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

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?

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 blackletter 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 overview 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.