Applying that principle, what, in your view, would be the effect—not the legal, but the practical consequences of overturning *Roe* v. *Wade*—the practical consequences?

Judge SOUTER. There would be the obvious practical immediate political consequence that the issue would become a matter for legislative judgment in every State. I think it is safe to say that those legislative judgments would not be uniform. There would be, I daresay, a considerable variety in the scope of protection afforded or not afforded. The issue of federalism would be a complicated issue.

Senator LEAHY. When I was a prosecutor, at that time it was prior to *Roe* v. *Wade,* or in Vermont, the case of *Beecham* v. *Leahy, et al.,* cases that changed the laws. Abortion was against the law prior to *Roe.* I prosecuted an abortion case. It was the only abortion case I picked to prosecute.

A call came to me in the middle of the night from the emergency room of our hospital. A young woman who was hemorrhaging nearly died. She did not. She did, however, end up sterile from a botched abortion. Our investigation found that the man arranging the abortions would bring young women from the Burlington area in Vermont, across the border to Montreal. The abortions were then performed by a woman who had learned the procedure while working for the SS at Auschwitz. The man I prosecuted would then blackmail these women after the abortion, either for money or for sex. In this case, it came to our attention because the woman nearly died and was brought into the emergency room; that opened up the whole issue. We found out about it, I conducted an investigation, prosecuted the man, and he went to prison.

I am not asking—and you have stated that you are not going to state how you would rule on *Roe* v. *Wade.* I mention this incident only from a legislator's point of view based on my experience as a former prosecutor about what the practical effect of outlawing abortion might be.

Judge SOUTER. I appreciate that. Thank you.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. We will recess until 2:15.

[Whereupon, at 1:18 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. Judge, I and my colleagues apologize for starting—I guess we are 12 minutes later—not guess, I know, looking at the clock.

Next time there is a Supreme Court Justice, I would respectfully request that that Justice decide not to announce his retirement until he is certain everything is calm in the world and that we are going to be in recess the whole time so nothing else can interfere with these very important processes. But I apologize, Judge.

Judge SOUTER. No need to, sir.

The CHAIRMAN. Now, we are to go next to our colleague from Alabama, Senator Heflin, but I have been entreated by our colleague from Utah, who says that he would just like a few minutes to correct the record. My friend from Alabama indicated he did not

mind. If the Senator from Utah really means a few minutes, there is no problem at all—excuse me, the Senator from New Hampshire is seeking recognition.

Senator HUMPHREY. An inquiry. It was my understanding that I was to be the first questioner following lunch.

The CHAIRMAN. I am sorry. Maybe you are. I beg your pardon. You are absolutely correct. The way it was supposed to work is that whenever Senator Simpson came back, we would have him. If he were the next Republican in order to be recognized, it would be him. Quite frankly, I didn't think he was coming back. That is why I indicated you would be next. I will let you two fellows fight that out while I recognize our colleague from Utah for just a few minutes. I will be bound by whatever the two of you conclude is the better way to do it.

I was wrong. It was not you, anyway, next, Senator. It is one of our Republican colleagues. So I am sorry.

Having said that, a few minutes to correct the record.

Senator HATCH. I thank the chairman. I have to go manage a bill on the floor, but I did want to correct the record a little bit.

I would just like to make this point, Judge Souter. Not even Justice Brennan adopted the view that mere congressional silence equals acquiescence in erroneous Supreme Court decisions or construction of a statute. Some Justices have spoken in more deferential terms toward prior errors in statutory construction because it is easier for Congress, they think, to revise a statute and repair the Court's mistake than it would be to amend the Constitution. But Justices Brandeis and Powell and Justices Potter Stewart and William Brennan, among others, acknowledge that erroneous interpretations of Federal statutes are also subject to correction by the Court. I would think that just goes without saying.

Judge, would you comment on this remark by Justice Brennan in the *Boys Market* case which overturned an 8-year-old interpretation of a labor statute in *Sinclair Refining Company* v. *Atkinson?* He said this, Brennan said, "The Court has cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

I might add that in *Boys Market* Justice Brennan also quoted Justice Frankfurter's opinion in the 1940 case of *Havering* v. *Halec:* "Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision"—precisely what you have been saying—"however recent and questionable, when such adherence involves a collision with a prior doctrine more embracing in its scope, intrinsically sound, or unverified by experience."

Now, that is all I want to say, but do you disagree with those comments?

Judge SOUTER. No, I wish I could have said it that well. I think one of the points that I was trying to make this morning is that in deciding the degree of weight to be given to a longstanding statutory interpretation, we cannot make that decision without looking not only to the time which has elapsed since that first decision, but to what else both the legislature and the courts have been doing. And the vitality of an earlier interpretation depends in part upon its coherence with what has passed since that time. We simply cannot divorce that possibility from our thinking.

Senator HATCH. Thank you. I just wanted to correct the record, and I want to thank the chairman and my two Republican colleagues who have deferred to me in this matter. I will go to the floor and get out of everybody's hair.

The CHAIRMAN. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Apparently the Senator from New Hampshire will be next. Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

Good afternoon, Judge. One of the things that fascinates me about the law, Judge, is the consistency and the striving for consistency. That is admirable. However, when we uncover inconsistency, it can be very frustrating. I want to explore a couple of areas that I regard as inconsistencies and see what thoughts they provoke.

Judge Souter, is an unborn child capable of inheriting or owning an estate?

Judge SOUTER. Well, in the civil law, for example, the rule on future interest recognizes the possibility of inheritance by an unborn child who is born alive and able to take.

Senator HUMPHREY. But even during gestation, an unborn child may have an interest in an estate, may be left an estate, a legacy—is that not correct—even during gestation, and that interest can be protected under the law?

Judge SOUTER. With respect, that is an issue which is capable of varying from jurisdiction to jurisdiction, and I will be candid to say to you that I don't recall a specific decision on it in the law of New Hampshire, which is the jurisdiction I would be familiar with.

Senator HUMPHREY. But I think it is known—as you say, it is more than likely to be a substantial difference from State to State, but it is a fact that an unborn child may be left a legacy and that may be protected under the law. How do you reconcile the fact that an unborn child has the capacity which may be protected by law to inherit and own an estate or a legacy on the one hand, while under *Roe* v. *Wade* on the other hand the very same unborn child has no enforceable right to life?

Judge SOUTER. Senator, I really cannot take up the task of reconciling that. As I said a moment ago, I am not sufficiently familiar with the specific body of civil law that you refer to, and the only thing I can say, as you know, is that *Roe* v. *Wade* is discussing a constitutional issue. One of the elements in the equation to which it speaks is the right of the mother. And the kind of inconsistency that you pose is, in fact, in the terms in which you pose it, an apparent reflection of weighting different interests of differential potential parties. But, beyond that, there really isn't anything I can say about reconciling it.

Senator HUMPHREY. Well, again, these are in some measure rhetorical questions. I am hoping to advance the public dialog on this issue by means of these questions.

You talk about weighing the interests. What interests of the unborn child does *Roe* acknowledge?

Judge SOUTER. Well, Senator, I think with respect that it is necessary for me to take the same position in response to your question that I have in response to the questions from some of your col-