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

MONDAY, SEPTEMBER 17, 1990

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 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, Thurmond, Hatch, Grassley, Specter, and Humphrey.

The CHAIRMAN. The hearing will come to order.

We are convened today to celebrate Judge Souter's birthday. Happy birthday, Judge.

Judge SOUTER. Mr. Chairman, that is up to you. [Laughter.]

The CHAIRMAN. The judge and I had a very brief conversation before we came in, and he indicated that whether or not he had a happy birthday was up to me. And I told him no, that occurs in about 2 or 3 weeks.

Judge, you are a veteran at this process by now. When we left off in the second round of questioning—and we will proceed, by the way, as we have the last 2 days. I believe, Judge, it is likely that your testimony will finish today, although we will go as long as Senators have questions. But my inclination is, based on what I have been told, that we will probably, Judge, be going after lunch. But it depends on how many of my colleagues feel that there are areas that they need to pursue.

I hope you have been satisfied with the procedures thus far, and we will continue as we have the first 2 days.

With that, let's begin immediately by yielding to my colleague, Senator Hatch from Utah, who was next in order for questioning, and then to Senator Metzenbaum, and we will work our way down the line.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge Souter, welcome back and happy birthday. We didn't bake a cake, but perhaps we will let you go home after today, and that will be even a better gift.

Today also happens to be the 203d anniversary of the adjournment of the Constitutional Convention in Philadelphia. It is remarkable that the Framers designed a system of Government

which, with the amendment process established by article V, has endured so long and so well.

The genius of the Constitution is that within the specific written limitations set forth in that document, it gives to the people, through their elected representatives, the right to govern themselves. Sometimes that right is poorly exercised, but so long as it is exercised within the Constitution's framework, only the people are entrusted with the power to correct their own mistakes or those of their elected representatives.

Now, Judge, I think you demonstrated to us last week that you are and that you will be a good listener. I am convinced of that, and I think that is a wonderful attribute in an appellate judge, and certainly in a Supreme Court Justice. You also demonstrated in my view that when you join the High Court, you are going to be listened to. I think you will have immediate contributions to make to the deliberations of your soon-to-be fellow Justices. I am convinced of that as well.

Now, of course, the staffs on both sides, the majority and the minority, have had the weekend to look over the transcript, and the representatives of dozens upon dozens of special interest groups have also gone over your earlier testimony with a fine-toothed comb. I suppose they have all been searching for inconsistencies. They have also looked for ways to suggest to some of us here how we can get you to commit on issues without sounding like that is what we are trying to do.

You may well be asked to expand on what you said last week, and you may be picked at over this or that particular phrase. In my opinion, if you will continue to adhere to what you think is right in how you answer questions put to you, or whether you answer them at all, I think you are going to be all right.

I have had an interest in the concerns and problems with persons with disabilities since before I entered the U.S. Senate. A number of us on this committee are on the Labor and Human Resources Committee. My counterpart, Senator Kennedy, is the chairman, and others on this committee actually are on the Labor and Human Resources Committee. So we are always concerned about these issues involving persons with disabilities.

I was quite struck by your opinion in the *New Hampshire Disability Rights Center* case in 1988. As I understand it, the Disability Rights Center is a nonprofit corporation that provided legal services to poor individuals with disabilities. The group filed a petition to expand those services to individuals with disabilities who really are not poor.

Now, what was the legal problem that they faced in that case?

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Judge SOUTER. Senator, the problem that they faced was a regulatory scheme in New Hampshire for the practice of law, which I think probably was characteristic of what would be found in a good many States. There were prohibitions against the practice of law in corporate form unless all members of the corporation which would be providing legal services were, in fact, attorneys admitted to

practice. And the only exception to that rule was for the benefit of corporations, legal corporations, that would be providing services to the poor alone.

Senator HATCH. How did you address that particular issue?

Judge SOUTER. Well, we had to address it first on the level of statutory construction to see if, in fact, the New Hampshire statutes were as restrictive as they had been assumed to be. And to make a somewhat long story short, we found that they meant what they said.

As a result of that, the Court was faced with a genuine first amendment challenge based upon the right to associate exemplified in cases like *NAACP* v. *Button,* and basically the claim that was made was that the New Hampshire statute was unenforceable because individuals, not necessarily all lawyers, were entitled to associate together for the purposes of advocating and, if appropriate, litigating the constitutional rights of their members.

The claim was that the New Hampshire statutes, in restricting the Disability Rights Center from representing those who were not poor in such challenges and in restricting their membership, or purporting to do so, to those who were only lawyers, were, in fact, infringing on the kind of associational right which the *Button* case had recognized. Having confronted the issue squarely, it was, in fact, our judgment, expressed in an opinion that I wrote, that there was such an infringement.

In the course of doing so, we dealt with some of the State's claims of countervailing interests necessary for the regulation of the practice of law, and we confronted the State's claim that, in fact, there had not been a demonstration; that in the absence of recognizing this associational right and without allowing the Disability Rights Center to engage in the representation that it proposed to do, the State argued there had been no claim that these people would be denied legal services entirely.

What we recognized in the course of our own examination of the case, and expressed in the opinion, is that this simply was not a sufficient countervailing State purpose which was adequate to in any way trump the first amendment claim that had been made. We therefore recognized it. We declared the New Hampshire statutes regulating and restricting the practice of law to that extent unconstitutional, and we decreed that the Disability Rights Center could do exactly what it proposed to do.

Senator HATCH. I want to compliment you on it, because I think that ruling by you showed great constitutional sensitivity.

Judge SOUTER. Thank you, Senator.

Senator HATCH. I think it is a very important case. And in this case, the result was, as you have explained, that persons with disabilities could get legal services from this nonprofit group, even though those persons with disabilities were not poor.

Judge SOUTER. They did; and I think it is probably also unquestionable that there is a further public benefit in a case like this. It is the same kind of public benefit that I alluded to when I was speaking on Friday with Senator Thurmond about the provision of legal services in the criminal area. That is, the result of allowing organizations like the Disability Rights Center to provide this kind of representation is to develop a body of expertise among a seg-

ment of the bar that we would be unlikely to see if this kind of informal specialization were not allowed. And I think just as in the area of the criminal law, I think in the long run there is no question that the quality of advocacy on this subject will be better in very practical ways as a result of what the Rights Center is doing.

Senator HATCH. Good. Well, that decision was very heartening to me. I want you to know that.

In my opening statement last week, I observed that your record in criminal cases reveals—at least to me, and I think anybody else who reads your cases carefully—a judge who is tough on crime but also fair when it comes to balancing the competing interests of the public and criminal defendants. And I noted the importance of your balanced views in this area for citizens across the country because, starting with the period under Chief Justice Earl Warren, many feel that precarious balance has swung way over to the side of criminals and against law enforcement agencies.

While the Court in recent years has continuously chipped away at some of these inventive decisions that were done under the Warren and Burger Courts—refusing, for example, to extend here and there the *Miranda* and *Mapp* decisions—many feel it has not yet swung the pendulum back to the middle.

Now, I was encouraged by your dissent in *State* v. *Koppel*. It was a 1985 decision where you argued for upholding the constitutionality of sobriety checkpoints under the State constitution. Earlier this year, the Supreme Court basically came out exactly for your position in upholding the constitutionality of this important police procedure in *Michigan State Police* v. *Sitz* just in 1990. Under the Federal Constitution, the basic constitutional issue is the same under the New Hampshire Constitution, at issue in the *Koppel* case.

Now, does the State's interest in detecting drunk drivers outweigh the intrusive effect of such procedures? And you decided that it did. Your dissenting opinion seemed to recognize the importance of the State's interest.

I would appreciate it if you could describe your reasoning in the *Koppel* case.

Judge SOUTER. Well, Senator, as you know, I think one of the points of common ground from which all of the parties and all of those with strong opinions on that case begin is that when there is a stop for a sobriety checkpoint, there is, to a very limited degree, a search and seizure and inquiry subject to fourth amendment standards. In New Hampshire, and I daresay probably all of the State constitutions, the stop and the inquiry is subject to regulation under their search and seizure provisions.

What we do not have in this kind of case is the sort of inquiry which is exemplified by the situation in which there is a search for evidence of prior crime, which, as you know, as a general rule must take place under the auspices of a warrant issued by a detached and neutral magistrate. Because at the point automobiles are asked to pull over for a sobriety checkpoint, there simply is not the particularized knowledge about what may be found inside which would support a warrant under the traditional probable cause standards of the criminal law.

What, therefore, the court did—and what, indeed, I did in my dissent—was to engage basically in an analysis which balanced the State and the private interests involved to determine whether the stop and the inquiry could be regarded as a reasonable one within the standards applicable to search and seizures, both for State and national purposes.

What we are particularly concerned with in these kinds of cases is that the discretion of the police be something other than an uncontrolled roving and inquiry covering no matter what period of time, no matter what elements of surprised and fright. The concern is to require a very tightly controlled discretion on the part of the police who may engage in these sobriety checkpoints which does not go one iota beyond what is necessary to satisfy the public interest in detecting driving under the influence before a tragedy occurs.

What we found or what I analyzed in my dissenting opinion in that case is that the practices there under consideration were, indeed, consistent with the need for strict control of this kind of discretion. The searches, the stops, were not at random. They followed a particular set plan at the beginning. They were very short in duration. The intrusion of the stops was comparatively minor. And there was no discretion given to the police to go beyond what seemed absolutely necessary to detect the one significant fact which was of concern to them.

The majority of the court in my case took what seemed to me a somewhat restrictive view of the demonstration of utility that was necessary. They were concerned that, despite the use of sobriety checkpoints, the great majority of arrests and prosecutions for driving under the influence still eventuated from routine controls and the kinds of police observation which, in the absence of checkpoints, would bring drunken driving to their attention. As you know from my opinion, I thought that they were taking an unduly restrictive view of what was necessary mathematically to justify these checkpoints.

The third point upon which the majority and I disagreed was a subject which I think was well raised; that is, in allowing a sobriety checkpoint like this, is the court starting down the road which would then lead to the possibility of what I think someone described as shopper checkpoints, whereby the police could stop anybody on the street and look in shopping bags and so on to see whether the merchandise in them was accompanied by a sales slip. Was it, in other words, sort of the thin end of the wedge for watering down very important fourth amendment protections?

My response to that was that we couldn't answer that question without attending very carefully to the kind of activity that was under consideration. And I contrasted the activity of driving an automobile which, simply because of the power of an automobile to harm, was a very highly regulated activity. The machinery was regulated; the people who operated the machinery were regulated; they had to pass tests of competence before they would even be allowed legally behind the car. And I contrasted that, as I said, with the kind of innocent activity of shopping, which, with the exception of things like pedestrian safety laws, is not a regulated activity.

I said that in judging what is reasonable, we have to take into consideration the potential danger which the activity poses and the State's expression of that danger by its decision to regulate or not to regulate it. And what might, indeed, be a perfectly reasonable inquiry in a highly dangerous and regulated activity, like driving, would not be reasonable at all in an innocent pursuit like walking down Main Street and doing errands. And I therefore concluded that there was not a danger, that a sobriety checkpoint approval under the fourth amendment was going to be taken as thin end of the wedge for an assault on civil liberties. I think that view has since been recognized.

Senator HATCH. It sure has. I am also encouraged, Judge Souter, by what I see as a reluctance on your part to reverse criminal convictions on the basis of strained constitutional arguments. In the case of *State* v. *Bruneau*, a man murdered his wife—killed her and then later confessed his crime to a friend by calling that friend long-distance. Although the friend contacted the police, they did not discourage the friend from taking later phone calls and reporting further incriminating evidence when the defendant volunteered.

When the defendant later asserted that the Constitution in the *Miranda* case required the reversal of his murder conviction simply because the police had allowed him to continue his compulsive voluntary confessions through his friend, your court rejected that claim. And in an opinion which you authored, you decided that his claim was absolutely wrong.

Could you just give us the benefit of your reasoning on that occasion?

Judge SOUTER. Yes, sir, I will. What the case on that particular point boiled down to was a question of whether the friend to whom the defendant has made his admissions was, in fact, acting as an agent of the State for the purpose of soliciting those admissions and, of course, passing them on to the police after he had received them. It, again, is common ground that if any criminal defendant makes a spontaneous admission or confession to a third party, as a general rule the third party, of course, is perfectly free to repeat that, and the State is perfectly free to use that as a matter of evidence.

The difficulty comes when the State is using ostensible third parties to make an end run about regulations on confessions under the fifth amendment and under the sixth amendment. And the question, therefore, in that case was: Was the friend, in effect, acting as an agent for the State so that every activity of the friend in talking and, indeed, in listening to the defendant should be imputed to the State and judged as if the friend were, in fact, a police officer working on the case?

At the time the case came to us, there was no law under the New Hampshire Constitution on that matter. And because the defendant raised both State and constitutional claims in support of his argument that the statement should be kept out, the first task that we had was, in effect, to read the New Hampshire Constitution to try to determine what was behind its provisions, providing the right to counsel as well as rights against compelled self-incrimination against the defendant; and to determine whether the princi-

ples that the New Hampshire Constitution embodied were, in fact, being violated by the use of the friend, as it were, as a conduit for information in this case.

What we determined was that the test that we should employ to determine whether an end run was being made around these constitutional guarantees was to determine whether the friend should be regarded as an agent of the police or as, in effect, a free third party who passed things along. And the test or tests that we came up with came down to the question: Was the friend acting at the behest of or under some kind of a contractual arrangement with the police so that he thought that he was doing an expected job for them or was doing something for which they had indicated he would receive some benefit?

What we were doing was trying to find a basis to determine whether there was an agency relationship. In asking those questions, we found that there was none in the case before us. We didn't use the exact terminology that the Federal courts have used in discussing similar issues under the national Constitution, but I think we came down with a substantially similar standard.

What the Federal cases ask for in these instances is whether there was such a substantial relationship between the third party and the police that, in fact, there should be really seen as an identity between the two of them. And applying that test, we likewise found that there was no agency relationship in the case, and we held that the statements had properly been admitted.

Senator HATCH. Well, thank you, Judge. I have 10 or 15 minutes left, but I am going to end it at that. I don't want to take all my time, and I hope others won't as well.

I just want to compliment you because you have been very forthright in your testimony. You have been very firm. I think you have covered a lot of issues that have been very interesting to everybody up here regardless of ideology or feelings. And I think you have conducted yourself in a very, very strong and important way during these hearings. I don't know anybody who really could see what you have done and watched you and listened to you that could disagree with the statement that you are incisive, you are intelligent, you apply the law, you really look at it carefully. You are very sincere and dedicated to trying to do the best job that you possibly can.

You are precisely the type of person I think ought to have this opportunity to serve on the Supreme Court, and that is in spite of the fact that many of those up here aren't sure what you are going to do on these litmus test issues. I have been kind of interested that during the Reagan and Bush administrations, some of our colleagues have been so concerned that they might impose litmus tests on their nominees, which they never did. And yet I see almost the opposite when it comes to their right to impose litmus tests. But, to your credit, you have handled this very well, and you have, I think, gone down that fine line and that fine road between being candid on what you really can be and not imposing upon yourself the obligation to vote in a certain way or to rule in a certain way in the future because of statements you have made here on these very, very important issues that are very difficult, and will be difficult, and will be complex and will be different, factually different

and legally different in so many ways as you serve on the Supreme Court.

So I have to hand it to you. I think you have done an excellent job, and I for one have a great deal of admiration for you.

Judge SOUTER. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Metzenbaum?

Senator METZENBAUM. Judge Souter, I join Senator Hatch in saying I have a great deal of admiration for you also. But I also have some reservations and some concerns, and my colleague has mentioned some earlier hearings where litmus test questions were asked. I would like to refresh his recollection that those on both sides have seen fit to use litmus test questions when they deem the occasion appropriate. I am going back to the days of Senator Fortas' confirmation hearing, others as well, and so I guess it is just a question of whose ox is being gored on any particular day on whether or not we do or do not believe in litmus test questions.

Let me proceed, however, to questions that still remain of concern to this Senator. You had a discussion with Senator Grassley that I would like to follow up on. In that discussion, you stated that all three branches of Government are sworn to uphold the Constitution; and when Congress fails to use its full authority to uphold the Constitution, the Court is forced to resolve difficult social problems. You referred to the vacuum that is created when the issues are not resolved elsewhere.

Of course, in the realm of fundamental rights, the Supreme Court has the unique obligation to interpret the Constitution and define those rights. The first amendment rights of political protesters, the fourth, fifth, and sixth amendment rights of criminal defendants, the due process and equal protection rights of minorities and women, frankly only the Supreme Court can protect those rights, no matter how unpopular their decisions may be at times.

Now, even though Congress has the responsibility to enact legislation to address difficult social problems, you believe that the Supreme Court has the unique obligation to interpret the Constitution and to declare rights to be fundamental and, therefore, entitled to scrutiny, as I understand your response to Senator Grassley. Am I correct in that?

Judge SOUTER. Well, Senator Metzenbaum, there is, of course, no question that the Court does have that jurisdiction and obligation. Its obligation is constantly to search, to identify those rights which are fundamental, and to implement them.

In my exchange with Senator Grassley last week when I made the remark about the constitutional vacuum, I was thinking, in fact, of a particular example, and I don't remember now whether I went on to that example or not. But I was thinking specifically with reference to the 14th amendment. I thought the case of *Brown* v. *Board of Education* was an example of what can happen, because the unusual situation in the case of the 14th amendment is that under section 1 there are provisions which are to be applied by the judiciary, following justiciable standards, and under section 5, Congress has its own specific enforcement power there. And as you know, for some time before the *Brown* decision came down,