.

The judicial function is essentially a policy applying function.

When all three branches are actively engaged in making national policy, there are bound to be not only honest differences of opinion, but also diametrically opposed points of view.

"Watergate" with its ramifications including impeachment proceedings is a

classic example of what can happen when all three branches are busy exercising legislative powers. In short, the current confusion in government today is directly attributable to the destruction of our constitutional system of checks and balances by the Congress of the United States.

### Findings

The Special Committee on Federal Jurisdiction Rules and Procedure finds:

1. The hearings, debates, committee report and related materials on H.R. 5463 do not demonstrate any real need for black letter statutory rules of evidence. Additionally, the hearings, debates, committee report, and the proposed Federal Rules of Evidence demonstrate not only a failure to account for elementary principles of jurisprudence, but also the deliberate avoidance of constitutional issues.
2. The hearings and related materials on S. 1876 do not demonstrate any real need for the division of jurisdiction between State and Federal Courts. Additionally, the hearings and related materials demonstrate an insensitivity to the needs of the people as well as a general avoidance of constitutional issues.
3. The hearings and related materials on H.R. 12462 demonstrate the efforts in the 93d Congress to cover up the destruction of our constitutional system of checks and balances.
4. S. 2803 and S. 2978 demonstrate further efforts in the 93d Congress to cover up the destruction of our constitutional system of checks and balances.
5. The impeachment proceedings manifest the overall effort to cover up the destruction of our constitutional system of checks and balances.

### Conclusions

The Special Committee on Federal Jurisdiction Rules and Procedure concludes:

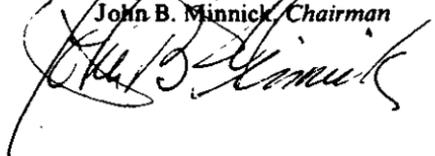
1. Our education in the field of Constitutional Law has been sadly neglected.
2. The Executive and Judicial Branches have compounded the mistakes and errors committed by the Legislative Branch.
3. The 93d Congress is fatally bent on covering up the destruction of our constitutional system of checks and balances.

### Recommendations

The Special Committee on Federal Jurisdiction Rules and Procedure recommends:

1. Establishment of a permanent standing committee on Constitutional Law.
2. Transfer the functions of the Special Committee on Federal Jurisdiction Rules and Procedure to the permanent standing committee on Constitutional Law.
3. Conduct a Constitutional Workshop at the Thirty-Sixth Annual Meeting of the Virginia State Bar.
4. Establish Constitutional Workshops in the Law Schools of Virginia.
5. Conduct the pilot project at the Washington and Lee University Law School in conjunction with its student research program.

Respectfully submitted,  
John B. Minnick, Chairman



U. S. SENATE NOMINATION -- JUDGE SOUTER

Anne Neamon, National Coordinator, Citizens for God & Country

THE URGENCY TO RESTORE CONSTITUTIONAL JUSTICE by  
DEFENDING AGAINST INVADING CORRUPTION

September 19, 1990

I. UNDER SACRED OATH TO DEFEND THE CONSTITUTION AGAINST ALL ENEMIES FOREIGN AND DOMESTIC, WILL THE NOMINEE, AS A JUSTICE ON THE U. S. SUPREME COURT, PROPOUND THE CONSTITUTIONAL FOUNDING PRINCIPLES FOR "REPRESENTATIVE GOVERNMENT, INDIVIDUAL RIGHTS, AND THE RULE OF LAW UNDER GOD," reasserted by President Reagan, July 4, 1982:

We are founded to legislate, propagate, and secure Christianity (western civilization), by the Christian common law; nothing be done to hurt Christianity. Bring infidels and savages unto human civility for a quiet and settled government, which cannot place Christianity in jeopardy, nor offend it. The morality of the nation is deeply engrafted upon Christianity. It is the duty of government to deter no-religion beliefs; secularism is unconstitutional, preferring those who disbelieve over those who do believe...The First Amendment was never intended to reduce Christianity to the levels of Judaism, Islamism, nor infidelity, (nor satanism, now propagated with public taxes). Holy Trinity Church, 1892; Engel, 1962; Abington, 1963; Jaffree, 1982, District Court; Lynch, 1984, Title 36, U. S. C. 172 - ONE NATION UNDER GOD; Public Law 97-280, 1982; Chicago Nativity Scene, 1987, dissenting opinion, Appeals Court.

II. Will the Nominee support C. J. Rehnquist loyalty against the Soviet Constitution, Art. 25 on "separation of church and state," and the deceptive judicial "three-prong test" - Lemon Test, imposed unconstitutionally by J. Brennan, usurping Constitutional moral order, and usurping Parental Sovereignty, Board of Education v Pico, 1982?

III. Will the Nominee by duty of the Oath, a religious commitment, DEFEND against anti-American internationalization imposed by the unconstitutional UNESCO Great Society Programs for the Soviet Constitution, "classless society, centralized education, socialization, 'legalized' militant labor union laws" which subvert the Constitution by centralized education and separation of church and state for international militant atheism -- destruction of western civilization, officially recognized in the Education Report to President Reagan, 1963, WE ARE A NATION AT RISK BY AN ACT OF UNDECLARED WAR?

IV. In Bondage to the U. S. Constitution, will the Nominee emphasize:

- 1) U. S. Christianity is the ONLY religion in the world which Constitutionally guarantees individualism for orderly citizens, Christian or non-Christian.
- 2) ONLY IN A CHRISTIAN NATION DO CHRISTIANS HAVE CIVIL RIGHTS. ONLY IN A CHRISTIAN NATION DO NON-CHRISTIANS, AWAY FROM THEIR LAND OF ORIGIN HAVE CIVIL RIGHTS, AND FAR MORE THAN AS A MAJORITY IN THEIR FATHERLAND. DEMY CHRISTIAN ETHICS, AND NONE SHALL KNOW FREEDOM.
- 3) God never endowed the anti-Godly with God-given, unalienable rights to molest and destroy Godly living - western civilization Christianity.
- 4) The Holy Scriptures forbid the subordination of the Supremacy of the New Testament, the basis for the U. S. Christian Constitution, SIGNED IN THE YEAR OF

OUR LORD, SUNDAYS EXEMPT FROM VETO DAYS.

5) The common culture is 96% Christian by founding purpose to secure Christianity by Euro-Christian concepts on color, race, religion, economy, education, economy -- the TOTAL CULTURE, for ONLY IN A CHRISTIAN NATION DO CHRISTIANS HAVE CIVIL RIGHTS, WILLING TO SHARE THOSE RIGHTS AND THEIR BLESSINGS OF FREEDOM WITH ALL ORDERLY CITIZENS.

To those demanding "You cannot put your religion on me," will the Nominee by Constitutional Divine Law guides in free government reassert, A CHRISTIAN NATION IS ENTITLED TO A CHRISTIAN ADMINISTRATION, with no considerations for the social convenience of abortions by deliberate murder of the unborn?

"OUR CONSTITUTION WAS MADE FOR RELIGIOUS PEOPLE. IT IS WHOLLY INADEQUATE FOR THE GOVERNMENT OF ANY OTHER." John Adams. Only through religious people can a nation uphold a moral order by Divine Law, citizens educated in the self-discipline by public conscience for self-government -- mutual respect and consideration -- ALL AS ONE NATION UNDER GOD, Title 36, U.S.C. 172; and THE BIBLE IS THE ROCK OF OUR REPUBLIC, guaranteed, U. S. Constitution, Art. IV, Sec.4, against the invading corruption of the international militant atheism, Public Law 97-280, 1980. We are a Christian Nation, entitled to a Christian administration, the U. S. Christian Constitution is our Supreme Law, and any to the contrary are null and void.

Submitted by,

*Anne Neamon*

Anne Neamon, National Coordinator  
Citizens for God & Country  
McLean, Va. 22101

# Christianity: Western Concepts for Law and Justice

The entire system of Christianity depends on Christ and His unchangeable doctrines. While differences may still exist among some who do not acknowledge unions of the Divine and human nature in any person, nonetheless, Christ is Second in the God-head of the Holy Trinity — the Father, the Son, and the Holy Spirit.

Scripturally, Christ serves as an intercessor between Christians and God, while Christians accept the fact that to stay or reconcile with God, Christians communicate with God through Christ! Naturally, how else can a Christian be a Christian, considering Christ from the God-head of the Holy Trinity?

A vital part of the Christian system is the essential Divine Guide for moral harmony — faith by acts of Obedient Obedience. These moral aspects of Christianity include love and belief in God; love and belief in Christ; and love of our neighbor as ourselves? By this Obedience, Christians obtain in western civilization upon the highest dignity, the inalienable, God-given rights for non-hostile citizens, whether ancestry or majority. Non-Christians, away from their land of origin, have no civil rights in any nation, but a Christian nation.

In fact, believing non-Christians are unconcerned about any "discomfort, diversified society, pluralistic society." They understand the common culture of 95 percent of Christians at the U.S. is the purpose of the founding of this nation, and the basis for the common law by concepts of western civilization, and that the religion provides more civil rights in a Christian nation than they ever had in their lands of origin.

It is the international militant atheism, disrespect of obligations the society by every citizen, who are intolerant of Christianity, by force, crime, and violence to deny Christian life, property, their children and liberty. Misrepresenting themselves as the one voice among their race, and misrepresenting laws and court decisions, buying politicians and laws, they attempt to infringe and control government to advance their money demands. With all their refutations, arguments, differences and rejections, they have yet to disprove history, that only upon divine law can liberty endure.

Christian Nations is entitled to a Christian Administration. At the time of the adoption of the

Constitution, and the [First] Amendment ... the present of not the universal sentiment in America was that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions and to make it a matter of state policy to hold it in utter inferiority would have created universal disapprobation, if not universal indignation.

"The real object of the Amendment [First Amendment — so established religion, state church] was not to countenance, much less to advocate, Mohammedanism or Judaism or Infidelity by protecting Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." (Justice Story, U.S. Supreme Court).

"By establishment of religion is meant the setting up or recognition of a state church, or conferring upon one church of special favors and advantages which are denied others." (Justice Cooley, U.S. Supreme Court).

"We are founded to legislate, propagate, and secure Christianity; the common law ... Nothing he does to hurt Christianity ... Bring infidels and swarves into America ... Enter into confederations to maintain and preserve the liberty and purity of the Gospel of Lord Jesus ... Almighty God being the only God of Christians is the duty of every man to worship God, (un)confessed in religious liberty, unless he be in disturbance of moral order, peace, and safety of society. To scandalize these doctrines is extremely impious ... to revile with malicious and blasphemous contempt the religion professed by almost the whole community is an abuse of that right. We are a Christian Nation." (Holy Trinity Church v. United States, 1892, asserted into current cases).

Summary  
Christian law priority, Christian superiority, no established Christian church, favored by government favoring or disfavoring one Christian church over another

— this is the true meaning of the first amendment establishment, the discrimination of impostors and their separation of church and state, diversified society for militant atheism, Soviet Communism, 52, and Communist freedom, 22. 29. The Constitution is signed in the year of our Lord, Sunday except from who deny. Christianity is our common law, moral order, and guide in government, and in individual citizens, the Holy Scriptures forbid subordination of the supremacy of the New Testament! All free nations in western civilization are guided in government by Christian ethics, Divine Law for stability of justice, based on the common culture, common law.

This is the basis for God-given, inalienable, inalienable rights, against which the government cannot interfere, as long as actions are, like the nation, under God as all laws!

Religion is not promoted by saying non-sectarian Christian school prayers, celebrating the legal-official holidays of Easter, Thanksgiving, Christmas with the Nativity and Christmas carols. No specific Christian church is favored or disfavored. Christian ethics belong in school curriculum and in government because we are endowed by our Creator. Those who advocate making prayers by discrimination and disorder are not entitled to such rights, for God never endowed any with hostility to his Divine Law. A Christian nation is entitled only to Christian administration. Being 95.5 percent Christian, 2 percent Jewish, 1 percent Islam. Here in the history of a diversified society? Only in a Christian nation do Christians have civil rights. Only in a Christian nation do non-Christians away from their land of origin have civil rights, and far more than as a majority in their fatherland. Only Christians ethics in government and none laws freedom.

International Perspectives  
The above facts are the truth on what the First Amendment establishment clause means. But let us be in Christian nation, who respects, believe their manipulations and distortions applied for centuries around the world to "mobs and break civilizations," will work to destroy the USA. As long as Christians or non-Christians remain vigilant, that will not happen, no matter how bitter the political battles.

applied to control defenders. Indeed, non-Christians are not encouraged to others about the loss of liberties, for they fear repeat histories of Germany and Latin America when Jews fled with the tyranny of clergy and the bombings of churches.

"We will, like communist governments everywhere, the Sandinistas have launched attacks against ethnic and religious groups. The capital's only synagogue was desecrated and destroyed. ... the entire Jewish community forced to flee Nicaragua. Protestant Bible meetings have been broken up by mobs, by mob violence, by machine guns. The Catholic Church has been singled out — priests have been expelled from the country, Catholics beaten in the streets after midnight Mass.

The Catholic primate of Nicaragua, Cardinal Ernesto y Bravo, has put the matter forthrightly. "We want to state clearly," he says, "that this government is totalitarian. We are dealing with an enemy of the Church." (State Department, Reagan, Policy 805, 1986).

Jews demand Christian law priority and Christian neutrality as a shelter for their religious, ethnic, cultural and economic security. They demand the acceptance of the anti-Christian, Rabbi Meier Kahane, The Jewish Press, 1989.

"America is not a melting pot, it is not a haven for the oppressed. Only the Christian Christians who, no matter how little they may practice at any given moment, are in the end, Christians who bitterly resent non-Christian bigotry and blasphemy and offend their faith. Any Jew of the law to do Christianize America will not only not succeed, but will so anger Christians as to bring about an explosion of terrible Jewish hatred. That is the effort of Jews to prevent official Christmas presentations or creches, Nativity, treat may we shortage victories — but at the expense of long-range disaster ...

The why when one reads that in England, Jews are infuriated by the fact that the Post Office has marked almost all letters with the words "Jesus is alive," one shudders. His head is in a dizzy. All the angry protests by British Jews are the past that England is a Christian country and if Christians in Israel would object to Jewish slogans and idolatry of the Jewish people, normal Jews would quite properly file no in indignation.

"If a Christian wishes to live in Israel,

he must accept that he is living in a Jewish country. The same holds true for the Jew if he willingly chooses to live in a Christian land, let him know it and not attempt to change it. On the one hand, he cannot. On the other, he will bring down on himself and his people tragedy."

Many Pro-American Jewish groups are speaking out, denouncing the anti-Christian onslaught of our Divine Law system of justice by concepts of western civilization, which is the prime target of such attacks.

It is the duty of every citizen, then, to participate in sharing their information with others. This is the purpose of this printed information. Please provide your periodic correction. Additional copies are available for a donation to help defray costs involved.

Remember, the USA — of all Christian nations — is without an established church, guided in government by Biblical ethics — the founding Christianity — the only religion in the world which focuses and guarantees in the Constitution the individual inalienable by private means to build the state, houses of worship, free speech, press, free elections and free enterprise, freedom to travel into and beyond our borders, the rights of conscience — always under God, in one nation under God guided by the Christian common culture and common law.

Notice carefully, it asks you to keep America free, Christian or non-Christian if you treasure your liberties, then do your part now, for to what country would you go, when the ships for the USA are down?"

One Nation Under God ...  
The 28 USC 172  
For more information,  
write to:  
Citizens for God  
and Country  
P.O. Box 137  
McLean, Virginia 22101

# Anti-Christian Bias Criticized

The following speech was entered into the Congressional Record of May 24 by Rep. William Dannemeyer (R-Calif.)

Mr. DANNEMEYER. Mr. Speaker, Tustin is a moderately sized southern California city, a very small portion of the 29th Congressional District in which I have the pleasure to serve. The citizens of Tustin are your average hard-working, industrious Americans.

Like in other communities around the Nation, the Tustin City Council begins each meeting with an invocation, a prayer offered by a local clergyman or other local resident. It has always been the way—that is, until January 3 of this year.

It was on that date that Tustin mayor, Richard B. Edgar, wrote to the Rev. Don Wright and other area ministers that while the mayor was grateful for their service in providing invocation, no longer will they be able to invoke the name of Jesus Christ at the close of their prayers.

Upon the legal advice of Tustin city attorney, James G. Hauer, the mayor stated "that all speakers here on using language that might be construed as endorsing a particular religious belief." Counsel stated that, "It appears that most courts will tolerate religious invocations only if they fall short of endorsing a particular religious doctrine or belief." He also cites *Murray v. Chasobone* (483 U.S. 703 (1987)) as an example of the Supreme Court upholding legislative prayers "because the chaplain had removed all references to Christ."

Such an executive policy is clearly anti-religious, but it is most specifically anti-Christian. It is a legalistic irony that the same U.S. Supreme Court which decided in 1962 to prohibit State prescriptions on the content of any prayer is the same court being cited by the mayor of Tustin, CA, to tell citizens just what they can and cannot say in prayer.

Mr. Speaker, our Judeo-Christian heritage is under attack in America. The attack is mostly subtle, a sprinkling of local complaints and subsequent court decisions which serve to slowly squeeze the religious life out of our national heritage. Sometimes the attack is brazenly offensive.

How often have we heard the plaintive cry of humanists that the Judeo-Christian ethic, and particularly Christianity itself, are responsible for the ills of America?

Humanists, they say, would be happy if only society would condone sex acts between men or two women, even though we be happy if only they could kill their own offspring without the burden of guilt; kids would be happy if only society would recognize the inhumanity of their parents' sexual relations, and Hollywood's elite would be happy if only society would properly care for its poor thereby relieving the guilt associated with million dollar incomes and 20,000 square foot homes occupied by the "hard work" of shedding one's sins on the big screen.

Christianity is the most oppressive external influence upon America, according to the new bigots. Hollywood, homosexuals, abortionists, family planners, the sexually promiscuous, self obsessed, selfish parents, and kids—all would be happy minus the Judeo-Christian ethic. Those Ten Commandments and that Sermon on the Mount can be so burdensome and restrictive. The best solution to relieve this burden is to get rid of it, or second best, put an amoral spin on it.

To pursue these solutions the new bigots have sought and nearly succeeded in taking control of our Government and our educational system. Control of the Government is necessary to oppress adults who believe in per-



Rep. William Dannemeyer (R-Calif.) denounces anti-Christian prejudice.

sonal accountability, self-sufficiency, and religious freedom. While control of our educational system is necessary to oppress the children of these adults and offset familial influence.

Mr. Speaker, examples abound of how the secular lords of lechery have used the Federal Government to oppress all who happen to disagree with their world view. However, the larger tragedy is what these new bigots have done to our kids by commandeering our educational system from the hands of parents and into the hands of unions, athletes, and lawyers.

Children who have managed to make it out of the womb are taught that killing children still in the womb is permissible in our society. Kids are taught that homosexual sodomy is normal behavior. Young girls are instructed by their adult supervisors that a line of virtue and subsequent conception is no more difficult of a problem than having an abortion. Oh, and next time there are always contraceptives available to prevent an unhappy reconnoissance of creation.

Our Constitution instructs kids that they have inalienable rights. But our Supreme Court, influenced by the demands of the new bigots, and set aside by our Constitution to interpret such issues, tells these kids that they cannot recognize their Creator in public school. Give such lessons to our children, are we surprised that kids manifest so many problems?

Mr. Speaker, permit me to take a moment to share with you an analysis of a gentleman named David Barton. Many of Members know his work. All should. Mr. Barton fell inspired to correlate various social problems with the 1962 removal of voluntary prayer in public schools. Here is what he found:

The birth rate for unwed teenagers, per thousand, ages 15 to 19 went from 15 in 1962

to 26.5 by 1963. That's double the amount of legitimate births.

Pregnancies to unwed teenagers, per thousand, ages 15 to 19 increased fivefold from 100 in 1962 to 540 in 1963.

The same figure for girls under 15 years old quadrupled in this time period.

Scholastic Aptitude Tests have dropped 72 points from 1962 to 1968. And the drop was dramatic from 1962, not a gradual fall.

High school dropouts have increased tenfold from 1962.

Violent crimes per thousand have increased from 250 in 1962 to 1,237 in 1968.

Single parent households have doubled, while unwed couples have quadrupled since 1962.

Yes, the new bigots who pay multimillionaires to create any means to discredit quantitative studies in disagreement with the party line will say that any number of factors have contributed to these ills. But those who know the power of prayer, those who know the value of children recognizing their Creator, will know that Mr. Barton's analysis is accurate.

Mr. Speaker, we should begin to call it a specific sin. The successes of former lawmakers, of the ACLU, of the People for the American Way, all the media such as "The Last Temptation of Christ" and the "Hamburger Tots," all the laws and court decisions which have kicked God out of our public schools, and all the venomous gossips of the left which seems to congeal it, but by no means limited to the Democratic Party are all examples of anti-Christian bigotry. They are not claims for justice or a defense of civil liberties. It is the vilification of the new bigots—and we should call it that from now on

# COMMUNIST AIMS SOLD TO AMERICANS BIT-BY-BIT!

The following list of 45 current Communist goals appeared in *The Congressional Record* January 10, 1963. They were taken from *The Naked Communist* by Cleon Skousen, who began his intensive study of the Communist Conspiracy during his 16-year term of service with the FBI.

The list confirms the "line" pursued in Communist publications in this country such as *The Worker*, *The People's World*, and a number of front publications.

Actively aided and abetted by such organizations as the National Council of Churches, The National Education Association, The American Civil Liberties Union, the Rockefeller controlled Council on Foreign Relations (*The Invisible Government in America*), The Rockefeller Foundation, The Ford Foundation, and others, the international Communist Conspiracy has managed to achieve many of these goals while you and I were asleep, dreaming it can't happen here! Well, IT IS HAPPENING HERE AND IT IS HAPPENING NOW right under your very nose. IT IS TIME TO WAKE UP AMERICANS!

## CURRENT COMMUNIST GOALS

1. U.S. acceptance of coexistence as the only alternative to nuclear war.
2. U.S. willingness to capitulate in preference to engaging in atomic war.
3. Develop the illusion that total disarmament by the United States would be a demonstration of moral strength.
4. Permit free trade between all nations regardless of Communist affiliation and regardless of whether or not items could be used for war.
5. Extension of long-term loans to Russia and Soviet satellites.
6. Provide American aid to all nations regardless of Communist domination.
7. Grant recognition of Red China. Admission of Red China to the U.N.
8. Set up East and West Germany as separate states in spite of Khrushchev's promise in 1955 to settle the German question by free elections under the supervision of the U.N.
9. Prolong the conferences to ban atomic tests because the United States has agreed to suspend tests as long as negotiations are in progress.
10. Allow all Soviet satellites individual representation in the U.N.
11. Promote the U.N. as the only hope for mankind. If its charter is rewritten, demand that it be set up as a one-world government with its own independent armed forces. (Some Communist leaders believe the world can be taken over as easily by the U.N. as by Moscow. Sometimes these two centers compete with each other as they are now doing in the Congo.)
12. Resist any attempt to outlaw the Communist Party.
13. Do away with all loyalty oaths.
14. Continue giving Russia access to the U.S. Patent Office.
15. Capture one or both of the political parties in the United States.
16. Use technical decisions of the courts to weaken basic American institutions by claiming their activities violate civil rights.
17. Get control of the schools. Use them as transmission belts for socialism and current Communist propaganda. Soften the curriculum. Get control of teacher's associations. Put the party line in textbooks.
18. Gain control of all student newspapers.
19. Use student riots to foment public protests against programs or organizations which are under Communist attack.
20. Infiltrate the press. Get control of book-review assignments, editorial writing, policy-making positions.
21. Gain control of key positions in radio, TV, and motion pictures.
22. Continue discrediting American culture by degrading all forms of artistic expression. An American Communist cell was told to "eliminate all good sculpture from parks and buildings, substitute shapeless, awkward and meaningless forms."
23. Control art critics and directors of art museums. "Our plan is to promote ugliness, repulsive, meaningless art."
24. Eliminate all laws governing obscenity by calling them "censorship" and a violation of free speech and free press.
25. Break down cultural standards of morality by promoting pornography and obscenity in books, magazines, motion pictures, radio and TV.
26. Present homosexuality, degeneracy and promiscuity as "normal, natural, healthy."
27. Infiltrate the churches and replace revealed religion with "social" religion. Discredit the Bible and emphasize the need for intellectual maturity which does not need a "religious crutch."
28. Eliminate prayer or any phase of religious expression in the schools on the ground that it violates the principle of "separation of church and state."
29. Discredit the American Constitution by calling it inadequate, old-fashioned, out-of-step with modern needs, a hindrance to cooperation between nations on a worldwide basis.
30. Discredit the American Founding Fathers. Present them as selfish aristocrats who had no concern for the "common man."
31. Belittle all forms of American culture and discourage the teaching of American history on the ground that it was only a minor part of the "big picture." Give more emphasis to Russian history since the Communists took over.
32. Support any socialist movement to give centralized control over any part of the culture, education, social agencies, welfare programs, mental health clinics, etc.
33. Eliminate all laws or procedures which interfere with the operation of the Communist apparatus.
34. Eliminate the House Committee on Un-American Activities.

35. Discredit and eventually dismantle the FBI.
36. Infiltrate and gain control of more unions.
37. Infiltrate and gain control of big business.
38. Transfer some of the powers of arrest from the police to social agencies. Treat all behavioral problems as psychiatric disorders which no one but psychiatrists can understand or treat.
39. Dominate the psychiatric profession and use mental health laws as a means of gaining coercive control over those who oppose Communist goals.
40. Discredit the family as an institution. Encourage promiscuity and easy divorce.

41. Emphasize the need to raise children away from the negative influence of parents. Attribute prejudices, mental blocks and retardation of children to suppressive influence of parents.
42. Create the impression that violence and insurrection are legitimate aspects of the American tradition; that students and special-interest groups should rise up and use united force to solve economic, political and social problems.
43. Overthrow all colonial governments before native populations are ready for self-government.
44. Internationalize the Panama Canal.
45. Repeat the Connally Reservation so the United States cannot prevent the World Court from seizing jurisdiction over nations and individuals alike.

## WASHINGTON OBSERVER

P.O. Box 1306, Torrence, CA 90505

The NEA is an association of teachers whose salaries are paid by taxes levied on working Americans. Its leaders have declared that they intend to control the direction of education. Executive Secretary of NEA, Terry Herndon, has openly declared the intention of NEA to destroy traditional Western values, saying: "In most places, the traditional values have included ... protestantism and things like that ... I think a good school system will expose children to traditional and alternative values and let the children decide."

The NEA's "alternative values" referred to by Herndon include the nihilistic and perverted rantings of savants such as Solomon Gordon and other authors of the depraved filth now flooding the schools at taxpayers' expense.

"The ADL never tires of telling us, and having us told, that because the population of the Jewish state is made up of an exceptional people unceasingly persecuted due to some ineradicable flaw in all non-Jews, the Israelis are exempt from the rules of human behavior and have a special license to steal other people's real estate, to kidnap anywhere in the world, to torture, to kill, to lie, to falsely accuse, and to interfere at will in the politics and social development of other countries."

## THE UNION LEADER

Manchester, N.H. Saturday, August 13, 1961

## "I Was Dumb"

Addressed to William Loeb: New York Mayor Ed Koch, former senator who blazed the trail for the "Great Society" programs, and the Civil Rights Act which gave it status declares that he voted for nearly every social and welfare proposal offered as a senator in U.S. Congress.

Now, having watched these programs up close under his administration as Mayor of New York City, Koch admits his serious errors.

"I was dumb. We all were dumb. I voted for so much crap! Who knew? We got carried away with what the sociologists were telling us ... We had a small number of people whom we permitted to dominate society.

This was their view: it never was the view of the majority." Considering all the damage which Koch did to our nation by supporting such programs, we hope he lives a long time to deal with his own cause of his prevailing problems. He should have fulfilled his oath to defend U.S. Constitution, which he still is not doing. Instead he supported subversion against U.S. Constitution. Christian law priority. Every aspect of the "Great Society" programs is from some mandate of the U.S.S.R. Constitution for the ultimate "classless society." Annex A. Yet, the "Dumb-dumbs," among them Kennedy and Cranston and others keep pushing for Great Society, which is sad destruction of all liberties including diversity. Every advocate in Congress who supports Great Society subversion should be held accountable for violation of the U.S. Code of ethics, priority of Christian law.

## CITIZENS FOR GOD &amp; COUNTRY

P. O. Box 137  
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Senator Joseph Biden  
 Room 224 Dirksen Building  
 Washington, D.C. 20510

September 19, 1990

I would like to request that you include my letter as a part of the public record submitted in conjunction with the hearings held in the confirmation process for Judge David Souter. I believe that my testimony is vital to understanding the issues raised by the Senators on the Judiciary Committee. The women panelists who purported to represent the views of the women of America do not represent my views or the views of the majority of the women of America.

First, the testimony heard and entered into the public record did not include the testimony from Women Exploited by Abortion. An organization with 6,000 members, all women who feel that abortion is the worst of many choices available to women. Women who grieve over the loss of their children and the way they were used and deceived by the abortion propagandists. I concur with their position, not because somebody is paying me to speak for them, but because I've experienced their loss, their pain and their sorrow.

When I was in college, as a very immature and unworldly freshman, I became sexually active. Perhaps because of my dancer's training I was aware of a change that occurred in my body the moment of conception and within weeks of conceiving I went to the South West Texas State University Infirmary to get advice, and information. They sent me to the Planned Parenthood in Austin. At Planned Parenthood I was told the test was positive, asked if I had enough money for "the procedure" and told they would take care of "my problem". The procedure was too horrifying and painful to adequately describe with the doctor's knife cutting and sawing and the dreadful sound of the suction machine making me feel as if it were tearing out my heart as well as "the contents of my womb". I went home to my apartment and went to bed where friends found me 3 days later with a raging fever that very nearly killed me. They took me to the University infirmary where I was given antibiotics. I didn't find out until many years later that the doctor who had performed the abortion had lacerated the wall of my womb and my colon. The ensuing infection had destroyed my tubes and filled my abdomen with scar tissue rendering me sterile and ending my career in the dance. Abortion was the only "choice" Planned Parenthood offered me. Abortion destroyed my first child, my ability to bear children and my chosen career.

Secondly, the testimony heard and entered into the public record did not include the testimony from such groups as Concerned Women of America. An organization with 700,000 members who have worked tirelessly for years to address women's and children's issues in a way which protects children and promotes women's dignity and worth. The testimony ignored the sincere convictions of the National Right to Life organization with over 1,000,000 members and over 3,000 local chapters or the women who are the members of Dr. James Dobson's Focus on the Family with a membership of over 1,900,000! The testimony disregarded the beliefs of the 750,000 to 1,000,000 people from all over the United States who came to Washington this spring to stand up and be counted as Pro-Life.

I feel sorry for those hard women who feel they must build women's freedom on the death of our children and on methods which destroy a woman's ability to provide and nurture life. But these very highly paid spokeswomen for the abortion industry do not represent me or the majority of the women of America. These women who demand that the Supreme Court continue to protect thier "right" to kill unborn children are completely ignoring the views and feelings of the millions of women involved in the struggle to provide compassionate alternatives to abortion. Sheltering homes and physicians fees. Diapers and financial support. Baby-sitting and transportation. These highly paid spokeswomen are completely ignoring the millions of couples who wait with open arms to adopt and love a child conceived under difficult or seemingly impossible circumstances.

Finally, the women are ignoring the feelings of the children. I would like to see Norma McCorvey's now grown daughter impanelled to give her testimony and her feelings on abortion. I would like to see pictures of my own beautiful adopted daughter included as testimony. Her story represents every reason used to justify abortion except incest. Her natural mother was raped. A young handicapped woman, she was taking medication which causes severe birth defects. She lost her job and her insurance just weeks before she received confirmation that she was between 6 and 7 months pregnant. Her doctors said she would not be able to carry the child to term and gave her one option: Abortion. They said that the abortion would cost her between \$1800.00 and \$3500.00 depending on the complications they might encounter. The fact that the doctors mentioned that there might be complications is what saved my daughter's life. Her natural Mom, though handicapped from a childhood head injury could not reconcile going ahead with something that sounded so dangerous. She sought counsel from a local Birthright organization. The counselor there made sure she had ALL the facts and ALL of the options and resources clearly available so she could make an INFORMED DECISION. My daughter's natural Mom chose to carry her child to term and then place for adoption privately so that she could personally choose the parents of her unborn child. If any one of the distinguished Senators were to ask our precious Catie if she likes being alive, I'm sure of what her answer would be!

Please stop this continuing disinformation campaign on women's issues. Please allow the views of other legitimate women's groups to receive a hearing. Please allow the enclosed pictures to speak to the committee and to the nation about the beauty and the vulnerability of our most precious resource, our children. Please do not continue to ignore the pain and the sorrow of the thousands of women in America who have been deceived and destroyed by the malicious misinformation of the abortion industry and their well paid spokespersons. I commend Judge David Souter for not bowing to the demands of the abortion lobby. These women do not represent the women of America.

*Sincerely for Life,  
Shelley (Mrs. A.L.) Nicholson*

1167 Olds  
Porter, TX 77365

## DAVID SOUTER, THE DARK SIDE

Statement by Daniel H. Pollitt, Professor of Law  
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David Souter, carefully groomed, scrubbed and coached, presented himself to the Senate Judiciary Committee as an articulate, thoughtful, moderate and mainstream constitutional lawyer; a not unattractive nominee for the Supreme Court. What we saw we may not get. His record as a New Hampshire prosecutor and judge tells us there is more to this "stealth" candidate than met the eye in three days of televised hearings. There is a darker side, concealed both by what he said and by what he refused to say. Lets look for the real David Souter. Lets look at his record.

JUDICIAL PHILOSOPHY

The Supreme Court is the ultimate guardian of the fundamental rights and liberties guaranteed by the Constitution. But how are these basic rights and liberties -- Due Process of Law, Equal Protection, Freedom of Speech, Establishment of Religion -- to be read, construed and interpreted? Chief Justice John Marshall, early on in our Constitutional history, interpreted the Constitution broadly to meet current needs: because the Constitution was "intended to endure for ages to come" and because "It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly and which can be best provided for

as they occur." McCulloch v. Maryland, 4 Wheat. 316 (1819). Robert Bork, on the other hand, interprets the constitution narrowly, and three years ago torpedoed his nomination to the Supreme Court with his claim that our Constitutional rights are frozen in time as of 1787 when the Constitution was ratified by We The People. Under his cribbed theory, the Supreme Court was wrong when it ended school segregation in the 1954 Brown decision.

Where does David Souter stand? With John Marshall or with Robert Bork? He told the Senate Committee that sometimes, Judges could find meaning in the Constitution beyond the words of its text and the specific intent of its framers. Here he seemed to stand with John Marshall. But there is another David Souter. Interviewed earlier this year Souter stated that on constitutional matters, "I am of the interpretivist school." The "interpretivist school" limits constitutional protection to those rights "the Framers had consciously in mind," those rights identified "by specific language of the Constitution." Massachusetts Lawyers Weekly, May 28, 1990.

As a Judge on the New Hampshire Supreme Court he applied the state constitution in this restrictive, "Borkian" fashion. Estate of Henry Dionne, 518 A.2d 178 (N.H. 1986). A New Hampshire law authorized litigants to call special sessions of the probate court upon payment to the probate judge of \$175.00 per day. The New Hampshire Supreme Court ruled that this practice violated the 1784 New Hampshire Constitution, which

guaranteed to "every subject of the state" the right to obtain justice freely "without being obliged to purchase it." The Court ruled that "the spectacle of a citizen or attorney giving cash in one hand and receiving a judicial hearing and decision in the other is one that can no longer be tolerated."

Judge David Souter could tolerate it, and dissented. The Court's "interpretative task" he wrote "is to determine the meaning of the Constitutional language as it was understood when the farmers proposed it and the people ratified it," i.e. back in 1784. But he went centuries further back than that. The 1784 New Hampshire Constitution has its roots in the Magna Carta, when in 1215 on the fields of Runnymede King John agreed with his mutinous barons that "to no one will we sell, to no one will we deny, or delay, right or justice."

The purpose of this provision of the Magna Carta, wrote Souter in 1986, was to end "the evil practice of the Anglo-Norman King in extorting money from the administration or retardation of justice." Souter reasoned that since the 1784 New Hampshire Constitution went back to Magna Carta, it too, must have been "intended to forbid bribery, not the imposition of fees and costs." Therefore to him, the New Hampshire "rent a probate judge" law was constitutional.

Is Souter a Bork in John Marshall clothing? The record so indicates.

#### STARE DECISIS AND ADHERENCE TO JUDICIAL PRECEDENT

An unanswered question is whether Souter, if confirmed, will

respect or reverse the decision in Roe v. Wade, which protects women's freedom to choose an abortion in the first two trimesters of pregnancy. Will he follow precedent, i.e. apply the legal doctrine of stare decisis, or will he follow his own predilections, go his own way?

His record demonstrates that, like other judges, he respects the stare decisis doctrine in areas of property and commercial law "where people have arranged their affairs in reliance upon the expected stability of a decision." But in areas of constitutional protections, his record demonstrates a willingness to reverse established liberties. Suffice here one illustration. Others occur throughout the following sections.

The Fourth Amendment guarantees "the right of the people" to be secure in their "persons, houses, papers and effects" against "unreasonable searches and seizures." In 1914 the Supreme Court held that when the federal police break into a man's house without a search warrant, they may not utilize the lottery tickets seized in the illegal search as evidence in the subsequent criminal trial. Were it otherwise, reasoned the Court, "the protection of the Fourth Amendment ... might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). Six year later, Justice Holmes reaffirmed the so-called "exclusionary rule" because without its "deterrent standard" the Fourth Amendment "would have been reduced to a form of words." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). In 1961 the Supreme Court extended the

"exclusionary rule" to state trials in a case where local policemen, without a warrant, forced their way into a house, ransacked it from top to bottom, seized some obscene pictures from a trunk, and used them as evidence in a subsequent criminal trial. Justice Clark wrote that "without the exclusionary rule" the assurance against unreasonable searches and seizures would be "valueless" and "undeserving of mention in a perpetual charter of inestimable human liberties." Mapp v. Ohio, 367 U.S. 643, 655 (1961). Despite all this, in 1971 Attorney General David Souter urged the Supreme Court to overrule Mapp v. Ohio and the exclusionary rule. Petition of New Hampshire for Rehearing in Coolidge v. New Hampshire. So much for a half century of legal precedent.

#### WOMEN'S RIGHTS

Justice Brennan, whose vacant Supreme Court seat Judge Souter might fill, recognized that "Our Nation has had a long and unfortunate history of sex discrimination" rationalized by an attitude of "romantic paternalism" which in practical effect, "put women not on a pedestal but in a cage." Frontiero v. Richardson, 411 U.S. 677 (1973). Since the early 1970s the Supreme Court under Brennan's urging, has been in the vanguard of the movement to open wide the cage doors, and give women opportunities and responsibilities equal to those enjoyed by men.

This advance was achieved by changing the standard by which the court reviewed discriminatory gender laws. Prior to 1970, the Supreme Court looked with a blind eye when reviewing sexist

laws, and sustained them whenever a "rational basis" could be hypothesized for the gender discrimination. Discriminatory laws almost always were sustained under this lax standard of review. In the 1970s come a "heightened scrutiny" standard of review whereby discriminatory laws were invalidated unless the state could prove as a fact that the gender discrimination was "substantially related to the necessary achievement of an important government interest." Craig v. Boren, 429 U.S. 190 (1976). Few discriminatory laws passed this higher, more stringent, level of review.

In 1978, Attorney General David Souter petitioned the Supreme Court to abandon the "heightened standard of review" and go back to the lax, "rational basis," "anything goes" standard of review which prevailed in former years. Petition for Writ of Certiorari in Helgemoe v. Meloon, No. 77-1058 (Jan. 25, 1978 at pp. 18-19).

This is his record, possibly difficult for a non-lawyer to appreciate, but deadly in operation.

There is more to the Souter anti-feminist record.

At one time in rape cases the victim would be cross examined about her sexual life-style, former boy friends, and the like to prove that she had consented to the defendant's sexual assault. There was general revolt against putting the victim of crime on trial this way. After all, even a prostitute can be raped. New Hampshire was one of the many states to enact a "rape shield" law which prohibits evidence concerning sexual activity between the

victim and any person "other than the defendant." Despite New Hampshire's "rape shield law," Judge Souter held that it was error from the trial court to exclude evidence to the effect that earlier in the afternoon of the alleged rape, the victim had engaged in "sexually suggestive behavior" at a bar by "sitting in the lap of one of defendant's companions" and "hanging all over everyone." State v. Colbath, 540 A.2d 1212 (N.H. 1988).

Professor Susan Estrich, an expert on such matters, wrote that this ruling "reflects the most traditional, backward, sexist view of women and sexual relations."

He affirmed his "backward view" on the status of women in his brief in a case called Woolley v. Maynard. New Hampshire required all licence plates to carry the state motto "Live Free or Die." For religious reasons, Mr. and Mrs. Maynard obliterated these objectionable words from their license plates. Mr. Maynard (but not Mrs. Maynard) was convicted three times in the local court for "Misuse of Plates." He did not appeal in the state court system but instead, with his wife as a co-plaintiff, filed suit in the federal court for protection of their religious liberty. Souter moved the federal court to dismiss the case because Mr. Maynard had failed to "exhaust his state remedies" by filing an appeal with the New Hampshire Supreme Court. He could not repeat this argument against Mrs. Maynard, as she had never been prosecuted. Instead he down played her very "personhood" with the argument that "but for the religious convictions and criminal conduct of Mr. Maynard, it is highly doubtful that Mrs.

Maynard would have instituted federal litigation."

This comment takes one back to Oliver Twist and the days when the law held the husband responsible for the crimes of his wife. When Mr. Bumble was informed that he was guilty of his wife's crime "for the law supposes that your wife acted under your direction" his ringing reply was "if the law supposes that the law is a ass--a idiot." The law has come a long way since a wife was considered an appendage of her husband, leaving David Souter behind in the dark decades of Charles Dickens.

#### FREEDOM TO CHOOSE AN ABORTION

The most important and hotly-contested issue of women's privacy rights is the right to choose an abortion, established back in 1973 in the landmark decision of Roe v. Wade. Souter does not support freedom of choice. In 1976 the federal government required the states to reimburse Medicaid-eligible women for the cost of abortions. Attorney General Souter fought this requirement in the courts. Why? Because "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." (emphasis supplied) Memorandum in Support of Defendant's Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, 406 F.Supp. 1072 (1976).

He continued to use this inflammatory language of the anti-choice movement. The following year, the New Hampshire House voted to repeal the New Hampshire abortion law of 1848 as obsolete and largely ineffective under Roe v. Wade. Attorney

General Souter was quick to point out that the 1848 state law was not completely ineffective, as Roe v. Wade permits the states to regulate abortions in the final trimester. Approximately .01% of abortions are performed during this period, generally because of severe fetal abnormalities discovered late in pregnancy. When the measure to repeal the 1848 abortion law reached the state Senate, attorney General Souter wrote a formal letter in opposition. He explained in an interview with the Manchester Union Leader May 27, 1977, that if the legislation passed, New Hampshire "would become the abortion mill of the United States."

#### CIVIL RIGHTS

Through much of this century, the Supreme Court has played a critical role in protecting and advancing civil rights and racial equality. Nominees to the Supreme Court must share this basic commitment to civil rights and equality. David Souter does not.

The right to vote is the most fundamental of all fundamental rights, and in 1970 Congress extended the ban on literacy tests to every state in the Union. But New Hampshire defied the federal law. When the United States filed suit to enforce it, Souter argued that the Voting Rights law was unconstitutional. Why? Because permitting illiterates to vote would "water down" the votes of other citizens. A three-judge federal court firmly rejected this argument. United States v. New Hampshire, (D. N.H., Civil Action No. 3191, Oct. 27, 1970). All members of the Supreme Court upheld this enactment in a related case because "literacy tests unduly lend themselves to discriminatory

application, either conscious or unconscious." Oregon v. Mitchell, 400 U.S. 112 (1970).

New Hampshire, alone among the fifty states, again defied the United States when the Equal Employment Opportunities Commission sent a questionnaire requesting the racial, ethnic and gender breakdown of its work force. Governor Thompson replied by designating all state employees as "American." The United States then filed suit to compel compliance with the federal law, and Attorney General Souter argued that the required statistics would lead to impermissible job quotas, and would promote discrimination. The federal court flatly rejected these claims because the statistics are "highly useful" in investigating discrimination and the regulations were "clearly constitutional." When Souter petitioned the Supreme Court to review his claim that the federal requirement was "abusive" and "contrary to constitutional principles," it was, ironically, Solicitor General Robert Bork who successfully opposed the petition as totally without merit. Memorandum for the United States in New Hampshire v. United States, (filed Nov. 1976).

A former Chair of the EEOC described Souter's claim as a "fatuous argument raised by people who are fundamentally against giving equal employment opportunity." Washington Post, Aug. 1, 1990, p. 4.

In a commencement speech that year at the Daniel Webster College, David Souter told his student audience that the government should not be involved in affirmative action because

affirmative action is "affirmative discrimination." Manchester Union Leader, May 31, 1976.

#### OTHER FEDERAL POWERS

Not only does David Souter challenge the authority of Congress to protect minority voting rights and employment opportunities, he also challenges the authority of Congress to cope with other pressing needs of our times.

In a 1978 speech to the Newport Chamber of Commerce Souter warned against a strong central government and cited three instances where the federal government exceeded its constitutional authority: (i) the nationwide 55 mph speed law, (ii) unemployment benefits for state and local government employees, and (iii) education for handicapped persons, Concord Monitor, Dec. 29, 1983.

The Constitution was established "to form a more perfect union," and to this end it authorizes Congress to regulate interstate commerce and to tax and spend for the general welfare. It is far too late in the day to assert that Congress cannot regulate gasoline consumption with a speed limit; that it cannot regulate the minimum wages and fringe benefits paid employees; and it was President Adams back in the 1820s who first proposed federal aid to education.

David Souter's concept of an impotent Congress may sit well with a well-paid professional living a monastic life; but it bodes ill for the rest of us.

#### CHURCH-STATE RELATIONS

The very first clause of the First Amendment provides that "Congress shall make no law respecting the establishment of religion" or "prohibiting the free exercise thereof." Thomas Jefferson wrote that this was intended to erect a "Wall of separation between church and state." David Souter tried to batter down that wall on three occasions.

1. The Lord's Prayer case. In 1962 the Supreme Court invalidated New York's "school prayer law" as a prohibited Establishment of Religion. Engle v. Vitale, 370 U.S. 421. The following year it invalidated the school prayer laws in Pennsylvania, Abington School Dist. v. Schempp and in Maryland, Murray v. Curlett, 374 U.S. 203 (1963). Non-the-less New Hampshire continued to authorize each school district to require "the recitation of the traditional Lord's prayer in public elementary schools," along with the reminder that "this Lord's prayer is the prayer our pilgrim fathers recited when they came to this country in search of freedom."

Suit was filed in 1976 to prohibit the school prayer. With no regard at all for the earlier Supreme Court rulings Souter stated his office would do "everything we can to uphold the law," Concord Monitor, Jan. 28, 1976 and he offered to file a brief in support of the law. Manchester Union Leader, Feb. 7, 1976. Needless to say, the federal court held that the New Hampshire school prayer law was "patently and obviously unconstitutional." Jacques v. Shaw, Civil Action No. 76-26 (D.N.H.)

2. The Good Friday Proclamation.

In 1977, as in previous years, Governor Meldrim Thompson issued a Proclamation that "Good Friday represents a day of solemn prayer and rededication" because of "the everlasting debt we owe to our Creator." He appealed to citizens of New Hampshire to "reverently observe Good Friday with due meditation in church or chapel" and announced that "Flags would be flown at half-mast" on our buildings "to memorialize the death of Christ on the Cross on the first Good Friday."

A number of ministers filed suit, alleging that the Proclamation and flag-lowering violated the Establishment Clause. The Federal court issued the requested injunction because the Proclamation "not only seeks to advance religion, but a particular religion."

Attorney General David Souter appealed this decision by trivializing the religiosity surrounding the Crucifixion of Christ. He argued that Jesus Christ "although primarily a religious figure may be respected and revered for secular purposes as well;" further

"The issuance of a proclamation and the neutral act of the symbolic lowering of a flag to commodate the death of an individual does not arises to the establishment of any religion." (emphasis added).

Needless to say, the Courts did not buy his argument that Good Friday is not a religious occasion.

Since his nomination, reports have surfaced suggesting that Souter may have disagreed with Governor Thompson on the

Proclamation and lowering on the flag. Manchester Union Leader, July 25, 1990. But the attorney who actually argued the case reported that Souter "directed the effort" and his "advice and counsel was important." Washington Times, July 26, 1990.

3. Live Free or Die. The background of this case goes back to 1943 when Jehovah Witnesses filed suit in West Virginia protesting the requirement that their children salute the flag each day in school. Their religious beliefs included a literal version of Exodus 20:4 and 5 that "Thou shalt not make unto thee any graven image ... thou shall not bow down thyself to them nor serve them." To the plaintiffs, the flag was a "graven image" and they refused to salute it.

The Supreme Court agreed that the required flag salute violated the Free Exercise of Religion. Justice Jackson wrote as follows:

"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can proscribe what shall be orthodox in politics, nationalism, religion, or force citizens to confess by work or act their faith therein." Board of Education v. Barnette, 319 U.S. 624 (1943).

Some fifteen years later Mr. and Mrs. Maynard covered over the state motto Live Free or Die on their license plate. They did so out of a "deeply held personal religious conviction" that "death is an unreality for a follower of Christ." They filed suit in the federal court to enjoin the repeated criminal suits

against them for "Misuse of Plates."

Once again David Souter ignored the Supreme Court precedent, and defended the state law (as in the *Godd Friday* case) by trivializing the religious beliefs of the Maynards. He argued to the Supreme Court that their conduct was "interpretable only as whimsy or bizarre behavior" which fell "far short of First Amendment protection." The Supreme Court, as expected, upheld the right of the Maynards to "refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." Wooley v. Maynard, 430 U.S. 705, 707 (1977).

The only time David Souter has been sensitive to the religious views of others was in the unlikely situation when the federal government sued New Hampshire to compel compliance with a federal regulation that the state fund the abortions of its indigents. Souter objected because

"May thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant. These are deep, often religious beliefs, giving rise to strong emotion." Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, 406 F.Supp. 1072 (1976).

#### A CARING, OR MEAN SPIRITED PERSON?

Perhaps first and foremost, the quality we want most in a Supreme Court justice is a respect and concern for human beings; in short, a caring person. Here David Souter is lacking. A few illustrations must suffice.

Appeal of Bosselait, 547 A.2d 682 (N.H. 1988) concerned two brothers, Albert and Edward. Well into their 70s, for a number of years they had shared a janitor's job; each working four hours a day. When the job was discontinued they applied for Unemployment Compensation. Naturally, they did not retain a lawyer. When told that New Hampshire law requires that those seeking Unemployment Compensation must be "ready, willing and able" to perform "full-time" work, they said they could not accept new jobs calling for more than four hours of work each day. Albert said he had a "weak back that goes out of joint when least expected." Edward said he was limited by "partial eyesight and angina." Edward added that "we don't dare to work more than four hours a day at our age" and he was "not gonna play with his health." When told again of the "full time" requirement Edward responded that the statute is "discriminating against old fellas ... old people."

Their claim for unemployment compensation was denied, and with the aid of the legal clinic at the Franklin Pierce Law Center they appealed. They argued that the "full time" requirement, as applied to sick and elderly persons, violated the (i) federal Age Discrimination Act, the (ii) federal Rehabilitation Act, and (iii) the constitutional guarantee of equal protection.

Judge Souter wrote the opinion denying their appeal. Why? Because these issues had not been properly raised at the Employment Compensation hearings. Souter wrote that "The record

below contains no reference to the Age Discrimination Act" and although Edward Bosselait said the state law discriminated against the elderly, "his remark could not reasonably have been understood as initiating a statutory claim under federal law." 547 A.2d at 686. This is mean-spiritedness with a vengeance.

David Souter was equally calloused in his consideration of the rights of the mentally ill. See State v. Ballou, 481 A.2d 260 (N.H. 1984). Kevin Ballou pleaded not guilty to a minor crime "by reason of insanity," and was committed to the New Hampshire State Hospital. Under then existing law the commitment was valid for two years only. At the end of that time the law required that he be released unless the court was satisfied that he still suffered from a mental disease. There after, the state legislature extended the length of committal orders from two to five years. Ballou now could be held for five years without court consideration of his mental condition. The New Hampshire Supreme Court held that this extension, as applied retroactively to Ballou, violated the New Hampshire Constitution forbidding retrospective or ex post facto laws.

Judge Souter dissented because Ballou had no "vested right in the continuance of the earlier statutory provision regulating the length of commitment." Consequently, adding the additional three years between Court examinations was not "punishment" within the Ex Facto Facto provision. To borrow the words of the majority opinion, this overlooks "the practical realities of the institutional life of a mental patient."

Finally, note must be made of Souter's harshness against the Seabrook demonstrators. In the mid 1970s, construction of the Seabrook Nuclear Power Plant in New Hampshire became a major controversy, and a rallying point for those who opposed nuclear power. On the May Day weekend in 1977, thousand of people gathered at Seabrook to protest the plant. They were orderly. The protest was peaceful. The demonstrators trespassed on the Seabrook property, but abided by a prior agreement not to enter a 40 acre section of the site where construction had already begun.

Over 1400 protestors were arrested that day. Attorney General Souter was in charge of the prosecution. He insisted on a cash bail for everyone, because the protest was "one of the most well-planned acts of criminal conduct in the state or the nation." The state was required to house 1,400 detainees at enormous cost, and it gratefully accepted a gift of \$74,000 from Seabrook to help finance the continuing prosecution and detention of the protestors. Who was calling the shots?

Trial began, and per agreement of the local district attorney, the trial court gave the protestors suspended 15 day sentences. When he heard of this, Souter rushed to the scene and demanded that all protestors be give 15 days at hard labor, \$200 fines and no suspensions: in short, the maximum penalty allowed by law. He wanted the last ounce of flesh.

Several weeks later Souter testified before the state Finance Committee. In response to a question he said that if there was a next time around, the state might use police dogs and

fire hoses to keep demonstrators from the site. Manchester Union Leader, June 3, 1977. Shades of Bull Connor and the Birmingham civil rights demonstrations of the early 60s!!

#### PERSONAL RESPONSIBILITY

Those who support Souter defend his mean spirited acts and attitudes on the theory that he was an attorney nearly doing the bidding of his clients Governors Thompson and Sununu. But we are all accountable for our acts. The "Good German" defense went out with the World War II War Crimes trial in Neurenberg.

True enough, some attorney, the so-called "hired guns," consider their law licenses as authority to advise clients on how to skirt, avoid, postpone, or even disregard their legal responsibilities. Most attorneys, fortunately, have a higher sense of professional responsibility. They advise their clients on how best to comply with the law. If the clients ignore their advice, they dump them.

At one time Governor Kerr Scott (later Senator Scott) was warned that his stand on behalf of rural unfortunates might cause political problems. He replied: "I don't have to be Governor of North Carolina." Souter did not have to continue on as legal advisor to Governors Thompson and Sununu. Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned their high posts rather than breach their faith and a Justice Department regulation when ordered by President Nixon to fire Special Prosecutor Archibald Cox during the Watergate investigations. This is the manner of a man or woman we want on

our highest court.

When we call the roll of the Supreme Court: Holmes, Brandeis, Hughes, Cardozo, Rutledge, Murphy, Black, Douglas, Warren, Brennan; it easily appears that David Souter does not belong in this company of high minded, high principled, justices.

Telephone 1-619-327-6503.

Chlene Smith  
1075 Sunny Dunes Rd.  
Palm Springs,  
California 92264  
September 20, 1990

The Honorable Joseph R. Biden  
Senator from Delaware  
489 RSOB  
Washington, D.C. 20510

Dear Senator Biden,

I am accepting your kind invitation to enter a statement for the record, in regard to the nomination of Judge David Souter, to the Supreme Court of the United States. I speak not as an authority but as a citizen who feels it is imperative that all the facts be scrutinized and circumstances be considered, not condemned, as you have so faithfully stated.

Some remarks by witnesses and Senate members indicate essential facts regarding *Roe v. Wade* have been overlooked. In order to come to

② <sup>Aden</sup>  
a.s.

a fair, just and reasonable conclusion, I offer them now for consideration by all the members of your committee. I most sincerely urge them to keep in mind the far-reaching ramifications of their decision.

I apologize for this handwritten letter and all its "misprints" but my typewriter refused to type. Time did not permit a "re-write".

I admire and respect the manner in which you've conducted the hearings. I'm hoping you will call Judge Souter back for more questioning.

I wish you the very best and extend those good wishes to all your "co-workers" on the "jury". Sincerely, <sup>Delene Smith,</sup>  
(Mrs Cassius Smith)

RB Biden  
a 1

The reason there is such a polarization between Pro-Choice and Anti-Choice advocates, is that, neither will fully acknowledge the deep-seated feelings relevant to the opposite viewpoint.

In order to resolve this issue, all of us must put aside our preconceived notions, — and listen, as if for the first time, to the arguments put forth.

Point and Counter-Point:

Point: ① The Catholic Church dictates that there be no abortion, for any reason, because human life is sacred.

Counter-Point: ② Many other religious orders believe that a woman has the right to choose, because they have witnessed the tragic results of forced pregnancies. Freedom of Religion gives her that right.

Biden  
u b

③  
(recopied)

① Just the idea of a developing being, damaged, denied birth, is a horrifying thought.

② To force a woman, after a brutal assault and rape, or a young incest victim, perhaps scarred for life, to go full term would be "cruel and unusual punishment" - meted out to a defenseless child (a horrifying edict) and a very vulnerable female, subject to deep psychological problems.

① Conception signals the beginning of a person and deserves the full protection under the law.

② Religious denominations sharply disagree, objecting to specific religious doctrine or dogma being imposed by law on all Americans.

(H) Biden  
21

① "Thou shalt not kill"

② No where in the Christian Bible does Jesus say birth control or abortion is a sin. He preached mercy and forgiveness.

① Women who choose abortions and doctors who perform them are criminals.

② Women who choose abortions are exercising their legal right under the I, IV, V, IX and XIV Amendments — "the right to privacy", "freedom of religion", "to be secure in their persons, houses, "against unreasonable" searches and seizures"; nor be deprived of life, liberty, property — #XIV . . . " . . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

(5) Biden  
u.s.

② continued: The decision is a difficult one, wrought out of desperation. A casual outlook is very much the exception, not the rule.

① Outlawing abortions will save millions of babies.

② Outlawing abortions will affect millions of babies and result in millions of women and young girls (afraid to confide in their parents) being mutilated, left sterile or dying from unsafe and illegal abortions. See (5-B)

① The fetus must be protected at all cost.

② And the cost is great when circumstances are brushed aside and no concern is shown the pregnant mother,

(5-B)

Kiden  
L.S.

② continued: In 1969, in New York City alone, 219,000 women were hospitalized due to being butchered by abortion quacks. In 1970, 107 died.

⑥ Hidden  
a.s.

② continued: their families, their husbands, children - when little or no provisions are made available to ensure these unwanted <sup>infants</sup> babies are supported, protected and nurtured - as they deserve to be. See (C-B)

Millions of youngsters have died and are dying - from starvation and crippling disease - the world over. Nations unable to care for their people face a dismal future.

Here in the United States: increasing homelessness, joblessness.

In 1966, Los Angeles reported 20,000 abandoned children, some on trash cans,

^ infant care increased 112% 1946-56

^ Homeless in the Top 100 cities up 50%

(6-B) *Redman*  
2.8.

① Many couples are eager to adopt new borns.

② Are woman and young girls to be treated as factories to meet supply and demand?

A much more humane act would be to adopt one of the many, many children, praying, with dimmed-  
ishing hope, to become part of a real family.

① Biden  
a.s.

(continued) - related deaths

1/5 Children receive no post-natal  
care along with their mothers12,000,000 live below the poverty  
level

40% receive no immunizations

#20th The United States has a  
shameful infant mortality  
rate. 19 countries place above  
our nation.above. 1/80% of prisoners were victims of child  
abuse. The United States is the only in-  
dustrialized country without maternity  
leave.Children having children: 600,000  
babies are born to girls 10-18 each year.  
- those babies face the highest risk  
of Sudden Death Syndrome.Addicts inflicting their habits and  
Aids <sup>(on)</sup> their unborn children - providing their

(8) Redden  
a.s.

continued: children as models for pornography, leading to prostitution.

In Haiti, 85% live in absolute poverty. Parents used to <sup>(have)</sup> 1.3 kids and would be lucky if 2 lived. Now young people have 2 or 3; they're growing up and going to school, made possible through Family Planning.

All things considered, I believe that abortion is far less harmful to "mankind" than the human tragedies that now occur every day under man-made laws.

① Reid  
a b.

Until the need for abortions is eliminated, they should be made safe and legal, ~~to avoid the human tragedies that occur every day, caused by man-made laws.~~ (Repeated)

The means to drastically reduce that need are already in place - prevention, education and research.

Planned Parenthood, America's oldest, largest and most respected Family Planning organization, has been working for 74 years to ensure that every child is a wanted child (to ensure) who will be welcomed into the family with open and loving arms.

In support of their efforts, Congress should reauthorize Title X, our nation's

(10)

Biden  
a.3

family planning program.

Congress should also facilitate research to develop safer and more effective contraceptives.

RU2 produced in Germany has been proven to be safe and effective. It also shows promise for treatment and cure in other areas of serious medical concern.

Education is the key: I would like—  
 A. to have printed material, listing alternatives, procedures, prevention, dangers of casual sex, be made available to patients in Clinics and doctor's offices before the decision to have an abortion is made.

B. To establish Parent-Teacher Sex Education classes to explain to the adults, the schools

⑪

Biden  
a.s.

program and offer suggestions how to explain this vital information to their children in a natural and comfortable way in their own home.

c. To stress in the Sex Education classes the importance of education, requirements of the workplace, <sup>and</sup> the dangers of sexual encounters, the demands of parenthood (and family life) and the wisdom to postpone both until they are mature adults.

d. To encourage churches, schools, adult-TV/Movies, the media - whenever appropriate - to stress the wisdom of monogamous relations. Make it the "in thing".

e. To challenge those in the Arts, <sup>and entertainment field</sup> to meet their responsibility to check over

(12) Biden  
a. d.

lives and not degrade <sup>them</sup> ~~it~~. Too often sex is portrayed as an exercise between strangers rather than a blending of two people who care about each other, respect one another. Sex is a treasure, not a tool, to be used to glamorize a product with which it has no relation as is the case in much of today's advertising. Such imprecis misrepresents basic values and misleads our young people.

We are not bound by a narrow reading of the Constitution. Progress and enlightenment serve as beacons for changes, new requirements, unforeseen by our forefathers.

The Bill of Rights allows us to apply

③ Reuben  
a.s.

... to rules of common sense, fairness, justice, common good in the context of today's world, opening the door for another change - long overdue - the Equal Rights Amendment.

Does Judge Nouter think women should have equal rights? Please ask him and any other question you deem proper (from my letter.)

I hope this letter has been worthy of your time and you've gained an insight as to what a 72-year old great-grandmother in California thinks about these important issues. Please share it with others on the panel, as the message was meant for them, too, of course. Thank you!  
Orlene Smith

# Alliance for Justice

A National Association of Organizations Working for Equal Justice

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NAN ARON  
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## ALLIANCE FOR JUSTICE

### STATEMENT IN OPPOSITION

#### TO THE SUPREME COURT NOMINATION OF

DAVID HACKETT SOUTER

September 21, 1990

On September 6, the Alliance for Justice issued an analysis of Judge Souter's record, covering his tenure as state attorney general and supreme court Justice. The report concluded that Judge Souter's record, and the absence of any vigorous defense of individual rights during his entire legal career, pointed toward rejection. Accordingly, Judge Souter bore the burden of proving a commitment to the principles of equal justice. (A copy of the Alliance report is attached and submitted for the record.)

However, the Alliance withheld final judgment, anticipating that Judge Souter's testimony before the Senate Judiciary Committee would provide a clearer picture of his vision of the Constitution. In his seventeen hours at the witness table, Judge Souter failed to do so. He spoke volumes, but said little. Given numerous opportunities to explain his judicial philosophy, Judge Souter provided responses that only raised more troubling questions. Furthermore, he was neither forthcoming nor sufficiently specific in his answers. Judge Souter's testimony consisted of vague assurances, rather than a recognition of specific constitutional principles.

After carefully reviewing the hearing record, the Alliance is convinced that Judge Souter will not protect the rights of those suffering discrimination on the basis of race, gender, ethnicity, religion, sexual orientation or literacy. Furthermore, his responses concerning reproductive rights only intensify concerns that he would overturn relevant precedents. This statement covers the major reasons for rejecting this nominee.

**Voting Rights.** Voting is one of our basic rights under the Constitution. When asked about his defense of New Hampshire's literacy test to qualify voters, Judge Souter stated that, as assistant attorney general:



6,

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"It seemed to me at the time that a state which was acting consistently with the Fourteenth Amendment -- and the State was -- had done no wrong."

(Hearing Transcript, Sept. 14, 1990, at 194.) In fact, one of the arguments in his brief was that voting by illiterate individuals "diluted the votes of people who read."

At the hearing, rather than retracting his statement, Judge Souter off-handedly characterized this assertion as merely "a mathematical statement." When asked to clarify, he repeated that it is "essentially a kind of statement of math." (Sept. 14, 1990, at 195.)

As an assistant attorney general, Judge Souter failed to understand that the right to vote is not dependent upon one's education level and that many citizens who are unable to read and write can still obtain information and formulate intelligent opinions through television and radio. Today, as a Supreme Court nominee, he continues to view the issue abstractly, ignoring the historic use of literacy tests to deny citizens the fundamental right to vote.

Civil Rights. In regard to New Hampshire's refusal to provide a racial breakdown of its state employees, as required by federal law, Judge Souter defended the state's action on the grounds that New Hampshire had no history of racial discrimination regarding its own employees. (Sept. 13, 1990, at 146.) Later, Judge Souter stated it even more broadly, that the "state of New Hampshire does not have racial problems." (Sept. 13, 1990, at 198.)

These statements show indifference to the existence of racial prejudice that is no less present in New Hampshire than it is anywhere else in the country. Numerous examples have been provided to the Committee. Moreover, his refusal to provide the statistical breakdown indicates a critical lack of understanding about the methods for detecting discrimination, namely, the collection of statistical data. It also suggests a potential hostility toward legislative attempts to overturn the Rehnquist Court majority decision in Wards Cove Packing Company, which imposed greater burdens of proof on Title VII plaintiffs bringing discrimination suits based on statistics.

Affirmative Action Speech. During the hearings, Judge Souter did not disavow his 1976 speech as attorney general in which he criticized affirmative action as "affirmative discrimination". He told the Committee:

"...I hope that was not the exact quote because I don't believe that. The kind of discrimination that I was talking about in that speech was discrimination, as I described it and I recall being quoted in the paper about it, a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, having nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution."

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(Sept. 14, 1990, at 111.) Several facts are apparent from this and later testimony. First, Judge Souter admits to having read the article covering his speech because he "recalled being quoted in the paper." He also attempts now to confine his criticism solely to racial quotas (though he painstakingly avoids using the phrase). However, during the last 14 years, he made no request for a retraction or clarification of the statement. David Souter made that speech as the state's chief lawyer and should have been aware of the seriousness and weight that his remarks carried.

Gender Discrimination. Several times during the hearings, Judge Souter criticized the "heightened" or "middle tier" scrutiny standard as "too loose" and as granting "an enormous amount of leeway to the discretion of the court". (September 13, at 156.) His statements mirror Justice Rehnquist's dissent in the landmark case of Craig v. Boren, 429 U.S. 190 (1976), that the heightened scrutiny standard is "diaphanous and elastic as to invite subjective judicial preferences." However, Judge Souter failed to note that this firmly established standard for reviewing sex-based classifications has been highly effective in battling discrimination against women.

When asked for examples demonstrating the "looseness" of the heightened scrutiny standard -- an alleged flaw that he repeatedly raised -- Judge Souter offered two cases, neither of which, however, involved the use of mid-level scrutiny for gender discrimination. (Sept. 17, 1990, at 55-57.) The first, Royster Guano Co. v. Virginia 253 U.S. 415 (1920), concerned an economic regulation, not a sex-based classification. The second, Reed v. Reed, 404 U.S. 71 (1971), although involving gender discrimination, was decided prior to Craig v. Boren, that is, before the establishment of the heightened scrutiny standard for gender cases and when the weaker, rational basis test was the law. His answer simply skirted the issue.

In light of several briefs and one judicial opinion in which Judge Souter called into question the heightened scrutiny standard, his comments about tightening the standard might give the hopeful impression that he believes sex discrimination deserves greater scrutiny than that provided by the current standard. However, noticeably absent in his testimony is a straightforward assurance that gender discrimination deserves at least heightened scrutiny. His exchange with Chairman Biden is illustrative:

"The Chairman. So there should be a middle level to define it more clearly?"

"Judge Souter. There has got to be something other than just threshold level scrutiny."

(Sept. 13, 1990, at 160.) Furthermore, Judge Souter shunned numerous opportunities to articulate a better approach to sex discrimination cases. (Sept. 13, 1990, at 160 and 217; Sept. 17, 1990, at 57.) Rather than providing a clearer picture of the principles he would use under the Equal Protection Clause of the Fourteenth Amendment, the nominee instead cast doubt on the security of the constitutional protections that have already been won for millions of women.

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Right of Privacy. Throughout the hearings, Judge Souter treated all questions involving the right of privacy, and consequently, the right to choose abortion, as if it were a game of chess, rather than a discussion involving fundamental rights that could determine the course of women's lives. Judge Souter refused to acknowledge a fundamental right of privacy beyond that accorded to a married couple (Sept. 13, 1990, at 113.) He did acknowledge that "if we are going to have any core concept of marital privacy, [procreation] would certainly have to rank at its fundamental heart." (Sept. 13, 1990, at 116.) However, he refused to state whether the marital right to privacy includes the right to use contraception -- the holding 25 years ago in Criswold v. Connecticut, 381 U.S. 479 (1965) -- and to terminate a pregnancy within or outside of a marriage. (Sept. 13, 1990, at 112.)

Judge Souter's refusal to answer nearly all questions regarding the right of privacy, on the basis that the constitutional principles underlying Criswold and Roe are unsettled law, is inconsistent with his answers to other questions. For example, he discussed the Lemon v. Kurtzman test for reviewing Establishment Clause cases, which recently have been decided along 5-4 lines. Judge Souter also discussed with some degree of detail Justice O'Connor's views on applying the Lemon test. In addition, he even told the Committee how he would approach cases under the Free Exercise of Religion Clause, another area of close division among the Justices. Moreover, Judge Souter willingly discussed his moral views on the death penalty and sentencing for white collar crimes, but he refused to do so in regard to abortion. This double standard for answering questions and lack of candor is unacceptable and should be grounds for rejection.

The single instance Judge Souter could recall to show his "equality of empathy" on the abortion issue occurred 24 years ago. However, this account has no connection to his judicial philosophy. The experience does not allay concerns about his later actions as attorney general, when he adopted the inflammatory language of the anti-choice movement to oppose the repeal of New Hampshire's criminal abortion statute and government funding of abortions for indigent women. And, as a state judge, he empathized only with the dilemma of anti-choice judges and physicians who might be obligated to participate in a woman's decision to terminate her pregnancy.

Along the same lines, Judge Souter, when asked by Senator Leahy about "the practical consequences of overturning Roe v. Wade," turned the issue into an abstract question, replying that "the issue would become a matter for legislative judgment in every state" and the "issue of federalism would be a complicated issue." (Sept. 17, 1990, at 113.)

Seabrook. Senator Leahy questioned Judge Souter about the unusual action taken by the state government to raise money in May 1977 from the owner of Seabrook and others to finance the prosecution of protestors opposed to the nuclear power facility. Judge Souter acknowledged that these fundraising actions were improper, particularly the \$74,000 contribution secured from the Seabrook owners.

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However, Judge Souter's statements concerning his knowledge of the details in these solicitations remain murky. He claimed to know nothing about these activities until June 30, 1977, even though his deputy was informed about the fundraising appeals two months earlier. Given that the Manchester Union-Leader broke the story on May 15 and that the events surrounding the protestors at Seabrook and fundraising actions were highly visible in the press, Judge Souter's "lack of knowledge" is implausible.

Conclusion. Judge Souter's dodging of key constitutional principles is unacceptable from a nominee to the U.S. Supreme Court. While he acknowledged in his opening statement that his decisions will affect the lives of millions of people, he is unwilling to tell the American people where he stands on the issues. Judge Souter has failed to meet the burden of proving that he is forward-looking and that he has the open-mindedness needed so critically to bring balance to the Court. We urge the Committee to reject this nominee.

Consumers Union, National Wildlife Federation and Natural Resources Defense Council do not take positions on judicial nominations.

# Alliance Justice for

A National Association of Organizations Working for Equal Justice

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**ALLIANCE FOR JUSTICE**

**Report on United States Supreme Court Nominees**

**David Hackett Souter**

**September 6, 1990**

**Prepared by**  
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## INTRODUCTION

The Alliance for Justice is a national association of civil rights, environmental, and consumer public interest law organizations. Its work includes promoting reform of the legal system to ensure equal access to the courts and encouraging the expansion of public interest representation. In addition, the Alliance works to preserve the integrity of the federal judiciary through the appointment of eminently qualified men and women who are committed to upholding the Constitution and the Bill of Rights.

This report analyzes Judge David Souter's opinions, writings and actions in light of his appointment to the U.S. Supreme Court, whose function is the vindication of individual and constitutional rights. The evaluation is a daunting one because the nominee's legal record is so sparse. As a New Hampshire Supreme Court Justice from 1983 until 1990, he wrote more than 200 opinions. Of these, only a few involve federal constitutional and statutory issues. The only other source of legal writings are the briefs he filed as Attorney General, a position he held from 1976 to 1978.

The underlying theme throughout David Souter's legal opinions and briefs is a constrained view of the role of the courts as the ultimate protectors of the disadvantaged and of unpopular minority groups against government coercion. During his tenure on the state Supreme Court, Judge Souter restrictively interpreted the New Hampshire Constitution, a document more protective of civil and individual rights than the federal Constitution. There is substantial reason to believe that he will limit federal constitutional guarantees in the same way.

In gathering information about David Souter's judicial philosophy, what is striking is an absence of any vigorous defense of individual rights or constitutional law. He has not, in any forum, spoken on any issue of law or philosophy. During the twenty-two years he spent as a public official, he neither gave speeches nor wrote legal articles. David Souter has failed to test his own thoughts on the great issues that he will undoubtedly face if he sits on the high court. For the U.S. Supreme Court and from David Souter, the country deserves more.

The Senate faces the responsibility of filling out the sketchy record on which David Souter can be judged. As an equal partner in the judicial appointment process, senators have the obligation to examine candidates on the full range of considerations on which the president has nominated them. Because of the closely divided U.S. Supreme Court, the Senate and the public need to understand where Judge Souter stands on the issues of privacy, civil rights, the role of the judiciary, as well as a range of other constitutional issues.

In recent years, the Senate has established the standard that a nominee's view of the Constitution and of the Supreme Court are key inquiries in the confirmation process. A president may choose someone who shares his views and values. However, he should not seek judges who show undue deference to majority rule over individual rights. Only after the Senate is fully satisfied that it has a substantial knowledge

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of David Souter and is assured that he understands the role of the courts in affording citizens the full protection of the Constitution, can they assess the wisdom of this nomination and cast their vote knowledgeably.

It is incumbent on Judge Souter to meet the burden of proof that he is qualified for the post. If he answers senators' questions with vague assurances and generalities on key issues such as abortion and civil rights, then the Senate ought to be skeptical. If his answers leave the impression that Judge Souter would weaken civil and constitutional rights, the Senate should withhold consent.

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#### JUDICIAL PHILOSOPHY

The judicial philosophy of Judge Souter raises critical questions about his theory of the role of the courts and his respect for the rights of individuals. His judicial opinions reveal a limited view of the judiciary's core function to protect individuals from overreaching by the state. In his Supreme Court questionnaire response on the role of the courts, Judge Souter is completely silent about safeguarding individual rights. Instead, he states that the "expansively phrased provisions of the Constitution must be read in light of its division of power among the branches of government and the constituents of the federal system." Thus, given an opportunity to expound upon the virtues of the Constitution, Judge Souter looks at the charter as merely a blueprint for power and omits any reference to the Bill of Rights.

#### Restrictive View of the State Constitution

Judge Souter has consistently refused to advance individual rights under the New Hampshire Constitution. Before his appointment to the New Hampshire Supreme Court, that court was developing a considerable body of law under the state Constitution, which often provided greater protections for individual than those secured under the federal constitution. This movement was reflected in State v. LaFrance, 471 A.2d 340 (1983), in which the court stated:

"[O]ur voters and founding fathers intended to create a government which would be checked by a higher law. That higher law is our state constitution."

. . . .

"The courts have a duty to interpret constitutional provisions. This duty may result in decisions that run counter to the present desires of the voters or their elected representatives. This is so because the constitutions of our states and nation are intended to be restraining documents so that the exercise of power by the majority does not go unchecked. We do not have unqualified majority rule; we have majority rule with protection for minority and individual rights. Without this limitation we would have tyranny of the majority and we would lose our liberty."

To further the development of state constitutional law, in State v. Ball, 471 A.2d 347 (N.H. 1983), the court held that when claims of violations of the federal and state constitutions are presented, the court should address the state claims first before treating the federal issues. From 1983 to 1985, Judge Souter joined the court in broadly interpreting the state Constitution. However, he expressed reluctance to rely on the New Hampshire Constitution as an independent source of rights in his concurrence in State v. Kellenbeck, 474 A.2d 1388 (N.H. 1984): "I would concentrate on the development of State constitutional law in those cases when a State rule would be different from its federal counterpart and would affect the outcome."

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Then, in 1985, Judge Souter began placing restrictions on Ball. In State v. Cimino, 493 A.2d 1197 (N.H. 1985), he warned litigants that they must clearly state independent grounds for a state claim if they are to be allowed to take advantage of Ball. By 1986, Judge Souter urged even greater limitations on Ball when he dissented from the court's consideration of a state constitutional claim on grounds that it was not "clearly" preserved for appeal. State v. Bradberry, 522 A.2d 1380 (N.H. 1986). He argued that the state issue had been inadequately presented, even though the claimant had specifically asked the trial court to rule on the issue and had raised it on appeal in the brief with citation to the specific constitutional provision. Subsequently, with a change in the court's membership due partly to then-Governor John Sununu's appointments, Judge Souter prevailed in blocking expansion of the state Constitution and in imposing stringent technical barriers on litigants seeking to press state constitutional claims. Overall, he has consistently refused to advance individual rights under the New Hampshire Constitution beyond those afforded under the federal Constitution.

#### Illustrative Cases

For example, given the opportunity to establish greater protections under the state constitutional guarantee of equal protection, Judge Souter declined. In State v. DeFlorio, 512 A.2d 1133 (N.H. 1986), a sixteen-year-old was convicted as an adult of misdemeanor traffic offenses -- driving without a license and operating a vehicle "in disobedience to a police officer" -- and sentenced to four consecutive weekends in the county jail, which lacked segregated facilities for juveniles. Because of his age, the county jail staff refused to admit him. On appeal, the county and the teenager argued that the statute requiring his being tried as an adult was unconstitutional on federal and state equal protection grounds. The defendant asserted that the court should apply "heightened scrutiny" to the statutory classification based on age, which requires the government to show that the age-based distinctions "serve important governmental objectives that are substantially related to achieving those objections." Craig v. Boren, 429 U.S. 190 (1976)

Judge Souter, writing for the court, rejected his argument and applied the less protective "rational basis test", which is used to review age-based discrimination under the federal equal protection clause. The rational basis test gives great deference to discrimination and requires only that the law be reasonable. By adopting this test as "the appropriate one to apply in assessing both the State and the federal claim," Judge Souter equated the two equal protection guarantees and completely ignored his statement in Kellenbeck that state constitutional standards should differ from their federal counterparts.

In cases involving criminal procedure, Judge Souter has shown an even greater willingness to defer to the state at the expense of individual rights. In State v. Koppel, 499 A.2d 977 (N.H. 1985), Judge Souter dissented from the majority holding that police roadblocks used to detect and arrest drunk drivers were unconstitutional under the New Hampshire Constitution, part 1, article 19, giving every citizen "a

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right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." Although similar to the federal Fourth Amendment, the New Hampshire court has recognized article 19 as providing "greater protection for individual rights." In his dissent, Judge Souter argued that the court was extending protections beyond prior cases and that the state's interest in roadblocks outweighed the "burden upon individual drivers." The Rehnquist Supreme Court has since adopted Judge Souter's views on the constitutionality of roadblocks. Michigan v. Sitz, 58 U.S.L.W. 4781 (1990).

However, Judge Souter's deference to police actions eventually prevailed. In writing for the majority in State v. Valenzuela, 536 A.2d 1252 (N.H. 1987), he held that the use of a pen register to record and disclose numbers dialed from an individual's telephone was not a "search" under article 19. Judge Souter was untroubled by the state police's foregoing use of a New Hampshire wiretapping law requiring judicial approval of telephonic intercepts, limited to a ten-day period, and instead asking federal agents to obtain a thirty-day period pen register authorization from federal court. The dissent noted that since the development of the case, the legislature had amended the wiretapping statute "to provide further protection for the citizens of this State in the maintenance of the 'proper balance between the State's duty to protect the public and the individual's right to privacy and free expression.'...[The legislature] has undertaken to preserve what it perceives as an expectation of privacy in an area where the plurality concludes that there is no such expectation."

Judge Souter also found no difficulty in weakening constitutional protections for individuals against retrospective or ex post facto laws. In State v. Ballou, 481 A.2d 260 (N.H. 1984), the defendant pled not guilty by reason of insanity and was subsequently committed to the state hospital. Under the law, his mental condition was due for reexamination in two years. However, during the intervening period, the legislature extended the validity of committal orders from two to five years, but also increased the state's burden of proof at recommittal hearings from mere preponderance of the evidence to that of proof beyond a reasonable doubt. The patient could seek review of his or her commitment prior to the expiration of the five-year period, but then the burden of proving sanity and non-dangerousness (by preponderance of the evidence) shifted to the patient. According to the majority in Ballou, the operation of the amendments so disadvantaged the patient, that they violated the state constitutional prohibition against retrospective laws "which changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed."

However, in dissent, Judge Souter concluded that this prohibition was completely inapplicable, stating that "[o]nly proof of dangerousness can justify commitment, and a commitment on grounds of dangerousness is not punishment" within the scope of the constitutional prohibition. He conspicuously omitted any discussion of the shifting burdens of proof.

Two years later, though, Judge Souter successfully narrowed the scope of the ex post facto prohibition. In State v. Heath, 523 A.2d 82

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(N.H. 1986), the legislature had restricted the statutory right to take discovery depositions in cases involving child victims. Because the statutory amendments came after the date of the alleged offense, the defendant claimed that application of the restrictions to his case constituted an ex post facto law. The ex post facto prohibition includes any law which "alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the [offense]." Writing for the court, Judge Souter disagreed, stating that "the change in the law of entitlement to depositions does not fall within any of the ex post facto categories."

The extraordinarily heavy burden that Judge Souter demands of those seeking relief from the courts is vividly demonstrated in Appeal of Bosselait, 547 A.2d 682 (N.H. 1988), a case involving both constitutional and statutory issues. In Bosselait, two brothers, ages 76 and 79, shared a janitorial job, with each working four hours a day. When their employer laid them off, the brothers sought unemployment benefits but were rejected. The Department of Employment appeal tribunal noted that the benefits statute required applicants to be "available for and seeking permanent, full-time work." Although the Bosselaites complained that they suffered health problems precluding full-time employment and that the statute "is discriminating against old fellas...old people," the appeals tribunal rejected their claims.

Judge Souter dismissed the plaintiffs' claims of violations under the state and federal constitutional guarantees of equal protection, the federal Age Discrimination in Employment Act and the federal Rehabilitation Act. Despite the plaintiffs' statements before the appeals tribunal (where they appeared without counsel), he stated that "[n]ot one of these issues...has been both timely raised below and preserved for consideration on appeal." Although finding the record inadequate to preserve the issues, Judge Souter proceeded, in lengthy dicta, to discuss and reject each claim.

In the context of involuntary civil commitment, Judge Souter showed similar hostility to state constitutional claims. In In re Sanborn, 545 A.2d 726 (N.H. 1988), he refused to address a mentally retarded individual's claims under state constitutional law that evidence obtained through police questioning should be suppressed in his commitment hearing. Judge Souter stated that the patient's "pleadings and brief have not crossed the line dividing passing references to State issues from analysis calling for adjudication on independent state constitutional grounds."

Judge Souter's imposition of stringent technical barriers to raising state claims and his refusal to recognize claims under the New Hampshire Constitution have resulted in a backsliding of state constitutional law. His harshly restrictive, mechanistic approach to the state Constitution raises questions that bear directly on his views of the role of the courts and how he will interpret the federal Constitution and the Bill of Rights.

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### Doctrine of Original Intent

Another aspect of Judge Souter's judicial approach is his adherence to the "original intent" theory of constitutional interpretation. Endorsed by former Attorney General Edwin Meese, Judge Robert Bork, and Justice Antonin Scalia, the theory holds that a judge's role in interpreting ambiguous, open-ended constitutional language is simply to divine the intent of the framers through textual and historical analysis.

Judge Souter's most explicit application of the original intent doctrine can be found in In re Estate of Dionne, 518 A.2d 178 (N.H. 1986). In Dionne, the majority held that a state law requiring parties to pay a fee to the probate court for holding a hearing on days not set by statute was invalid under the state Constitution, part I, article 14, which provides that "[e]very subject of this state is entitled...to obtain rights and justice freely, without being obliged to purchase it..." According to the majority, compensating probate judges (who adjudicate wills and involuntary commitments) for special hearings "smacks of the purchase of justice." Although the arrangement had been in existence for almost one hundred years, the court stated that "[i]n an era of heightened sensitivity to appearances of impropriety, the spectacle of a citizen or attorney giving cash in one hand and receiving a judicial hearing and decision in the other is one that can no longer be tolerated."

Judge Souter dissented, urging obedience to the "court's clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption.'" He stated that the "court's interpretive task is...to determine the meaning of the article 14 language as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text that took effect in June 1784." Judge Souter proceeded to trace the historical derivation of the constitutional provision from the Magna Carta of 1215 and recounted the statutory practice of compensating judges, dating back to American colonial days. He concluded by stating:

"Since the adoption of that article [14] was not followed by any known challenge to the statutory provision for fees to compensate probate judges, the most reasonable inference is that the constitutionalists of that time did not understand the fee provision to be a forbidden obligation to purchase justice."

Judge Souter's heavy reliance on what the framers intended in the late 1700s reveals a fundamental and troubling aspect in his judicial philosophy. His dissent ignored what the majority recognized -- that standards of justice have evolved over the last two hundred years and that paying a fee to the judge (not the court clerk) to hear one's case raises questions about the judge's impartiality.

Furthermore, Judge Souter's failure to consider changing and modern circumstances is aptly illustrated by the very cases cited for support in his Dionne dissent. He cited an 1860 advisory opinion on proposed

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legislation reducing the number of jurors from twelve to six, and claimed that the court had "confirmed the vitality of the [original intent] rule as recently as 1981," in another advisory opinion on nearly identical legislation. However, Judge Souter neglected to mention that the 1981 opinion was based not only on the 1860 opinion but also on empirical studies of the last twenty years using social science data on the use of six-person juries and the possibly greater risk of erroneous convictions.

In a recent interview with The Massachusetts Lawyer, Judge Souter failed to adequately explain this dissent in Dionne:

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

While the Dionne dissent alone is not conclusive proof that Judge Souter subscribes to the theory of original intent, he has said nothing to dispel this impression. Because original intent analysis can be used to roll back the progress of the last forty years in constitutional rights, Judge Souter's views must be fully explored.

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#### ROLE OF ATTORNEY GENERAL

In addition to his opinions on the state Supreme Court, David Souter's briefs and actions as state attorney general, from 1976 to 1978, provide further insight in his legal views. These raise questions about whether he viewed his role as advocate for the public interest or as the lawyer for the governor who appointed him; whether and to what degree he adopted the legal positions he defended; and what his current view is of the arguments he advanced.

#### Institutional Independence

Several institutional checks guarantee the independence of the attorney general in New Hampshire. Because the attorney general's term of four years -- five years during David Souter's tenure -- extends beyond the governor's two-year term, he is not forced to adopt the governor's positions in order to maintain his appointment, and he is shielded to some degree from the political posturing that may occur with biennial gubernatorial elections. Second, under the laws of New Hampshire, the governor is provided his own legal counsel -- separate from the attorney general -- who serves at the governor's pleasure. RSA 4:12. And third, any attempt by the governor to remove the attorney general from office is appealable to the state Supreme Court. RSA 4:1.

In Opinion of the Justices, 259 A.2d 660 (N.H. 1969), the court noted that the attorney general "has sole responsibility of formulating his legal opinion." Furthermore, any order by the governor, under RSA 7:9, to the attorney general to represent the state's interest in any case must be "reasonable and practicable". Opinion of the Justices, 175 A.2d 396 (N.H. 1961).

#### Personal Independence and Standards

David Souter sought to establish his independence early in his tenure. In an interview prior to his January 1976 confirmation, he stated that not only is the attorney general the "chief law enforcement officer" and "civil law officer for state government", but he is also "counsel to the public". (Manchester Union-Leader, Dec. 28, 1975) Only a few weeks later, he declared:

"At no time would I give testimony with which I disagree. And it would be irresponsible for the attorney general to support any state agency if he felt what they were doing was clearly wrong." (Concord Monitor, Jan. 7, 1976)

However, Attorney General Souter also stated that "he will represent an agency in an already-completed action, or in ongoing actions on which the law is open to interpretation." In a 1978 letter, shortly before he left office, Mr. Souter further described his standard:

"My standard...has been simply this: this office will represent any governor in a proceeding brought against him in his official capacity whenever his action cannot reasonably be judged patently illegal or unconstitutional. If, as I

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believe, the Attorney General should act as a lawyer guided by generally applicable principles, I don't believe any other standard is possible. The alternatives seem to me to be an Attorney General who is a political rubber stamp or one who is a political spokesman for political opposition to the Governor. I find each such alternative unacceptable."

Letter to Robert A. Backus, Esq., March 30, 1978.

### Conflicts with the Governor

#### Gambling Legislation

David Souter's first clashed openly with New Hampshire Governor Meldrim Thomson, who appointed him, in 1976, when he successfully blocked legislation permitting sports card betting and jai alai. He testified that "illicit operations would flourish" and "people who were not bettors before could have latent gambling interests stimulated to the point where they would eventually be giving money over to criminal operations." (Manchester Union-Leader, April 7, 1976)

The following year, when similar legislation was proposed to authorize casino gambling and slot machines, Mr. Souter again objected. He stated that it would invite organized crime to launder money in the state, and that it "is not really a call to increase our tourism" but instead an attempt to "exchange our present vacationers for a different sort of traveler." (Concord Monitor, Jan. 28, 1977) Governor Thomson supported the bills "wholeheartedly" and stated that he was "very much appalled" by the scare tactics used by the opponents. (Concord Monitor, April 7, 1977)

#### Seabrook Licensing

Governor Thomson and Attorney General Souter took opposite positions again on an issue that usually found them in complete agreement -- the Seabrook nuclear power plant. In July 1976, Mr. Souter filed legal objections to the federal government's licensing of the plant, claiming that the company had underestimated the number of people who would be affected by a nuclear accident, and that plant construction could not be conditioned on the Environmental Protection Agency's approval of the plant's cooling system.

Governor Thomson said that he "was deeply disturbed" by Mr. Souter's actions "especially since the law did not compel him to take such action." He further stated that the "Attorney General discussed with me his plan to make the appeal. The matter is entirely in his hands under the statutes and out of control of the governor." But the governor also stated that he might have his own legal counsel enter the case. (Manchester Union-Leader, July 18, 1976)

When criticized for objecting to the construction, Mr. Souter stated, "I see the attorney general's office as the counsel for the public, and it has been our job to make sure we worked within the rules as laid down by law." (Manchester Union-Leader, July 20, 1976) The

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attorney general also stated that his appeal was not intended to halt or delay construction of the plant, but only to ensure its safety.

Despite these disagreements, David Souter supported the governor's positions on such issues as lowering the flag on state buildings on Good Friday to commemorate the death of Jesus Christ and refusing to comply with federal fair employment reporting regulations (New Hampshire was the only state in the Union to refuse). A former attorney of Mr. Souter's staff recalled that at his own farewell dinner, Mr. Souter publicly thanked the governor for never asking him to take a position that he thought was inappropriate.

#### Responsibility and Supervision

As a state official, David Souter held responsibility for any briefs or letters that went out under his name. In one of his early interviews as attorney general, David Souter stated his intention to keep his office small to maintain "a tightly-knit, tightly-run organization." One former staff member, Richard Wiebusch, a senior attorney who handled a case opposing Medicaid funding for abortions, recently told a reporter that Mr. Souter "had no time to look at most of the documents his staff wrote." (Concord Monitor, Aug. 8, 1990) However, several attorneys serving under Mr. Souter contradicted that statement, saying that the attorney general reviewed most documents filed under his name, such as opinion letters and briefs, though the degree of review varied according to individual. Regardless of the degree of his supervision, David Souter was constitutionally entrusted with carrying out and defending the legal positions of the state.

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#### PRIVACY

David Souter's opinions, writings and public remarks in the area of privacy, coupled with his adherence to the doctrine of "original intent", raise serious questions over whether he will uphold this fundamental right.

#### The Right to Choose Abortion

Although Judge Souter grudgingly recognizes the Court's Roe v. Wade holding, his focus has never been on a woman exercising her constitutional right. Nor has he shown any measure of solicitude for the difficult decision she faces. Instead, as attorney general, David Souter has sought to block government funding for abortions and to retain restrictions on them. In addition, he has expressed sympathy for anti-choice doctors and judges who eschew any involvement in helping women exercise their right. Perhaps most significantly, in discussing abortion, David Souter has used the language of the anti-choice movement, including "abortion mill," "killing the unborn," and "the destruction of fetuses." The only known occasion in which he did not take a restrictive position is when the board of trustees of the Concord Hospital voted soon after Roe v. Wade to allow abortions to be performed at the hospital. Those present do not recall Judge Souter, a member of the board, commenting on the policy.

#### The Smith v. Cote Concurrence

As a state Supreme Court justice, David Souter concurred in a decision involving a woman's right to sue her doctor for failing to discuss the abortion option. In Smith v. Cote, 513 A.2d 341 (1986), a mother who had contracted measles during her pregnancy sued her doctor after the baby was born with birth defects. She asserted that the doctor was obligated to inform her of the possibility of birth defects and discuss with her the option to terminate the pregnancy. Recognizing a cause of action for wrongful birth, the New Hampshire Supreme Court held that doctors have a duty to test for birth defects, inform pregnant women of the results, and discuss the option of abortion.

In his concurrence, Judge Souter reached out to resolve an issue not before the court concerning the dilemma faced by doctors who are opposed to abortion and yet must discharge their professional obligation. He offered an alternative for such doctors, by allowing them to make timely referrals to other physicians "who are not so constrained." The majority believed it unnecessary to address the issue raised in Judge Souter's concurrence because it had not been briefed or argued in the court below.

#### Letter Lobbying Against Judicial Involvement

In 1981, Judge Souter expressed the same concern for anti-choice judges. As a superior court judge, David Souter wrote to a state legislator concerning proposed legislation that would have required either parental or judicial consent before an abortion could be performed on an unmarried minor. Speaking on behalf of the New

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Hampshire Superior Court in his role as chair of the court's legislation committee, Judge Souter urged deletion of the judicial consent provision, because it left to judges a "fundamental moral decision about the interests of other people without any standards to guide the individual judges." Judge Souter raised the issue that some judges who "believe abortion...is morally wrong...could not in conscience issue an order requiring an abortion to be performed." He further wrote that he believed the legislation would result in "shopping for judges who would entertain such cases."

Contrary to David Souter's position, judges have a legal obligation -- just as doctors have a professional obligation -- to apply the law to issues regardless of their personal beliefs. Judges frequently make moral decisions, most visibly in death penalty cases. Judge Souter's empathy with anti-choice judges suggests not only a restrictive view on the role of the courts in protecting individual rights and applying constitutional standards, but also his strong distaste for abortion. In addition, though the letter was instrumental in preventing passage of the bill, Judge Souter took no position on whether young women should be required to obtain parental consent -- leaving open the question of whether he would vote with some of the U.S. Supreme Court Justices to permit states to require parental consent or notification without the opportunity for teenagers to obtain judicial relief.

#### Opposition to Repeal of Abortion Statute

As attorney general in 1977, David Souter successfully opposed the repeal of an 1848 law which applied criminal penalties for the performance of an abortion. To support his argument, David Souter evoked the symbol of New Hampshire becoming the abortion capital of the country. He is quoted as saying, "Quite apart from the fact that I don't think unlimited abortions ought to be allowed...I presume we would become the abortion mill of the United States." He further hypothesized, "Let's say somebody performed an abortion, which would now be legal in New Hampshire...in the eighth month. Let's assume you had a viable fetus. If that fetus died as a result of the abortion, that would not be murder or manslaughter. That would be no offense at all the way I read the statute."

Apparently, Mr. Souter was concerned that repeal would leave the state without any prohibition against abortions, when in fact the abortion statute was (and is) completely unenforceable under Roe. Moreover, Roe has always allowed state-imposed restrictions after viability, contrary to Mr. Souter's assertions. These gratuitous, inflammatory comments reveal a hostility to the fundamental right to choose.

#### Medicaid Funding of Abortion

Also, while David Souter was state attorney general, his office filed a brief opposing Medicaid funding of abortion for poor women. According to the brief, "it is equally clear that Congress did not enact Title XIX to aid in the destruction of fetuses." Moreover, the state was justified in prohibiting the funding of elective abortion except

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when the life or health of the mother is in danger because "thousands of New Hampshire citizens possess the very strongly-held and deep-seated moral belief that abortion is the killing of unborn children." The state lost at the district court level, but an identical case before the U.S. Supreme Court approved the funding prohibition.

#### Rape Shield Cases

Similar to the rape shield laws enacted by forty-six states and the U.S. Congress, New Hampshire's statute is essentially a codification of the right to privacy for rape victims and is intended to encourage them to come forward to testify. The law provides that "[p]rior consensual sexual activity between the victim and any person other than the actor [defendant] shall not be admitted into evidence." Before Judge Souter's appointment to the state supreme court, in State v. Howard, 426 A.2d 457 (N.H. 1981), the court held that the rape shield law must yield to some degree to the defendant's constitutional right to cross-examination, and allow him an opportunity, out of the jury's presence, to show that the value of evidence of prior consensual sexual activity outweighs its prejudicial effect on the victim.

In State v. Colbath, 540 A.2d 1212 (N.H. 1988), Judge Souter reversed the trial court's exclusion of evidence of prior consensual sexual activity, stating that the rape shield law could not bar testimony of the rape victim "hanging all over everyone and making out with [the defendant] and a few others" in the hours preceding the incident. In this case, for example, "the jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group." He further suggested that the victim may have alleged rape to "excuse her undignified predicament". The court concluded that the evidence related directly to the accused's defense of consent. However, on retrial, the defendant was convicted again. In State v. Baker, 508 A.2d 1059 (N.H. 1986), Judge Souter and the court reversed the conviction of a defendant for felonious sexual assault on the grounds that the defense counsel had not been given an opportunity to demonstrate that the rape shield law did not apply to testimony about the victim's prior consensual activity.

Judge Souter simply refused to recognize the importance of the rape shield law. Although the New Hampshire legislature clearly meant to ensure the victim's privacy rights, Judge Souter showed little deference to the lawmakers' intentions. In addition to ignoring the intent of the legislature, his approach echoes the harmful, stereotypical notions of "she asked for it" and "she made it up". Interestingly, his decision for the convicted rapist in Colbath is one of the few in his judicial career in which he ruled in favor of the defendant. In nearly all of his criminal cases, he upheld convictions and took a narrow view of constitutional protection for the accused.

#### Rights of Gays and Lesbians

In Opinion of the Justices, 530 A.2d 21 (1987), the Supreme Court rendered an advisory opinion on the constitutionality of state

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legislation prohibiting gays from adopting children, becoming foster parents, and running day care centers. The court relied heavily on Bowers v. Hardwick, 106 S.Ct. 2841 (1986), which held that homosexuals do not have a federal constitutional right of privacy. Judge Souter and three other Justices accepted without any critical evaluation and despite contrary evidence presented, the legislative assumptions that "the provision of a healthy environment [for children] should exclude homosexuals...from participating in governmentally sanctioned programs of adoption, foster care, and day care" because "being a child in such programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce."

Applying the weakest scrutiny possible -- the rational basis test -- the court advised that the ban on adoption and foster parenting was constitutional. However, the court concluded that prohibiting gays from running day care centers was constitutionally infirm, on the basis that day care providers, unlike adoptive and foster parents, are not primary role models.

In a stinging dissent, Justice Batchelder rejected the use of sexual orientation as a factor in evaluating potential adoptive or foster parents. He writes, "[t]he State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to groups of citizens because of ancient prejudices against that group."

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#### THE FIRST AMENDMENT

As reflected in the briefs filed as attorney general, David Souter views the protections of the First Amendment narrowly. In his positions on this subject, Mr. Souter has deferred to state action promoting the establishment of Christianity and interfering with the free exercise of religion, without requiring a compelling justification.

#### Separation of Church and State

##### Lowering the Flag on Good Friday

David Souter defended the state's ability to infringe upon First Amendment rights in his support for Governor Meldrim Thomson's order that flags on state buildings be flown at half-staff on Good Friday of 1978. The governor had ordered the flag-lowering to "memorialize the death of Christ on the first Good Friday" and called for meditation or prayer. Several clergymen filed suit, claiming that the order offended the First Amendment religion clauses.

Attorney General Souter supported the flag lowering, stating that it was "a religiously neutral symbol of respect for an individual" within the state's discretion. Lowering the flags, he claimed, had a secular purpose in that it recognized Good Friday as an occasion to commemorate the death of Jesus Christ. Failing to recognize the religious significance attached to Jesus Christ and inherent in the observance of Good Friday, Mr. Souter contended that the order did not advance or inhibit religion:

"The lowering of the flag to commemorate the death of Christ no more establishes a religious position on the part of the State or promotes a religion than the lowering of a flag for the death of Hubert Humphrey promotes the cause of the Democratic Party in New Hampshire."

A federal judge issued a temporary restraining order, noting that the governor's order contained "all the seeds of divisiveness that the establishment provision was designed to prevent. It not only seeks to advance religion, but a particular religion." The First Circuit Court of Appeals reversed, but Justice William Brennan, as Justice for the First Circuit, issued a temporary stay on the appeals court decision, thus reinstating the district judge's order.

In this instance, Judge Souter was not simply acting at the behest of Meldrim Thomson, but on the belief that the flag order was lawful. In his own words, David Souter applied a straightforward standard "...in flag cases and any others...[that] this office will represent any governor in a proceeding brought against him in his official capacity whenever his action cannot reasonably be judged patently illegal or unconstitutional." It is reasonable to conclude that David Souter saw no constitutional problem with the flag order.

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#### Displaying State Motto on License Plates

Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), two Jehovah's Witnesses challenged the constitutionality of a New Hampshire state law which required the display of the state motto, "Live Free or Die", on license plates. Objecting to the motto on religious grounds, Maynard covered over and cut out portions of the motto on his license plates and was convicted for violating state law. The case eventually reached the U.S. Supreme Court.

The attorney general's office, under David Souter, defended the constitutionality of the statute. He argued that important government interests were furthered by the establishment of an efficient motor vehicle registration system and promotion of tourism and state pride. The attorney general's office also argued that obscuring the motto bore "no relationship to the freedom of expression of the [Maynards]" and did not amount to symbolic speech worthy of First Amendment protection. Mr. Souter did not believe that the message conveyed by obscuring the state motto was sufficiently "particularized" to constitute symbolic speech. He characterized Maynard's conduct as "pure whimsy" without further explanation.

In an opinion by Chief Justice Warren Burger for a seven-member majority, the U.S. Supreme Court disagreed. While not passing on the "symbolic speech" issue, the Court found that the state could not compel an individual to display an ideological message on his private property for viewing by the public. The First Amendment, the Court held, protects the rights of individuals to refuse to foster an idea they find morally objectionable. Contrary to Mr. Souter's views, the Court also held that the state's interest was not sufficiently compelling to justify required display of the state motto on their license plates.

The Burger Court, unlike Mr. Souter, clearly found that the state interest in identifying passenger vehicles could have been achieved through less drastic means that did not impinge so broadly on First Amendment rights. Furthermore, the state's interest in promoting tourism and state pride through display of the motto did not outweigh an individual's right not to be forced to carry such messages.

#### Political Dissent

David Souter's involvement in the controversy surrounding the Seabrook nuclear power plant displays an unduly harsh treatment of political dissenters. As a state official representing the public interest, David Souter himself questioned the granting of the license to construct the power plant. However, Mr. Souter did not approve of civil disobedience regarding citizen opposition to the plant.

In 1976, Attorney General Souter questioned the safety precautions laid down by the Atomic Safety and Licensing Board before issuing the permit to the Seabrook plant. (Manchester Union-Leader, July 20, 1976) For raising these issues, Mr. Souter incurred the wrath of the Union-Leader, and "deeply disturbed" Governor Thomson, who claimed that his action would "comfort" opponents to the nuclear plant. (Associated

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Press, July 19, 1976.) Later, however, Mr. Souter assured the governor that he did not care to be allied with either side. "[The Attorney General's] office never has, is not now and is not likely in the future to take a position adverse to the building of the plant as such. In particular, at this stage of the game, we're not trying to stop construction." (Manchester Union-Leader, December 1976)

Meanwhile, the Attorney General's office prosecuted ten of two hundred protesters involved in an August 1976 demonstration at the plant. For violating an injunction against entry at the plant site, the Attorney General's office successfully sought unusually severe sentences of six month's jail time (with three months suspended) for the demonstrators.

Less than one year later, in May 1977, the Clamshell Alliance, a New England-wide anti-nuclear group, organized a second demonstration, which was described as "the first large-scale show of civil disobedience in the nation in opposition to construction of a nuclear power plant." (Facts on File, May 28, 1977) More than 1,400 protesters were arrested and held in the National Guard Armory.

The trial court gave the first demonstrator on trial a suspended sentence of fifteen days at hard labor and an order to pay a \$100 fine. Vehemently objecting, David Souter made an extraordinary, personal appearance in trial court and asked that the sentences not be suspended, "The imposition of a 15-day suspended sentence is for all practical purposes the imposition of nothing." Concord Monitor, May 6, 1977. He described the demonstration as "one of the most well-planned acts of criminal activity" in the nation's history and stated that the police had overheard citizens band radio messages indicating that the demonstrators planned to reoccupy the construction site. Concord Monitor, May 7, 1977.

Mr. Souter then had to account for the financial costs for quashing the protest. The state Senate Finance Committee questioned the wisdom of his decision to incarcerate 1,400 demonstrators for almost two weeks at the cost of \$50,000 per day. He defended his actions as necessary to preserve the integrity of the criminal justice system, and that the demonstrators had the attitude that "the state of New Hampshire is not going to do one damned thing to us." (Associated Press, June 3, 1977) Although admitting that incarceration was unusual for criminal trespass, Mr. Souter told the committee that he thought it necessary to clear away the protesters to avoid confrontation with the construction workers, who were scheduled to begin working the next day. The state also had to pay a National Guard bill of more than \$500,000. (Associated Press, June 22, 1977)

With the responsibility for Seabrook prosecution costs squarely on his shoulders, David Souter faced the governor's Commission on Crime and Delinquency to request an additional \$150,000 to defray the bill. When the Commission questioned his use of funds, Mr. Souter threatened to have the Commission disbanded if they did not appropriate the funds, according to one Commission member. The attorney general's office

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accepted \$74,000 from the power plant owners to defray the state's prosecution costs. (Manchester Union-Leader, May 15, 1977)

As the chief law enforcement officer in the state and with ultimate responsibility for all criminal prosecutions, David Souter shaped the course of the criminal proceedings in the Seabrook demonstration. The severity of the measures which he applied to the demonstrators reveals an intolerance of political dissent.

#### Gag Order on State Employees

An obtuse statement by David Souter in connection with one of Governor Thomson's controversial policies should give free speech advocates concern.

At Governor Meldrim Thomson's urging, the Executive Council adopted a resolution supporting nuclear power as the official state policy of New Hampshire. The resolution was in response to mounting criticism from legislators and state officials for the nuclear power plant that was to be built at Seabrook. Essentially, the resolution sought to prevent state employees from speaking against nuclear power in any official capacity. (New Hampshire Times, March 17, 1976)

"If someone wants to oppose the nuclear power plant, he has an easy way out. He can resign and then speak out against it," declared Governor Thomson. When critics charged the governor with imposing a gag rule, he quickly retreated, "State employees have always been free to speak out on any issue as private citizens....If any state employee were called before a regulatory board or court to give testimony on a subject with which he had special competence, he or she would be expected to respond regardless of the direction of the testimony." (Manchester Union-Leader, March 6, 1976)

Attorney General Souter's comment on the governor's resolution was noncommittal: "No state employee, whose job it is to make sure that environmental protection safeguards are obeyed, should feel intimidated by the new policy." Mr. Souter failed to assure employees that their jobs would be protected if they openly disagreed with Thomson's policy. Looked at another way, his statement could be interpreted as trivializing the employees' free speech rights.

#### Public Right to Know

David Souter's narrow interpretation of the state's Right-to-Know law, when New Hampshire was coping with mounting criticism of the state prison, suggests a position which, at best, is vague and noncommittal. At worst, it is evidence of a belief that the state has the right to deny information to the public.

In July 1976, Governor Thomson announced that the Executive Council and the state prison board would be holding a "closed-door" session to discuss problems at the prison. Attorney General Souter defended the private meeting under an exception in the state's Right-to-Know Law permitting executive sessions if matters to be discussed "would be

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likely to adversely affect the reputation of any person other than a member of the body itself." Mr. Souter promised reporters he would advise the governor to open the meeting if discussion drifted to criticizing Prison Warden Helgemoe's administration. (Concord Monitor, July 1, 1976)

The Concord Monitor criticized this attempt to evade the Right-to-Know law. According to the newspaper, Governor Thomson "already has so sullied Warden Helgemoe's reputation that little could be said in a public session to damage it further...The closing of the joint meeting was a sham, a cover-up and an evasion of the law. The public was denied its right to know the truth about the prison." (Concord Monitor, July 2, 1976)

Recognizing that the "reputation" exception could be used to exclude the public from almost any discussion, Attorney General Souter admitted that "it could be stretched so far as to swallow the law entirely." But then Mr. Souter declared that the Right-to-Know Law as a whole "stinks" because it is a piece of "vague and lousy legislative drafting."

#### Judicial Opinions

As a Justice on the New Hampshire Supreme Court, David Souter has written several opinions on freedom of expression, but they shed little light into his philosophy of the First Amendment. In State v. Hodgkiss, 565 A.2d 1059 (N.H. 1989), Judge Souter upheld a law banning the posting of signs on city property, but struck down another which prohibited encumbrances on sidewalks that prevented an individual from distributing literature and urging passers-by to vote for a candidate. In Petition of Chapman, 509 A.2d 753 (N.H. 1986), Judge Souter and the majority struck a compromise between the New Hampshire bar association and several member attorneys claiming that the association's lobbying against tort reform legislation violated their free speech rights. The court concluded that the bar association could lobby on legislative measures regarding the administration of justice, but not on proposed changes in substantive law, such as the creation or repeal of causes of action. In In re New Hampshire Disabilities Rights Center, 541 A.2d 208 (1988), Judge Souter invalidated a state law provision prohibiting non-profit corporations from providing services to non-indigent clients. He agreed that operation of the law violated an organization's rights of association and advocacy under the federal constitution.

Finally, as a trial judge on the New Hampshire Superior Court, in the 1981 case of State v. Siel, Judge Souter quashed subpoenas of two student reporters whose notes were sought by the defendant in a murder trial. Their newspaper article alluded to the victim's involvement in a local drug trafficking ring, which was a key factor at trial.

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#### CIVIL RIGHTS

As attorney general, David Souter openly refused to comply with federal civil rights laws. He strongly attacked affirmative action and characterized attempts to implement programs to monitor discrimination as gratuitous and based on questionable intent. Furthermore, his narrow view of civil rights raises questions about whether he believes that the bedrock principles of the Fourteenth Amendment include women as a protected class.

#### Affirmative Action

In a 1976 speech as attorney general, David Souter attacked federal affirmative action guidelines, calling them "affirmative discrimination." He said that the federal government should not be involved in establishing rules requiring employers to give preference to particular ethnic or racial groups. Mr. Souter said that such policies make people eligible for some service solely by virtue of ethnic background. He stated his belief that the protection of civil liberties should be accomplished through the restraint of power, as supported by "our Constitutional history". (The Manchester Union-Leader, May 31, 1976)

Mr. Souter used the same reasoning when, as attorney general, his office defended New Hampshire's refusal to report the racial composition of the state's workforce, as required by federal fair employment laws. In the state's brief before the U.S. Supreme Court, Mr. Souter challenged the constitutionality of the reporting requirement, calling it "superfluous" and "abusive." He claimed that the requirement "proceeds from the cynical assumption that the fairest employer cannot be trusted any more than the most biased. And, it ends in treating every employer as if he were a suspected bigot and lawbreaker." He stated the regulation was non-essential to the aims of Title VII and a intrusive and unnecessary exercise of governmental power. Brief for Appellant in United States v. New Hampshire, No. 76-1018 (1st Cir. filed Feb. 20, 1976).

Mr. Souter contended that requiring state employers to make racial and ethnic classifications was itself an illegal state action in violation of the equal protection clause. Such requirements were to be tolerated no more than racial quotas, which were impermissible in his view. Mr. Souter further argued that the reporting requirements would cause employers to think in terms of color, rather than merit, and thereby result in employers acting in terms of color. He assumed this result, even though the reporting was to be done on an aggregate, not an individual, basis. The First Circuit Court of Appeals rejected his arguments, United States v. New Hampshire, 539 F.2d 277 (1st Cir. 1976), and the Supreme Court denied his request for review.

#### State Literacy Test

The 1965 Voting Rights Act amendments are pivotal in this country's commitment to the protection of minority rights. In 1970, David Souter sought New Hampshire's exemption from adhering to them. In United States v. New Hampshire, Civ. No. 3191 (D. N.H. 1970), the Nixon Justice

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Department filed an action, declaring that the amendments to the 1965 Voting Rights Act invalidated provisions in the New Hampshire constitution which prescribed a literacy test as a qualification to vote. As assistant attorney general, Mr. Souter defended the literacy test. He unsuccessfully argued that a suspension of the tests under the 1965 amendments exceeded Congress's authority, because the tests had been previously administered in compliance with federal law.

David Souter is obviously untroubled by the position he was asked to defend. Twenty years later, in his questionnaire to the Senate Judiciary Committee, he described this case as one of the ten most significant that he argued. However, given the opportunity to explain his position, he does not reflect on the substance of the case or on how the Voting Rights amendments have affected minority citizens. Instead, Mr. Souter could only recall the intellectual exchange of his oral argument.

#### Equal Protection

David Souter's views on the scope of equal protection regarding sex-based classifications are evidenced in a brief filed by the New Hampshire Attorney General's office in an appeal of a statutory rape case, Meloon v. Helgemoe, No. 77-1197 (D. N.H. April 27, 1977). Mr. Souter opposed a federal order holding that New Hampshire's statutory rape law was unconstitutional, because it punished only men who had sexual intercourse with underage females and not women who had intercourse with underage males. Mr. Souter disagreed in an extremely paternalistic manner.

He contended that any claim of sex discrimination was to be analyzed under the rational basis test, dismissing the "heightened scrutiny" standard for gender-based classifications that the U.S. Supreme Court had firmly adopted the year before in Craig v. Boren, 429 U.S. 71 (1976). The Craig test requires that a classification "must serve important government objectives and must be substantially related to the achievement of those objectives." Mr. Souter insisted that this language was merely an outgrowth of the rational basis test, contrary to mainstream legal thought concerning equal protection standards.

#### Sex Discrimination

Further evidence of Mr. Souter's restrictive interpretation of law is apparent in the civil rights case of King v. New Hampshire Department of Resources and Economic Development, 420 F.Supp. 1317 (D. N.H. 1976). The Attorney General's office under David Souter argued that the plaintiff had failed to prove that sex discrimination had occurred.

The female plaintiff had been refused summer employment with a beach meter patrol for three consecutive summers. In one job interview she was asked whether she could wield a sledgehammer, whether she had any construction industry experience, and whether she could "run someone in." Despite the fact that these duties admittedly constituted "less than one percent" of the duties of the job, the attorney general's office contended that such questions were job-related and did not

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evidence any "discriminatory animus" toward the female applicant. Such questions, the office concluded, were not unlawful even if they resulted in a refusal to hire the plaintiff. The Second Circuit Court of Appeals rejected the argument and upheld the district court's findings that such questions evidenced a discriminatory state of mind on the part of the interviewer.

David Souter's office also contended that the plaintiff needed to show that the job was offered to male applicants with similar qualifications in order to make out a prima facie case of sex discrimination. However, the appeals court found that a prima facie case of sex discrimination was made and the burden was on the state to provide a legitimate nondiscriminatory reason for the employee's rejection.

Finally, the attorney general also contended that the district court had imposed an unreasonable burden on employers to check with every past employer reference of a female applicant. Such a requirement was described as "reverse discrimination", placing an onerous burden on small employers. The Court of Appeals disagreed, stating that an employer cannot use an isolated, negative reference as a pretext for not hiring an applicant, and such a negative reference was insufficient to overcome the showing of discriminatory animus has been made.

#### CONCLUSION

This report identifies the issues which require full exploration by the Senate Judiciary Committee. However, the Senate cannot be content with simple explanations of these issues. Mr. Souter's statements must be measured by the historic purpose served by the Supreme Court, which is to uphold the guarantees contained in the Bill of Rights.

The Alliance calls on the Senate to fill in the blanks and to show that Mr. Souter's appointment would serve the interest of the Court and of the country. The Senate must require that David Souter show an appreciation and recognition of the great strides made toward advancing social justice.

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

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**DAVID H. SOUTER:  
THE DEFINITION OF JUDGING**

**An analysis of  
President George Bush's nomination of  
DAVID H. SOUTER  
to be an associate justice on the  
Supreme Court of the United States**

**by  
Thomas L. Jipping, M.A., J.D.  
Legal Affairs Analyst**

August 1990

## EXECUTIVE SUMMARY

When he nominated U.S. Circuit Judge David H. Souter to be an associate justice of the U.S. Supreme Court, President George Bush said that his nominee would "interpret" the law rather than "legislate from the bench." In doing so, President Bush was not distinguishing between different forms or styles of judging; he was distinguishing judging from something else altogether.

In our constitutional system of limited republican government, the judiciary is as much governed by the rule of law as the executive and legislative branches. An independent judiciary, set apart from politics institutionally and in approach to its task, is essential to safeguard liberty. The very act of judging itself is defined by application of the law rather than the preferences of the judge, no matter where that process may lead.

Since the nomination, attention has been almost exclusively focused on a single issue about which we know virtually nothing: abortion. Judge Souter's record as a justice on the New Hampshire Supreme Court, however, is a rich source of insight and information about his judicial philosophy. That record paints a consistent picture of a conservative jurist passionately devoted to the rule of law and properly conducting the act of judging.

A careful jurist, Judge Souter takes a narrow view of the role of the judge. He respects precedent, strives to decide cases based on the facts without reaching unnecessary issues and without announcing rules broader than necessary to the task before him, and consistently applies traditional rules of jurisdiction, statutory construction, and constitutional interpretation.

Judge Souter is eminently qualified to serve on the U.S. Supreme Court. His judicial philosophy is exactly as President Bush described it: interpreting, not legislating. He is a judge, after all, not a politician.

In fulfilling its constitutional role of advice and consent, the U.S. Senate in 1987 shifted radically from examining qualifications to checking out a nominee's politics, from conducting a searching inquiry into judicial philosophy to narrowly testing how a nominee would vote once on the bench. This is not only a dangerous aberration from traditional practice, it directly threatens the independence of the judiciary and literally demands that a nominee bias himself in public on issues that may well come before him as a judge.

In 1987, the Senate seemed to say that a "paper trail" was a liability. At least the most liberal members of that chamber are today seeming to say that the lack of a "paper trail" is a liability. Those liberals condemn attempts to regulate the Court's appellate jurisdiction in areas like abortion as "political tampering" but today feel free to impose their own political litmus test upon nominees to the bench in areas like abortion. This is hypocrisy, nothing more and nothing less.

The Senate should aggressively conduct a properly focused investigation of this superb nominee and consent unanimously to his appointment before the Court's October 1990 Term begins.

**DAVID H. SOUTER:  
THE DEFINITION OF JUDGING**

On July 23, 1990, President George Bush exercised his power under Article II, Section 2<sup>1</sup> of the United States Constitution and formally nominated U.S. Circuit Judge David H. Souter to be an associate justice of the Supreme Court of the United States.

This analysis is intended to assist the U.S. Senate in fulfilling its constitutional "advice and consent" role in considering Judge Souter's nomination.<sup>2</sup>

**JUDGE SOUTER'S RESUME**

David Hackett Souter was born in Melrose, Massachusetts, on September 17, 1939. He received his B.A. *magna cum laude* from Harvard in 1961 and continued his education as a Rhodes Scholar at Oxford University, England. A member of Phi Beta Kappa, he received his law degree from Harvard in 1966 and joined the Concord, New Hampshire, law firm of Orr & Reno.

After just two years of legal practice, David Souter entered public service. He served as Assistant Attorney General from 1968 to 1971, Deputy Attorney General under then-Attorney General Warren Rudman until 1976, and Attorney General until 1978. Moving to the judicial branch, he served as an associate justice of the New Hampshire Superior Court for five years and, by appointment of then-Governor John Sununu, an associate justice of the New Hampshire Supreme Court from 1983 to 1990. President Bush nominated Justice Souter to be a judge on the U.S. Court of Appeals for the First Circuit in February 1990.<sup>3</sup> The American Bar Association rated him "well qualified" for this post and the U.S. Senate unanimously consented to his appointment. He began service on May 25, 1990.<sup>4</sup>

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<sup>1</sup> Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint...all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

<sup>2</sup> The author gratefully acknowledges the valuable research assistance of Michael L. Pendleton (University of Baltimore School of Law); Paul R. Jensen (Duke University School of Law); David M. Baloga (American University); Jeffrey L. Handwerker (Rutgers College); and Peter D. Crawford, Jr. (Williams College).

<sup>3</sup> See 58 U.S.L.W. 2448 (February 6, 1990).

<sup>4</sup> See "Judicial Milestones," *The Third Branch*, July 1990, at 4.

Judge Souter is a member of the New Hampshire and American Bar Associations, a member of the board of trustees of Concord Hospital from 1973 to 1985 (president, 1978-1984), a member of the board of overseers of Dartmouth Medical School from 1981 to 1987, and a member of the New Hampshire Historical Society (trustee, 1976-1985; vice president, 1980-1985). His service on legal and judicial committees has included the New Hampshire Police Standards and Training Council, the Governor's Commission on Crime and Delinquency, and the New Hampshire Bar Association Committee to Recommend Codification of Rules of Criminal Procedure.

### SOURCES OF INFORMATION

Information about David Souter and his views derives from several sources. Determining the information's significance, however, requires attention to the particular source. State attorneys general, for example, may file briefs and make arguments which reflect the views of their governor-client rather than their own. Opinions by a five-member court, especially in cases involving sensitive or controversial issues, rarely indicate exactly the views of individual members of the court and never reveal the negotiating, coalition-building, agreements, or concessions that took place during the process of producing a majority opinion. Advisory opinions, frequently given by state courts but never by federal courts, are entirely abstract and can differ substantially from opinions in actual cases following the identification of concrete issues, filing of legal briefs, trials or appellate argument, etc. Votes, as well as lines of reasoning or analytical approaches, are always the product of an actual case. Each case, of course, is unique.

### JUDGE SOUTER'S RECORD WHAT WE DON'T KNOW: ABORTION

Perhaps the most contentious single issue surrounding the Souter nomination is one on which virtually nothing concrete exists: abortion. Pro-life and pro-abortion activists agree that this nomination will at least affect the Court's abortion jurisprudence.

In 1973, the Court voted 7-2 in *Roe v. Wade*<sup>5</sup> to create a virtually unlimited right to abortion. The dissenters, William Rehnquist and Byron White, remain on the Court. In 1975, John Paul Stevens replaced William Douglas, leaving the balance essentially intact. In 1981, Sandra Day O'Connor replaced Potter Stewart. Stewart had voted with the *Roe* majority; O'Connor has made it clear that she at least opposes *Roe*,<sup>6</sup> though has not indicated she would flatly overrule the decision. In 1986, Antonin Scalia replaced William

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<sup>5</sup> 410 U.S. 113 (1973).

<sup>6</sup> In *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), Justice O'Connor harshly criticized the *Roe* trimester framework as "unworkable" and "on a collision course with itself."

Rehnquist when President Ronald Reagan elevated Rehnquist to Chief Justice; Scalia is clearly a vote to overrule *Roe*. In 1987, Anthony Kennedy replaced Lewis Powell. Powell supported *Roe*, writing the 1983 *Akron v. Akron Center for Reproductive Health*<sup>7</sup> decision reaffirming it. Kennedy is generally viewed as a vote to overrule *Roe*. Therefore, the pro-*Roe* majority has shrunk from 7-2 in 1973, to 6-3 in 1986, to 5-4 today.

David Souter has never presided over an abortion case, never written judicial opinions or scholarly articles on the subject, never spoken his mind about it. As such, activists on both sides can only look at the slim bits of his record that bear even tangentially on the subject. They reveal nothing of substance about those views. In the interest of a thorough and balanced evaluation of this nomination, those bits of information are listed here.

- \* "Abortion opponents attacked Souter for serving on the boards of two New Hampshire medical facilities where abortions are performed."<sup>8</sup>
- \* The Manchester *Union Leader* reported that, while state attorney general, Souter opposed a bill which included provisions repealing the state's strict anti-abortion law. He stated: "Quite apart from the fact that I don't think 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."<sup>9</sup> The article pointed out that Souter was representing Meldrim Thomson, New Hampshire's strongly pro-life governor, and that his remarks did not necessarily reflect his own views.
- \* In 1981, a pro-abortion member of the New Hampshire House of Representatives requested an opinion from the Superior Court about a pending bill requiring parental consent for abortions on minors but authorizing a "judicial bypass" of the parents' wishes. Justice Souter wrote a letter on behalf of the court to the relevant committee chairman recommending that the legislature "not authorize the exercise of judicial choice by justices of the Superior Court to determine whether an abortion should be performed upon a pregnant, immature minor whose parents do not consent to that course of action."
- \* The letter expressed no opinion about parental consent: "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."

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<sup>7</sup> 462 U.S. 416 (1983).

<sup>8</sup> Mauro and Hall, "Groups Press for Souter's Abortion View," *USA Today*, July 27, 1990, at 8A.

<sup>9</sup> "Souter: In 1977 Interview, He Said He Opposed Unlimited Abortions," *Manchester Union Leader*, August 4, 1990, at 1.

- \* The letter addressed only the "judicial bypass" provision, allowing a judge to authorize an abortion for an immature minor which would be in her "best interests."
- \* The letter objected to the judicial bypass provision because it required making "fundamental moral decisions about the interests of other people without any standards to guide the individual judge." The individual judge's "predilections" rather than articulated "rules and stated norms" would result in judges engaging in inappropriate "acts of unfettered personal choice."
- \* The letter objected to the judicial bypass provision because of the "necessarily moral character" of the decision judges would have to make and the "resulting disparity of responses." In sum, "a principled and consistent application of the quoted provision would be impossible."
- \* One journalist concluded: "While the 1981 letter may have been useful to abortion-rights supporters [in defeating the proposed legislation], it also reflected a view of the role of judges that is in line with the philosophy espoused by Bush and his predecessor, Ronald Reagan."<sup>10</sup> The bottom line is that this letter said nothing about *Roe v. Wade*, nothing about parental consent, and nothing about abortion.
- \* A state regulation prohibited the use of Medicaid funds to pay for elective abortions. A U.S. district court permanently enjoined this regulation and the state appealed. The brief on the merits, dated March 10, 1976, was filed with the U.S. Court of Appeals for the First Circuit under Attorney General Souter's name by the brief's author, Assistant Attorney General Richard Wiebusch. The following statement appears on page 41 of the brief: "Plaintiffs cannot in good faith dispute that thousands of New Hampshire citizens possess a very strongly held and deep-seated moral belief that abortion is the killing of unborn children." Wiebusch also wrote and filed, under Souter's name, a separate memorandum supporting the state's motion for suspension of the injunction pending appeal. The following statement appears on page 6: "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." Wiebusch has told reporters that Souter had "nothing to do with this brief. This wasn't his language. He didn't preapprove it....I didn't even talk with him about the case until after we lost it."<sup>11</sup>

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<sup>10</sup> Broder and Marcus, "Souter Letter Opposed Role in Parental Consent Bill," *Washington Post*, July 26, 1990, at A13.

<sup>11</sup> Weyrich, "Souter 'Smoking Gun' on Abortion Denied," *Washington Times*, July 31, 1990, at A6.

\* In *Smith v. Cote*,<sup>12</sup> Justice Souter joined an opinion in which the New Hampshire Supreme Court<sup>13</sup> recognized for the first time a cause of action for "wrongful birth."<sup>14</sup> The court stated that the U.S. Supreme Court's decision in *Roe v. Wade* "is controlling"<sup>15</sup> and felt the issue before it was "whether, given the existence of the right of choice recognized in *Roe*, our common law should allow the development of a duty to exercise care in providing information that bears on that choice."<sup>16</sup> Justice Souter concurred specially to address a significant issue not specifically raised by the questions of law transferred by the superior court. He raised the hypothetical of the pro-life physician and wrote that "I do not understand the court to hold...that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."<sup>17</sup> Clearly, whatever one's evaluation of the court's legal analysis concerning the relevance of *Roe*, the court assumed that decision's relevance without any comment as to its validity.

That's all there is on the issue. The bottom line is that we do not have any clear and specific evidence of Judge Souter's personal or judicial position on abortion or the validity of the Supreme Court's decision in *Roe v. Wade*. As with so many other issues and so many other nominees, we must use intuition and judgment based on what we do know about this nominee and his judicial philosophy.

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<sup>12</sup> 513 A.2d 341 (N.H. 1986). This case involved questions of law transferred to the state supreme court from the superior court.

<sup>13</sup> Chief Justice King did not participate in this decision.

<sup>14</sup> In such a case, a woman sues her doctor for failing to inform her of facts that might prompt her to choose abortion, thus rendering the birth a legal "wrong" for which she claims compensation.

<sup>15</sup> *Smith*, 513 A.2d at 346.

<sup>16</sup> *Id.* at 344.

<sup>17</sup> *Id.* at 355.

**JUDGE SOUTER'S RECORD  
WHAT WE DO KNOW: THE "GRAB BAG"**

While virtually nothing is known about Judge Souter's specific personal or judicial views on abortion, a significant body of judicial decisions exists covering a wide range of issues. Focusing, as the media and most activists have, exclusively on the unknown ignores the known and the consistent picture it paints of the "conservative mindset" of this "careful jurist."<sup>18</sup>

"During his seven years on the New Hampshire Supreme Court, David Hackett Souter wrote more than 200 opinions reflecting the grab bag of issues that are the staple of state supreme courts--focused more often on mundane and technical legal issues than questions of sweeping constitutional magnitude."<sup>19</sup> The *Washington Post* compared Justice Souter's record on the New Hampshire Supreme Court with retired Justice William Brennan's record on the New Jersey Supreme Court.<sup>20</sup> Justice Souter authored 217 opinions including 187 majorities, 13 concurrences, and 17 dissents. Justice Brennan authored 232 opinions including 210 majorities, four concurrences, and 18 dissents.

Three of Justice Souter's 187 majority opinions were appealed to the U.S. Supreme Court. The Court refused to review any of them.<sup>21</sup> Of his 187 majority opinions, 179 (95.7%) were for a unanimous court and eight (4.3%) were for a divided court. "Divided" means any decision attracting a separate, even a concurring, opinion by another Justice. Justice Batchelder, known as the most liberal member of the bench at that time, wrote a separate opinion in seven of these eight cases.

As state attorney general, David Souter filed petitions for review by the U.S. Supreme Court in three cases. The Court refused to review any of them.<sup>22</sup>

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<sup>18</sup> Marcus, "Souter: Conservative Mindset, Careful Jurist," *Washington Post*, July 25, 1990, at A6.

<sup>19</sup> Broder and Dewar, "Bush Opens Drive for Court Nominee," *Washington Post*, July 25, 1990, at A6.

<sup>20</sup> "Predicting a Justice's Future," *Washington Post*, August 1, 1990, at A18.

<sup>21</sup> *Town of Nottingham v. Bonser*, 552 A.2d 58 (N.H. 1988), cert. denied, 109 S.Ct. 3163 (1989); *Appeal of Bosselait*, 547 A.2d 682 (N.H. 1988), cert. denied, 109 S.Ct. 797 (1988); *State v. Valenzuela*, 536 A.2d 1252 (N.H. 1987), cert. denied, 485 U.S. 1008 (1988).

<sup>22</sup> *Rumney v. New Hampshire*, 397 U.S. 1051 (1970); *Heine v. New Hampshire*, 396 U.S. 1012 (1970); *Bentley v. New Hampshire*, 394 U.S. 1051 (1969).

While on the New Hampshire Superior Court trial bench, Justice Souter took an opportunity in 1981 to describe his views on criminal sentencing. In the context of sentencing a man convicted of negligent homicide in the deaths of three teenagers while driving drunk, Justice Souter said in part:

*I want to speak explicitly on something which I think about and which the counsel for the defendant quite rightly said I should think about, and that is the purposes of sentencing.*

*To start off with, one of them is the perception in the world around us that the defendant has been justly dealt with in relation to what he did. There should be a proportion observed in sentencing, and trivial cases should not be dealt with with severity. And flagrant cases should not be dealt with leniently.*

*Secondly, one considers the effect usually referred to as the reformatory effect likely on the defendant from the sentence....I don't believe that very many sentences on many--very many--criminals are likely to have much reformatory effect after the first offense....[I]f the defendant does not receive a heavy sentence, one may reasonably guarantee that it's not going to have any reformatory effect.*

*[The t]hird consideration is deterrence....And [the] fourth consideration is public protection. I don't know whether this defendant's alcoholism is ever going to be controlled. But I think the circumstances justify trying to protect the public from the effects of that alcoholism for about as long as it is possible.<sup>23</sup>*

Judge Souter's "record" is comprised almost entirely of his actions while in public service in New Hampshire. The most substantive portion of this record is found in the body of opinions he authored while an associate justice on the New Hampshire Supreme Court. This section will explore opinions by Justice Souter drawn from the following categories:

- A. Evidence
- B. Labor Law
- C. Family Law
- D. First Amendment - Libel
- E. First Amendment - Freedom of Association
- F. Fourth Amendment - Search and Seizure
- G. Fifth Amendment - *Miranda* Rights
- H. Fifth Amendment - Self Incrimination
- I. Sixth Amendment - Speedy Trial
- J. Criminal Procedure - Due Process
- K. Criminal Procedure - Deposing a Child Victim/Witness
- L. Miscellaneous

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<sup>23</sup> The text of this statement is excerpted in "Souter's Stern Judgment on Sentencing," *Legal Times*, August 6, 1990, at 10-11.

In each of these substantive areas, Justice Souter evidenced a consistent commitment to apply the law, stick close to the facts, and avoid imposing his own preferences or notions of good social policy. He did not stretch settled rules to achieve specific outcomes. He did not redefine settled terms to "bring them up to date." He regularly deferred to legislative enactments within the constraints imposed by common law and constitutional mandates. His record is described by President Bush's repeated phrase: Justice Souter interpreted the law, he did not legislate from the bench.

This analysis is necessarily selective in terms of both its categories and cases. It includes areas raising issues of wide interest and likely relevance to issues Justice Souter might confront on the U.S. Supreme Court. It avoids, for example, the substantial number of zoning and insurance cases the state high court regularly addressed. It does address various constitutional issues. Conclusions reached here as to Judge Souter's judicial philosophy would not be appreciably altered by a searching examination of other substantive areas of case law.

**A. Evidence.** Two cases demonstrate how Justice Souter carefully applied New Hampshire's "rape shield law."<sup>24</sup> In doing so, he demonstrated his commitment to maintaining the due process rights of criminal defendants rather than imposing his personal feelings about some abstract sense of "justice." The Supreme Court of New Hampshire had held that a rape defendant must have the opportunity to demonstrate that the evidence's probative value outweighs its prejudicial effect.<sup>25</sup>

In *State v. Colbath*,<sup>26</sup> Justice Souter, writing for a unanimous court, reversed a conviction for aggravated felonious sexual assault and remanded for a new trial. The trial judge had instructed the jury that evidence of the complainant's sexually provocative behavior in a bar with men other than the defendant within hours of the incident was irrelevant. Justice Souter wrote that in this case, "the jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group."<sup>27</sup>

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<sup>24</sup> This statute bars the admission of evidence of "[p]rior consensual sexual activity between the victim and any person other than the [defendant]." New Hampshire Revised Statutes Annotated 632-A:6.

<sup>25</sup> *State v. Howard*, 121 N.H. 53 (1981).

<sup>26</sup> 540 A.2d 1212 (N.H. 1988).

<sup>27</sup> *Id.* at 1217.

In *State v. Baker*,<sup>28</sup> Justice Souter, writing for a unanimous court, reversed a conviction for felonious sexual assault because the trial court had denied a hearing to assess the "probative vs. prejudicial" question in order to save time. Justice Souter wrote: "What is more important, in any event, is that a...hearing is a due process requirement, which must be given a higher priority than efficiency in the use of jurors' and witnesses' time."<sup>29</sup>

In *State v. Knowles*,<sup>30</sup> Justice Souter, writing for a unanimous court, affirmed a conviction for driving under the influence, second offense. The defendant's mother had told an investigating officer at the scene where a car had snapped a utility pole that despite her efforts to dissuade the defendant from driving, he "drove off and hit the pole." At trial, she disavowed any knowledge of the incident and the defense moved to exclude as hearsay her statement to the officer. The trial judge admitted the statement under the "catch-all" exception to the rule against hearsay. Justice Souter, affirming this ruling, wrote that "we cannot say the trial judge was clearly wrong in thinking the police had done as much as they reasonably should have on the evening of the event."<sup>31</sup>

**B. Labor Law.** In *Panto v. Moore Business Forms, Inc.*,<sup>32</sup> Justice Souter, writing for a unanimous court, answered two questions certified to the justices by the U.S. District Court for the District of New Hampshire. The plaintiff worked for 12 years as an at-will employee.<sup>33</sup> In preparation for lay-offs, the employer unilaterally promulgated to its employees a written policy statement announcing the employer's intention to continue salary and benefits for a limited period after the lay-off. Applying traditional contract concepts,<sup>34</sup> Justice Souter held that promulgation of this statement "may be treated as an offer subject to an employee's acceptance, to be expressed by the continued performance

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<sup>28</sup> 508 A.2d 1059 (N.H. 1986).

<sup>29</sup> *Id.* at 1062.

<sup>30</sup> 562 A.2d 185 (1989).

<sup>31</sup> *Id.* at 186.

<sup>32</sup> 547 A.2d 260 (N.H. 1988).

<sup>33</sup> This means that "either party was free to end the relationship with or without cause at any time." *Id.* at 262.

<sup>34</sup> Justice Souter cited New Hampshire precedents dating back to the 1860s.

of his duties, upon which an enforceable unilateral contract term will be formed.<sup>35</sup> Therefore, the necessary elements of proof are unilateral offer, acceptance, and consideration.<sup>36</sup> Justice Souter viewed this as more like a case involving deferred compensation than a "handbook case" in which at-will employees seek to enforce terms in a handbook existing from the time they were hired.

In *Appeal of White Mountain Education Association*,<sup>37</sup> Justice Souter, writing for a unanimous court, affirmed a decision by the Public Employee Labor Relations Board dismissing an action on behalf of a discharged school custodian. That complaint alleged the custodian was fired in retaliation for his union membership. The board initially found for the employee, ordering reinstatement without back pay. On rehearing, the board dismissed the complaint altogether. Justice Souter noted that a party who has not applied for a rehearing before the agency may not take an appeal to the state supreme court. This means that "[w]hen a decision on any issue is reversed on rehearing, the newly losing party must apply for a further rehearing and satisfy [statutory requirements] before appealing to this court."<sup>38</sup> The court nevertheless chose not to dismiss the appeal because "it appears that each party erroneously assumed that the association's earlier motion for rehearing satisfied the [statutory requirements] as a condition for this appeal."<sup>39</sup> On the merits, the court held that the burden is on the union to prove "some minimal degree of retaliatory motivation."<sup>40</sup> The court refused to "place a burden on an employer to justify his action upon a mere claim of retaliation or upon the complainant's introduction of any evidence of retaliation."<sup>41</sup>

**C. Family Law.** In the area of family law, Justice Souter consistently maintained his commitment to the rule of law while achieving results that furthered New Hampshire's interest in upholding parental rights and strengthening family unity. He did not second-guess the legislature. He did not substitute any personal preferences about the meaning or definition of "family" or any "enlightened" notions about "domestic arrangements" in the 1980s. Rather, he faithfully applied the law.

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<sup>35</sup> *Panto*, 547 A.2d at 264.

<sup>36</sup> *Id.* at 269.

<sup>37</sup> 486 A.2d 283 (N.H. 1984).

<sup>38</sup> *Id.* at 286.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 288.

<sup>41</sup> *Id.*

In *In re Noah W.*,<sup>42</sup> Justice Souter, writing for a unanimous court, held that a finding of abuse by a district court is a prerequisite to a probate court's termination of parental rights. He utilized "the standard of statutory construction by reference to the plain meaning of the language employed."<sup>43</sup> His conclusion stemmed in part from his observation that the legislature's objectives included "the preservation of family unity" and corresponding protection of parental rights, as well as "the reunification of families that have been split by dispositional orders in abuse cases."<sup>44</sup>

In *In re Adam E.*,<sup>45</sup> Justice Souter, writing for a unanimous court, held that while a district court judge in New Hampshire can terminate parental rights, "the order must include a statement of conditions on which the parent may regain custody and a plan of services to help the parent and the child."<sup>46</sup> Even though the court acknowledged that, in that case, there appeared very little chance that the family could be reunited because of the mother's mental illness, it nonetheless preserved procedural safeguards against the unconditional termination of parental rights.

In *In re Jason C.*,<sup>47</sup> Justice Souter, writing for a unanimous court, affirmed a lower court ruling that two unmarried adults may not jointly petition to adopt a child. Striving for a construction "consistent with legislative intent," Justice Souter concluded that "it was the legislature's intent to confine adoption to applicants who will probably provide a unified and stable household for the child."<sup>48</sup>

In *Matter of Matthew G.*,<sup>49</sup> Justice Souter, writing for a unanimous court, affirmed the denial of a mother's petition to terminate the parental rights of her former husband because of abandonment. In addition to maintaining jurisdictional rules of timeliness,<sup>50</sup> the court held that a finding of abandonment does not itself require considering the "best

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<sup>42</sup> 549 A.2d 1210 (N.H. 1988).

<sup>43</sup> *Id.* at 1211.

<sup>44</sup> *Id.* at 1212.

<sup>45</sup> 480 A.2d 160 (N.H. 1984).

<sup>46</sup> *Id.* at 161.

<sup>47</sup> 533 A.2d 32 (1987).

<sup>48</sup> *Id.* at 33.

<sup>49</sup> 469 A.2d 1365 (N.H. 1983).

<sup>50</sup> The plaintiff claimed error in the introduction of hearsay evidence. The record did not disclose any objection at trial. Therefore, citing a case from 1862, Justice Souter held that the "attempt to raise the issue is untimely." *Id.* at 1366.

interest of the child." Noting that "a determination of abandonment is essentially factual," the court decided that "the conclusion of what is in the child's best interest is not an evidentiary fact" and "has no logical tendency to prove that the parent in question abandoned the child."<sup>51</sup>

**D. First Amendment - Libel.** In the area of libel, Justice Souter's analysis and application of the law has been clear and thorough in every case. He has not exhibited a knee-jerk approach that anyone can print what he chooses without being held accountable. He has made the necessary distinctions between different forms of printed material and has not hesitated to correct a trial judge's too-hasty decision to deny a plaintiff the opportunity for his day in court.

In *Duchesnaye v. Munro Enterprises, Inc.*,<sup>52</sup> Justice Souter, writing for a unanimous court, affirmed a superior court judgment in favor of the plaintiff with respect to an editorial.<sup>53</sup> The paper printed an editorial which, if read in conjunction with a factually correct news story, "could be understood to describe the plaintiff as needing psychiatric help for instability, and it could be read to imply that the plaintiff had made obscene telephone calls."<sup>54</sup> Justice Souter applied the rule that "a statement in the form of an opinion may be read to imply defamatory facts, and it is actionable if it is actually understood that way."<sup>55</sup>

In *Nash v. Keene Publishing Corp.*,<sup>56</sup> Justice Souter, writing for a unanimous court, reversed the trial court's summary judgment for the defendant newspaper and remanded for trial. The newspaper printed a letter imputing behavior, "as well as personal limitations and proclivities, that would be highly undesirable in a police officer" written by an individual whom the plaintiff officer had arrested and restrained.<sup>57</sup> Although it was the newspaper's stated policy not to print "allegations we are unable to verify independently,"

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<sup>51</sup> *Id.*

<sup>52</sup> 480 A.2d 123 (N.H. 1984).

<sup>53</sup> The court found in favor of the newspaper with respect to a news story.

<sup>54</sup> *Duchesnaye*, 469 A.2d at 124.

<sup>55</sup> *Id.* at 125. The U.S. Supreme Court recently ruled the same way. See *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846 (June 21, 1990).

<sup>56</sup> 498 A.2d 348 (N.H. 1985).

<sup>57</sup> *Id.* at 350.

it failed to substantiate statements in the letter and later published an apology. Justice Souter concluded that it was error for the trial court to find that the letter must necessarily be read as "a non-actionable expression of opinion."<sup>58</sup> He also found that the officer's status as a "public official" for purposes of a libel action<sup>59</sup> must be left to the jury.<sup>60</sup>

In *Keeton v. Hustler Magazine, Inc.*,<sup>61</sup> a woman sued *Hustler* for publishing defamatory material. By the time she brought suit, only New Hampshire's 6-year statute of limitations remained intact. Even though the plaintiff was a resident of New York, the defendants were residents of Ohio, and 99% of the libelous material was circulated outside of New Hampshire, she brought suit there and won a \$2 million judgment. On appeal, the chief judge of the U.S. Court of Appeals for the First Circuit certified two questions to the New Hampshire Supreme Court. The court unanimously agreed to adopt the "single publication" rule for cases of multistate dissemination of defamatory material. The majority also applied New Hampshire's statute of limitations to the entire action for damages arising in all 50 states. While accepting the basic rule that procedural issues are to be decided by the law of the forum state, Justice Souter in dissent wrote that there is "nothing inherently persuasive in characterizing a statute [of limitations] as merely procedural....Nor is there anything persuasive in the reasoning of our prior cases that have so held."<sup>62</sup> Examining precedents dating back to 1940, Justice Souter concluded that the court's 1978 decision in *Gordon v. Gordon*,<sup>63</sup> which held that a limitation statute is procedural, was an aberration that failed to appropriately address the issue and ignored prior case law. As a result, Justice Souter wrote that "the *Gordon* rule is manifestly devoid of reasoned support, and...persuasive authority counsel[s] for the repudiation of *Gordon*."<sup>64</sup>

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<sup>58</sup> *Id.* at 352.

<sup>59</sup> A public official cannot recover for libel "without clear and convincing proof that the defendant had acted with actual malice [either with knowledge of the falsity or with reckless disregard for the truth] in publishing a false and defamatory statement concerning the plaintiff's official conduct." *Id.*

<sup>60</sup> *Id.* at 353.

<sup>61</sup> 549 A.2d 1187 (N.H. 1988).

<sup>62</sup> *Id.* at 1198.

<sup>63</sup> 118 N.H. 356 (1978).

<sup>64</sup> *Keeton*, 549 A.2d at 1199.

**E. First Amendment - Freedom of Association.** In *In re Chapman*,<sup>65</sup> the court held that active opposition by the Board of Governors of the State Bar Association<sup>66</sup> to tort reform legislation was not within the mandate of the Association's constitution.<sup>67</sup> "Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate." The court viewed this mandate narrowly to include "those matters which are related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession."<sup>68</sup> Justice Souter joined Justice Brock's opinion, but concurred specially. He wrote that when "the compulsory organization uses dues or fees to finance political or ideological activities that are not reasonably related to the responsibilities that justify the compulsion to join, it infringes on the first amendment rights of members who dissent from the organization's positions."<sup>69</sup> This suggests that Justice Souter's view of what must justify using compulsory dues and fees for activities unrelated to the central mission of a compulsory organization may have been more relaxed than the majority.

**F. Fourth Amendment - Search and Seizure.** Justice Souter's opinions in this area demonstrate that he has avoided the imaginative bias of many liberal judges that readily deems necessary and appropriate investigative efforts by law enforcement officials to be unconstitutional "searches." Such judges often appear to presume that a search is automatically "unreasonable." As in other areas, Justice Souter rigorously and evenhandedly applied the law but resisted invitations to impose extra-legal standards or "gut feelings" of "fairness," thereby thwarting legitimate law enforcement activities.

In *State v. Valenzuela*,<sup>70</sup> Justice Souter, writing for a 3-1 majority,<sup>71</sup> holding that use of a "pen register" to record numbers dialed from the defendant's telephone was not a "search" for constitutional purposes, affirmed a conviction of the controlled substances law. He confined the analysis according to "the posture in which the parties have presented it,"

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<sup>65</sup> 509 A.2d 753 (N.H. 1986).

<sup>66</sup> The New Hampshire bar is a "unified" or "integrated" bar. Membership is compulsory in order to practice law in the state.

<sup>67</sup> The U.S. Supreme Court recently reached a similar conclusion with regard to the integrated California bar. See *Keller v. State of California*, 58 U.S.L.W. 4661 (June 4, 1990).

<sup>68</sup> *Chapman*, 509 A.2d at 759 (emphasis added).

<sup>69</sup> *Id.* at 761-62 (emphasis added).

<sup>70</sup> 536 A.2d 1252 (N.H. 1987), *cert. denied*, 485 U.S. 1008 (1988).

<sup>71</sup> Justice Thayer did not participate in this case. Justice Batchelder dissented because he would find that the use of a "pen register" to obtain numbers dialed from the defendant's telephone was a constitutional "search" and, therefore, must be based on a finding of probable cause. *Id.* at 1268.

utilizing principles from the U.S. Supreme Court's Fourth Amendment jurisprudence.<sup>72</sup> He carefully distinguished between the routine voluntary communication of electronic data like the number dialed from the protected contents of a telephone conversation. Justice Souter held that "there is no violation of constitutional privacy when the telephone operator acts as a government informer by communicating what a defendant has addressed to the operator, and we therefore find no violation when the 'hearer' is not an operator but a machine receiving functionally equivalent information communicated by a defendant and directed to the company."<sup>73</sup> His analysis also reflected a thorough knowledge of criminal procedure, for example, the difference between "stale probable cause" and "stale information."<sup>74</sup> Justice Souter found that the judge issuing the search warrant in the case was neutral despite having given advice to the police. Nevertheless, he added "a further word about it, with an eye to the future. Legal advice to police officers ought to come from city or county attorneys, or from the attorney general's office, not from judges."<sup>75</sup> This again reflects Justice Souter's dual devotion to applying the law and to maintaining the proper role for judges in our legal and political system.

In *State v. Koppel*,<sup>76</sup> the court held that roadblocks used to detect and apprehend drunk drivers were an "unreasonable search and seizure" and reversed the trial court's denial of the defendants' motion to suppress evidence obtained when they were arrested. The majority went beyond the traditional "balancing test" between the value of a roadblock to the public and its burden on individual drivers to announce a new test weighted in favor of the latter and requiring that the value of the roadblock must "significantly" advance the public interest. Justice Souter dissented, placing his emphasis on whether a particular search was "unreasonable" rather than on the knee-jerk assumption that any search is unreasonable by definition. He wrote: "Even assuming that such a weighted balancing test is appropriate, I could not join in the conclusion that the majority reach, for I believe that the evidence indicates that the value of the roadblocks in this case did significantly outweigh the minimal disadvantage to the drivers whose cars were stopped."<sup>77</sup> He concluded: "Contrasting this significant public benefit with the minimal private intrusion, I conclude that the roadblocks in question did not result in unreasonable seizures."<sup>78</sup> He

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<sup>72</sup> In doing so, Justice Souter again demonstrated his careful attention to the proper and limited role of the appellate judge. He did not purport to announce a new rule that the state constitution's protection against unreasonable searches and seizures must necessarily be understood according to the U.S. Supreme Court's Fourth Amendment holdings. Nor did he cast any doubt on existing state high court precedents. *Id.* at 1257.

<sup>73</sup> *Id.* at 1262.

<sup>74</sup> *Id.* at 1264.

<sup>75</sup> *Id.* at 1266.

<sup>76</sup> 499 A.2d 977 (N.H. 1985).

<sup>77</sup> *Id.* at 984.

<sup>78</sup> *Id.* at 985.

addressed the majority's "slippery slope" argument that roadblocks to find drunk drivers today will mean stopping pedestrians to find shoplifters tomorrow by stating that "[m]easures that would be reasonable in policing activities of great risk would not be reasonable as intrusions into the characteristically safe and innocent pursuits of social life."<sup>79</sup>

**G. Fifth Amendment - *Miranda* Rights.** In these cases, Justice Souter consistently demonstrated a commitment to apply applicable standards, but also to resist either substituting his judgment for that of the trial court as found in the record or extending rules of law beyond their conceptual limits. In short, he gave criminal defendants a fair appeal but ruled against them if the law required it.

In *State v. Coppola*,<sup>80</sup> Justice Souter, writing for a unanimous court, affirmed a conviction for burglary and aggravated felonious sexual assault. The defendant had, prior to his arrest, responded to police questions with a boast about being street-wise and refusing to confess to anything. He claimed that this boastful statement amounted to an invocation of his right against self-incrimination under the 5th and 14th Amendments to the U.S. Constitution and that, therefore, it could not be used against him at trial. Justice Souter refused to "expand [the Supreme Court's decision in] *Jenkins [v. Anderson]*"<sup>81</sup> beyond recognition by equating any occasion to remain silent in response to police questioning with an inducement [to remain silent].<sup>82</sup> The most significant flaw in the defendant's argument was "the factual unreality of equating his taunt to the police with an invocation of his constitutional right to remain silent....While post-*Miranda* invocations of a right to silence are insolubly ambiguous...pre-*Miranda* refusals to confess are not."<sup>83</sup>

In *State v. Elbert*,<sup>84</sup> Justice Souter, writing for a unanimous court,<sup>85</sup> affirmed a conviction for attempted first-degree murder and use of a firearm in the attempt to commit a felony. The defendant had fled to New York after committing the acts in question. Police officers from New Hampshire retrieved him and, while in Connecticut, read him his *Miranda* rights. He waived those rights and made statements to the officers which were admitted into evidence at trial. The court held that the evidence supported the trial court's

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<sup>79</sup> *Id.*

<sup>80</sup> 536 A.2d 1236 (N.H. 1987).

<sup>81</sup> 447 U.S. 231 (1980).

<sup>82</sup> *Coppola*, 536 A.2d at 1239.

<sup>83</sup> *Id.*

<sup>84</sup> 480 A.2d 854 (N.H. 1984).

<sup>85</sup> Justice Douglas did not participate in this case.

finding of each necessary element -- the defendant initiated discussion of the charges prior to any waiver of *Miranda* rights, he understood and waived those rights, and he made a statement voluntarily.<sup>86</sup>

In *State v. Lewis*,<sup>87</sup> Justice Souter, writing for a unanimous court,<sup>88</sup> affirmed a conviction for robbery and second-degree murder after finding that the defendant voluntarily waived his *Miranda* rights and that admission of his confession did not violate his right to due process. Police officers had spoken twice to the defendant before the arrest, in each case giving him the appropriate *Miranda* warnings. They did so again before questioning him after the arrest. "The defendant signed a waiver of the applicable rights and made a confession that was later introduced into evidence at trial."<sup>89</sup> Justice Souter applied the "beyond a reasonable doubt" standard under state law, even though the U.S. Supreme Court recently held "that the State need prove waiver only by a preponderance of the evidence."<sup>90</sup> Finding that "the issue is a close one,"<sup>91</sup> the court meticulously reviewed each statement involved in the giving and waiving of *Miranda* rights. Noting that the defendant was 28 years old, had a high school education, and was found free of drugs or alcohol, the court concluded that the evidence pointed to "a correct understanding of waiver."<sup>92</sup> The court dismissed other arguments against finding waiver by stating that "the defendant is seeking to extend *Miranda* beyond its conceptual justification, on the basis of an argument divorced from reality."<sup>93</sup>

In *State v. Derby*,<sup>94</sup> Justice Souter, writing for a unanimous court, affirmed a conviction for felonious sexual assault. A police officer read defendant his *Miranda* rights and defendant initialed each statement to indicate his understanding, and then signed a waiver and an agreement to answer questions. His subsequent incriminating statements were introduced at trial. Justice Souter readily applied rules limiting the court's subject

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<sup>86</sup> *Elbert*, 480 A.2d at 859.

<sup>87</sup> 533 A.2d 358 (N.H. 1987).

<sup>88</sup> Justice Batchelder did not participate in this case.

<sup>89</sup> *Lewis*, 533 A.2d at 360.

<sup>90</sup> *Id.* at 361. See *Colorado v. Connelly*, 107 S.Ct. 515 (1986).

<sup>91</sup> *Lewis*, 533 A.2d at 361.

<sup>92</sup> *Id.* at 363.

<sup>93</sup> *Id.* at 364.

<sup>94</sup> 561 A.2d 504 (N.H. 1989).

matter jurisdiction, finding that certain issues were not properly raised.<sup>95</sup> Even though the defendant suffered from several ailments and was receiving half a dozen medications, the court acknowledged that this evidence had been before the trial court and upheld its finding that the defendant had voluntarily waived his *Miranda* rights.

**H. Fifth Amendment - Self Incrimination.** In a rare split decision, Justice Souter demonstrated his willingness to depart from his colleagues when he felt the law required it. In *State v. Cormier*,<sup>96</sup> the court, by a 3-2 vote, affirmed a conviction for operating a motor vehicle while under the influence of intoxicating liquor. The defendant claimed that evidence she refused to submit to a chemical blood-alcohol test<sup>97</sup> violated her right against self-incrimination under the state constitution.<sup>98</sup> Justice Souter first held the constitutional protection applied only to "evidence by a defendant that is of testimonial character"<sup>99</sup> and does not apply to "physical evidence such as a sample of defendant's blood...or to demonstrations provided by the performance of field sobriety tests."<sup>100</sup> The refusal in the present case was "an act of choice to suppress physical evidence" and, therefore, non-testimonial.<sup>101</sup> Justice Souter also held that, whether testimonial or not, the evidence in question had not been "compelled."<sup>102</sup>

In another split decision, the court in *State v. Denney*<sup>103</sup> reversed a conviction of driving while intoxicated, holding that admission of evidence that the defendant had declined to take a blood alcohol test violated his right to due process where the arresting officer gave the standard *Miranda* warnings but did not specifically notify him that his

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<sup>95</sup> The defendant relied not only on the Fifth and Fourteenth Amendments to the U.S. Constitution, which imposes a "preponderance" standard to prove waiver, but also on the parallel provision of the state constitution, which imposes a "beyond a reasonable doubt" standard. Justice Souter rejected the state's argument that the court overrule its precedent establishing the stricter standard as improperly raised. *Id.* at 505.

<sup>96</sup> 499 A.2d 986 (N.H. 1985).

<sup>97</sup> New Hampshire statutory law permits introduction of such evidence. New Hampshire Revised Statutes Annotated 265:84.

<sup>98</sup> Article 15, part I, states that no one shall "be compelled to accuse or furnish evidence against himself."

<sup>99</sup> *Cormier*, 499 A.2d at 987.

<sup>100</sup> *Id.* at 988. Chief Justice King, joined by Justice Douglas, dissented and would have held that the constitutional right against self-incrimination did apply because the state provision is broader than the federal provision and applies to evidence, as in the present case, that is "testimonial" in nature.

<sup>101</sup> *Id.*

<sup>102</sup> Justices Batchelder and Brock concurred specially to write that their vote to affirm the conviction was based on "the analysis that the defendant is not 'compelled' to make a testimonial assertion." *Id.* at 991.

<sup>103</sup> 536 A.2d 1242 (N.H. 1987).

refusal could be used against him in court. Justice Souter dissented and concluded that the *Miranda* warnings alone were enough to satisfy the due process requirement since one of those warnings is that anything an individual says can and will be used against him in court. Justice Souter went further, criticizing the majority's "more fundamental error...in holding that due process requires such a warning at all."<sup>104</sup>

**I. Sixth Amendment - Speedy Trial.** In *State v. Tucker*,<sup>106</sup> Justice Souter, writing for a unanimous court, affirmed the conviction of a fugitive from prosecution in spite of a ten-month delay between arrest and trial. With "no suggestion of deliberate delay"<sup>106</sup> and "the want of any indication of actual prejudice to the conduct of the defense,"<sup>107</sup> the delay alone did not violate the Constitution.

**J. Criminal Procedure - Due Process.** Consistent with his decisions in other areas of criminal law and procedure, Justice Souter applied the law consistently and dispassionately. He resisted creative attempts to challenge convictions through "back door" arguments and would not tolerate the legal fictions that lawyers so often raise in hopes of getting appellate judges to disregard lower court decisions and overturn convictions on specious grounds. Rather, Justice Souter insisted on rigorous application of jurisdictional requirements and "called a spade a spade" when identifying and evaluating issues before the court.

In *State v. Goding*,<sup>108</sup> the court affirmed a conviction of driving while intoxicated, second offense. The defendant had initially been tried and convicted on DWI-first offense in district court.<sup>109</sup> He exercised his right to a fresh trial in superior court; a mistrial was declared after the jury failed to reach a verdict on the DWI-second offense charge. He was retried and convicted on the DWI-second offense charge. The majority rejected the defendant's due process claim, based on alleged prosecutorial vindictiveness, that the state is constitutionally prohibited from increasing the charge in superior court after the defendant has been tried and convicted of a lesser charge in district court. Justice Souter dissented from this portion of the majority opinion, writing that the defendant had not "adequately raised any due process issue distinct from a claim of double jeopardy."<sup>110</sup>

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<sup>104</sup> *Id.* at 1246.

<sup>105</sup> 561 A.2d 1075 (N.H. 1989).

<sup>106</sup> *Id.* at 1077.

<sup>107</sup> *Id.* at 1078.

<sup>108</sup> 513 A.2d 325 (N.H. 1986).

<sup>109</sup> The prosecutor did not have the necessary proof of the prior offense in his possession and could not try the defendant on the DWI-second offense charge.

<sup>110</sup> *Goding*, 513 A.2d at 331.

**K. Criminal Procedure - Deposing a Child Victim/Witness.** *In State v. Heath*,<sup>111</sup>

Justice Souter, writing for a unanimous court, answered four questions transferred by the superior court following the defendant's indictment for aggravated felonious sexual assault on a seven-year-old boy. Between the incident and the indictment, the legislature passed into law a measure restricting a defendant's right to depose young victims and to provide for use of videotaped depositions. As in other cases, Justice Souter began by determining the "common usage" of the statute's critical terms.<sup>112</sup> The court held that the statute did not impose an absolute bar to discovery depositions of witnesses in criminal cases who are under 16 years of age. Rather, a companion provision allows the trial court to order videotaped depositions in lieu of trial testimony.<sup>113</sup> "Legislative history indicates...that the mandate to follow the 'manner' of trial was not intended to preclude discovery questions."<sup>114</sup> A court can disallow deposition discovery of a young victim or witness without violating constitutional standards of due process or equal protection.<sup>115</sup>

**L. Miscellaneous.** Many decisions, of course, do not fit neatly into specific categories or can be assigned to more than one. Several of these are significant and continue the pattern established in the foregoing opinions of Justice Souter as a careful and conservative jurist who follows the law and the facts while resisting the temptation to dictate results based on his own preferences or irrationally expand accepted doctrines and principles.

In *In re "K"*,<sup>116</sup> Justice Souter, writing for a unanimous court,<sup>117</sup> reversed a superior court order requiring a hospital to produce a nurse's report and minutes of a committee meeting. The hospital claimed the documents were privileged under a New Hampshire statute. Justice Souter began his analysis by stating: "The principal issue being the applicability of the statutory privilege to the documents in question, our first concern is with the words of the statute."<sup>118</sup> The court, noting that "the statute's drafting is imprecise,"

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<sup>111</sup> 523 A.2d 82 (N.H. 1986).

<sup>112</sup> *Id.* at 85.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 86.

<sup>115</sup> *Id.* at 87.

<sup>116</sup> 561 A.2d 1063 (N.H. 1989).

<sup>117</sup> Justice Johnson did not participate in this case. Justice Batchelder wrote a short special concurrence.

<sup>118</sup> *In re "K,"* 561 A.2d at 1065.

further conducted a "search for the legislature's probable intent."<sup>119</sup> It concluded that the statutory reference to "a hospital committee organized to evaluate...." must be understood "by reference to [a committee's] functional responsibility."<sup>120</sup> "Those committees...would include one on infection control."<sup>121</sup>

In *Opinion of the Justices*,<sup>122</sup> the court, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of a proposed bill that would prohibit homosexuals from adopting, becoming foster parents, or operating child care agencies. Justice Souter joined the opinion.<sup>123</sup> The court examined the proposal under several different theories.

- \* Under the equal protection clause of the federal or state constitution, the court concluded that homosexuals are not a "suspect class." There exists no "fundamental right to engage in homosexual sodomy....There is, further, no such right to adopt, to be a foster parent, or to be a child care operator....[T]he proper test to apply...is whether the legislation is 'rationally related to a legitimate governmental purpose.'<sup>124</sup> The bill's fully legitimate purpose was providing appropriate parental role models for children. The court concluded that prohibiting adoption or foster care by homosexuals was rationally related to this purpose; prohibiting operation of a child care agency was not because this activity did not "approximat[e] a familial or parent-child arrangement."<sup>125</sup>
- \* Under the due process clause of the federal or state constitution, there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore

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<sup>119</sup> *Id.* at 1066.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1067.

<sup>122</sup> 530 A.2d 21 (N.H. 1987).

<sup>123</sup> Such opinions never indicate individual authorship. Justice Batchelder separately stated that any restriction in the bill on the activities of homosexuals was unconstitutional. This is likely the result that Justice William Brennan, whose seat on the U.S. Supreme Court Judge Souter was nominated to fill, would have reached.

<sup>124</sup> *Opinion of the Justices*, 530 A.2d at 24.

<sup>125</sup> *Id.* at 25. Because of this conclusion, the court did not further address the constitutionality of the prohibition against homosexuals operating child care agencies.

required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."<sup>126</sup>

\* The court rejected any argument based on the so-called "right to privacy" or freedom of association under either the state or federal constitution.

In *State v. Grondin*,<sup>127</sup> Justice Souter, writing for a unanimous court,<sup>128</sup> reversed a superior court order dismissing an indictment for violating a motor vehicle habitual offender order. The defendant had been convicted three times for driving after suspension of his license. After a hearing, at which the defendant was represented by counsel, the superior court entered an order prohibiting him from driving until his license was restored. He later moved the superior court to vacate the order, claiming the guilty pleas underlying his prior convictions were made without benefit of counsel. The superior court granted the motion. Justice Souter applied a prior supreme court decision holding that a defendant charged with violating a habitual offender order may not attack that finding absent proof he had been unrepresented by counsel at that hearing. Justice Souter was careful to make the assumptions necessary to decide that particular case and avoid appearing "unduly ready to reach constitutional issues that might not require decision."<sup>129</sup>

In *In re Sanborn*,<sup>130</sup> Justice Souter, writing for a 4-1 majority, reversed a probate court order dismissing a petition for involuntary civil commitment. A man charged with second-degree murder was found incompetent to stand trial. The state filed a petition for involuntary civil commitment "on the ground of mental illness posing a danger to others."<sup>131</sup> The probate judge concluded that the state had failed to prove dangerousness beyond a reasonable doubt and dismissed the petition. The court overruled its previous decision in *Proctor v. Butler*,<sup>132</sup> which had established the reasonable doubt standard for civil commitment, and held that "the clear and convincing standard must hereafter be employed in civil commitment cases."<sup>133</sup> The citizens of New Hampshire had approved a constitutional amendment in 1984 establishing the clear and convincing standard for

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<sup>126</sup> *Id.* at 26.

<sup>127</sup> 563 A.2d 435 (N.H. 1989).

<sup>128</sup> Justice Johnson did not participate in this case.

<sup>129</sup> *Grondin*, 563 A.2d at 436.

<sup>130</sup> 545 A.2d 726 (N.H. 1988).

<sup>131</sup> *Id.* at 728.

<sup>132</sup> 117 N.H.927 (1977).

<sup>133</sup> *Sanborn*, 545 A.2d at 733.

commitment in cases of criminal insanity. The court unanimously concluded that "we perceive no intellectually realistic basis for holding that due process can require a burden of proof [for civil commitment cases] that is different from the State's burden when it seeks commitment after a verdict of not guilty by reason of insanity to a criminal charge."<sup>134</sup>

Judge Souter's views on civil rights are unknown. His record on the state bench yields no evidence. While Attorney General of New Hampshire, Souter urged the U.S. Supreme Court to review a decision by the U.S. Court of Appeals for the First Circuit upholding a federal agency's requirement that the state submit a racial breakdown of its employees. New Hampshire, per Attorney General Souter, argued that this race-conscious view violated the Constitution's mandate of color-blindness. A newspaper report stated that, as attorney general, Souter referred in a speech to "affirmative action" programs as "affirmative discrimination."<sup>135</sup>

### JUDGE SOUTER'S JUDICIAL PHILOSOPHY

This wide-ranging look at Justice Souter's decisions from the New Hampshire Supreme Court intentionally avoids an analysis according to political "outcome" or simplistic references to "winners" and "losers." A judicial decision which stretches concepts to the breaking point, plays fast and loose with the facts, and neglects traditional notions of jurisdiction can be no more acceptable to conservatives because it affirms a criminal conviction than it can be to liberals because it finds a due process violation or reverses a conviction. The integrity and independence of the judiciary, the validity of the act of judging itself, depends on a foundational commitment to the rule of law. That commitment must be above raw politics, it must resist forcing a pre-determined result "peg" through a differently shaped process "hole." Especially in the context of constitutional law, where a decision by unelected judges can trump the decision of elected political branches, the commitment to the rule of law is paramount.

When President Bush nominated Judge Souter, he stated that this nominee would "interpret the Constitution" and not "legislate from the bench." This is another way of describing a commitment to the rule of law. The evidence supports the President's assessment. In various ways, Judge David Souter is a careful jurist who puts the rule of law and the integrity of the process of judging above everything else.

Judge Souter is a careful jurist who resists rules broader than necessary to accomplish the task before him. He gives proper deference to the public policies established by the people's political representatives and only voids them when absolutely necessary. He does not force the law to say what is really his own preference or opinion.

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<sup>134</sup> *Id.* at 735.

<sup>135</sup> See Marcus, "Souter, as State Official, Opposed U.S. Racial Breakdown Rules," *Washington Post*, August 1, 1990, at A4.

This sometimes leads to results that conservatives like; in other cases, it produces a tally that liberals favor. Overall, however, Judge Souter rigorously - though not inventively - applies the law, wherever that process may take him.

Judge Souter is tough on criminals, some say. He is also tough on lawyers, insisting that they do their job in preparing and presenting appeals. He will not do their work for them. He will not accept "legal fictions," which are really bald requests for political results masquerading as legal arguments. He puts arguments under the spotlight and lawyers to their proof. He applies jurisdictional requirements consistently and even-handedly. And, again, he is content wherever that process may take him.

Consistent with his focus on the rule of law and his narrow view of the proper role of judges, Judge Souter accepts and consistently applies the traditional standards of interpretation. In statutory construction, his standard gives "reference to the plain meaning of the language employed."<sup>136</sup> In such cases, he writes, "our first concern is with the words of the statute."<sup>137</sup> If those are ambiguous, the central focus is on a "search for the legislature's probable intent."<sup>138</sup> In constitutional cases, he regularly applies the "clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption.'"<sup>139</sup>

Another mark of judicial restraint is the refusal to reach unnecessary constitutional issues. That is, if a case can be decided on statutory rather than constitutional grounds, a court should take that narrower course. Justice Souter has indeed followed this tenet as well. In *State v. Grondin*,<sup>140</sup> for example, he was careful to make the assumptions necessary to avoid appearing "unduly ready to reach constitutional issues that might not require decision."<sup>141</sup>

Judge Souter described his own judicial philosophy in the Senate Judiciary Committee questionnaire he submitted at the time of his nomination to the U.S. Court of Appeals. He wrote:

*The obligation of any judge is to decide the case before the court, and the nature of the issues presented will largely determine the appropriate scope of the principle on which its decision should rest. Where that principle is not provided*

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<sup>136</sup> *In re Noah W.*, 549 A.2d 1210, 1211 (N.H. 1988).

<sup>137</sup> *In re "K,"* 561 A.2d 1063, 1065 (N.H. 1989).

<sup>138</sup> *Id.* at 1066.

<sup>139</sup> *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986) (Souter, J., dissenting), quoting *Opinion of the Justices*, 44 N.H. 633 (1863).

<sup>140</sup> 563 A.2d 435 (N.H. 1989).

<sup>141</sup> *Id.* at 436.

*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.*

#### APPROPRIATE LINES OF QUESTIONING

The Constitution identifies two powers involved in the selection of federal judges. The Constitution grants both of these - nomination and appointment - to the President. Consistent with the overall scheme of "checks and balances" which serves to limit concentration of government power, the Senate has a role of "advice and consent" which accompanies the President's appointment power.

The battle over the 1987 nomination of Judge Robert H. Bork marked a radical aberration in the traditional understanding of the Senate's advice and consent role. That traditional understanding was that the Senate should focus on a nominee's judicial philosophy and overall qualifications. The Bork battle introduced the notion that the Senate could also investigate and evaluate a nominee's positions on political issues, his specific views on existing Supreme Court precedents and doctrines, and how that nominee would vote in future cases.

"Judicial philosophy" refers to a nominee's approach to the Constitution, to constitutional interpretation, to the role of the courts in the American political and legal system, and to the proper function and definition of judges and judging. A huge array of questions bearing on various aspects of a nominee's judicial philosophy is available to the members of the Senate Judiciary Committee.

A classic example of the difference between judicial philosophy and politics comes from Raoul Berger, retired Charles Warren Senior Fellow in American Legal History at Harvard Law School. Professor Berger, a political liberal through-and-through, is the most distinguished defender and expositor of the "intentionalist" school of constitutional interpretation. He follows this process, this approach to judging, consistently to whatever outcome it produces, whether he personally likes it or not. He writes: "I'm for abortion...but along with almost all academics, I don't think the Constitution guarantees it."<sup>142</sup>

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<sup>142</sup> Quoted in P. McGuigan & D. Weyrich, *Ninth Justice: The Fight for Bork* (Washington, D.C.: Free Congress Research & Education Foundation, 1990), at 33.

By going beyond qualifications and philosophy to politics and outcomes, the Senate went beyond an "advice and consent" role in the judicial selection process to an active role in the judicial decisionmaking process. The Senate went beyond serving as a check on the President's appointment power and claimed for itself an independent power in substantively shaping the federal judiciary.

A Department of Justice study concludes:

*What distinguished the Bork, and to a lesser extent the Kennedy confirmation proceedings, therefore, was the equating of criticism of the judicial reasoning of a case with criticism of its substantive results, the confusion of political opinion with judicial philosophy, the use of statistical track records as evidence of judicial philosophy, and the attempts to obtain preconfirmation commitments on certain issues from the nominees. The assumption underlying much of this approach was that judicial philosophy and political philosophy are essentially identical, and that a nominee's political views will direct or even determine his judicial decisions. Indeed, the proceedings suggested not only that the judicial decisionmaking process is political, but that it ought to be.*

*To the extent such thinking has become prevalent in the Senate, the courts, academia, and in society generally, it threatens to compromise the independence of the Judicial Branch, and thus to undermine the legitimacy of its authority. Because an independent, apolitical judiciary is a vital part of our constitutional system, this in turn has implications for the structure and workings of our entire democratic system of government.<sup>143</sup>*

Interest groups, whether liberal or conservative, are wrong to call for any kind of political litmus test. President Bush was entirely correct in not imposing one in making this nomination; the Senate must not impose one when fulfilling its role of advice and consent. Nothing less than the independence and integrity of the judiciary is at stake. Supreme Court Justice John Paul Stevens addressed a session of the recent annual meeting of the American Bar Association and echoed this theme. "Justice Stevens cautioned that for a President or senators to pin down a nominee in advance [on specific issues or future votes] discouraged open-mindedness on the part of the judge, gave an appearance of impropriety, and threatened an independent judiciary."<sup>144</sup>

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<sup>143</sup> *By and With the Advice and Consent of the Senate: The Bork and Kennedy Confirmation Hearings and the Implications for Judicial Independence* (Washington, D.C.: U.S. Department of Justice, Office of Legal Policy, 1989), at 4.

<sup>144</sup> Margolick, "Souter Hearings Won't Be Useful for Predictions, One Justice Says," *New York Times*, August 8, 1990, at A14.

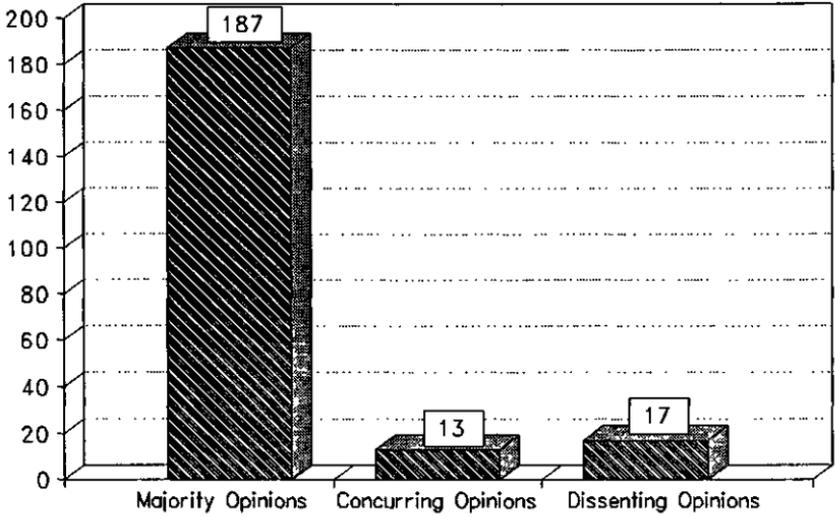
Those who condemn efforts to regulate the appellate jurisdiction of the Supreme Court as "political tampering" but who call for application of a political "balance" approach to filling vacancies on the Court are disingenuous at best and lack any integrity at worst.

The Senate must exercise its role of advice and consent in a way that respects the unique nature and place of the judiciary in our constitutional framework. Questions that require a nominee to bias himself publicly on issues that may well come before him later as a judge essentially demand that he violate in advance his oath to support and defend the Constitution. Litigants deserve as neutral, detached, and non-political a judiciary as we can preserve for them.

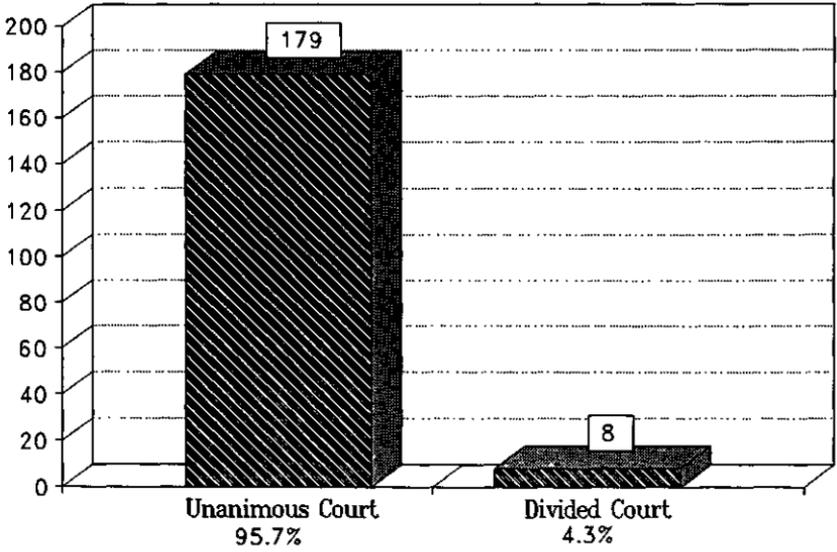
#### CONCLUSION

President Bush has nominated a conservative jurist with a clear and consistent record of judging rather than legislating. He faithfully applies the law rather than his own preferences. That is, he is a judge, not a politician. An independent, restrained judiciary that remains a co-equal branch of the federal government requires nothing less. The Senate must not turn this superb nomination into its own version of "Court packing" and thereby threaten the integrity of the institution itself.

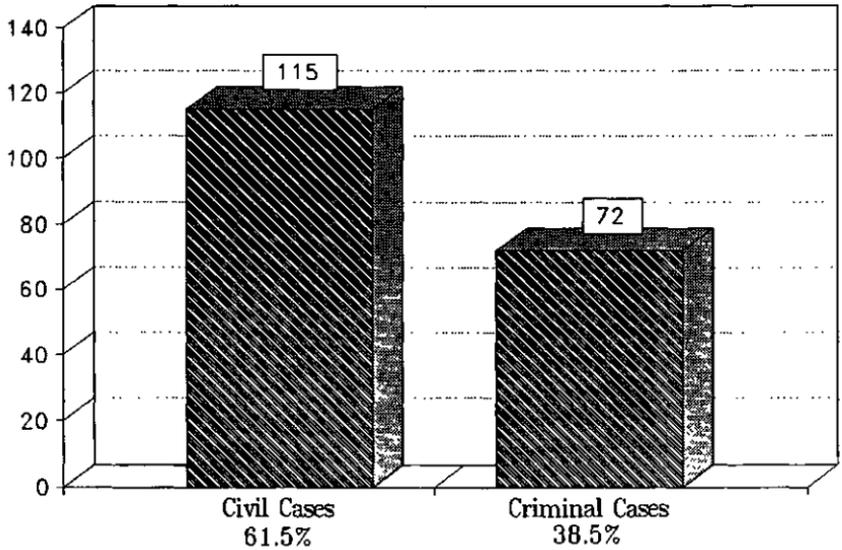
Justice David H. Souter  
New Hampshire Supreme Court  
Total Case Breakdown 1983-1990



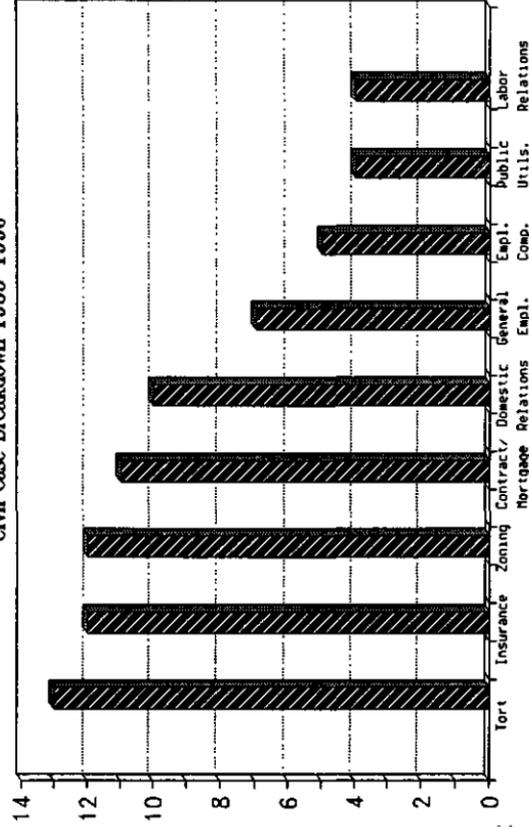
Justice David H. Souter  
New Hampshire Supreme Court  
Majority Opinion Breakdown 1983-1990



Justice David H. Souter  
New Hampshire Supreme Court  
Majority Opinion Breakdown 1983-1990

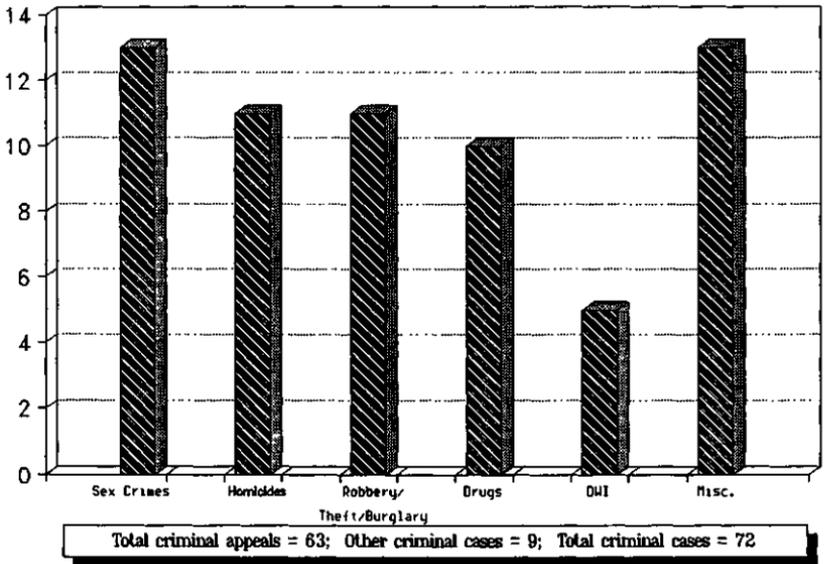


Justice David H. Souter  
 New Hampshire Supreme Court  
 Civil Case Breakdown 1983-1990



(NOTE: 30 civil cases which do not fall under the above categories, have been omitted.)

Justice David H. Souter  
New Hampshire Supreme Court  
Criminal Appeal Breakdown 1983-1990



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REPORT OF THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ON THE NOMINATION OF  
DAVID SOUTER  
TO BE AN ASSOCIATE JUSTICE OF THE  
UNITED STATES SUPREME COURT

SUBMITTED TO THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

AUGUST 31, 1990

This report on the nomination of Judge David Souter to the United States Supreme Court is submitted on behalf of the 25,000 members of the National Association of Criminal Defense Lawyers and its state and local affiliates. Among NACDL's principal missions is to guarantee that all persons accused of crime are afforded the fundamental rights contained in the Constitution and Bill of Rights.

The Supreme Court stands atop our system of government as the guardian of these rights. When a new nomination to the Court is made, NACDL is committed to undertaking a complete examination of the nominee's qualifications, including his or her substantive pronouncements on issues affecting the balance between the powers of the government and the rights of the governed--a balance which the nominee will be in a position to influence significantly for decades to come. This is the report of a special committee of the NACDL which was established to carry out this function.

The NACDL Committee fairly reflects both NACDL's membership and the seriousness of the task at hand. The Committee is comprised of a dean of a prominent law school, a former U.S. Attorney, a former state prosecutor, and well known trial attorneys, including an attorney from the State of New Hampshire.<sup>1</sup> Moreover, the Committee has not limited its inquiry to the cold record offered by the nominee's judicial opinions, but has inquired of its members and other attorneys who have observed the nominee as a state prosecutor, trial

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<sup>1</sup> The Committee is chaired by Terrance Reed of Washington, D.C. and includes: Thomas Dillard and Charles Fels of Knoxville, Tennessee; Joseph Johnson of Topeka, Kansas; Mark Sisti of Chichester, New Hampshire; and Dean Gerald Uelmen of Santa Clara Law School.

attorneys who appeared before him found him willing to apply the law in an even-handed manner, including a willingness to suppress illegally obtained evidence in appropriate cases. As an appellate judge, he displayed integrity in taking the factual record presented to him, rather than resolving disputes based on assumptions or conclusions not borne out by the trial record. Thus, in cases where the facts clearly favor the defense, Judge Souter has ruled for the defense, an observation which is supported by the fact that every opinion he penned which reversed a conviction was unanimous.

Our examination of the nominee's judicial philosophy, however, has given us less to commend. His approach to resolving cases is conservative and methodical. While elevation to the Supreme Court would certainly give the nominee an opportunity to think on a broader level, his record leaves doubt as to whether he has the ability or interest in doing so.

Of the 82 opinions in criminal cases we examined, Judge Souter voted for positions asserted by the accused only nine times, and did so only when the Court spoke unanimously. Conversely, Judge Souter dissented three times from the Court's reversal of a conviction. Two of these dissenting opinions are illuminating in that both involve instances in which Judge Souter refused to recognize the greater protections identified by his colleagues under the state constitution than those available under the federal constitution. See State v. Koppel, 499 A.2d 977, 983 (1985); State v. Denney, 536 A.2d 1242, 1245 (1987). Of course, many of the 73 cases in which the nominee rejected defendant's position on appeal merely reflect the lack of merit of those positions, but they also offer insight into the nominee's view of the Constitution and the role it plays in protecting all citizens against the focused resources of the State.

Several of Judge Souter's opinions reveal that the nominee is capable of a healthy respect for the right to a jury trial and fair trial procedures, including the Sixth Amendment right to jury trial. For example, in State v. Jones, 484 A.2d 1070 (1984), Justice Souter wrote an opinion for a unanimous court which reversed a conviction because the trial judge responded to a jury question in such a way as to intrude upon the jury's fact-finding duties. In Richard v. MacAskill, 529 A.2d 898 (1987), Justice Souter reversed a conviction based upon a nolo contendere plea because the defendant had not knowingly and intelligently waived his right to a jury trial. Similarly, in State v. Hewitt, 517 A.2d 820 (1986), Justice Souter overturned a defendant's conviction because the trial court failed to obtain defendant's

personal consent, as opposed to that of his lawyer, before excusing a member of his deliberating jury. See also State v. Baker, 508 A.2d 1059 (1986) (reversing conviction for failure to hold evidentiary hearing, a "due process requirement which must be given higher priority than efficiency in the use of jurors' and witnesses' time").

Finally, in State v. Colbath, 540 A.2d 1212 (1988), Justice Souter reversed a rape conviction based upon a trial court's exclusion of evidence of provocative behavior by the complainant notwithstanding the provisions of New Hampshire's rape shield law. The Colbath opinion is particularly out of character, in that Judge Souter made a broad constitutional holding when he could have reached the same ruling on narrower statutory grounds. While the holdings of these cases are not remarkable, they do indicate that the nominee has the capacity to appreciate the importance of many rights which are essential to the preservation of the fundamental right to a fair trial. Moreover, these cases reinforce the conclusion of the attorneys who appeared before the judge as trial attorneys that the nominee was genuinely interested in providing litigants with a fair trial.

The practical reality of our criminal justice system, however, is that only a small minority of federal or state criminal cases ever go to trial. For most individuals accused of crime, contact with the criminal justice system is limited to police encounters or other common occurrences, such as bail determinations, that take place early in the criminal justice process. It is in this vitally important area that the nominee has not proven as sensitive to constitutional values as he has been in the area of trial rights.

Indicative of the nominee's perspective is his opinion in State v. Coppola, 536 A.2d 1236 (1987), in which he upheld the admission into evidence of a statement made by a suspect to police that: "I am not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. If you think I'm going to confess to you, you're crazy." This comment was immediately followed by the suspect's assertion of the right to see counsel before further questioning. Rather than recognizing this as a brusque assertion of the Fifth Amendment right not to incriminate oneself, Judge Souter held that this was admissible as evidence of the suspect's consciousness of guilt. On federal habeas corpus, the First Circuit Court of Appeals reversed, holding that, however boastful, the suspect's words adequately communicated that he was invoking his Fifth Amendment right to remain silent, and thus their

admission constituted reversible error. Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989).

Of course, like everyone else, Judge Souter is a product of his environment, and his opinion in Coppola may just reflect the fact that his life has been far removed from the daily realities that attend the lives of many of our citizens. Indeed, the nominee's distance from the mainstream of American life is not only a result of his intensive legal training, but also a matter of personal choice, as the nominee has acknowledged that he does not watch television, listen to the radio, nor generally does he read newspapers. June 1, 1977, Deposition of D. Souter, at 47, 107 in Wolff v. Thomson, Civil Action No. 77-143 (D. N.H.). Unlike the nominee, however, many citizens are not well versed in the subtleties of constitutional protections, and indeed, the Miranda opinion represents an effort by the Supreme Court to inform citizens of their rights before they unwittingly surrender them. We would expect from our judiciary a sensitivity to the fact that our constitution protects even those who lack respect for the law, and that an effort, however crude, to invoke the protections of our Constitution will be honored.

Similarly, in State v. Denney, 536 A.2d 1242 (1987), Justice Souter dissented from a majority opinion which reversed a defendant's Driving Under the Influence conviction because the police failed to warn the arrestee that his refusal to take a blood test could be used against him in court. Justice Souter dissented from the majority's holding that this was a violation of due process, and indicated that he would have held that the plain Miranda warning given that anything the arrestee said could be used against him was sufficient. Again, the nominee simply assumed that the average citizen would have the legal acumen to interpret police warnings about silence as applicable to police demands for blood.

We note that in his Denney dissent, Justice Souter makes a disturbing and confusing suggestion that the Miranda warnings must be so narrowly construed as to apply only to situations where the defendant has actually remained silent, as opposed to making some verbal utterance to the effect that he wishes to remain silent. He wrote that the warning given to the defendant that "if he made any statement, it could and would be used as evidence against him" was "certainly adequate to advise him that a statement of his refusal to take the [blood] test would be so used." 130 N.H. at 223. He seemed to suggest that if the defendant had remained silent instead of verbally declining to take the blood test, an entirely different

situation under Miranda would be presented and he would not now be arguing that the admissibility of the statement should be upheld:

(Lest there be anything misleading about my own reliance on Miranda, however, I should add that I do not rule out the possibility of a conflict between a Miranda warning of the right to silence and the introduction of evidence that subsequent to the warning the defendant chose to remain silent as a means of refusing to submit to a blood test under the implied consent law . . . This problem is not, of course, before us and it has no bearing on either the majority's or the dissenters' views of how to resolve the issue that is before us . . .)

Id. at 224.

What is confusing is that he then goes on to point out that blood tests under implied consent laws are not covered under Miranda anyhow, raising the question of whether he would venture into this silence/verbal refusal distinction outside of the context of implied consent laws.

Our concern is heightened by reference back to the Coppola case, where he found the "if you think I'm going to confess to you, you're crazy" statement of the streetwise defendant to be admissible evidence of consciousness of guilt rather than an inadmissible invocation of the Fifth Amendment right to remain silent. Do uncooperative or defiant suspects get less Fifth Amendment protection than silent ones? Where would Judge Souter come down on other possible ways of refusing to make a statement to the police--less defiant statements such as "I'm absolutely not going to confess to you," or "I refuse to confess to you," or "I refuse to say anything"? Somewhere along this continuum, Judge Souter would surely find a valid invocation of the right to remain silent, but we are concerned that his rather wooden reading of the defendant's words, to the exclusion of their clear thrust and intent, bodes ill for the serious protection of rights which the Constitution affords equally to all citizens, whether articulate or not.

Likewise, in State v. Lewis, 533 A.2d 358 (N.H. 1987), Justice Souter rejected a Miranda violation claim by a defendant in what the nominee recognized was a "close case." In Lewis, a suspect was read Miranda warnings, after which he inquired of the police what the waiver language meant and whether he would be giving up his rights. The police responded by saying "Oh no-no-no-not at all--not at all." Despite this blatantly false response by the police, Justice Souter found that subsequent answers of the police officer adequately clarified what a waiver of rights meant. None of the officer's subsequent comments, however,

clarified that the officer had misspoke, at best, in telling the suspect that he would not be giving up his rights by talking further with the police about the crime. Similarly, in affirming a conviction despite a defendant's contention that he was too impaired by medications to understand Miranda warnings, Justice Souter described the warnings given as "Miranda litany" and a "Miranda protocol". State v. Derby, 561 A.2d 504 (N.H. 1989). Such opinions by Justice Souter evidence an extremely rigid and mechanical view of the Miranda ruling, and the fundamental Fifth and Sixth Amendment values it was designed to safeguard.

In at least one respect, the difference between the nominee and Justice Brennan, the Justice he would replace, could not be more glaring. Justice Brennan was a champion of state constitutional rights, especially in an era when federal constitutional rights were being narrowly construed. Contrary to the efforts of some of his colleagues, most notably then-Justice and now-Representative Charles Douglas, who construed the New Hampshire Constitution as providing a broader body of rights than the Federal Constitution, see e.g., State v. Ball, 471 A.2d 347 (1983), Judge Souter, while on the New Hampshire Supreme Court, has attempted to limit state constitutional rights to those rights available under the Federal Constitution.

For example, in State v. Koppel, 499 A.2d 977 (1985), a majority of the court, with Justice Souter dissenting, relied upon the search and seizure provisions of New Hampshire's Constitution to strike warrantless roadblocks. In State v. Bradberry, 522 A.2d 1380 (1986), Judge Souter wrote a concurring opinion in which he expansively interpreted prior precedent as holding that where a defendant had not expressly articulated a specific claim at trial that the State Constitution provides greater protection than the Federal Constitution, that no state constitutional claim could be considered. See also In re Sanborn, 545 A.2d 726 (N.H. 1988) (defendant's citation of inapposite state cases fails to raise state constitutional due process claim despite reference to due process under state constitution.) Thus, when the nominee was entrusted with interpretation of the New Hampshire Constitution he did not evidence any interest in broad application of state constitutional protections, but rather declined to join his fellow Justices when they chose to do so.

Because the nominee would be replacing Justice Brennan, the Committee also examined the criminal law opinions of the Supreme Court since the 1987 term to identify cases in which Justice Brennan's vote was a deciding vote in a Court divided by a 5-4 split. Justice Brennan's

vote was important in forming the majority on issues ranging from the death penalty to double jeopardy to flag burning. An index of these opinions is attached as appendix to this report. While it is impossible to predict whether the nominee would have voted in the same fashion as Justice Brennan, the nominee's record gives some reason for doubt.

In summary, we find that the nominee, though conservative in judicial philosophy, appears inclined to respect precedent, and disinclined to resort to "judicial activism"—either in the sense of leaping to broader constitutional issues where narrower statutory ones will suffice, or of selecting or massaging facts to reach preordained conclusions. In this, the nominee clearly falls within the mainstream of American jurisprudence.

We have reservations, however, about his willingness to extend existing constitutional protections to new situations where they would logically apply, and about his ability to resist governmental invitations to curtail such protections in appealingly "modest" increments. By this means, many cherished constitutional rights can suffer lingering death by a thousand wounds. In part, this may reflect a lack of successful separation, to date, from the prosecutive milieu in which his legal career developed. Or it may reflect a more troubling, innately narrow vision of the Constitution's role in our society. Whatever the reason, we are deeply concerned that the nominee has rarely displayed the courage to take constitutional positions independent of those urged by the State.

The picture that emerges from the nominee's jurisprudence is that he is driven by the force of logic, rather than by experiences of the human condition. His interpretation of constitutional rights tends to be crabbed, recognizing constitutional rights only where they are clearly established and carefully preserved by both citizens and their counsel. Moreover, his record is marked by a preference to halt any further extension of constitutional values.

Thus, his enforcement of trial-related rights, versus pre-trial rights, may well reflect a more general philosophical commitment to well established constitutional rights versus a lack of enthusiasm for more recently acknowledged constitutional rights, such as Miranda rights. This reluctance to embrace recently established constitutional rights may simply reflect a judicial preference for recognition of textually rooted constitutional rights, such as the right to a jury trial. Certain important constitutional rights, such as the right of privacy, fall within the category of recently recognized, non-textual rights secured only by general constitutional

guarantees of "due process" or the Ninth Amendment.

Nonetheless, the record demonstrates that the nominee endorses the principle of *stare decisis*--following settled precedent. For example, in State v. Meister, 480 A.2d 200 (N.H. 1984), Justice Souter filed a concurring opinion joining in the majority's reversal of a lower court's refusal to annul the defendant's conviction record. Justice Souter acknowledged that he disagreed with the majority's opinion, but that it was based on an earlier case, State v. Roger M. 424 A.2d 1139 (1981), in which his identical position as a trial judge had been reversed on appeal. Casting aside his "personal considerations" about the correctness of his position as a trial judge, Justice Souter observed that, "The consequences of what I believe was an unsound conclusion in that case are not serious enough to outweigh the value of *stare decisis*." *Id.* at 205.

In this instance, the nominee's commitment to *stare decisis*, then, was sufficiently strong to supercede his personal convictions. Nonetheless, the nominee also appears to recognize that when the consequences of an incorrect decision are serious enough, the value of *stare decisis* may be outweighed. Accordingly, while the nominee's record indicates a willingness to follow binding constitutional precedent, it also indicates he is very sparing in the recognition and enforcement of recently established constitutional rights. Especially when four current justices have recently concluded that *stare decisis*, while a "cornerstone of our legal system," nonetheless "has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes," Webster v. Reproductive Health Serv., 106 L.Ed.2d 410, 435 (1989), the nominee's commitment to *stare decisis* is a question that will have a dramatic impact on the vitality of many recently acknowledged constitutional rights.

In summary, we have found the nominee to be highly qualified by means of his intellectual abilities, his judicial temperament, his integrity, his experience, and his industry. We are troubled, however, by his lack of sensitivity to selected but important constitutional rights such as Miranda. We are also concerned that the nominee has not displayed much independence from the views espoused by the State. Nonetheless, based upon the personal experiences of counsel who have appeared before the nominee, we are reasonably confident that he is capable of becoming sensitized to the critical role that constitutional rights play in

everyday life in America. It is our fervent hope that the nominee would seize the opportunity that has been extended him to breathe life into the guiding constitutional principles of our times. Accordingly, we do not oppose the nomination of David Souter to the United States Supreme Court.

#### APPENDIX

The following cases are United States Supreme Court decisions involving a 5-4 split with Brennan in the majority from October 1987 until June 27, 1990.

James v. Illinois, 110 S. Ct. 648 (1990) - The exclusionary rule forbids evidence obtained in violation of the Fourth Amendment from being used to impeach the testimony of a defense witness other than the defendant. Justice Brennan in writing for the majority stated that the balance of interest changes when tainted evidence is proposed to be used against witnesses other than the defendant. This is because the prospect of a perjury conviction is far more daunting to a witness than to a defendant who already faces conviction of a crime.

Idaho v. Wright, 110 S. Ct. 3139 (1990) - Any statements made by a suspected child victim of sex abuse to her treating pediatrician and offered for admission under the residual exception to the hearsay rule did not, when evaluated under the totality of the circumstances surrounding the making of the statements, have the particularized guarantees of trustworthiness that the Sixth Amendment confrontation clause requires for the admission of out-of-court statements for hearsay exceptions that are not firmly rooted. The existence of other evidence corroborating proper hearsay does not bear on whether the hearsay is sufficiently trustworthy to be admitted.

United States v. Eichman, 110 S. Ct. 2404 (1990) - The Flag Protection Act of 1989 which criminalizes the conduct of anyone who knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon the United States flag is a content based restriction on expressive conduct that violates the First Amendment as applied to the acts of flag burning in protest of government policies and the passage of the Flag Protection Act itself.

Grady v. Corbin, 110 S. Ct. 2084 (1990) - The Fifth Amendment's double jeopardy clause bars subsequent criminal prosecution in order to establish an essential element of an offense charged when the prosecution will prove conduct that constitutes a defense for which a defendant has already been prosecuted. Here the defendant was arrested for causing a fatal traffic accident. He pled guilty to two traffic offenses which included drunk driving and failure to keep right of way. Several months later he was indicted on charges of manslaughter. The bill of particulars stated that the prosecution intended to prove that the defendant drove while drunk and failed to keep right of way. The Court, basing its decision on Illinois v. Vitale, 447 U.S. 410 (1980), stated that the test is what conduct the State will prove, not what evidence they will use.

South Carolina v. Demetrius Gathers, 109 S. Ct. 1110 (1989) - For purposes of imposing the death penalty, the defendant's punishment must be tailored to his personal responsibility and moral guilt. It is improper for the prosecutor to comment concerning the victim's personal characteristics, as is allowing the jury to rely on this information in imposing the death sentence because of factors about which the defendant was unaware and were irrelevant to the decision to kill. Here, in the prosecutor's closing arguments, he read to the jury at length from a religious tract the victim was carrying and commented on the personal qualities that the prosecutor inferred from the victim's possession of the religious tract and his voter registration card. The Court held that where there was no evidence that the respondent read either the tract or the voter card, the content of the papers the victim was carrying were purely fortuitous and could not provide any information relevant to respondent's moral culpability notwithstanding that the papers had been admitted in evidence for other purposes.

Mallard v. U.S. District Court for the Southern District of Iowa, 109 S. Ct. 1814 (1989) - In this case, an attorney who had recently been admitted to practice before the District Court, was appointed to represent indigent inmates in their suit against prison officials in a 1983 action. After the magistrate denied the attorney's request to withdraw, he appealed stating that forcing him to represent indigent inmates in an action requiring trial skills he did not possess would compel him to violate his ethical obligations and would exceed the Court's authority under 28 U.S.C. 1915(d). In a 5-4 decision, consisting of an unusual split, Justice Brennan wrote the majority opinion and was joined by Rehnquist, White, Scalia and Kennedy. The Court held that 1915(d) does not authorize the federal court to require an unwilling attorney to represent an indigent litigant in a civil case. As the operative term is request, the Court differentiated between 1915(c) which states that "officers of the Court shall use and serve all process and perform all duties in such cases" and 1915(d). The word "shall" rendered section (c) compulsory, while 1915(d) states that "the Court may request an attorney to represent an indigent litigant."

Mills v. Maryland, 108 S. Ct. 1860 (1988) - The petitioner was a Maryland prison inmate who challenged the death sentence he received for the killing of his cell mate as being unconstitutionally mandatory under Maryland law. He claimed that the statute required imposition of the death sentence if the jury unanimously found an aggravating circumstance but could not agree unanimously as to the existence of any particular mitigating circumstance. The Court held that in a capital case, the sentence may not be precluded from considering any relevant factors as mitigating circumstances. If the petitioner's assertion was correct, and the jury believed they were unable to consider any mitigating circumstances unless they unanimously agreed on the existence of a single mitigating factor, then the case must be remanded for resentencing.

Houston v. Lack, 108 S. Ct. 1008 (1988) - A prisoner's delivery to prison authorities for forwarding to a Federal District Court of a Notice of Appeal in a case in which the prisoner is acting pro se amounts to the filing of the notice within the meaning of Federal Rule of Appellate Procedure 4(a)(1) which sets a 30 day time limit for the filing of such a notice with the clerk of the court.

Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) - The Eighth Amendment's prohibition of cruel and unusual punishment forbids a capital defendant who is less than 16 years of age at the time of the offense from being sentenced to death under statutes that do not set a minimum age in which the commission of a capital crime can make the defendant subject to the death penalty.



## MEMORANDUM

TO: Members of The United States Senate Judiciary Committee  
 FROM: Dawn Johnsen, Legal Director  
 DATE: September 21, 1990  
 RE: Judge David Souter's Testimony Regarding The Fundamental Right to Privacy

Introduction

Before the Senate Judiciary Committee began hearings on Judge David Souter's nomination to the U.S. Supreme Court, NARAL urged the Committee to question Judge Souter about his views on the level of constitutional protection afforded the right to privacy, including the right to choose abortion. Although his record contained no definitive indication of his views in this area, all of the available evidence suggested that Judge Souter was likely to refuse to protect the right to choose. We therefore felt that it was essential for the Committee to ascertain Judge Souter's general legal approach and reasoning in this critical area. We at no time, however, suggested that Judge Souter should be required to state how he would decide a specific fact-contingent case prior to reviewing the record or briefs, nor did we suggest that Judge Souter should be required to give the Committee an irrevocable commitment as to the legal approach he would use.

We felt it was necessary to consider Judge Souter's views on the right to choose due to the exceptional circumstances surrounding his nomination: For the past decade, our Presidents have made nominations to the federal judiciary after having pledged -- in three consecutive Republican Party Platforms -- to use the judicial appointment process to deprive women of their fundamental right to make their own decision whether or not to continue a pregnancy. With each Supreme Court nomination during that period, the Administrations made good on their promise. They have succeeded in diminishing the support for the right to choose from a strong 7-2 majority to the point where the Supreme Court is currently at best one vote away from overruling Roe v. Wade, 410 U.S. 113 (1973).

For the Senate to confirm Judge Souter without determining whether he recognizes the right to choose would be to acquiesce in this strategy to take away a fundamental constitutional right for the first time in our Nation's history. NARAL therefore urged the Senate to oppose Judge Souter's confirmation unless he openly recognized that the fundamental right to privacy extends to a woman's decision whether or not to have an abortion.

During the course of the hearings, several senators -- most notably Chairman Biden and Senators Simon, Metzenbaum and Leahy -- repeatedly asked questions of Judge Souter aimed at learning if he regards a woman's decision whether or not to continue a pregnancy as a constitutionally protected fundamental right. Despite his willingness to discuss his approach to reviewing a variety of important constitutional issues, Judge Souter chose to be silent on this vital issue. His cryptic comments revealed only that he recognizes a "marital right to privacy." This is precisely the narrow definition of the right to privacy offered by many who seek to overrule Roe v. Wade. Because Judge Souter refused to answer these questions and did not rebut the strong presumption that he does not support the fundamental right to choose, the Senate should refuse to consent to his nomination.



### The Fundamental Right to Choose

At no time during his testimony did Judge Souter give any indication that he views the right of a woman to decide whether or not to have an abortion as a fundamental right. He closed the door to this line of inquiry with his answer to the first question addressed to him, which was posed by Chairman Biden. Judge Souter could not have been more adamant in his refusal to respond to any question that might provide insight into his approach to this issue. For example, on this basis, Judge Souter refused to provide specific answers to questions about the outcomes in other privacy cases, such as Griswold v. Connecticut, 381 U.S. 479 (1965) and Moore v. East Cleveland, 431 U.S. 494 (1977), (9/13, pp. 104, 114), refused to answer certain questions regarding the factors he would use to determine if the right to choose is fundamental, (9/13, p. 120; 9/14, p. 138), and refused to discuss his personal views on the morality of abortion, (9/14, pp. 183-90).

I would not think that it was appropriate to express a specific opinion on the exact result in Griswold, for the simple reason that as clearly as I will try to describe my views on the right of privacy, we know that the reasoning of the Court in Griswold, including opinions beyond those of Justice Harlan, are taken as obviously a predicate toward the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination -- Roe v. Wade, upon which the wisdom or the appropriate future of which it would be inappropriate for me to comment. (9/13, p. 104).

Although he scrupulously avoided revealing his views on the merits, Judge Souter did indicate that he views the existence of a fundamental right to choose as an open question that "is something which is going to have to be developed by the courts over the course of probably a great many years." (9/14, p. 59; 9/14, p. 108; 9/17, p. 111; 9/17, p. 133) He at no point acknowledged that it is well-established precedent that should be regarded as having been settled. Judge Souter also stated that he has not made up his mind as to whether or not he would vote to uphold Roe v. Wade. (9/14, p. 128)

As Chairman Biden persuasively demonstrated, Judge Souter answered questions on many other issues -- including those likely to come before the Court -- of precisely the type he refused to answer in the abortion context -- that is, concerning the level of constitutional protection he would afford an asserted right and the general legal analysis he would use to approach the issue. Without offering a convincing justification, Judge Souter singled this one issue out for silence. (9/14, pp. 146-48, 151-52; 9/18, pp. 70-72)

### The Fundamental "Marital Right to Privacy"

Throughout his testimony, Judge Souter remained committed to the line he drew in his first exchange with Chairman Biden: he would say only that among the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment is the "marital right to privacy" which includes the right of a married couple to procreate. Judge Souter was extraordinarily careful always to use "marital" as a qualifier each and every time he described what he views as part of the fundamental right to privacy. (9/13, pp. 112-13, 114, 116; 9/14, p. 59; 9/17, pp. 23, 111, 112)

Although he clearly and repeatedly recognized "marital privacy" as a fundamental right, Judge Souter stated that he would not "endorse the specific holding of Griswold or its opinions," and that if Roe were overturned, the continued validity of the prior privacy cases would be called into question. (9/17, p. 111)

Significantly, Judge Souter would not say whether he views the right of unmarried individuals to use contraception as fundamental. In his first exchange with Chairman Biden about Eisenstadt v. Baird, 405 U.S. 438 (1972), Judge Souter avoided indicating whether the fundamental right to privacy extends to the right of unmarried women and men to use contraception. He focused on the technical fact that the case was decided on equal protection grounds and only stated the obvious and legally irrefutable point that "there is going to be an equal protection implication from whatever bedrock start privacy is derived under the concept of due process." (9/13, p. 112)

When later questioned by Senators Metzenbaum and Leahy, Judge Souter again gave an exceedingly narrow and uninformative answer, focusing on the equal protection analysis used in Eisenstadt. (9/14, pp. 25-26; 9/17, p. 25-26) Only when explicitly pushed by Senators Biden and Leahy would Judge Souter answer the question in terms of the fundamental right to privacy, and then his responses were profoundly disturbing. Judge Souter described the question whether unmarried individuals possess the fundamental right to use contraception as "an open question" and stated "I do not think that is a simple question to answer." (9/17, p. 28) Moreover, for the reasons described by Chairman Biden, Judge Souter's description of the approach he would take to determine whether unmarried individuals enjoy the fundamental right to use contraceptives, was -- in Chairman Biden's words -- "worrisome." (9/17, p. 27)

#### Discussion and Analysis

Clearly, Judge Souter did not state that he recognizes a woman's fundamental right to make her own decision whether or not to have an abortion. Nor do his repeated references to fundamental aspects of a "marital right to privacy" give any indication that he would recognize the right to choose as fundamental. In fact, these references are far more troubling than reassuring. His very deliberate use of "marital" to qualify the scope of the privacy right leaves wide open the possibility that he believes that the fundamental right to privacy does not extend to either the right choose abortion or the right of unmarried people to use contraception.

In fact, those who advocate overruling Roe typically purport to support Griswold. See, e.g., Brief for the United States as Amicus Curiae Supporting Appellants at 12 n.9, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (plurality); Webster, 109 S. Ct. at 3057-58 (Rehnquist, C.J., White, Kennedy, JJ.). One approach commonly used to attempt to distinguish the cases is to describe the fundamental right at stake in Griswold in the most limited terms possible: not as an individual right, but as a right that exists within some aspects of a marital relationship -- the precise characterization offered by Judge Souter.

Judge Souter's focus on the right as a "marital" right is at odds with the Supreme Court's view that the fundamental right to privacy is a right of the individual, and does not depend on the marital relationship. While Judge Souter was correct in saying that Eisenstadt was decided on equal protection grounds, he ignored that the

opinion also made clear that the fundamental privacy right recognized in Griswold is possessed by "the individual, married or single":

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (plurality) (emphasis in original).

Elsewhere, too, the Supreme Court describes the right recognized in Griswold in ways studiously avoided by Judge Souter, presumably because the Court's characterizations highlight the natural progression from Griswold to Eisenstadt to Roe and its progeny.

The decision whether or not to bear or beget a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right to privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, Griswold v. Connecticut, ... and most prominently vindicated in recent years in the contexts of contraception, Griswold v. Connecticut, ...; Eisenstadt v. Baird, ...; and abortion, Roe v. Wade; Doe v. Bolton; Planned Parenthood of Central Missouri v. Danforth.

Carey v. Population Services International, 431 U.S. 678, 685 (1977) (citations omitted).

Defining the fundamental right to privacy as a marital, and not an individual, right -- as Judge Souter does -- has become a prime tactic for those who seek to justify overruling Roe while ostensibly allowing Griswold to stand. This approach is clearly illustrated by a recent debate in the academic literature. In an article published in the University of Pennsylvania Law Review, Walter Dellinger and Gene Sperling convincingly argue that there exists no principled basis on which the Supreme Court can continue to uphold Griswold but at the same time find that a woman's right to choose abortion is not fundamental -- with the possible exception of "reduc[ing] the case to a largely inconsequential decision." "Abortion and the Supreme Court: The Retreat from Roe v. Wade," 138 U. Pa. L. Rev. 83, 94 (1989). William Van Alstyne responded with an article in the Duke Law Journal which does just that, by limiting Griswold to a recognition of "marital privacy." "Closing the Circle of Constitutional Review From Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe," 1989 Duke Law Journal 1677, 1678. Van Alstyne distinguishes and dismisses the fundamental right claimed in Eisenstadt as "a right of fornication," and the fundamental right claimed in Roe as "a woman's right to kill the gestating life within her solely according to her own choice, with any willing physician's help," id. at 1678 n.5, 1679 (emphasis in original).

**NATIONAL WOMEN'S LAW CENTER**

Statement Of The National Women's Law Center  
In Opposition To The Confirmation Of Judge David Souter  
Submitted To The Senate Committee On The Judiciary  
September 18, 1990

Katherine Connor  
Nancy Duff Campbell  
Marcia D. Greenberger

On September 11, 1990, the National Women's Law Center issued its report, Judge Souter and the Confirmation Process: The Future of Women's Constitutional Rights, focusing on the serious concerns raised by Judge Souter's record on two issues of critical importance to women -- the fundamental right to privacy that includes contraception, pregnancy and termination of pregnancy and especially searching judicial scrutiny of sex discrimination under the equal protection clause of the fourteenth amendment. Because these two constitutional rights are the core principles upon which women must depend when the government draws distinctions based on sex, the report concluded that Judge Souter should not be confirmed unless he allays the concerns raised by his record and demonstrates his commitment to these bedrock principles.

The National Women's Law Center has carefully listened to all of Judge Souter's testimony and must conclude that he has failed to allay the substantial concerns raised by his record and to demonstrate a commitment to core constitutional principles of fundamental importance to women. Thus, we must oppose the nomination of Judge Souter to the Supreme Court.

The application of the right to privacy to women has been achieved through a long line of Supreme Court cases recognizing that courts must subject laws that interfere with contraception, pregnancy and termination of pregnancy to strict judicial scrutiny. In the hearings, Judge Souter recognized that there is a fundamental constitutional right to privacy and that the right extends to procreation in marriage. However, he refused to state whether the right extends to contraception generally or termination of pregnancy in or outside of marriage. The implications of his position for the continued constitutional protection of pregnancy are also unclear. Judge Souter based his refusal to respond to these central questions on his unwillingness to indicate his position on the validity of Roe v. Wade. However, these core principles could be and should have

been affirmed by Judge Souter; his doing so would not have compromised his independence on the ultimate question of whether he would overturn Roe v. Wade. Thus, Judge Souter failed to allay the concerns raised by his record and failed to demonstrate a commitment to women's fundamental privacy rights.

So, too, Judge Souter failed to allay the substantial concerns raised by his record on equal protection. Until the middle tier heightened scrutiny standard for measuring sex discrimination was developed by the Supreme Court, beginning in 1971, no law treating men and women differently had ever been invalidated under the equal protection clause. Yet, as Attorney General and as a New Hampshire Supreme Court judge, Judge Souter repeatedly criticized the heightened scrutiny standard, and during the hearings he reiterated several times these criticisms.

Judge Souter stated that the middle tier level of scrutiny is too loose a standard, allowing judges to slip toward the lowest rational basis standard of review for equal protection challenges. Yet, Judge Souter described his problem with the current middle tier test in connection with its use in older cases (Royster Guano Co. v. Virginia (1920) and Reed v. Reed (1971)) where a less rigorous standard was in place than is now the law, thereby leaving the impression that he viewed the middle tier test as less rigorous than it currently is. Moreover, he refused to commit to any test for sex discrimination challenges under the equal protection clause beyond stating that he would apply a test more stringent than the lowest rational basis standard of review. His description of the current standard, in combination with his refusal to articulate a test he would adopt in place of the current standard or in any way to commit to a standard at least as rigorous as the current test, leaves women in the country without any assurance of meaningful protection against sex discrimination.

Moreover, Judge Souter's failure to demonstrate an understanding of the nature of discrimination and the ways in

which it is eradicated does not bode well for his interpretation and enforcement of equal protection guarantees. Judge Souter acknowledged that as Attorney General of New Hampshire he defended the refusal of the state to file statistical data on the racial composition of its workforce against a challenge under Title VII of the Civil Rights Act of 1964, and the state's use of a literacy test against a challenge under the Voting Rights Act. He stated, however, that his positions in these cases were not positions he would have agreed with at the time if they were presented to him as a judge, or positions that validly could be asserted today by a state. Despite distancing himself from his earlier positions, Judge Souter continued to defend his advocacy of these positions on the grounds that a state without racial discrimination, absent considerations of a uniform national rule, should not be required to file statistical data on race, or prohibited from using a literacy test in a nondiscriminatory manner. The suggestion that such an argument is an appropriate defense evidences a lack of understanding about the way discrimination may be revealed, since, for example, until statistical data is collected discrimination may not be apparent. Moreover, Judge Souter's assertion that New Hampshire was free of discrimination in the mid-1970s when the state took these positions lacks credibility and suggests an Attorney General insensitive to very real problems of New Hampshire's minority population. Rather than allay concerns about Judge Souter's understanding of the nature of discrimination and the ways in which it is eradicated, his statements at the hearings serve to intensify them.

Judge Souter's persistent refusal to state his position on key privacy concepts, and his failure to articulate his commitment to an equal protection standard at least as strong as the standard currently employed by the Supreme Court stands in sharp contrast to his statements of adherence to basic principles in other areas of the law, not only in cases representing settled

law, like Brown v. Board of Education (1954) and Bolling v. Sharpe (1954), but also in areas where the basic principles are still subject to controversy, like the key first amendment establishment clause case, Lemon v. Kurtzman (1971), and cases challenging the constitutionality of the death penalty. Judge Souter's failure to commit to core principles of privacy and equal protection for women is no more acceptable than would be a failure to adhere to the key constitutional principles established in Brown, Bolling and Lemon.

After carefully evaluating Judge Souter's testimony, we conclude that he has not met the burden incumbent upon him to allay the serious concerns raised by his record and to demonstrate his commitment to bedrock constitutional principles of fundamental importance to women. We therefore oppose his nomination.

**NATIONAL WOMEN'S LAW CENTER**

**Judge Souter and the Confirmation Process:**  
**The Future of Women's Constitutional Rights**

A Report by the

**National Women's Law Center**

**Katherine Connor  
Nancy Duff Campbell  
Marcia D. Greenberger**

**September 11, 1990**

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National Women's Law Center

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**INTRODUCTION AND SUMMARY**

The Supreme Court has interpreted the Constitution to contain two core principles upon which women's access to the full panoply of rights and opportunities in this country rest. These principles are first, that sex discrimination must be subjected to especially searching scrutiny under the equal protection clause of the fourteenth amendment; and second, that there is a fundamental right to privacy, which includes pregnancy and termination of pregnancy. Any nominee to the Supreme Court who does not fully support these two core principles should not be confirmed to the Supreme Court. Therefore, Judge Souter should not be confirmed unless he puts to rest questions raised by his record and demonstrates his commitment to each of these key doctrines of constitutional law.

The first of these principles, that any governmental distinctions made on the basis of gender must be subjected to searching, or "heightened" scrutiny under the equal protection clause of the fourteenth amendment, establishes that courts must be more demanding of the government to defend policies or practices which discriminate on the basis of sex than is the case when most government policies are reviewed by the Court. Under the heightened scrutiny standard, a state must demonstrate that an important governmental interest is substantially served by the discriminatory practice. Further, the test must be applied free of fixed or stereotyped notions concerning the roles and abilities of males and females.

Until this heightened scrutiny principle was established by the Supreme Court in 1971 in Reed v. Reed, 404 U.S. 71 (1971), no law treating men and women differently had ever been invalidated under the equal protection clause by the Court. Thus, Supreme Court decisions upheld state laws which excluded women from the practice of law, from juries, and even from holding certain jobs unless a male relative was present.

Since 1971, and the later Supreme Court cases which developed and refined the precise contours of the heightened standard for review of gender-based discrimination, profound changes have occurred in our laws and practices. The Supreme Court has struck down a wide variety of laws disadvantaging women in many diverse areas of life, including women's right to serve as executors of estates, secure Social Security and other government benefits for their families, be supported by their parents to the same age as their brothers, and manage jointly-owned community property with their husbands.

So, too, after 1971, key laws prohibiting sex discrimination in areas such as employment, education and credit were passed by Congress and in the states. These laws both implement the Supreme Court's interpretation of women as specially protected under the equal protection clause and also build on that constitutional core principle to eliminate sex discrimination broadly. As a direct result of Supreme Court precedent and these anti-discrimination laws, substantial progress has been made in opening opportunities to women, although much remains to be done.

The constitutional fundamental right to privacy mirrors the equal protection clause in its importance to women. As interpreted and developed by the Supreme Court over many decades, the right to privacy protects such central concerns as family integrity, marriage and reproductive rights.

The application of the right to privacy to pregnancy and termination of pregnancy assures that its basic protections are fully available to women, as they are to men. The Supreme Court's 1973 landmark decisions in Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179, extended to women the privacy-based right to abortion. Because the right is "fundamental," the government must demonstrate a "compelling" state interest in order to justify its restriction. So, too, the Supreme Court relied on this right to protect women who chose to continue a pregnancy as employees, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and to receive unemployment benefits, Turner v. Department of Employment Services, 423 U.S. 44 (1975).

However, women's right to privacy is under serious threat. Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), has called into question whether a majority of the Supreme Court will interpret the constitutional fundamental right to privacy to apply to abortion, certain forms of contraception, and by this questioning, to pregnancy itself. The new justice on the Court could be the deciding fifth vote to overturn Roe v. Wade's inclusion of abortion and contraception in the fundamental right

to privacy, thereby eliminating the need of states to demonstrate compelling reasons for restricting the right.

Further, the Supreme Court has signaled a serious retreat in the constitutional protections afforded to young women's access to abortion in Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990). The Hodgson case highlights the danger, for in that case four justices would have upheld a state requirement that two parents be notified before a minor could obtain an abortion, without even the safety valve of a requirement that a court be available as an alternative where notice to both parents would be harmful to the minor.

The aspects of Judge Souter's record which bear on equal protection and privacy raise serious questions about the nature of his commitment to these two core principles. In the case of equal protection, he has articulated legal theories and approaches in written opinions which are antithetical to the application of the heightened scrutiny test to sex discrimination as we know it today. Legal briefs and statements he made while Attorney General of New Hampshire add to the concern. Similarly, with respect to the right to privacy as applied to abortion for adult and young women, Judge Souter, both when on the bench and as Attorney General, has articulated legal theories and approaches which undercut the right.

Because these two constitutional rights are the core principles upon which women must depend when the government seeks

to draw distinctions on the basis of sex, there can be no more important rights to which a nominee to the Supreme Court must be committed. The absence in Judge Souter's record as it has come to light of a clear sign of commitment to these constitutional rights, coupled with the disturbing aspects of his record that address them, makes it imperative that he provide the needed commitment if he is to be confirmed.

**I. JUDGE SOUTER MUST DEMONSTRATE A COMMITMENT TO THE HEIGHTENED SCRUTINY STANDARD FOR SEX DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE, AS SHOULD ANY NOMINEE TO BE CONFIRMED TO THE SUPREME COURT**

The Supreme Court's determination that women have a special status under the equal protection clause of the fourteenth amendment stands as a critical development in providing bedrock constitutional protections for women. In practice, the constitutional protection against sex discrimination has been accomplished through the Court's use of a "heightened scrutiny" standard to evaluate governmental classifications that discriminate on the basis of sex. Any nominee to the Court must recognize both that women are accorded special status under the equal protection clause and that heightened scrutiny is critical to eradicating unconstitutional gender discrimination.

**A. The Supreme Court Has Established A Heightened Scrutiny Standard For The Review of Sex Discrimination Cases**

Before 1971, the Supreme Court was of the view that the government could treat men and women differently under the equal protection clause as long as any "rational basis" could be advanced to justify the discriminatory treatment. This analysis gave the government virtually unlimited leeway in treating people differently on the basis of sex. Under the rational basis standard, no sex discrimination challenge brought to the Court succeeded. The Court upheld blatantly sex-discriminatory statutes against fourteenth amendment challenges based on rational basis review.

In Muller v. Oregon, 208 U.S. 412 (1908), the Court rejected a fourteenth amendment challenge to a law limiting the hours that women employees, but not men employees, could work, holding that the need for a woman to "properly discharge . . . her maternal function," justified a law "protecting" women by limiting their employment opportunities. As the Court explained in Goesaert v. Cleary, 335 U.S. 464 (1948), upholding a Michigan law providing that women could not work as bartenders unless they were the wives or daughters of male bar owners:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. . . . The Constitution does not require legislatures to reflect social insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

Id. at 465-66.<sup>1</sup> It is this complete deference to the legislature that makes rational basis review fatal to a challenge to a sex-discriminatory statute.

In its landmark decision in Reed v. Reed, the Court departed from the rational basis standard of review that had permitted wholesale governmental discrimination against women. In Reed, the Court for the first time struck down a sex-discriminatory statute on equal protection grounds, holding that a state could not automatically prefer men over women in administering a decedent's estate, 404 U.S. at 75-76.

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<sup>1</sup> See also Hoyt v. Florida, 368 U.S. 57 (1961) (finding a rational basis for a law giving all women an automatic exemption from jury service that resulted in all-male juries).

Beginning in 1971, the Court has evolved an analysis, which has come to be known as the "heightened scrutiny" test, or an "intermediate" standard of review. It is called intermediate because it is in the middle between the highest level of scrutiny, strict scrutiny, which is the most rigorous standard of judicial review of governmental actions,<sup>2</sup> and rational basis review, which is the most deferential standard.

Under the intermediate standard, a party seeking to uphold a gender-based classification must show an "exceedingly persuasive justification" for the classification. This burden is met only when the differential treatment is "substantially related" to the achievement of "important governmental objectives." Moreover, this test must be applied "free of fixed notions concerning the roles and abilities of males and females;" the statutory objective cannot reflect "archaic and stereotypic notions" about men and women. Mississippi University for Women v. Hogan, 458 U.S. 717, 724-25 (1982) (state-supported nursing school violated equal protection clause by denying enrollment to men). At the heart of this approach is the requirement that courts undertake a more probing examination of governmental classifications than would be required under rational basis review; the government's

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<sup>2</sup> Strict scrutiny review is applied to laws that infringe on fundamental interests, see discussion infra, and laws that classify on the basis of race, alienage or national origin. See, e.g., In Re Griffiths, 413 U.S. 717 (1973) (holding unconstitutional a state's exclusion of aliens from admission to practice law). This strict scrutiny is critical to the elimination of discrimination against minority women.

justification cannot be taken at face value but must be carefully reviewed.

The Court most recently reaffirmed the "fully established principles" by which to evaluate claims of gender discrimination in Heckler v. Matthews, 465 U.S. 728 (1984), reviewing and applying the heightened scrutiny standard set forth in Mississippi University for Women v. Hogan.<sup>3</sup>

**B. Heightened Scrutiny is Critical to Eradicating Unconstitutional Sex Discrimination**

Employing heightened scrutiny, the Court has struck down many sex discriminatory laws. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a statute which required female, but not male, Army personnel to prove that their spouses were dependent in order to receive benefits); Craig v. Boren, 429 U.S. 190 (1976) (invalidating a sex-based age differential for the legal consumption of beer); Califano v. Westcott, 433 U.S. 76 (1979) (invalidating a provision which provided aid to Families With Dependent Children to children with unemployed fathers, but not mothers); Weinberger v. Wisenfeld, 420 U.S. 636 (1975) (invalidating a Social Security provision providing payment to widows, but not widowers, with children); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a statute

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<sup>3</sup> In Heckler the Court held that the temporary application of the Social Security pension offset provision invalidated on sex discrimination grounds in Califano v. Goldfarb, 430 U.S. 199 (1977), was substantially related to the important governmental interest of protecting individuals who planned their retirements in reasonable reliance on the law in effect prior to Goldfarb. See 465 U.S. at 750-51.

providing higher age of majority for males than females so that males were entitled to parental support for a longer period of time); Kirchberg v. Fenestra, 450 U.S. 455 (1981) (invalidating a statute giving husband exclusive authority over community property); and Califano v. Goldfarb (invalidating a Social Security provision granting survivor's benefits to any widow but only to widowers who had been receiving half of their support from their wives).

In a number of these cases, Chief Justice Rehnquist dissented and applied a rational basis test under which he would have upheld as constitutional laws that discriminated on the basis of sex. See, e.g., Frontiero v. Richardson, 411 U.S. at 691; Craig v. Boren, 429 U.S. at 217; Califano v. Goldfarb, 430 U.S. at 224.<sup>4</sup> Thus, heightened scrutiny is critical to the Court's determination that a law unconstitutionally discriminates on the basis of sex. Any nominee to the Court must unequivocally support the special protection of women under the equal protection clause through the use of the heightened scrutiny standard.

C. Judge Souter And Sex Discrimination Under The Equal Protection Clause

Judge Souter's writings and statements raise questions about his commitment to the constitutional protection of women under

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<sup>4</sup> Justices Scalia and Kennedy have not yet addressed any sex-based equal protection challenge, so that their position on the proper standard of review is not known.

the equal protection clause which must be the basis for further inquiry during his confirmation hearings.

First, Judge Souter has employed a theory of constitutional interpretation known as "original intent" which, if applied to the federal Constitution, could effectively eliminate the equal protection clause's application to women. Under this theory, courts must interpret the Constitution only as the men "who drafted, proposed, and ratified its provisions and its various amendments" would have applied them in the historical context in which they were written and written and ratified. See Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 826 (1986). Since the framers of the fourteenth amendment were not concerned with discrimination against women, if Judge Souter applied an original intent approach to a claim of sex discrimination under the equal protection clause, rational basis and not heightened scrutiny review would be employed, with devastating results for the hard-won constitutional gains made by women under the equal protection clause.<sup>5</sup>

Second, Judge Souter's writings suggest that he may have reservations and problems with the heightened scrutiny standard itself, both as applied to cases of gender discrimination and as part of any equal protection analysis.

Third, Judge Souter's writings and statements reflect a lack of understanding both about the nature of discrimination and

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<sup>5</sup> For a discussion of the implications of the original intent approach for the right of privacy, see section II-C-1 infra.

about the role that sexual stereotyping can play in the development of discriminatory classifications.

Judge Souter must allay the concerns raised by his record about his commitment to the special protection of women under the equal protection clause and the necessary and appropriate use of heightened scrutiny in cases of gender discrimination.

1. The Original Intent Theory, as Reflected in Judge Souter's Dissent in Dionne, is Inconsistent with Heightened Scrutiny Standard for Sex Discrimination

The majority opinion in Estate of Dionne, 518 A.2d 178 (1986), struck down a law requiring litigants to pay special fees directly to probate court judges for holding hearings on days other than the ones fixed by statute. Writing that this method of compensating probate judges in addition to their salaries "smacks of the purchase of justice," the court held that it was repugnant to the state constitutional guarantee that "[e]very subject of this state is entitled ... to obtain right and justice freely, without being obliged to purchase it." Id. at 179. In reaching this conclusion, the majority looked not only to historical evidence of the meaning of the constitutional guarantee but also to contemporary factors: heightened public sensitivity to the appearance of impropriety, as recognized in rigorous standards of conduct under supreme court rules and codes of judicial conduct; and evidence that the system had severe problems in practice, including a report of the Judicial Council concluding that it was "inconsistent with a professional judiciary." Id. at 180. Based on all of this evidence, the majority struck down the law as unconstitutional.

Judge Souter agreed with the majority's condemnation of the fee law. He dissented, however, because he found that the law was constitutional as interpreted under "this court's clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption,'" and

only this historical evidence is relevant to the court's inquiry. Id. at 181, quoting Opinion of the Justices, 44 N.H. 633, 635 (1863).<sup>6</sup> Judge Souter looked to two sources to ascertain the intent of the framers of the constitution: the body of commentary on the Magna Carta of 1215, from which the constitutional language was derived; and the history of other New Hampshire laws regarding probate fees. Delving into this historical evidence in detail, he concluded that the framers did not intend to preclude such a fee system, and therefore, the court could not find it unconstitutional.

It is not the purpose of this review to offer a lengthy critique of the original intent doctrine. Others have shown that the philosophy of original intent is not shared by judges in the mainstream of the American constitutional tradition -- both liberal and conservative -- who accept the responsibility the framers clearly imposed on them to continue to develop and apply

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<sup>6</sup> Judge Souter also cited Opinion of the Justices, 121 N.H. 480, 483, 431 A.2d 135, 136 (1981), "as confirming the vitality" of the original intent method of constitutional interpretation. However, this case did not advocate relying only on the framers' intent in interpreting the scope of the state constitution.

The court was called on to address the constitutionality, under the state and federal Constitutions, of a bill that would reduce the number of persons serving on juries in civil cases from twelve to six. While finding that the law might pass muster under the federal Constitution, the court held that it would violate the state constitution. In reaching this conclusion the court did not stop after determining the intent of the framers but went on to assess the vitality of their conclusions today. Citing a number of empirical studies that raised concerns about the impact of smaller juries on group deliberation, the court held that the bill would be unconstitutional. Id. at 137.

legal principles, which are necessarily imbued with moral sense and values, to protect the rights of individuals against the government.<sup>7</sup>

Rather, the emphasis of this report is on the potentially devastating consequences of Judge Souter's theory of original intent if he were to use it to interpret the scope of individual rights guaranteed by the constitution. When the original Constitution and the Civil War Amendments, including the fourteenth amendment, were drafted, women were not considered

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<sup>7</sup> In the words of Chief Justice Hughes, written over half a century ago:

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a Constitution we are expounding; a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433 (1920), 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in light of what was said a hundred years ago.'

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934). See also Thornburgh v. ACOG, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("[T]his Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers."); H. Jefferson Powell, "The Original Understanding of Original Intent," 98 Harv. L. Rev. 885 (1985).

full citizens.<sup>8</sup> Contemporaneous interpretations of the Civil War Amendments denied their applicability to women.<sup>9</sup> Because the framers of the fourteenth amendment clearly were not concerned with sex-based discrimination, under an original intent analysis there is no place for women in the equal protection clause.

The Senate must inquire into Judge Souter's views on original intent and whether he would use this theory to evaluate a claim of sex discrimination under the equal protection clause. Because the doctrine of original intent is inconsistent with a heightened scrutiny standard for evaluating claims of sex discrimination, Judge Souter's views on original intent are critical to evaluating his commitment to the heightened scrutiny standard. Although he has not articulated the original intent theory in other cases,<sup>10</sup> its potential consequences for women are

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<sup>8</sup> When a woman married, her legal identity merged into that of her husband; she was civilly dead. She could not sue, be sued, enter into contracts, make wills, keep her own earnings, or control her own property. Her husband had the right to restrain her freedom and force her to engage in intercourse. 2 Blackstone's Commentaries 440, 442-444 (1803); See Williams, Reflections on Culture, Courts and Feminism, 7 Women's Rights L. Rptr. 175, 176-77 (1982).

<sup>9</sup> See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1873) (holding that a statute excluding women from the legal profession did not violate the Fourteenth Amendment).

<sup>10</sup> In a recent interview with Judge Souter published in The Massachusetts Lawyers Weekly, the paper reported him as viewing the Constitution as a living document, quoting him on the subject of original intent: "On constitutional matters, I am of the interpretist school. We're not looking for the original application, we're looking for the meaning here. That's a very different thing." Legal Times, Aug. 31-Sept. 3, 1990, p. 10. The relationship between this statement and the approach taken in Dionne must be carefully examined.

so significant that the Senate must be assured that he will not use this doctrine to limit the fourteenth amendment's protection against sex discrimination.

2. The Briefs Filed by the Attorney General's Office Under Judge Souter's Name in Helgemoe v. Heloon Directly Challenge the Appropriateness of the Heightened Scrutiny Standard for Sex Discrimination

In practice, the constitutional protection of women has been accomplished through the Court's use of a heightened scrutiny standard. Judge Souter's record as Attorney General directly calls into question his support for the application of heightened scrutiny to claims of sex discrimination.

While Judge Souter was Attorney General, he decided to appeal a federal trial court ruling that New Hampshire's "statutory rape" law -- a law that prohibits intercourse with a minor female regardless of whether she consents -- violated equal protection because it punished males but not females who engaged in sex with minors. See Nashua Telegraph, May 14, 1977. The brief filed by Judge Souter and an assistant attorney general in the Court of Appeals for the First Circuit primarily focused on arguing that the statute was constitutional under the intermediate scrutiny test. However, the brief took a passing swipe at intermediate scrutiny in arguing that the test was simply a variation on the lowest level of scrutiny, rational basis review:

The State submits that the Reed - Craig substantial relation test is merely a heightened form of the traditional rational basis test. It is not an independent and median-level standard. Rather, it

is a creation of the rational basis test, and on a graduated scale would fall much closer to that test than to the strict scrutiny standard.

Brief for Appellants, Meloon v. Helgemoe, No. 77-1197 (1st Cir. 1977) at 16. The Court of Appeals affirmed the trial court, holding the law unconstitutional. Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977).

The Attorney General's Office made its most vigorous attack on the intermediate scrutiny standard in its Supreme Court petition for certiorari.<sup>11</sup> The brief advocated limiting or even abandoning the heightened scrutiny standard:

In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale [sic] basis and strict scrutiny tests. This new standard lacks definition, shape or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so "diaphanous and elastic" as to permit subjective judicial preferences and prejudices concerning particular legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard. In all events, it presents the opportunity for the Court to correct a situation which invites subjective judicial judgments and possible abuses.

Petition for a Writ of Certiorari, Helgemoe v. Meloon, No. 77-1058 at 18-19, cert. denied, 436 U.S. 950 (1978) (emphasis added).

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<sup>11</sup> The petition, too, was filed under the names of then-Attorney General Souter's and an assistant attorney general. Whatever may have been the level of review he afforded the brief his office filed in the Court of Appeals in Helgemoe, it seems unlikely that a petition for certiorari filed in the United States Supreme Court would not have received his careful attention. This is confirmed by the fact that Attorney General Souter ran "a tightly-knit, tightly-run organization." See "Next AG Plans Little Expansion," Massachusetts Union Leader. (Dec. 28. 1975).

The Supreme Court denied certiorari but in 1980 ruled on an equal protection challenge to a similar statute from California, Michael M. v. Superior Court, 450 U.S. 464 (1981). The Court's opinion reaffirmed that heightened scrutiny was appropriate and upheld the law's gender classification finding that it was substantially related to important governmental objectives.

3. Judge Souter's Opinion in City of Dover Raises Concerns About His Willingness to Apply the Heightened Scrutiny Standard for Sex Discrimination

As a member of the New Hampshire Supreme Court, Judge Souter was bound by United States Supreme Court decisions that interpreted the scope of protection of individual rights under the federal Constitution. In several cases, Judge Souter briefly referenced the heightened scrutiny test for gender, see, e.g., State v. Heath, 523 A.2d 82 (N.H. 1986), but he has not applied it to evaluate a claim of sex discrimination.

However, in a dissenting opinion he authored in City of Dover v. Imperial Casualty & Indemnity Company, 1990 N.H. Lexis 39 (1990), a case that did not involve sex discrimination, Judge Souter called for reexamination of the state's "somewhat heightened scrutiny" test. This standard, which under state law applies to laws that restrict the right to recover in civil actions, see Carson v. Maurer, 424 A.2d 825 (N.H. 1980), is less rigorous than the federal standard for gender discrimination. While Judge Souter has not indicated whether he would reconsider the federal standard that applies to gender discrimination, the strong criticism in the Attorney General's petition for

certiorari in Helgemoe, as well as this dissent, raise concerns about his commitment to heightened scrutiny that must be examined during the hearings.

4. Judge Souter's Statements in Connection with United States v. State of New Hampshire Reflect a Lack of Understanding of the Nature of Discrimination Essential to the Proper Application of the Heightened Scrutiny Standard.

The Supreme Court's recognition in the 1971 case Reed v. Reed that sex discrimination must be accorded special scrutiny under the equal protection clause was central not only to the development of constitutional law, but also to the enactment and enforcement of such basic laws as Title VII of the 1964 Civil Rights Act (prohibiting employment discrimination on the basis of sex, race, national origin and religion);<sup>12</sup> Title IX of the 1972 Education Amendments, prohibiting sex discrimination in federally-funded schools; and the Equal Credit Act of 1973. These laws both implement the Supreme Court's interpretation of women as specifically protected under the equal protection clause and also build on the core principle that sex discrimination should be eliminated.

In the almost two decades since Reed was decided and these laws were passed, the Supreme Court has many times been faced with interpreting the scope of discrimination protections, both under the Constitution and statutes, and often these

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<sup>12</sup> Title VII was amended in 1972 to include public and professional employees within its ambit, specifically recognizing for the first time the special problems of sex discrimination which Title VII had to address. See 42 U.S.C. § 2000e-16.

interpretations are related.<sup>13</sup> Therefore, Judge Souter's record regarding his understanding of discrimination in the context of these anti-discrimination statutes is highly probative of his adherence to the fundamental equal protection principles in the Constitution.

In United States v. State of New Hampshire, the United States filed a complaint against the state of New Hampshire for failure to comply with EEOC regulations interpreting Title VII which required employers, including states, to file yearly reports documenting the race and gender composition of their workforces.<sup>14</sup> Before Judge Souter became Attorney General, a federal trial court ruled against the state. United States v. New Hampshire, No. 75-197 (D.N.H. Dec. 22, 1975). In 1976, when Judge Souter held the position of Attorney General, the state appealed the trial court's ruling.

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<sup>13</sup> The Supreme Court, for example, decided that both the Constitution and Title VII had the same meaning regarding the inclusion of pregnancy within the ambit of sex discrimination. General Electric v. Gilbert, 429 U.S. 125 (1976). Further, anti-discrimination statutes have been challenged as unconstitutional violations of the Equal Protection Clause. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding the constitutionality of a congressional set-aside program for minority businesses); Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990) (Five-to-four decision upholding the constitutionality of two congressionally-mandated FCC policies favoring minorities and women, although the constitutionality of the preference for women was not addressed).

<sup>14</sup> New Hampshire was the only state that failed to comply with these EEOC regulations. Washington Post, August 1, 1990.

In the brief filed with the First Circuit, then-Attorney General Souter argued<sup>15</sup> that the regulations went beyond the authority of Title VII, were unconstitutional under the equal protection clause, and violated other constitutional guarantees including the right to privacy. See Brief for Appellant, United States v. New Hampshire, No. 76-1018 (1st Cir. 1976).

First, the brief objected to the requirement for gathering statistics on the grounds that such data could be used to implement a quota system in violation of Title VII. Id. at 11. The First Circuit dismissed this argument, stating that the statistics were "highly useful" in investigating and proving discrimination and that "the possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data." United States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976). Second, the brief objected to the regulations on the grounds that they unreasonably exceeded the authority of Title VII. Brief for Appellant, United States v. New Hampshire, at 14. Again, the First Circuit disagreed:

We have no doubt but that the information sought by the EEO-4 form is both reasonable and fully consistent with the overall purpose of Title VII, viz. "to achieve

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<sup>15</sup> The available evidence suggests that Judge Souter was involved in the framing of the arguments on appeal to the First Circuit and Supreme Court: the name of Attorney General Souter and one assistant attorney general appear on both briefs, and that assistant has reported that Judge Souter was "supportive of and involved in the effort." Legal Times, August 27, 1990, at 10. In addition, then-Governor Thompson has stated that "I know [Judge Souter] did not discourage me" from pursuing the EEOC case to the Supreme Court. Washington Post, August 1, 1990.

equality of employment opportunities and remove barriers that have operated in the past..."

539 F.2d at 280 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

The final argument, also rejected by the Court of Appeals, was that the regulations violated the equal protection clause because they require an employer to be color-conscious rather than color-blind. Brief for Appellant, United States v. New Hampshire, at 38. The Court held that the regulations were consistent with Title VII's clearly constitutional purpose -- to achieve equality of employment opportunities. 539 F.2d at 281.

Despite the opinions of the federal district court and First Circuit Court of Appeals holding in favor of the United States, the Attorney General's office filed a petition for certiorari with the Supreme Court reiterating the arguments made in the First Circuit. The Court denied certiorari.

As Attorney General, Judge Souter personally expressed views consistent with the state's position in United States v. New Hampshire in a May, 1976, speech. At a commencement speech at a New Hampshire College, Judge Souter denounced the EEOC regulations as "affirmative discrimination," which he defined as "a policy whereby a person achieves eligibility for some service strictly by virtue of his ethnic background." In the same speech he asserted that affirmative action does not help those who need it, and government should not be involved in it: "there are some

things that government cannot do, and our whole Constitutional history is a history of restraining power."<sup>16</sup>

The briefs in United States v. New Hampshire and Judge Souter's comments on the EEOC regulations at issue in the case evidence a fundamental lack of understanding about the broad anti-discrimination purposes underlying Title VII. Without the ability to collect statistical information on the racial, ethnic and gender composition of the workforce, the EEOC would be unable to ascertain possible instances of discrimination and assure equal employment opportunity, as Bush nominee and EEOC Chair Evan Kemp has noted. See "Souter as State Official Opposed U.S. Racial Breakdown Rule," Washington Post, August 1, 1990, at A4. This evidence of Judge Souter's lack of understanding of discrimination and lack of commitment to its eradication, raise questions about his adherence to the fundamental equal protection guarantees of the Constitution.

5. Judge Souter's Opinion in State of New Hampshire v. Colbath Evidences a Lack of Understanding of the Nature of Sexual Stereotyping That is Essential to Application of the Heightened Scrutiny Standard for Sex Discrimination

Judge Souter's opinion in State of New Hampshire v. Colbath, 540 A.2d 1212 (N.H. 1988), raises questions about his ability to follow the Supreme Court's mandate that heightened scrutiny be applied "free of fixed notions concerning the roles and abilities of males and females," and free of stereotypes.

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<sup>16</sup> "Souter Raps Ethnic Preferment," Manchester Union Leader, May 31, 1976.

See Mississippi University for Women v. Hogan, 458 U.S. 717, 725 (1982).

In Colbath, Judge Souter atypically reversed a defendant's conviction<sup>17</sup> for aggravated felonious sexual assault based on the trial judge's instruction that evidence of the victim's behavior with men other than the defendant in a bar the night she was raped was irrelevant to the question of whether she consented to sexual intercourse with the defendant. Judge Souter held that the victim's behavior could be relevant to the issue of consent despite New Hampshire's rape shield law which, like its counterpart in forty-seven other states, precludes evidence of "[p]rior consensual sexual activity between the victim and any person other than the [defendant]," when offered to prove a sexual offense. 540 A.2d at 1215.

Rape shield laws have a dual purpose -- they protect a victim's privacy and help to assure that the jury considers only relevant information, free from the erroneous stereotypical belief that if a woman has engaged in sexual relations with other men in the past, she is more likely to have consented to sexual intercourse with the defendant. See Tanford and Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U.Pa.L. Rev. 544 (1980); Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L.Rev. 1 (1977). See also State v. Howard, 426 A.2d. 457 (N.H. 1981). However, rape shield laws

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<sup>17</sup> A review by the National Association of Criminal Defense Attorneys found that Judge Souter ruled in favor of the prosecution in all but five of 75 criminal cases.

are not an absolute bar to the admission of evidence of the victim's prior sexual activity. Under New Hampshire case law, as in most other states, in order to protect the defendant's constitutional right to confront the witnesses against him, the defendant "must be given an opportunity to demonstrate that the probative value [of the statutorily inadmissible evidence] in the context of [the] particular case outweighs its prejudicial effect on the prosecutrix." State v. Howard, 426 A.2d 457 (N.H. 1981). Judge Souter applied this test in Colbath to find that, under the facts presented, the defendant had sustained his burden and the rape shield law must give way to his right to present potentially-exculpatory evidence.

In reaching this conclusion, Judge Souter weighed only one of the rape shield law's purposes -- that of protecting the privacy of the victim -- against the probative effect of the defendant's evidence. Finding that the public nature of the victim's conduct in the bar placed it outside any privacy interest she might have, he proceeded to discuss at length the defendant's interest in presenting evidence of the victim's behavior. At the end of this discussion he concluded summarily that "little significance can be assigned here ...to a fear of misleading the jury," but failed to explain the basis for his conclusion. Id. at 1217. This failure ignores the second important purpose of the rape shield law -- to protect against an assumption by the jury, based on sexual stereotyping, that a woman who consents to sexual activity with one partner may be

found to have consented to sexual intercourse with the defendant. By focusing his discussion almost exclusively on the probative effect of the defendant's evidence, Judge Souter effectively assigned no role to, and gave no weight to, the potential for prejudicial effect on the jury that arises out of such sexual stereotyping. His apparent lack of understanding of the role that sexual stereotyping can play in jury deliberations does not bode well for his assessment of the role it can play in legislative classifications based on gender that, as a Supreme Court justice, he will certainly be required to review.<sup>18</sup> The Senate must assure that Judge Souter understands the effect of sex-based stereotyping on legislative judgments, and that such stereotyping cannot withstand heightened scrutiny under the equal protection clause's protection against sex discrimination.

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<sup>18</sup> See also In Re Opinion of the Justices, 530 A.2d 21 (N.H. 1987). In this case the New Hampshire Supreme Court, at the request of the legislature, issued an advisory opinion holding, under a rational basis test, that a proposed law prohibiting homosexuals from being foster or adoptive parents would not violate the equal protection clause, although its application to child care facility operators would violate equal protection. In upholding the validity of the statute's application to foster and adoptive parents, the court, including Judge Souter, based its decision on the stereotypical assumption that homosexuals are unsuitable parents despite, in the words of the dissent, "the overwhelming weight of professional study on the subject [that] concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents." Id. at 28.

Judge Souter has articulated legal theories and approaches which are antithetical to the application of the heightened scrutiny standard as we know it today. The burden is on Judge Souter to allay the concerns raised by his record.

**II. JUDGE SOUTER MUST DEMONSTRATE A COMMITMENT TO THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY THAT APPLIES TO PREGNANCY AND TERMINATION OF PREGNANCY, AS SHOULD ANY NOMINEE CONFIRMED TO THE SUPREME COURT**

The long line of cases recognizing a constitutionally-protected fundamental right to privacy stands for the clear proposition that decisions affecting marriage, childbirth, reproductive rights and family relationships are so fundamental and critical to self-determination that governmental interference must survive "strict scrutiny" judicial review. Under strict scrutiny, the government must demonstrate a compelling interest justifying its interference and that the interest is furthered by means which are the least restrictive on fundamental rights. The Supreme Court's application of the right to privacy to pregnancy and termination of pregnancy, including contraception, assures that its basic protections are fully available to women, as they are to men. Any nominee to the Supreme Court must have a commitment to these core constitutional protections for women guaranteed by the fundamental right to privacy.

**A. The Supreme Court Has Established a Constitutional Right To Privacy That Includes Contraception, Abortion and Pregnancy**

In a line of decisions stretching back more than half a century, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution. Decisions recognizing a fundamental privacy interest have forbidden governmental intrusion into marriage, Loving v. Virginia, 388 U.S. 1, 12

(1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Meyers v. Nebraska, 262 U.S. 390, 399 (1923).

The leading modern case first recognizing the constitutional right to privacy in reproductive decisions is Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Court held invalid a law prohibiting the sale or use of contraceptives, even by married couples. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court extended this right to unmarried persons and defined a constitutional right to privacy broad enough to include "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

Against this backdrop, the Court issued its decisions in Roe v. Wade and Doe v. Bolton. In opinions written by Justice Blackmun, the Court recognized that a woman's fundamental right to privacy includes the right to abortion, and thus any governmental interference with that right would be subjected to strict scrutiny. Under Roe, until the time a fetus is viable, in the beginning of the third trimester, the only state interest compelling enough to justify regulation of abortion is protection of the woman's health. The state's interest in fetal life only becomes a sufficiently compelling justification to interfere with a woman's fundamental right when the fetus is viable.

In Cleveland Board of Education v. LaFleur, the Supreme Court relied in part on the fundamental privacy right, articulated the year before in Roe, to protect pregnant women. Citing the long line of privacy decisions, the Court held that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." Id. at 631. Based on this reasoning and fact that the law created an "irrebuttable presumption" of a pregnant woman's incapacity to teach after her fourth month of pregnancy, the Court struck down the law. Id. at 644-48.

The application of the right to privacy to contraception, abortion, and pregnancy assures that its basic protections are available to women as well as men. However, women's right to privacy based on their unique reproductive capacity is under serious threat.

B. The Constitutional Privacy Rights Of Women Are Threatened

After Griswold and Roe were decided, the Supreme Court repeatedly struck down state laws which infringed on women's privacy rights. For instance, the Court invalidated laws prohibiting the sale of contraceptives to minors and limiting their distribution to licensed pharmacists, Carey v. Population Services International, 431 U.S. 678, (1977); laws restricting the availability of unemployment benefits for pregnant women, Turner v. Department of Employment Services; laws requiring that married women obtain their husbands' consent to have an abortion, Planned

Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); and laws requiring physicians to convey intimidating information designed to dissuade women from having abortions, Thornburgh v. ACOG, 476 U.S. 747 (1986).

However, with the changing composition of the Supreme Court, the assault on women's privacy rights -- and especially the strict scrutiny of governmental interference in contraception and abortion, including minors' access to abortion -- has intensified.

The Supreme Court's decision in Webster v. Reproductive Health Services was an unprecedented retreat from the long line of cases recognizing that contraception and abortion are included in the fundamental right to privacy, and thus any governmental interference with these rights must be subjected to strict scrutiny. The Missouri law at issue in Webster began with a preamble, which stated the legislature's "findings" that a human being's life begins at conception, defined as the time of fertilization; and "unborn children" have protectable interests in life, health and well-being. The preamble further directed that the laws of Missouri be interpreted to assure that "unborn children" have the same rights as all other persons in the state, within the limits imposed by the United States and Missouri Constitutions.

Chief Justice Rehnquist wrote for five justices in upholding the preamble, construing it as merely expressing the state's value judgment favoring childbirth over abortion. Since the

preamble by itself did not restrict the activities of the plaintiffs, these justices decided that only when Missouri uses the preamble to restrict an individual's actions would the Court determine whether the particular restriction was constitutional.

The four dissenting justices held that an assault on the fundamental privacy right to contraception and abortion was inherent in the preamble. According to the dissent, the preamble's definition of life as beginning at conception and conception as occurring at the time of fertilization unconstitutionally interferes with a woman's right to abortion and to use methods of contraception that can prevent implantation of the fertilized ovum, including the IUD, the "morning-after" pill, low-dosage oral contraceptives, and the French-produced drug RU-486. *Id.* at 3068, n.1, 3081. In the wake of Webster, laws proposed in other states have incorporated the Missouri definition of when life begins, with potentially devastating results for reproductive rights.

The preamble to the Missouri law at issue in Webster was enacted as part of a comprehensive law placing onerous restrictions on abortion, including a prohibition on the use of public facilities broadly defined or employees to perform abortions, a requirement of specific viability tests for abortions at twenty weeks of pregnancy, and a prohibition on the use of public funds for abortion counseling. Besides the

preamble, the Court upheld the prohibition on public funding, and the viability testing requirement.<sup>19</sup>

Chief Justice Rehnquist's opinion on these provisions -- joined by Justices White and Kennedy -- did not explicitly overrule Roe but undermined its foundation, by concluding that the viability testing requirement is "reasonably designed to ensure that abortions are not performed when the fetus is viable -- an end which all concede is legitimate -- and that is sufficient to sustain its constitutionality." Id. at 3058. This language suggests the plurality is applying rational basis review, the standard applied to rights granted only minimal constitutional protection, not fundamental rights like the right to privacy. Moreover, the plurality also concluded that there was no reason that the state's interest in protecting fetal life should come into existence only at the point of viability, referring to a "compelling interest" in protecting potential human life throughout pregnancy, from the moment of conception. Under this analysis, even if the rights to abortion and contraception remain in name fundamental rights, strict scrutiny is satisfied by the state's compelling interest in potential life from the very beginning of pregnancy and thus, any governmental interference with the rights could be upheld.

Justices O'Connor and Scalia did not join this part of the Court's opinion but for very different reasons. Justice Scalia

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<sup>19</sup> The prohibition on the use of public funds for abortion counseling was dismissed as moot and the Court did not rule on its constitutional validity.

argued that the plurality's reasoning had covertly overruled Roe, and denounced the failure to face squarely overruling Roe explicitly. In her separate opinion, Justice O'Connor argued that since the testing requirements aided in the determination of viability, they were within the state's authority under Roe. Seeing no conflict with Roe, she refused to join in what she saw as its unnecessary reconsideration. In the past, however, Justice O'Connor has supported the authority of states to enact restrictions which do not impose "an undue burden" on the right to choose, which she appears to define very narrowly to only include laws which impose "absolute obstacles" or "severe limitations." Thornburgh v. ACOG, 476 U.S. at 828 (O'Connor, J., dissenting). Thus, there are at least four Justices no longer applying the strict scrutiny protection of the rights to contraception and abortion included in the fundamental right to privacy.

Further, Supreme Court decisions issued last term threaten the right of young women to abortion through the imposition of rigid parental notification laws that Justice O'Connor held were not justifiable even under the minimal rational basis test. These cases, Hodgson v. Minnesota and Ohio v. Akron Center for Reproductive Health, stand in sharp contrast to prior Supreme Court cases interpreting minors' privacy rights to abortion. In the 1979 case, Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), the Supreme Court struck down a Massachusetts law requiring a minor to obtain parental consent to her abortion, or

judicial authorization for the procedure but only after notifying her parents of her decision. The Court declared that a state could only require parental consent if it provided an alternative procedure whereby a minor could obtain judicial authorization for an abortion without parental consultation, either by showing that she is mature or that an abortion would be in her best interests. Because the Massachusetts law allowed parents to completely block a minor's access to abortion by blocking her access to court authorization, the Court struck down the law. Id. at 647.

Later Supreme Court cases focused on assuring that laws restricting minors' access to abortion contained judicial bypass procedures that complied with the Bellotti II framework. For example, in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), Justice Powell, writing for a six-justice majority, struck down a parental consent law because the City failed to expressly create the Bellotti II bypass procedure. And in Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983), the Court upheld a Missouri parental consent law, finding that the judicial bypass procedure satisfied the Bellotti II requirements by assuring a confidential and expeditious judicial decision.

However, Hodgson v. Minnesota and Ohio v. Akron Center for Reproductive Health signal a threatening departure from the Court's previous focus on assuring that minors for whom parental notification is detrimental or impossible have a viable judicial alternative. In Hodgson, four members of the Court -- Justices

Kennedy, Rehnquist, Scalia and White --voted to uphold a Minnesota law requiring two-parent notification without a judicial bypass procedure, despite the overwhelming evidence that the law had disastrous effects on young women, especially those in homes where parents were abusive and in the vast number of single-parent households, where two-parent consultation was inappropriate or even impossible. Justice O'Connor voted to uphold the law, even though she found that it was irrational to require two-parent notification, as long as there was a judicial bypass procedure for minors who found parental consultation impossible, detrimental or inappropriate.

Thus, there are four justices who are prepared to accept the absence of any judicial bypass procedure in parental notification laws, despite the fact that for some young women the judicial bypass is absolutely critical to their ability to exercise their right to abortion.

It is clear that the next appointee to the Supreme Court will play a pivotal role in determining the continued constitutional protection of women's fundamental right to privacy, including the rights to contraception, abortion and minors' access to abortion. Any nominee must support the inclusion of these rights in the fundamental right to privacy so that this core constitutional protection is available to women.

C. Judge Souter's Record Raises Questions About His Commitment to The Fundamental Right To Privacy In General, and As Applied To Women's Reproductive Rights In Particular

Although there are limited aspects of Judge Souter's record which are relevant to the fundamental right to privacy, they raise serious questions about his commitment to the right and to strict judicial scrutiny of laws that interfere with it. Judge Souter's record on abortion is particularly troubling because it suggests a lack of respect and support for the fundamental nature of this right. Many of his writings focus on the moral concerns of those on the periphery of a woman's reproductive decision but make no mention of the rights of women themselves.

1. The Original Intent Theory, as Reflected In Judge Souter's Dissent In *Dionne* Is Inconsistent With A Constitutional Right To Privacy

We have discussed Judge Souter's "original intent" theory, articulated in his dissent in *Dionne*, and its inconsistency with the heightened scrutiny standard for sex discrimination under the equal protection clause. See discussion *supra* at section I-C-1. For similar reasons, it is a theory which may leave women and men without constitutional protection of the fundamental right to privacy. Because the fundamental right to privacy, including its application to pregnancy, contraception and abortion was not explicitly articulated by the framers of the Constitution, an original intent analysis could suggest no constitutional right to privacy at all.

Proponents of original intent argue that the appropriate forum for the resolution of individual rights that the framers did not intend to address is the political arena, an arena unchecked by constitutional protections and guarantees. The implications for women's privacy rights are severe -- access to contraception and abortion would depend on where a woman lives or whether she has sufficient funds to travel to a state with non-restrictive laws. As our country's history before Roe v. Wade makes clear, a patchwork of laws restricting women's reproductive rights would have devastating effects on women's lives.

Judge Souter must be examined to determine if he would apply the "original intent" theory to the constitutional right to privacy, including the protection of pregnancy, contraception and abortion.<sup>20</sup> Any nominee to the Supreme Court must support strict scrutiny constitutional protection of the fundamental privacy right generally, and the application of that right to pregnancy and the termination of pregnancy in particular.

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<sup>20</sup> When Judge Souter was Attorney General, his office did assert a constitutional right to privacy in New Hampshire v. United States. He argued that EEOC regulations requiring employers to file forms identifying the racial composition of the workforce violated the employees' right to privacy. This novel argument was rejected out of hand by every court that considered it. See discussion of this case supra at section I-C-4.

2. Judge Souter's Writings and Statements On Reproductive Rights Raise Questions About His Commitment To The Right To Privacy As It Applies To Abortion
  - a. Judge Souter's Concurrence in Smith v. Cote, And The Majority Opinion He Joined, Reflect A Distancing From Roe v. Wade That Raises Concern About His Commitment To The Privacy Right To Abortion

In Smith v. Cote, 513 A.2d 341 (1986), the New Hampshire Supreme Court held that a woman could maintain an action against her obstetrician for failing to test for rubella and to warn her of possible risks to the fetus resulting from the illness, thus depriving her of information that would have been relevant to her decision about whether to continue the pregnancy. The majority opinion, in which Judge Souter joined, held that physicians who provide testing and advice relevant to the constitutionally-guaranteed right have an obligation to adhere to reasonable standards of professional performance, which include advising women of information that might lead to abortion. However, in so ruling the court explicitly distanced itself from the constitutionally-protected right to abortion articulated in Roe:

As we indicated above, we believe that Roe is controlling; we do not hold that our decision would be the same in its absence.

Id. at 346.

Notwithstanding the disparate views within society on the controversial practice of abortion, we are bound by the law that protects a woman's right to choose to terminate her pregnancy. Our holding today neither encourages nor discourages this practice . . . .

Id. at 348.

Not only did Judge Souter join the majority's opinion -- and its failure to support Roe -- but he also added his own separate opinion focusing on an issue that the majority stated it did not address because it was "not raised, briefed or argued in the record" -- the proper course for physicians who have moral hesitations about abortion:

The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure. The defensive significance, for example, of timely disclosure of professional limits based on religious or moral scruples, combined with timely referral to other physicians who are not so constrained, is a question open for consideration in any case in which it may be raised.

Id. at 355 (Souter, J., concurring).

His concurring opinion is silent on the rights and concerns of women. Judge Souter's decision to highlight only the concerns of doctors with moral qualms about abortion, in a case where it was clearly unnecessary, is extremely troubling, especially when coupled with his and the majority's reluctant acceptance of Roe.

b. The Brief Filed By Then-Attorney General Souter's Office In *Coe v. Hooker* Reflects a View That The Abortion Rights Of Women May Be Limited By The Moral Objections Of Others That Threatens The Privacy Right To Abortion

Additional evidence of Judge Souter's views of abortion as a privacy right arises in *Coe v. Hooker*, a case involving the obligation of the state to fund abortions for poor women. The federal district court enjoined enforcement of a state regulation limiting Medicaid funding of abortions to cases that are "medically necessary to preserve the life or health of the woman."<sup>21</sup> In arguing against Medicaid funding, the brief of the Attorney General's office relies in part on the argument that because "thousands of New Hampshire citizens possess a very strongly-held and deep-seated belief that abortion is the killing of unborn children," their strongly held moral belief could constitutionally interfere with "a women's otherwise unrestricted freedom to decide to have an abortion." Brief of Appellants at 41.<sup>22</sup> This statement is at odds with a constitutionally-

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<sup>21</sup> Judge Souter did not participate in the case at the trial stage, when the injunction was entered. *Coe v. Hooker*, 406 F. Supp. 1072 (1976), but was Attorney General at the time the case was appealed. The name of Souter and one assistant attorney general appear on the brief. See Appeal of Decision of District Court of New Hampshire, Brief of Appellants, *Coe v. Hooker*, No. 75-206 (1st Cir. 1976). The assistant attorney general who argued *Coe* has stated that Judge Souter had little knowledge of the case. See Los Angeles Times (July 31, 1990). This is inconsistent with other information to the effect that he ran a "tightly-knit, tightly-run organization." See "Next AG Plans Little Expansion," Manchester Union Leader (December 28, 1975). Judge Souter's participation in this brief must be examined.

<sup>22</sup> In *Maier v. Roe*, 432 U.S. 464 (1977), the United States Supreme Court held that a state could constitutionally refuse to fund abortions, not because citizens' moral opposition was grounds for infringing on the right, but rather as an expression

protected fundamental right to abortion, for it has never been held that moral beliefs of the public rise to the level of a compelling state interest. In fact, the very purpose of a constitutional fundamental right is to assure that politics and popular views of the moment cannot infringe on the right.

c. Judge Souter's Opposition To Repeal of New Hampshire's Unconstitutional Laws Criminalizing Abortion Using Anti-Abortion Rhetoric Evidences A Lack Of Commitment To The Privacy Right To Abortion

Judge Souter himself has been quoted as using language commonly employed by opponents of a constitutionally-protected right to abortion. In a 1977 newspaper interview, then-Attorney General Souter in discussing why he opposed a bill that would fully repeal unconstitutional state laws criminalizing abortion stated that "[q]uite apart from the fact that I don't think unlimited abortions ought to be allowed . . . I presume we would become the abortion mill of the United States."<sup>23</sup> The report of the interview suggests that Judge Souter was concerned about the possibility that after repeal New Hampshire law would allow unrestricted post-viability abortions. Id.

Yet, while expressing concern about the need for restrictions on post-viability abortion, the interview with then-

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of "a value judgment favoring childbirth" which did not infringe on the basic right. Id. at 474.

<sup>23</sup> See "Bill is seen making NH an 'Abortion Mill'", Manchester (NH) Union Leader, May 19, 1977. Then-Governor Thomson has reportedly said that he assumes Souter was speaking for himself, but the reporter who conducted the interview thought he was speaking on behalf of the Governor. See "Souter Opposed Unlimited Abortion," Concord Monitor, August 6, 1990.

Attorney General Souter contains no statements from him reflecting support for the general privacy-based right, even pre-viability. Nor does the account contain any statement of support for the Supreme Court decisions which invalidated the state laws at issue. It is important that Judge Souter's role in the state's failure to repeal the criminal abortion statutes be explored, to determine its bearing on his commitment to the privacy-based right to abortion.

d. Judge Souter's Letter To The New Hampshire Legislature Reflects A Lack Of Understanding About The Significance Of Judicial Bypass To The Exercise Of The Privacy Right To Abortion By Minors

Finally, a letter that Judge Souter wrote while on the superior court to the New Hampshire legislature suggests a lack of commitment to the fundamental privacy rights of women, and especially young women. The New Hampshire legislature had pending before it a bill requiring a minor to obtain parental consent or judicial authorization before she could have an abortion. At the request of a member of the legislature,<sup>24</sup> Judge Souter wrote expressing the opinion of the court on the bill. He focused only on the bill's judicial bypass provision, raising the following objections, among others:

First, it would express a decision by society, speaking through 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

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<sup>24</sup> The letter was apparently solicited by a pro-choice legislator who hoped that the judges would "help kill the bill" and this in fact is what happened. See "Souter Note Helped Sink '81 N.H. Bill on Abortion," The Boston Globe, July 26, 1990.

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.

. . .

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.

Letter, dated May 13, 1981, from Judge Souter to Roma H. Spaulding, Chairman of the House Committee on Health and Welfare.

The letter has troubling implications for women's privacy rights. With four justices on the Supreme Court prepared to eliminate the judicial bypass procedure in parental notification laws, Judge Souter's discomfort with judicial involvement in protecting minors' fundamental rights suggests that he may be the fifth vote to eliminate the bypass altogether. Yet, the judicial bypass procedure is an absolutely critical safeguard for many young women who, without a judicial alternative, could not exercise their fundamental privacy right to abortion. Moreover, the letter reveals a very limited vision of the proper judicial role in protecting the fundamental right to abortion of young women. According to Judge Souter, because the issue is a difficult moral one and there may not always exist clear rules and guidelines, judges should not be involved.<sup>25</sup> Judge Souter's reluctance to involve judicial resources in assuring that minor

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<sup>25</sup> Judge Souter's complaint that the bill does not provide adequate standards is without merit. The bill uses the Bellotti II standard that a judge must determine if a minor is mature or if an abortion would be in her best interests. These standards are frequently used by judges in deciding cases involving minors. In a custody case, Judge Souter had no difficulty in determining whether an award of custody to the mother or the father would be "most conducive to [the son's] benefit." See Morin v. City of Somersworth, 551 A.2d 527 (N.H. 1988).

women have access to abortion does not bode well for his willingness to provide strong constitutional protection to women's fundamental privacy rights.

\* \* \*

Any nominee to the Supreme Court must support the fundamental constitutional right to privacy and the application of the right to women through cases recognizing a fundamental right to contraception, pregnancy and abortion, including minors' access to abortion. Judge Souter's record raises serious concerns about his respect for women's privacy rights that he must allay during the Senate hearings. Unless these concerns are allayed, Judge Souter should not be confirmed.

**CONCLUSION**

While much of Judge Souter's record has little bearing on his views of the key constitutional principles of equal protection and privacy as they apply uniquely to women, there are disturbing aspects of his record which evidence a lack of commitment to these core protections. Because they are the two bedrock constitutional principles protecting women against unjust government laws and policies directed against them, Judge Souter should not be confirmed to the Supreme Court unless he can dispel concerns raised by those disturbing aspects of his record. This country can ill afford to lose the progress made toward equality and individual rights and dignity for women during the last twenty years since the Supreme Court's recognition of the core principles at issue in this nomination.

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## SALT Statement on the Confirmation of David H. Souter

The confirmation of anyone to take the seat of Justice William Brennan is an awesome undertaking. This choice will profoundly affect the quality of justice and life in this nation as well as the capacity of our Supreme Court to merit worldwide attention for its role in protecting human rights. The Board of the Society of American Law Teachers calls upon the Senate Judiciary Committee and the Senate to judge all nominees to the Supreme Court according to whether they have demonstrated a commitment to equal justice and empathy for the experience of discrete and insular minorities. This standard is consistent with the crucial role of the Court as enforcer of the Bill of Rights and protector of the rights of the less advantaged, the different and the dissident.

Serious questions about qualifications of Judge David Souter arise from his record as Attorney General and Judge of the New Hampshire Supreme Court. Significant questions remain unanswered after two days of hearings. The record cries out for an in depth inquiry. Among the issues to be addressed are:

- the principles that underpin his view of the right of privacy beyond the concept of marital privacy;
- his understanding of the complexity of race and gender discrimination;
- his views on discrimination against lesbians and gays;
- issues of separation of church and state;
- questions about the power of Congress to declare war, and;
- the inconsistency of his refusal to discuss anything he defines as touching upon Roe v. Wade, when he has been willing, by contrast, to discuss other legal issues of immediate interest, such as the death penalty, the Powell Commission recommendations and many decisions from last year's Supreme Court term.

Judge Souter's record raises serious questions about his understanding of the poor and the impact of governmental policy on their lives.

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**POSITION PAPER OF THE ASSOCIATION FOR OBJECTIVE LAW  
 ON THE NOMINATION OF DAVID H. SOUTER TO THE SUPREME COURT OF THE UNITED STATES**

Throughout this confirmation process, the focus of almost every organization, no matter where on the political or jurisprudential spectrum it falls, has been on the question of what David H. Souter should reveal about his beliefs. Many on the political left have demanded that Judge Souter state his positions on specific issues, such as abortion. Many on the political right disagree, maintaining that at most, Judge Souter may properly be asked his position only on broader topics, such as "privacy" and "judicial activism", they praise Judge Souter as having an "open mind" on specific issues

The position of the Association for Objective Law is different: Judge Souter must be questioned probingly on fundamental issues, but the fundamental issues are not issues on the level of abortion, judicial activism or even privacy. The fundamental and crucial issue is David Souter's view on individual rights. If David Souter is to be confirmed, he must have a view on this issue, and his view must be revealed.

A nominee for Justice of the Supreme Court of the United States should be asked if his vision of individual rights is the one on which the United States is grounded. Under this view, rights arise out of the nature of man; they are not gifts or permissions, and may not be withdrawn for any reason. They are absolute; no invasion of a right may be justified by "balancing" against a so-called "public interest" or "government interest." Indeed, the only proper purpose of government, and of laws, is to protect the rights of individuals. This principle is crystallized in the Declaration of Independence: "To secure these rights, governments are instituted among men. . . ." For a judge to express and implement these principles is not "judicial activism." In fact, it is unacceptable for a judge to have an "open mind" on such principles. They are not optional.

Statements on narrower, more concrete issues, such as abortion, or the right of privacy, will of course be revealing. But statements on individual rights as such are infinitely more revealing, as the hearings on Robert Bork's nomination made chillingly clear. To the extent that a judge is consistent, his philosophy will determine and make predictable his view on every specific issue coming before the court. Bork believed that there are no rights, only what the political majority writes down as permissions. The "majoritarian" principles Bork espoused are fundamentally opposed to individual rights, and therefore Bork was properly adjudged unfit to serve as a Supreme Court Justice on the basis of his philosophical approach.

What is David Souter's philosophy of individual rights? His supporters appear to believe that confirmation would be doubtful if Judge Souter revealed his views. But for the reasons stated above, a nominee who refuses to state his fundamental principles should be immediately rejected. Moreover, majority and dissenting opinions written by Judge Souter as a state court judge raise many questions. There is more to be seen in these opinions than a passionless, antiseptic, "strict construction" approach or a hard-line tendency towards criminals. The writings suggest an acceptance of the notion that rights may be "balanced," and of the notion that rights may be overridden by "public interests." There is even some suggestion that, like Robert Bork, Judge Souter believes that rights may be voted away by the majority. See, e.g., New Hampshire v. Koppel, 499 A.2d 977, 984-85 (1985); Cole v. Combined Insurance Co. of America, 480 A.2d 178, 180 (1984).

It is terribly important that David Souter state forthrightly and precisely his view of individual rights. The fate of our freedom should not be at the mercy of hidden standards.

\* \* \*

The Association for Objective Law is a national organization formed in 1988. Its members are lawyers, law students and others. Its purpose is to advance Objectivism, the philosophy of Ayn Rand, as the basis of a *proper* legal system. TAFOL currently has members in some 30 states and 7 foreign countries.

**JUDGE DAVID SOUTER'S RECORD  
ON  
WOMEN'S CONSTITUTIONAL AND LEGAL RIGHTS:  
CAUSE FOR SERIOUS CONCERN**

**A Women's Legal Defense Fund Report**

**September 10, 1990**

DAVID SOUTER'S RECORD ON WOMEN'S LEGAL AND CONSTITUTIONAL RIGHTS:  
CAUSE FOR SERIOUS CONCERN

Introduction:

This report discusses the Senate's role in examining and confirming Supreme Court nominees, and analyzes Judge David Souter's record in four key areas of particular concern to women: constitutional protections against gender discrimination, equal employment opportunity enforcement measures, rights to privacy and reproductive freedom, and freedom from crimes of sexual violence.

At a minimum, a Supreme Court nominee must demonstrate his or her adherence to the law's most basic guarantees of individual rights and equality. After reviewing Judge Souter's record, we cannot conclude that he subscribes to key constitutional and legal principles that protect women against discrimination and guarantee their fundamental rights to privacy and reproductive freedom. Unless Judge Souter offers adequate assurances of his commitment to protecting the legal rights of women, we will oppose his confirmation as a Justice of the Supreme Court.

The Senate has a constitutional obligation and a public responsibility to examine Supreme Court nominees as to their views on the Constitution, individual rights, and the role of the Court.

Because of its constitutional mandate to "advise and consent," the Senate has both the right and the duty carefully to

examine candidates for life tenure on the federal bench. Without question, this obligation assumes particular significance with respect to Supreme Court nominees, since at stake is the composition of "the final arbiter of those issues that most deeply divide our citizens from one another."<sup>1</sup> Senator Strom Thurmond underscored the gravity of this duty: "[T]he Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of prospective Justices or Chief Justices as it relates to broad issues confronting the American people and the role of the Court in dealing with these issues."<sup>2</sup>

Senator Joseph Biden, Chairman of the Senate Committee on the Judiciary, has carefully chronicled the Senate's historic willingness to undertake searching inquiry into nominees' views of the Constitution, individual rights, and the role of the Supreme Court;<sup>3</sup> such examination has led to the withdrawal, rejection, or indefinite postponement of nearly one-fifth of all nominees.<sup>4</sup>

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<sup>1</sup> Testimony of Shirley Hufstedler before the Senate Committee on the Judiciary, September 23, 1987.

<sup>2</sup> Hearings on the Nomination of Abe Fortas and Homer Thornberry before the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 180 (1968); see also 133 Cong. Rec. S10,526 (July 23, 1987).

<sup>3</sup> 133 Cong. Rec. S10,522-29 (1987).

<sup>4</sup> Of nearly 150 Supreme Court nominations, 28 have been rejected, withdrawn, or indefinitely postponed because of the Senate's opposition. David O'Brien, Judicial Roulette: Report of the Twentieth Century Fund's Task Force on Judicial Selection at 66-67 (1988); see also Laurence Tribe, God Save This Honorable

Moreover, constitutional law scholars urge that this scrutiny is fundamentally necessary to the preservation of our constitutional framework. As Professors Phillip Kurland and Laurence Tribe have written, "The Republic may demand -- and its Senators ought therefore to assure -- that its life tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process."<sup>5</sup>

The nomination of David Souter to the Supreme Court thus calls for the Senate's careful scrutiny of his commitment to equal protection and individual rights, including constitutional and legal protections for women. The Senate should require that Judge Souter resolve any doubts and ambiguities as to his views on these subjects. Given the Court's critical role in deciding the most important questions of law and policy, Judge Souter -- as a nominee for lifetime appointment -- must ultimately bear the burden of establishing his qualifications.

Judge Souter's public record raises serious concerns about his commitment to protecting the legal rights of women.

From Assistant Attorney General to Associate Justice for the state supreme court, Judge Souter has spent the last 22 years as a public servant; yet his public record on issues of bedrock importance to women is surprisingly spare. We find it remarkable

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Court (1986).

<sup>5</sup> Letter to the Senate Judiciary Committee, June 1, 1986.

that -- over the course of more than two decades as the state's advocate and jurist -- Judge Souter apparently has published no speeches, articles, or other writing on pressing issues of law and policy. Clearly he did not take advantage of the opportunity afforded him as a public official to promote individual rights and equal opportunity.

Consequently, what we know about Judge Souter's fitness to serve on our highest Court comes only from his judicial opinions and his actions as state attorney general. This record is extremely disturbing.

As discussed below, Judge Souter's record raises serious questions as to his acceptance of well-established American jurisprudence, including constitutional and legal protections against gender-based discrimination, as well as affirmative measures to redress past abuses. Nor are we convinced that the nominee recognizes women's constitutional rights to reproductive freedom and the importance of securing their freedom from crimes of sexual violence.

During the confirmation process, we will be looking for Judge Souter's recognition of a fundamental right to privacy that encompasses reproductive freedom -- including a woman's right to choose contraception and abortion. His recognition should embrace traditional Supreme Court analysis of this privacy right -- holding that any restrictions on such rights are constitutionally impermissible unless proved necessary to a compelling state interest. In any event, he must provide

assurances that he will not dilute the protections now afforded women by Roe v. Wade.

Judge Souter must also demonstrate that he is willing to strike down invidious gender-based classifications as violative of the Constitution's guarantees of equal protection. He must affirm his commitment to the law's safeguards of equal employment opportunity, including affirmative measures proven effective in battling on-the-job discrimination. And, he must provide adequate assurances that he will scrupulously uphold the law's protections against crimes of sexual violence.

The task before the Senate Judiciary Committee is an urgent one, as a lifetime appointment to the Supreme Court requires the fullest review. The confirmation process must fill in the gaps in Judge Souter's record and scrutinize its more troubling elements. As part of this process, the Senate must ascertain Judge Souter's position on these issues of our specific concern: equal protection, employment discrimination, the right to privacy -- including the right to choose abortion -- and freedom from crimes of sexual violence. Unless Judge Souter can clarify his views sufficiently to overcome the disturbing tenor of his record, he should not be a member of the Supreme Court.

Our major areas of concern are discussed below.

1. Judge Souter's challenge of the Supreme Court's heightened scrutiny standard -- which has often proved successful in eradicating gender discrimination -- raises serious questions as to his willingness to strike down invidious sex-based legal classifications as violative of the Constitution's equal protection guarantees.

Over the course of nearly 20 years, the Supreme Court has consistently held that sex-based classifications require careful scrutiny under the Fourteenth Amendment's Equal Protection Clause.<sup>6</sup> The Court recognized that such scrutiny is necessary since "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."<sup>7</sup>

Thus, the Court has repeatedly ruled that sex-based classifications are unconstitutional unless they "serve important governmental objectives [that are] substantially related to achievement of those objectives."<sup>8</sup> This heightened scrutiny has proved critically important in battling sex discrimination. As Professor Tribe has noted, "Every law student learns that only the Supreme Court's development of much more closely structured

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<sup>6</sup> E.g., Craig v. Boren, 429 U.S. 190 (1976); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

<sup>7</sup> Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

<sup>8</sup> E.g., Craig v. Boren, 429 U.S. at 197. This approach is known variously as "heightened" or "middle-tier" scrutiny because it is more rigorous than the "rational-basis" or "minimal" scrutiny that evaluates legislative enactments with great deference, requiring only that they be "reasonable." Even more unyielding, however, is "strict scrutiny," the standard of review applied by the Court to race-based classifications or classifications that infringe upon fundamental rights.

forms of scrutiny of laws based on sex and race has led us predictably toward equality."<sup>9</sup>

Constitutional experts agree that "[i]t is clear that when the Supreme Court struck down sex discrimination in medical education and in other areas, it has done so only by applying a more rigorous standard. . . .For a great many years, [the rational basis test] was in essence the test that led to the upholding of almost all kinds of sex discrimination."<sup>10</sup> In fact, "the Supreme Court struck down not one single statute distinguishing between the sexes in the entire time it applied [the rational basis] standard to such cases."<sup>11</sup> Under this minimal standard of review, for example, the Court upheld the constitutionality of statutes excluding women from jury service, as well as laws preventing women from working as bartenders or in restaurants late at night.<sup>12</sup>

In contrast, the Court's development of heightened scrutiny analysis has proved enormously effective in battling blatant and harmful discrimination: "The Supreme Court's recognition that gender discrimination is presumptively wrong has had a tremendously positive impact on the lives of women in this

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<sup>9</sup> Testimony before the Senate Judiciary Committee, September 22, 1987.

<sup>10</sup> Id.

<sup>11</sup> Testimony of Professor Wendy Williams before the Senate Committee on the Judiciary, September 23, 1987 (emphasis in original).

<sup>12</sup> Hoyt v. Florida, 368 U.S. 57 (1961); Goesart v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

country. Under the Court's direction, the federal courts have invalidated dozens of laws excluding women from wage work and public life and devaluing the wages and benefits they receive."<sup>13</sup>

On at least two occasions, however, Mr. Souter has questioned heightened scrutiny analysis, preferring the more deferential rational basis standard (or "minimal scrutiny") instead. His views cast doubt on his commitment to eradicating invidious sex-based discrimination.

As state attorney general, Mr. Souter filed a brief before the First Circuit Court of Appeals that expressly rejected the notion that gender-based classifications are subject to heightened scrutiny.<sup>14</sup> Meloon v. Helgemoe involved a defendant's equal protection challenge to his conviction under a statute that held a male criminally liable for sexual intercourse with an underage female.

The Souter brief argued that the statute's concededly gender-based classification should not be subjected to a distinctly middle-tier level of scrutiny and, therefore, that it should be allowed to stand. After recounting the development of the Supreme Court's equal protection jurisprudence, the Souter

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<sup>13</sup> Testimony of Professor Sylvia Law before the Senate Committee on the Judiciary, September 23, 1987.

<sup>14</sup> Brief for Raymond Helgemoe and the State of New Hampshire, Meloon v. Helgemoe, 564 F.2d 602, cert. denied 436 U.S. 950 (1st Cir. 1977) (No. 77-1197).

brief concluded that sex-based distinctions were entitled to little more than rational basis scrutiny:

"The State submits that the Reed-Craig substantial relation test is merely a heightened form of the traditional rational basis test. It is not an independent and median-level standard. Rather, it is a creature of the rational basis test, and on a graduated scale would fall much closer to that test than to the strict scrutiny standard."<sup>15</sup>

The Court of Appeals ruled against the state and held the statute unconstitutional. Judge Souter then even more affirmatively challenged the validity of heightened scrutiny in petitioning the Supreme Court for certiorari. The Souter petition urged the Court to reconsider -- and even abandon -- its standard for evaluating gender-based distinctions:

"In sum, this Court has created a new equal protection test which resides somewhere in the 'twilight zone' between the rationale [sic] basis and strict scrutiny tests. This new standard lacks definition, shape, or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so 'diaphanous and elastic' as to permit subjective judicial preferences and prejudices concerning particular legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard."<sup>16</sup>

As a judge, Souter has not had an opportunity to rule on a gender-based equal protection challenge. But, just a few months ago, Judge Souter again expressed difficulty with middle-tier scrutiny, albeit in a context other than that of sex

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<sup>15</sup> Id. at 16.

<sup>16</sup> Petition for Certiorari for Raymond Helgemoe and the State of New Hampshire at 18-19, Meloon v. Helgemoe, supra, (1978) (No. 77-1058) (emphasis added).

discrimination. City of Dover v. Imperial Casualty & Indemnity Co.<sup>17</sup> applied the state's middle-tier level of review to evaluate the constitutionality of a municipal immunity statute. Dissenting from the majority's holding of unconstitutionality, Judge Souter argued that the majority had misapplied the state's middle-tier scrutiny, in that it had not been sufficiently deferential to the legislature's classification. In his discussion of the standard, Souter argued that it

"suffers from a proven susceptibility to confusion with other standards of equal protection review . . . . Although the federal judiciary, like this court, has subsequently tried to use Royster's formulation to provide 'somewhat heightened' middle tier scrutiny, the very opinions cited in Carson as so applying it have reverted to type, as it were, by lapsing into rational basis terminology."<sup>18</sup>

Judge Souter's dissent thus echoed his earlier brief in suggesting that middle-tier scrutiny is really little more than minimal scrutiny, and intimating that a distinctly articulated middle-tier review is difficult, if not impossible, to apply.<sup>19</sup>

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<sup>17</sup> 1990 N.H. Lexis 39 (1990).

<sup>18</sup> Id. at 24-25 (citations omitted).

<sup>19</sup> However, in an earlier decision, Judge Souter noted federal courts' use of heightened scrutiny to evaluate discriminatory statutes. In rejecting an equal protection challenge to a statute limiting the deposition discovery rights of defendants accused of crimes against victims under sixteen years of age, Souter wrote that "the distinction in question does not rest on gender or legitimacy as to entitle the defendant to heightened scrutiny under the federal standard." State v. Heath, 523 A.2d 82, 88 (1986).

Since Judge Souter had no opportunity to evaluate a sex discrimination claim as a judge, we are unable to conclude whether this mention of heightened scrutiny demonstrates his acceptance of the analysis as necessary in eliminating discrimination, or mere recitation of existing federal precedent.

As the state's advocate, Judge Souter's willingness to have gender-based classifications reviewed under merely "a creature of the rational basis test" alarms us. Even more unsettling was his suggestion that the Court retreat from heightened scrutiny of such distinctions. His recent expression of judicial discomfort with the difficulty in applying middle-tier review does nothing to dispel these concerns.

Judge Souter's record thus gives us reason to doubt his willingness to apply the Court's equal protection jurisprudence in this critical area -- and, consequently, his readiness to invalidate statutes that discriminate on the basis of sex. His writings suggest that he might evaluate classifications by gender with little more than rational basis scrutiny -- a standard clearly inadequate for uprooting invidious discrimination. As history has taught us all too painfully, courts have used the lesser rational basis test to uphold gender-based distinctions that disable women from full participation in political, business, and economic arenas.

The Senate must further inquire into Judge Souter's willingness to strike down gender-based distinctions as violative of constitutional guarantees of equal protection. Absent his

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Nor are we able to analyze how he would actually undertake equal protection review of sex-based classifications -- i.e., whether his evaluation of such classifications, even if in the name of heightened scrutiny, would prove rigorous or deferential. For these reasons, Judge Souter's dicta in Heath offers us little guidance.

firm commitment to eliminating invidious sex-based classifications, Judge Souter should not be confirmed.

2. As state attorney general, Judge Souter actively opposed measures designed to enforce guarantees of equal employment opportunities. In challenging Equal Employment Opportunity Commission regulations, Mr. Souter's arguments revealed a fundamental misapprehension of Title VII and the role of the EEOC in achieving equal employment opportunity.

Although Mr. Souter -- as Attorney General -- appeared as counsel on all briefs filed by the state, they were often actually prepared by one of his Assistant Attorneys General. Nevertheless, Mr. Souter bore ultimate responsibility for the state's arguments. As Souter himself remarked, "At no time would I give testimony with which I disagree. And it would be irresponsible for the attorney general to support any state agency if he felt what they were doing was clearly wrong."<sup>20</sup>

Moreover, Souter was reluctant to expand the size of his relatively small staff for fear of relinquishing some measure of control: "I'm probably going to surprise you but I don't think it should be expanded. . . .I personally don't want to see [the staff] get any bigger than it has to be. When you talk about 20 or 30 lawyers, you talk about independent judgment. It can't be a tightly-knit, tightly-run organization."<sup>21</sup> Thus, it can be

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<sup>20</sup> "New Attorney General Said 'Lawyer's Lawyer,'" Concord Monitor at 14, January 7, 1976.

<sup>21</sup> "Next AG Plans Little Expansion," Manchester Union Leader at 10, December 28, 1975.

assumed that Mr. Souter was personally involved in developing the arguments in his office's major cases, especially those prepared for the Supreme Court.

This seems especially true when, as state attorney general, Mr. Souter challenged Equal Employment Opportunity Commission regulations that required states to submit reports listing their employees' race, national origin, and sex by job category.<sup>22</sup> New Hampshire was the only state during that period to balk at the EEOC's requirements, which, properly interpreted, can be used to determine the possibility of Title VII violations. Then-Solicitor General Robert Bork defended the reasonableness of the regulations against Mr. Souter's challenge.

Mr. Souter's petition for certiorari to the Court argued that the recordkeeping requirements forced employers to "become color-conscious rather than color-blind,"<sup>23</sup> thus violating

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<sup>22</sup> Interviews with others involved in New Hampshire's challenge of the EEOC regulations further suggest that Judge Souter endorsed the state's arguments. Edward Haffer, the Assistant Attorney General whose name appears on the briefs along with that of Mr. Souter, remembers that Souter was "supportive of and involved in the effort." Legal Times, Aug. 27, 1990, at 10. Moreover, then-New Hampshire Governor Meldrim Thomson recently recalled that Souter "did not discourage" pursuing the case all the way to the Supreme Court. "Souter, as State Official, Opposed U.S. Racial Breakdown Rule," Washington Post, Aug. 1, 1990 at A4.

<sup>23</sup> Petition for Writ of Certiorari for the State of New Hampshire at 7-8, New Hampshire v. United States, (1976) (No. 76-453).

Interestingly, Mr. Souter's cert petition also urged that the EEOC regulations violated employees' constitutional right of privacy. The brief argued that "the right to refuse to inform the government of one's racial/ethnic background" was "a matter of individual privacy." Id. at 15. Whether Judge Souter's concern for privacy extends to a woman confronted with the difficult decision whether to continue or terminate a pregnancy

constitutional and Title VII principles. While offering no supporting evidence, the state maintained that employment quotas would be the "natural consequence" of keeping information on employees' race and sex -- even though the creation of such quotas would constitute a violation of Title VII.

Mr. Souter's argument reveals a fundamental misapprehension of the purposes underlying Title VII and the role of the EEOC in achieving equal employment opportunity. As the Supreme Court has recognized, one of Title VII's objectives is to serve as a catalyst for encouraging employers to examine their own practices to eliminate unlawful sex- and race-based discrimination.<sup>24</sup> And, as civil rights experts such as Bush appointee and EEOC chair Evan Kemp agree, this recordkeeping is necessary in evaluating possible cases of discrimination and in measuring progress in attaining equal employment opportunity.<sup>25</sup> Requiring employers to track the diversity of their workforce is a reasonable and effective enforcement measure fully in keeping with the EEOC's regulatory authority.

Over the past 25 years, Title VII has facilitated the slow but steady progress of women and people of color in achieving equal opportunity in the workplace. But its continued effectiveness hinges largely upon courts' enthusiasm for

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demands the Senate's further investigation. See Section 3, infra.

<sup>24</sup> E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

<sup>25</sup> Washington Post, supra note 23.

enforcing it. Judge Souter's assault on the EEOC's sensible recordkeeping requirements, coupled with his reported characterization of "affirmative action" measures as "affirmative discrimination,"<sup>26</sup> casts doubt on his understanding of and dedication to equal employment opportunity law.

The Senate must further examine Judge Souter's commitment to constitutional and legal protections against employment discrimination -- including affirmative efforts proven effective in translating the dream of equal opportunity into reality for women, especially women of color. Unless he makes clear his willingness to enforce these crucial laws and regulations, he should not be confirmed.

3. Judge Souter's record fails to demonstrate a commitment to protecting women's fundamental right to reproductive freedom, including the right to choose abortion.

A woman's ability to enjoy the full range of personal liberties guaranteed by the Constitution -- her privacy and her equality before the law -- hinges upon her freedom to choose when and whether to have a child. Judge Souter's position on this most fundamental of women's rights remains unclear. In a number of instances, however, he has taken positions that lead us to question his support of a woman's right to choose.

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<sup>26</sup> "Souter Raps Ethnic Preferment," Manchester Union Leader, May 31, 1976.

For example, in a 1977 interview, then-Attorney General Souter expressed opposition to legislative efforts to repeal the state's 19th-century laws criminalizing the performance of abortion<sup>27</sup> -- despite the fact that the laws' enforcement had already been enjoined as unconstitutional under Roe v. Wade. Mr. Souter was apparently worried that repeal would leave the state with no ban on abortion at all, even though Roe allowed state-imposed restrictions after viability. Although less than one percent of all abortions are performed in the third trimester, Mr. Souter feared that

"Quite apart from the fact that I don't think unlimited abortions ought to be allowed, if the state of New Hampshire left the situation as it is now [by enacting the repeal], I presume that we would become the abortion mill of the United States."<sup>28</sup>

Mr. Souter went on to announce that "[n]ow that this bill has been received by the [state] Senate Judiciary Committee, I'm going to address that committee and advise we had better sit down and talk about this and decide what is to be done." Even if Mr. Souter's concern was based on a sincere desire to limit post-viability abortion, his opposition to the repeal of legislation that clearly violated the constitutional rights of women is troubling. As the state's top law enforcement officer dedicated to upholding both state and federal constitutions, we would expect Mr. Souter to have worked to modify the laws consistent

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<sup>27</sup> "Bill is Seen Making NH an 'Abortion Mill,'" Manchester Union Leader, May 19, 1977.

<sup>28</sup> Id.

with constitutional protections as outlined in Roe. The Senate should carefully explore Mr. Souter's position in this matter, inquiring as to any actual efforts he undertook to ensure that New Hampshire law complied with the constitutional requirements of Roe.

In 1981, on behalf of the state Superior Court, Judge Souter wrote a letter to New Hampshire's state legislature in opposition to a judicial bypass provision in a pending bill that would have required a minor to secure parental consent before obtaining an abortion. Expressly taking no position on whether parental consent should be required at all, the letter objected to a provision that would require a Superior Court justice to authorize a minor's abortion when in her best interest.

Judge Souter objected on two grounds: he felt that the provision would force judges to make fundamentally moral decisions without any standards for guidance; and he felt that the bypass provision would prove difficult for judges who believed that abortion was morally wrong or who felt unable to pass on the minor's best interests -- thus obligating them to refuse to authorize the minor's request for an abortion.

Judge Souter's views raise concern, even though he apparently wrote at the request of a pro-choice advocate. His criticism of judicial authorization runs counter to the Court's 1979 decision in Bellotti v. Baird.<sup>29</sup> There the Court invalidated a law that required a minor to notify her parents of

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<sup>29</sup> 443 U.S. 622 (1979).

her plans for an abortion; absent their consent, she could then seek judicial authorization. The Court objected, inter alia, to the statute's failure to offer a minor the opportunity to get an independent judicial determination that she was mature enough to make the abortion decision herself or that an abortion would be in her best interests. Souter's obvious distaste for such judicial determination invites inquiry into whether he would vote to overrule Bellotti's requirement of a judicial bypass mechanism and to prohibit altogether minors' access to abortion absent parental consent.

More recent Supreme Court decisions have upheld certain parental consent and parental notification statutes so long as they allowed for a judicial bypass provision. Souter's expressed discomfort with judicial authorization of a minor's abortion, coupled with his silence on the parental consent question generally, leads us to wonder under what circumstances he would uphold and protect a minor's constitutional right to obtain an abortion at all.

Judge Souter's recent special concurrence to the New Hampshire Supreme Court's decision in Smith v. Cote<sup>30</sup> did nothing to dispel these concerns. There, the majority found a doctor negligent for his failure to test a pregnant woman for rubella and to warn her of possible risk to a fetus exposed to rubella, thereby depriving her of information on which she would have had an abortion. Souter wrote separately to raise an issue

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<sup>30</sup> 513 A.2d 341, 355-56 (1986).

not before the Court -- discussing how a doctor who opposed abortion might discharge his or her professional obligations in such a situation.<sup>31</sup> In so doing, he referred to abortion only as "a sphere of medical practice necessarily permitted under Roe v. Wade." He entirely failed to discuss Roe's recognition of the right to choose as a fundamental liberty grounded in the Constitution itself.<sup>32</sup>

As was the case in his earlier letter to the state legislature, Judge Souter voiced concern for the rights of those who oppose abortion while remaining silent as to constitutional protections of women's reproductive freedom. On two separate occasions, he has abandoned his normal reticence out of distress for the professional hardships faced by anti-choice judges and doctors; he has yet to speak to the burdens faced by women struggling with the decision whether to terminate a pregnancy.

Judge Souter's commitment to protecting women's reproductive freedom remains entirely unclear. Because of the critical

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<sup>31</sup> Indeed, the majority opinion remarked on Judge Souter's decision to discuss an issue not before the court: "We do not reach the issue raised in the special concurrence of Souter, J., because it has not been raised, briefed, or argued in the record before us." 513 A.2d at 355.

<sup>32</sup> Id. The majority opinion, in which Judge Souter joined, also refused to reaffirm the right to choose as constitutionally based. Instead, it framed its decision as mandated by binding federal precedent, rather than compelled by the Constitution: "The basic social and constitutional issue underlying this case thus has been resolved [by Roe]; we need not cover ground already traveled by a court whose interpretation of the National Constitution binds us. . . .As we indicated above, we believe that Roe is controlling; we do not hold that our decision would be the same in its absence." 513 A.2d at 344, 346.

importance of this issue, the Senate must probe for a more complete articulation of his views. And, unless he acknowledges a fundamental right to privacy under the Constitution -- providing assurances that he will not dilute the protections of this right now afforded women by Roe v. Wade -- he should not be confirmed.

4. Judge Souter's record -- which illustrates his failure to grasp the significance of rape shield laws in prosecuting and deterring rape -- does not demonstrate a commitment to enforce legal protections against rape.

Forty-six states and the U.S. Congress have enacted rape shield laws that bar evidence of a rape victim's prior sexual behavior with persons other than the defendant. Rape shield laws serve two important purposes: they prohibit using rape victims' private sexual lives as a means of courtroom harassment and intimidation; and they protect a woman's freedom to decide whether, when, and with whom she chooses to have sex by recognizing that her sexual behavior with others is entirely irrelevant to whether she consented to sex with the defendant.

Judge Souter's reversal of a rape conviction in State v. Colbath<sup>33</sup> is especially troubling in its misconception of the law's protections against sexual violence. In Colbath, Souter ruled that the complainant's sexual behavior with men other than the defendant could be relevant to the issue of consent, holding

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<sup>33</sup> 540 A.2d 1212 (1988).

that the state's rape shield law did not preclude the admission of such evidence.

In ruling that the complainant's public behavior with others was probative as to her consent to sex with the defendant, Judge Souter ignored a primary purpose underlying rape shield laws. His reasoning suggests that a woman's consensual behavior with one person robs her of the ability to decline sex with another.

Judge Souter's opinion is no less disturbing for its adoption of the defendant's version of the facts over that of the prosecution:

"[T]he two of them left the tavern and went to the defendant's trailer. It is undisputed that sexual intercourse followed; forcible according to the complainant, consensual according to the defendant. In any case, before they left the trailer the two of them were joined unexpectedly by a young woman who lived with the defendant, who came home at an unusual hour suspecting that the defendant was indulging in faithless behavior. With her suspicion confirmed, she became enraged, kicked the trailer door open and went for the complainant, whom she assaulted violently and dragged outside by the hair. It took the intervention of the defendant and a third woman to bring the melee to an end."<sup>34</sup>

Nowhere does Judge Souter attribute this narrative to the defense, nor does he mention the woman's very different version of events (that she was injured not by a jealous girlfriend, but by the defendant during a violent rape).<sup>35</sup> Judge Souter thus

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<sup>34</sup> 540 A.2d at 1212-13.

<sup>35</sup> Compare Judge Souter's opinion in State v. Colbath, 540 A.2d at 1212-13 with Brief for the State of New Hampshire, State v. Colbath at 3-5 (No. 86-390).

seemed to adopt the defense's version as his own, without indicating that the facts were in dispute.

Given Judge Souter's record of ruling in favor of the prosecution in an overwhelming majority of criminal cases,<sup>36</sup> his apparent readiness to adopt the defendant's version of events in this case is troubling. His opinion's concluding paragraphs further suggest a belief that women are wont to fabricate rape charges: he found that the victim could have "allege[d] rape as a way to explain her injuries and excuse her undignified predicament."<sup>37</sup> Two separate juries did not so find, making Judge Souter's speculation as to the victim's credibility all the more distressing.

Rape is a crime to which women are especially vulnerable; its constant threat limits their freedom and forces them to live in fear for their personal safety; its aftermath can be physically and psychologically devastating. Judge Souter's failure to grasp the significance of rape shield laws in prosecuting -- and thus deterring -- rape triggers our concern.

Again, the Senate must thoroughly explore Judge Souter's views on the prosecution of rape and the law's treatment of rape victims. Unless he fully articulates a firm commitment to the law's protections against crimes of sexual violence, he should not be confirmed.

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<sup>36</sup> A review by the National Association of Criminal Defense Attorneys found that Judge Souter ruled in favor of the prosecution in all but five of 75 criminal cases.

<sup>37</sup> 540 A.2d at 1217.

Conclusion

Judge Souter's record fails to demonstrate a commitment to constitutional and legal guarantees of freedom and equality for women; moreover, he has at times affirmatively challenged constitutional analyses and enforcement tools that are essential in fighting sex discrimination.

The Constitution requires and the public interest demands that the Senate carefully examine Judge Souter's views on equal protection and individual rights -- those most important protections largely dependent upon the Court for their continued preservation. Thus, unless Judge Souter can further articulate his positions in these areas -- including equal protection, employment discrimination, privacy rights that encompass the right to choose contraception and abortion, and freedom from crimes of sexual violence -- he does not meet the minimum standards for a seat on our nation's highest Court. Absent a coherent and convincing discussion of Judge Souter's commitment to upholding these protections, we will urge the Senate to reject his nomination.