

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.  
2900 CHAMBLEE TUCKER ROAD, BUILDING 4  
ATLANTA, GA 30341  
(404) 458-8313  
FAX (404) 458-3960

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 "WAFLING," 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.