

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