The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Judge, we have a very distinguished and able Chairman, but I am glad you did not answer the questions the way he wanted you to answer them. [Laughter.]

Judge SOUTER. I hope you will have a persuasive effect on the Chairman, Senator Thurmond.

Senator THURMOND. Judge Souter, earlier this morning, one of my colleagues, I understand, referred to a letter suggesting that all of your decisions in the area of labor are in favor of management interests.

Let me refresh your memory by citing to you the opinion which you wrote in *Panto* v. *Moore Business Forms,* which concerns a continuation of a laid-off employee's salary. There are other cases in which you have ruled in favor of the employee. Is it not true that *Panto* and these other opinions can fairly be construed as rulings in favor of employees?

Judge SOUTER. Senator, yes, the answer is yes to that and I see your staff has been busy at lunch and I have had some help at lunch myself. I would be glad to supply you or the committee with some citations to things that I did not think of at that time.

Let me just say, if I may, just a word about the *Panto* case, since you have mentioned it and I think Senator Simon probably would have interest in it: *Panto* is a case brought by a so-called at-will employee or on behalf of an at-will employee who had been given what is known as an employee's handbook, which supposedly set out the terms and conditions of employment.

One of the terms and conditions that were described in that handbook was a right to deferred compensation upon the termination of his employment. The question in the *Panto* case was whether the employer could unilaterally simply revoke that particular condition, and one of the arguments made was that an at-will employee could be fired at any time, by definition, and, therefore, the conditions of employment can be changed at any time.

The holding of the court in New Hampshire, which was unanimous in adopting the opinion that I wrote, was that, in giving that kind of a handbook, you are engaging in exactly the same kind of enterprise that you do when you make a unilateral contract, you are holding out a set of terms and saying if you will do something for me, these are the terms upon which you will be recompensed or will be rewarded.

I have to say that I really did not think the reasoning in the case, including the analogy to the unilateral contract, was very remarkable, but I do know that in similar cases courts in other jurisdictions, particularly in times past, have gone the other way.

So, it is true, it was—I would not have put it, if I had been classifying my cases, as a pro-labor case, but if you are going to draw that kind of distinction, I think that is the decidable line that it belongs on.

Senator SIMON. If my colleague would yield, I want to thank Judge Souter.

Senator THURMOND. I would be pleased to yield.

Senator SIMON. I would just ask, Mr. Chairman, that the record be open here, if there should be any other cases that Judge Souter would want to enter in the record at this point, too.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Without objection.

Senator THURMOND. Judge Souter, recently there have been considerable scholarly debate in the Congress and opinions issued by the Federal courts concerning constitutional protection of expressive conduct under the first amendment. How would you characterize the distinctions of protections under the free speech clause between expressive non-oral conduct and the actual spoken word?

Judge SOUTER. Senator, the problem that has to be confronted in those cases is that when there is a combination of expressive conduct and speech in the most literal sense, the kind of conduct which is used for expressive purposes may be subject to reasonable and legitimate regulation by the government, in a way that mere words would not be.

Therefore, what the courts have done is to try to come up with a test for evaluating the government's interest in the conduct, as opposed to the speech or the merely expressive part of it, and the test that has been devised consists of asking whether, in some way infringing on what would otherwise be an absolute freedom to engage in that expressive conduct, the government has a substantial and legitimate interest which is unrelated to the regulation of free expression, and, if so, whether the particular law which tends to restrict the right of expression there does so in a way which is narrowly tailored to serve that governmental interest and to infringe on the right of expression no more than is absolutely essential.

It is a kind of line-drawing, when conduct is complex, some of it clearly subject to first amendment standards and some of it subject to regulation on grounds having nothing to do with speech.

Senator THURMOND. Judge Souter, under our Constitution, we have three very distinct branches of government. It is my firm belief that the role of the judiciary is to interpret the law and not make the law.

However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will, as judicial activists. Would you please briefly describe your views on the topic of judicial activism?

Judge SOUTER. Senator, there are, I suppose, a great many things we could say, but there are two aspects of it which I think are foremost in our minds. The first is the appropriateness of judicial remedy. Sometimes activists have been criticized for seeming to look for causes, rather than cases.

I do not know that there is much we can say, in general, about it, except what I said on the questionnaire which was filed with the committee, that the extent of a judge's obligation to provide remedies in a case in which some violation or infringement of right has been found is primarily and, in the first instance, a function of the case before him. It is a function of the extent of the violation that he has found.

The second sense of activism which I think is probably in the back of everyone's minds is a sense that I have touched upon in earlier remarks before the committee, and that is a sense of the judge as embodying pure personal preferences and value choices, however sincerely they may be felt, as opposed to embodying values which are found and based upon some kind of an objective

search for meaning, whether it be the meaning of Constitution and the meaning of statute.

I think I have said more than once during the course of these hearings that my approach to the obligation of judging is to try to find an objective source of meaning that simply does not force the court into, in effect, giving free rein to its own predilections.

Senator THURMOND. Judge Souter, the Supreme Court recognized a good-faith exception to the exclusionary rule in the case of *United States* v. *Leon.* This exception applies only to searches made pursuant to a warrant. Would you discuss the effect of the exclusionary rule and the good-faith exception in preventing police misconduct?

Judge SOUTER. As you know, Senator, the basis for the exclusionary rule, as it was explained in *Mapp* v. *Ohio,* the case that applied the exclusionary rule to the States, was to induce the police, to induce the executive branch of the government from engaging in activities which violated fourth amendment rights, and the theory was that if the police could not profit, if the prosecution could not profit by using evidence illegally seized, there would therefore be an inducement to avoid seizing evidence illegally, so that the object of the exclusionary rule as a means to enforce the values of the fourth amendment was a very pragmatic one. But the focus of that explanation was, of course, on police conduct.

That point is reflected in the *Leon* case, as you have just described it, because what the *Leon* case is saying is that if the mistake which leads us to conclude that there has been a fourth amendment violation was a mistake not made by the police, but made by the judge or a magistrate who issued the warrant, that should not preclude the introduction of evidence on the theory described in *Mapp* v. *Ohio.* If the mistake is not the police's mistake, then you gain nothing in influencing police conduct by keeping the evidence out.

The one overriding limitation which was placed, of course, on the *Leon* rule is that the mistake must not only have been a judicial mistake, but the kind of mistake which the police could nonetheless, as it were, in good-faith proceed without recognizing, and, therefore, I think the *Leon* rule is entirely consistent with the rationale for the exclusionary rule as described in *Mapp.*

Senator THURMOND. Judge Souter, the Supreme Court's decisions in the cases of *Teague* v. *Lane* and *Penry* v. *Linnow* have ended what has been an essentially ad hoc approach to the area of constitutional criminal law known as retroactivity. This area of the law deals with whether or not a Supreme Court decision is retroactively applicable to previous convictions.

As you know, the *Teague* and *Penry* cases limited the principle of retroactivity by creating the rule that the legality of a prisoner's sentence will usually be measured by the law in effect at the time of his trial and direct appeal, unless the Supreme Court declares that a subsequent ruling shall apply retroactively.

The effect of these decisions has the greatest impact in the area of Federal habeas corpus. Would you please comment generally about the legal basis for the Court's ruling in *Teague* and *Penry*?

Judge SOUTER. Senator, there is a curious parallel between the explanation that I am going to give you now and the discussion

that we had just a second ago on the good-faith exception, because as the Court has explained it and as you know, the *Teague* and the *Penry* cases refer to the availability of what is known as collateral relief by writ of habeas corpus in the Federal courts for State prisoners.

What that means in practical terms is that a State criminal defendant may well have been through the State criminal justice system by way of direct appeal or even collateral review in the State system, have taken his request for relief as far as the Supreme Court of the United States and have been denied discretionary review and still have an opportunity to raise constitutional claims by petitioning for a writ of habeas corpus in the Federal courts. And because the relief is sought by a new proceeding, we call it collateral, rather than a source of direct relief.

Now, as the Supreme Court of the United States has explained the theory behind underlying Federal habeas corpus relief in situations like this, it in effect has said we recognize that not all constitutional errors may get corrected in the course of direct review in the State system, and collateral relief by writ of Federal habeas corpus is provided as an inducement to the State systems to do a good and sound and reliable job of constitutional adjudication, because if they do not, they know that the prisoner has another avenue of relief in the Federal system.

Now, what the two cases that you describe have held, starting with *Teague*, what they have held is that if a prisoner is going to get relief on habeas corpus collaterally in the Federal system, with two minor exceptions—well, not minor, but two exceptions, that relief has got to be based on the law that was in existence at the time the State courts reviewed the conviction, and the reason for this is they are saying we provide this relief in order to induce reliability and good faith and constitutional adjudication by the State courts.

That is a value which is not going to be served, if we also grant relief on the basis of law which was not in existence or had not been declared at the time the State courts did their review. In other words, I suppose in a very simplistic way, we cannot blame them for failing to follow some law which was not there for them to follow at the time. Therefore, under those cases, Federal habeas relief is restricted and is available only for violations of the law as it stood at the time.

As I said, there are two exceptions to that for changes in the law which recognize conduct or penalty totally beyond the power of the courts to impose and for violations which go to the fundamental reliability of a conviction. But subject to those two exceptions, habeas relief is, therefore, limited and it is limited in a way which is consistent with its object.

Senator THURMOND. Judge Souter, the issue of capital punishment is a controversial topic, with strongly held views on both sides. However, the Supreme Court has ruled that the death penalty is a constitutional form of punishment, provided steps are taken to insure that it is not imposed with unfettered discretion.

Certainly, there are judges who are personally opposed to the death penalty. Since the Supreme Court has ruled that the death penalty is constitutional, what role, if any, should the personal

opinion of a judge play in decisions he or she may render in cases such as the death penalty?

Judge SOUTER. Senator, we all work with the ideal that the kind of personal opinion which may be at variance with the law is not going to play a role in the judicial decision. When we get to an area like the imposition of the death penalty, we also I think have to recognize the limits on what is humanly and morally possible.

I do not know whether there are any States, I presume there are none, in which the death penalty decision is one which is rendered in the discretion of the judge, and I presume that that is totally out of the question today. But even though a judge may not have the role of deciding that the death penalty may be imposed, the judge certainly may have great moral qualms, if the judge is morally opposed to the death penalty, in taking part in a proceeding which could have the result of an imposition which he believes is morally wrong.

I think what judges have to recognize in those circumstances is perhaps there are cases in which their moral views are so strong that they simply cannot preside, and I think we have to recognize the moral compunctions that a judge would feel in those circumstances and we have to recognize a right to recuse if a judge feels that way.

Senator THURMOND. Judge Souter, prison overcrowding is a major problem facing Federal and State institutions today. Several State systems are currently under Federal prisoner cap orders which limit committing additional inmates to certain prisons. At a time when violent crime and drug offenses are such a problem, what other alternatives are available to insure that prison space is available for those sentenced to serve time?

Judge SOUTER. Senator, as you know, one of the proposals that has gained attention and currency in some places has been referred to as the privatization of prisons, in effect, the contracting out of what traditionally has been regarded as a direct State function and State responsibility for imprisonment.

I am not sure, in response to the question that you describe, that that really is an alternative, because if any one thing is clear, it is that so many of our prison overcrowding problems are functions of the amount of money that can be spent or is spent in prison construction and prison administration.

There is no question that if prisons are not to be expanded, if alternative facilities are not to be found, and the rates and periods of incarcerations tend to rise, as in many places they are as a result of the activity in drug prosecution, then there may very well have to be value choices made by the States to change the possible penalties in other crimes, so that there will be room in the prisons for those thought by the legislature to have the first priority in the need for prison space.

Senator THURMOND. Judge Souter, Congress established the U.S. Sentencing Commission in 1984. Its function is to promulgate sentencing guidelines for Federal judges, to insure uniform and predictable prison sentences.

The Supreme Court ruled, in the case of *United States* v. *Menstrata* that these sentencing guidelines are constitutional. From your experience as a judge, do you believe that uniformity in sen-

tencing is more fair to those individuals who commit similar crimes and, in the long run, will sentencing guidelines create greater confidence in the criminal justice system?

Judge SOUTER. Senator, I think the sentencing guidelines will create a greater confidence in the justice of the system. I would not take the position, I do not think anyone takes the position that sentences have got to be imposed absolutely, without judicial discretion.

But I do think very strongly that the judicial discretion which is exercised in sentencing should be a very structured and disciplined discretion, otherwise the problem of disparity in sentencing is simply insoluble. Like countless other judges, I have sat on a court in which sentence is set to be rendered. One of the concerns that I and, I suppose, most other judges have is that, if Judge A gives a sentence twice as long as Judge B for the same offense, there has got to be a very strong and apparent reason for that disparity, without the belief that there is, in fact, injustice in the sentencing system.

My concern about the effectiveness of this perception of injustice is not limited simply to the perception of the public. I think there should be an equal concern for the perception of the defendants who are sentenced. If there is going to be any hope for any rehabilitative effect in sentencing, particularly on young and early offenders, it seems to me it has got to rest upon a reasonable perception that the system in which the sentence has been imposed is itself a fair system.

I applaud the efforts of the government to devise sentencing guidelines. As I think you may know, the chief judge of the court on which I now sit was one member of the commission that proposed the guidelines that we have.

Senator THURMOND. Incidentally, Senator Kennedy and I worked very hard on that question.

Judge Souter, the Sentencing Commission is considering whether the current Federal criminal sentences are adequate. In fact, the commission will promulgate new guidelines for white collar and corporate offenses. Congress has also seen fit to increase the terms of imprisonment for various white collar crimes, including those involving financial institutions.

From your experience, have penalties for white collar and corporate defendants been sufficient, and do you anticipate tougher penalties for white collar criminals in the future, as a result of the public outcry over the recent savings and loan offenses and securities-related crimes?

Judge SOUTER. My experience, Senator, has been entirely in the State system. As you know, I am a member of the United States Court of Appeals for the First Circuit right now, but I have sat there hardly at all.

I do have a very vivid recollection of the problem of white collar crime in the State. The problem there was not that penalties were insufficient in the sense of there being no penalties on the books which were adequate to the offense. But there was for a long time, certainly in the early years in which I was practicing law and engaged in the criminal justice system, an unspoken feeling that somehow the white collar criminal should at least get one free

chance or the feeling that the white collar criminal, even when caught, should never in fact be sentenced to incarceration. This seemed to me was both morally unjust and socially indefensible.

I can recall being, I think, part of the process within the courts by which a very different kind of look on white collar sentencing has been gradually taken effect, and suffice it to say, I do not take the position and have never taken the position that the white collar criminal should be dealt with in some way which is essentially different from any other brand of criminal.

Senator THURMOND. Judge Souter, is it your opinion that the Federal Government was designed to be a government of limited powers? If so, do you have a legal basis for your position which you would discuss with the committee?

Judge SOUTER. Senator, we know, without much fear of argument on the point, that the basic conception of the Constitution, as it was proposed in 1787, was that of a government of limited powers. That very assumption was the reason why a Bill of Rights was not proposed, because the reasoning went that a government whose powers were as limited as these were not a threat to civil liberties and that civil liberties could be perfectly well guarded by the bills of right in the State constitutions.

The position of the Federal Government, of course, has in some respects changed since 1787, and the biggest change has come about as a result of the enactment of the 14th amendment, which has given the government a power with respect to the subjects covered by the 14th amendment, which the constitutionalists of 1787 certainly never anticipated.

So we know that there has been deliberate action by the country in the adoption of the 14th amendment which has had an effect on the constitutional theory of 1787, and the difficult issues that are going to face the courts probably in the next decade or two is to work out with a precision, which the courts have never done, just the extent of added power, particularly to the Congress of the United States, which was intended to be conveyed by section 5 of the 14th amendment.

Senator THURMOND. Judge Souter, there have been complaints by Federal and State judges regarding the poor quality of advocacy before the courts, including the Supreme Court. Throughout your years of service on the bench, have you found that legal representation in the courts was adequate, and what in your opinion should be done to insure that individuals get quality representation in the courts?

Judge SOUTER. Senator, we all fuss, and frequently fuss with reason, that the level of performance in the trial courts and the appellate courts is not what we wish it could be.

There is not any ultimately generalization that is possible. I have heard splendid arguments in the Supreme Court of New Hampshire and I have heard some that were poor. I have seen lawyers who seem barely above the level of competence in the trial courts and I have seen others who seemed to be geniuses of trial law.

I think you put your finger on one approach to the problem of trial competence, when at the end of your question you refer to the adequacy of the level of representation, and I think when you do

that, you make reference particularly to representation in the area of the criminal law.

I alluded yesterday to the fact that, when I first started practicing law, every lawyer sort of took the cases that were assigned to him by people who needed representation without cost, and lawyers took on criminal representation under the same circumstances.

One thing we found is that in criminal law, as in anything else, it helps to be an expert. And one of the things we have found—and I am sure this is true not only in New Hampshire, but throughout the Nation—is that the federally funded public defenders, usually federally funded or State funded public defenders, have provided a degree of expertness in criminal representation which it is virtually impossible to get, simply by drafting a lawyer in private practice who does not do criminal law, suddenly to take over the representation of a defendant.

We have had exactly the same experience in looking at the criminal appellate work which is funded, whether by State or Federal dollars, as a result of which we have an expert criminal appellate bar which is the envy and the equal of the prosecution in the State. This kind of evening up of the level of representation has, in fact, brought about a quality of justice which was unknown when I got admitted to the bar.

Senator THURMOND. Judge Souter, the caseload of the Supreme Court has grown rapidly over the past several decades. Cases today are more complex, as our laws have become far more numerous and intricately fashioned. Would you please give the committee your thoughts on the current caseload of the Supreme Court, without going into great detail, and comment briefly on any innovative methods you may have utilized at the State or Federal level for handling this increased caseload?

Judge SOUTER. Senator, I think it would be presumptuous of me to try to give a disquisition on the United States Supreme Court's caseload, which I, of course, have had no personal experience with.

The one thing all of us outside the Court are aware of, although we are probably inadequately aware of, is the enormous pressure of that caseload, in the number of petitions for review and in the pressure on the Court to accept the maximum number of cases which may exhaust its limited time.

As you know, in the course of the last term of the Supreme Court, the number of cases taken has been reduced somewhat, and that seems to me an appropriate thing for the Supreme Court to do.

At the State level, we too have had caseload problems. One effect of that in my own State was, as a practical matter, to force the State Supreme Court to go to a system of discretionary review, deciding whether or not to take a given case for which an appeal is decided, as against the old system when I was younger, in which everybody had an appeal of right.

One of the other effects of the growing caseload, as we said the other day, yesterday, was to foster ways of disposing of cases outside of the traditional adversary judicial system, sometimes under its auspices, sometimes on a purely private basis.

I can tell you that the exploration of what everybody tends to group together under the title of alternate dispute resolution is, I think, an extremely hopeful sign. There is only one thing that I fear, and that is that, as State budgets continue to be squeezed and as money for the judicial system becomes harder and harder to find, in competition with the other claimants for limited State budgets, that there is going to continue to be such a squeeze, particularly in the civil area, where there are no mandatory constitutional standards or few mandatory standards for speedy trial, that in fact private civil litigants are going to get squeezed out of the judicial system, and as they get squeezed out of, simply because the system cannot handle their cases, they are, instead, going to resort, as they are already doing and are doing in my State, basically to private judging, in which parties will get together and they will hire somebody who may be called an arbitrator or may be called by some other title, in effect to decide their cases for them, entirely outside the judicial system, simply so that they can get the cases decided.

If this trend continues, the great fear that I have is that we are going to be creating in the United States essentially two systems of justice, and the only people who are going to be using the civil justice system, if this is carried to extremes, are in fact the people who cannot go outside and spend money out of their pockets to hire a judge or someone in the private sector to adjudicate their cases.

This seems to me an appalling prospect, not only appalling for the judicial system, but appalling for the Nation in the broader sense, that we are going to lose one of the institutions and one of the symbols that binds us together as a Nation, and that is a system of justice open to everyone, and that justice certainly has got to include civil as well as criminal justice.

Senator THURMOND. My time is up. Thank you, Judge.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge, just a few moments ago, in response to questions of Senator Thurmond, you talked about the moral dilemma that some judges might face who are against the death penalty and yet must impose it, and I thought you demonstrated some legitimate concern for those particular judges.

Then you talked about the whole question of the morality of sentencing, in terms of white collar criminals, and I thought you were very eloquent when you talked about the fact that some of those who were involved in white collar crime might expect that they should, at least for the first offense, not do time, and you expressed your own kind of moral concern that that was not correct.

Picking up on that question, let me ask you this, whether, as a matter of your own individual and personal moral beliefs, do you believe that abortion is moral or immoral?

Judge SOUTER. Senator, I am going to respectfully ask to decline to answer that question, for this reason, that whether I do or do not find it moral or immoral, will play absolutely no role in any decision which I make, if I am asked to make it, on the question of what weight should or legitimate may be given to the interest which is represented by the abortion decision.