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.