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 stonecutter 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, untrammeled 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 alloted 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.