pendence is mirrored in our own State constitution, in its reference to rights which are not only inherent, but some of which are indeed inalienable.

Senator HUMPHREY. And when do they inhere?

Judge SOUTER. There again, Senator, I think you have passed that point with me.

Senator HUMPHREY. Well, they are not inalienable, in the eyes of the Supreme Court, with respect to unborn human beings, that is clear.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you.

Before I yield, another point of clarification, if I may. If I remember from law school about decedent estates—and there is very little I remember from law school, with good reason, I might add. [Laughter.]

There can be vested rights in a child that is not even a glimmer in the eyes of his mother or father. In other words, there can be a vested right in a decedent who has not even reached the status, by anyone's definition, of being a fetus. Is that not correct?

Judge SOUTER. Well, I was referring to the rule that an unborn child may take a contingent remainder, if the child is born alive. That is what I was referring to.

The CHAIRMAN. But by "unborn child," just so we——

Senator LEAHY. I am sorry, I missed part of that last answer. I wonder if the Judge would repeat it.

Judge SOUTER. That an unborn child, a child who was unborn at the time a prior interest terminates may nonetheless take a remainder interest, if the child is born alive.

The CHAIRMAN. The point I am making is that the child unborn does not necessarily refer to a child who is, arguably from the position of the Senator from New Hampshire, that is in the mother's womb. There may not even have been a—how can I say it—a child may not even have been anything other than a thought in the mind of a parent at the time the right vests, if born alive, is that not correct?

Judge SOUTER. Well, on the rule that I was referring to, the child must be born alive in order to ultimately take the remainder, and the question is the remainder will simply remain in abeyance until the law find whether a child comes along.

The CHAIRMAN. The child comes along somewhere, some day.

Judge SOUTER. That is right.

The CHAIRMAN. That is right, but it does not relate to whether or not, in the law, whether or not there is a fetus, it relates to whether or not there is ultimately a child, correct?

Judge SOUTER. Yes, sir.

The CHAIRMAN. Thank you. I just want to make sure I understood that.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Judge, I am going to try to ask you some questions about issues that have not been raised. I think we duplicated enough of some of the issues and there have been a lot of efforts, directly and indirectly, flanking, collaterally and every other way, to get you to a point and you are pretty good on just not answering

it, and so I am not going to try to test wits with you, to see whether or not you might say one word or two words on the issue of *Roe.*

There are still some issues that I would like to inquire about. One involves an opinion that you wrote in *State* v. *Hewitt*, which was a case where a defendant was convicted of forgery, and during the trial the judge came to the conclusion that one of the jurors might know the defendant, so he excused the juror, and the defendant's attorney, when asked, said this was all right.

The issue arose as to whether or not the defendant had a trial by jury in the sense that it was not a 12-man jury, from the viewpoint of the U.S. Constitution and the New Hampshire Constitution. In that case, you wrote the opinion and you held, basically, that he did not waive his right to a 12-man jury. Would you give us the background relative to that in your decision and your reasoning therein?

Judge SOUTER. Yes, Senator. One of the issues that was raised by that case was whether—or the issue I guess that was raised by that case—was whether the defendant was bound by his own counsel's expression of approval, when the judge decided to excuse the juror.

What happened in that case is what does happen from time to time, and that is between that moment and the moment at which the case was argued before us, the defendant had obtained new and different counsel and that counsel was then claiming that the defendant was not bound by his first lawyer's decision to accept the judge's determination that the juror should be excused.

The issue that we had to confront in that case is whether to recognize that there are certain constitutional rights of a defendant, which are indeed so personal and fundamental that they may not be waived by someone on the defendant's behalf, that they would be exceptions to the general rule the defendant is bound by decisions of counsel, and we held in that case that the right of a trial by a full jury was indeed just such a right, and because the defendant had not on the record indicated a waiver of his right to 12, we reversed the conviction.

Senator HEFLIN. In your opinion, you recite the split in the Federal circuits pertaining to this issue and other issues.

Judge SOUTER. I believe that is right, yes.

Senator HEFLIN. You made a determination to decide the case on the New Hampshire Constitution?

Judge SOUTER. Yes, sir.

Senator HEFLIN. Now, would you tell us basically your reasoning for doing that?

Judge SOUTER. Well, we decided on the basis of the New Hampshire Constitution, because the New Hampshire Constitution was extremely clear on the right to a 12-person jury. That was an issue which had been litigated in the past, I think around 20 to 25 years ago, prior to the time that we were writing. So that we were in a situation in which there was extant constitutional law in the State that was clear and explicit on one of the fundamental issues in the case.

We took the position that where the State constitutional law was clear on a very significant issue, that it was appropriate to rest the decision on a State constitutional basis.

Senator HEFLIN. Would you give us your general feelings on the right of trial by jury? It is under attack today in a lot of different ways. What are your feelings on jury trials?

Judge SOUTER. Well, my feelings are very strong on their value. I think I said earlier, when I was referring to some of the experiences that I had had as a trial judge, one of the best of those experiences was simply the continual exposure to jurors. I watched what they did in hundreds of cases. I talked with them after the cases were over. I left virtually every trial with an enormous respect for the jurors and the jury system.

If there are two kinds of cases that I would emphasize that I found the jurors just indispensable in and dependable in, it was in criminal cases and in civil damage actions where the determination of an appropriate damage remedy was a reflection and should be a reflection of community standards.

Let me just say a word about my feeling about the soundness of the jury system in criminal cases. I have heard lawyers, from time to time, wonder cynically whether, in fact, in front of a jury a defendant really does enjoy the presumption of innocence when that defendant does not take the stand and testify?

One of the happy conclusions that I can report after presiding over hundreds of jury trials in criminal cases is that the answer to that question is, yes, juries do take that right seriously and they are, in my judgment, scrupulous and capable in following instructions.

I had a number of instances, over the years, in which I would speak with jurors after a criminal case was over, in which jurors have said to me—cases in which there had an acquittal, in a criminal trial, and the defendant had not taken the stand—and I have had jurors say to me—I never ask jurors questions, by the way, about their views on the case—but they would often volunteer them, and they would say to me, Judge, we thought the defendant was guilty but not beyond a reasonable doubt. We weren't that sure.

Those were cases in which the defendant had not taken the stand. I came away with an unbounded respect for the jury system in those circumstances.

I think if I were giving advice to any party, in any case and certainly to a criminal defendant in a criminal case, my advice would be, at least in the State I'm familiar with, you may depend upon the jury's good faith in applying the instruction on the presumption of innocence even if you do not testify. But the one thing you must not do is take the stand and lie because jurors have an extraordinary capacity to perceive untruth.

That is advice that I would never hesitate to give. When you have had the kind of experiences that I'm alluding to there, you come away a great champion of the jury system.

Senator HEFLIN. I'm delighted to hear your feelings on that.

Richard v. *McCaskell* was another instance relative to a waiver of a constitutional right in which you held that such waiver didn't exist. This was where a defendant, I believe, was charged with writing bad checks or something in this regard, and he entered a plea of nolo contendere. Later, he was put on suspended sentence. Later he was arrested for similar offenses, and the issue arose as to

whether or not the defendant knowingly and voluntarily waived certain rights when he entered the plea of nolo contendere.

Would you give us your background of that and your reasoning relative to that? It is somewhat similar, perhaps, to the case that I previously asked you about.

Judge SOUTER. Well, Senator, I'm going to have to make a confession. I remember the case of *Richard* v. *McCaskell* and I remember the circumstances from which it arose, but I did not reread that case in the last couple of weeks and I'm shaky on it. Could I look at the opinion when we take a break and perhaps address your question afterward?

Senator HEFLIN. Sure.

It goes basically to a fundamental right that a person has to knowingly and voluntarily waive, and it's part of constitutional law, I think, particularly in the field of criminal law that many of us are interested in.

You also, in another case which was sort of a unique case, *State* v. *Vanderhaden,* in which a majority of the New Hampshire Supreme Court held that the presence of unauthorized police officers in a grand jury room warranted the quashing of subsequent indictments. You wrote a dissent in that case, arguing primarily that the criminal defendant should have the burden of showing prejudicial effect.

Why did you reach this opinion? If you can, tell us about that.

Judge SOUTER. My recollection is that in that case the police officer was in the grand jury room contrary to the instructions of the Court. No issue was raised, as I recall in the case, that the police officer had acted in any affirmatively inappropriate way. The question was, whether the integrity of the grand jury system was best served by quashing an indictment with respect to which there was no indication of prejudice to the defendant, or whether the grand jury system was best preserved by, in effect, requiring the Court to enforce its own orders, and to keep tabs on what was going on in the grand jury room.

My view was that in the absence of any indication of prejudice by misconduct by the police officer that the social balance was best served not by quashing an otherwise valid indictment, but by depending no the trial court's authority over its own proceedings, including the conduct of grand jury proceedings, to police the grand jury room in that way.

Senator HEFLIN. I notice that the Supreme Court of New Hampshire gives advisory opinions to the legislature on proposed enactments as to the constitutionality of certain provisions, or the act itself.

Judge SOUTER. Yes, sir.

Senator HEFLIN. My State does the same thing. I've realized that there are a lot of faults with advisory opinions. They are looked upon somewhat where they're not supposed to be stare decisis. But advisory opinions are looked upon as being just the opinion of the individual justices combined collectively. It is not in a factual setting, and I have some criticisms of advisory opinions from a decision-functioning process as to whether they should establish law to be considered under the concept of stare decisis.

Do you have any feelings about that?

Judge SOUTER. I do. That is or was a function of the Supreme Court that I was most reluctant to undertake. There was no question that I had a constitutional duty to do it, and I did so. But the faults of the system are exactly as you describe them. We are asked to give opinions on subjects where we have no benefit of any factual record. I don't know how it works in your own State, Senator, but in mine it is rare, and perhaps—I'm not sure it has ever happened in my experience—that we have oral arguments in those cases. They are submitted on the basis of memorandums, and frequently it's the case that we are faced with the constitutional duty to give an advisory opinion in which one side of an issue is not even represented by memorandums, and let alone, resting on a factual record which is necessary to sharpen any issue.

So we find ourselves giving opinions and we do it sort of with our hearts beating fast because the fact is we need the help of oral advocacy. Courts do not do well or would not do well to sit by themselves and decide cases without the help of lawyers, and indeed of pro se parties, and we don't have that kind of help in any systematic way in those advisory opinions.

If you were going to poll, I think, the New Hampshire judiciary on the article of the Constitution they were most likely to amend, that one would win.

Senator HEFLIN. Well, in one of these advisory opinions there was a decision pertaining to a proposal which prohibited gays and lesbians from running daycare centers, but held that the provisions to exclude gays and lesbians from adopting children or becoming foster parents were consistent with State and Federal constitutions.

Would you give us your reasoning relative to that decision?

Judge SOUTER. Well, the distinction turned, well, the issue arose on the question, whether there was, in fact, a legitimate State interest which would justify the legislative decision made in that case.

The reason the court drew the distinction that it did, saying that the prohibition against the operation of daycare centers would not pass constitutional muster, but that the prohibition on adoption would, turned on their being an evidentiary basis for the legislature to hold that there was a role model function served by adoptive parents, but conversely that we did not see that there was a strong argument or an indication of evidence that the same thing could be said with respect to those who operated daycare centers.

In fact, as the bill was written—a daycare—an individual would be prohibited from operating a daycare center even if there were no contact between the individual and the children, and we found that that was just outrageously too broad.

There is no question that I think that case probably illustrates one of the difficulties inherent in any advisory opinion of the sort that we've been talking about, and that is we did not have, as a record behind us, a developed evidentiary record on the role model theory. The most that we could say is, yes, there were thinkers and child psychologists who believed that that was, in fact, a proper analysis. We realized that it was a disputed point, but we believed it was within the legislative power to make a judgment on that.

But there is no question that in that case, as in many others, we might have had a very different record if we had had an actual

piece of litigation coming to us, instead of an advisory opinion request.

Senator HEFLIN. The United States Supreme Court, in 1984, rendered the decision in *Pulliam* v. *Allen,* which was a case involving a magistrate in Virginia where a person was charged with an offense that did not have any punishment by imprisonment. I think it was a fine alone. There was a denial of bail, and the defendant went into Federal Court and obtained an injunction and later obtained a judgment against the judge for substantial court costs, including an attorney's fee.

The issue, of course, arises as to judicial immunity and the doctrine of judicial immunity. The Supreme Court, by a sharply divided case of 5 to 4, held that the doctrine of judicial immunity neither prevented the injunctive relief in the Federal civil rights action challenging the decisions of the State judge, nor barred attorney's fees awards against the judge.

I have legislation in the Senate attempting to remedy that, but without expressing yourself in any matter that might come before the Court, do you feel the independence of the judiciary—particularly the State judiciary—is a necessary protection?

Judge SOUTER. Well, I do, without question. As you know, Senator, the threats to the State judiciary, to the independence of the judiciary are less probably in an injunctive situation than they would be in a situation in which monetary fines could be recovered and monetary damages could be recovered. There is great concern throughout the country about the susceptibility of actions to monetary awards based on actions by the courts which are administrative in nature as opposed to the exercise of core judicial functions.

The judges, in the aftermath of those decisions, have had to exercise great care in trying to draw the lines between what they deem as the exercise of a core judicial function, as opposed to administrative functions. But there is no question that there is a threat which is felt. Whether ultimately that threat is justifiable or not I suppose is an issue that could, indeed, come before the Court again in my time, but I understand the argument on the side that you refer to.

Senator HEFLIN. You have written a number of opinions on the issue of insanity and the commitment to mental institutions. In one case, in particular, you broke with prior precedent and established a new burden of proof in cases of involuntary civil commitment. This is the case of *In Re: Sanborn.*

Judge SOUTER. Yes.

Senator HEFLIN. In that particular case you lowered the burden of proof in these types of cases from one of reasonable doubt to one of clear and convincing. What led you to the belief that a lower standard was necessary?

Judge SOUTER. What led us to that belief, Senator, was the fact that the people of New Hampshire had already amended the New Hampshire Constitution to provide that in cases in which there had been a commitment based on what we generally call insanity arising out of a criminal case, the burden of proof would be clear and convincing.

Now, that constitutional provision was adopted in the train of a series of New Hampshire decisions going back before the time that

I was on the supreme court, in which the court had held that, both with respect to commitments based on mental illness and dangerous propensity arising out of purely civil proceedings and the same kinds of commitments arising out of criminal proceedings, the standard of proof required for the State to prove the probability of dangerousness, if the subject were allowed to go at large, would be the standard of beyond a reasonable doubt.

In those prior cases, the court had taken pains basically to say that although the proceedings from which these commitments arise are different kinds of proceedings—one is criminal, one is civil—the justification for State action is essentially the same in each case. It is a concern with safety, both for the public and for the individual committed.

What those prior cases had done, in effect, was to put the civil and the commitment cases on the same footing so far as the factual and, in fact, constitutional justification for commitment. When, therefore, the New Hampshire electorate amended the constitution to provide that in cases arising out of criminal proceedings, the standard would be reduced to clear and convincing—when, in effect, they overruled the New Hampshire Supreme Court with respect to the criminal commitment cases—it was necessary to follow the same rule with respect to the civil commitment cases because in each case the justification was the same. It was a kind of self-policing of equal protection, in a way. And so, therefore, we believed that we were compelled to adopt the—in effect, to take the constitutional change in the criminal area as a mandate to change the standard in the civil area as well. It, in fact, was probably inadvertence that the drafters of the constitutional amendment had not expressly referred to both. But, in any case, we had a very simple question of evenhandedness.

Senator HEFLIN. There have been efforts, particularly in the field of legislatures, to file resolutions calling for Congress to call a Constitutional Convention, particularly pertaining to a balanced budget. There is a lot of debate going on relative to whether a Constitutional Convention, if called, would be limited to the resolutions in which three-fourths of the States would have petitioned Congress to call such a Constitutional Convention; that is, the specific grounds and reason for calling the Constitutional Convention.

On the other hand, there are those who feel that a Constitutional Convention, if called, would not be limited and could be wide open, addressing whatever it might choose to address, and whatever was done through the ratification process could become our Constitution.

Do you have any general thoughts pertaining to whether or not such a Constitutional Convention, if called, would be limited, or is it wide open?

Judge SOUTER. Well, Senator, I have never done any research on the question of whether it could be limited. I have tended to assume that it would not be if it was called. And I would not in my present position give advice to the Congress or to the Nation about what they should do. But it is instructive to remember on the assumption that I have made that when the Convention of 1787 was called, its charge was to revise the Articles of Confederation. And we all know what happened. That was a magnificent departure

from the intent of the Convention. Whether we could expect such happy results another time is a question I think everybody had better face.

The CHAIRMAN. Well said.

Senator HEFLIN. I believe my time is about up. Is my time up?

The CHAIRMAN. You still have 2 minutes, Senator.

Senator HEFLIN. Well, I noticed, too, in your opinions on the Supreme Court, trying to review quite a large number of them, that you wrote a lot of concurring opinions and dissenting opinions the first 3 years, but in the last 4 years you have hardly written any other than the opinions that you have written yourself. How do you account for the absence of your writing concurring opinions? Have the issues changed, or is it that you are spending more time doing something else?

Judge SOUTER. No, it is not that I got tired or took up another activity. I would like to think that I probably got a little bit more persuasive with my colleagues in conference. [Laughter.]

Senator HEFLIN. That is a good answer. That is all I have. I wish your colleagues—well, your colleagues probably listen to you a lot more. It is hard to get them to listen here in this forum. [Laughter.]

The CHAIRMAN. The judge longs for those days when he was on the Alabama Supreme Court. But we all do listen to him here, anyway, notwithstanding that.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

I was very interested in the dialog between the two judges, and I have the greatest respect for both of them. That is a very interesting part of what you will be doing. I would think that that obviously is something that you thoroughly enjoy doing. You like that interchange of judge to judge and discussion of distinction upon distinction and case upon case and that kind of—I guess to some it would be excitement. [Laughter.]

But not me. I am fascinated by that because that never appealed to me in my practice of 18 years. When there would be a vacancy and they would say there is a judgeship available, boy, it almost made me cower in the corner. Many people are aware of why that would be, I think. There are certain of us that enjoyed the give and take, and it is always most intriguing to me to hear the discussion of very able lawyers, who I think would have been great jurists—and one who is a great jurist, and that is the judge from Alabama. But enough.

Let me just say I do apologize for being absent on Friday. I was necessarily so. I spent the day with two former Governors, one my predecessor, U.S. Senator Cliff Hanson. And while I was gone, I was able to watch some of the activity later in the day, and then I have seen some tapes of the activity. And I can just tell you that out in the land—and I was with a very diverse group of people from all over the United States, jurists, lawyers, Medal of Honor winners, football players—there is a good feeling about you. There is a good feeling out among those people from all over the United States who have a good sense of who you are. That has come through to them. And I think that that is because you are there, in this very patient way, answering every single question that can