

But if we can keep in mind that there really is one, only one great exercise of the mind here, and it is very simple for lawyers, and that is to see people go on the bench and see people who practice law who will assure a just and fair determination of rights based on the facts and the law of each case that comes before us, and not do the head-of-the-pin dance, or "what would you do?" or the hypothetical. Rule 1 of the Code of Civil Procedure: Simple, just, determination, whatever it is, swift and fair. And that is the issue. And I think that you are highly capable of that, skillfully so.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

For the record, I would like to publicly dissociate myself from the Senator from Wyoming's law school record. The only thing I learned in law school that turned out to be true, Judge, is that the A students go on to be judges and professors, and the B students work for the C students. That is the only axiom I have ever found that turned out to be true. [Laughter.]

And I don't know why everyone is so worried here about the Court overreaching. Bickel went on to point out that the Federalist Papers basically made the assertion—and I think this is Bickel's—it is paraphrasing him if not quoting him. [Laughter.]

Bickel said something to the effect that the Court was the least dangerous branch of the Government. I am not sure why everyone is so concerned about overreaching of the Court if it is the least dangerous branch.

But having said that, let me yield to my colleague from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Souter, when I questioned you yesterday, I mentioned this growth idea, and what you might do as a member of the Court to understand a little more the desperation of some in this country. Have you reflected on that at all? Do you have any ideas?

Judge SOUTER. I have. I don't have an itinerary to lay out, and I know that that is not what you were expecting me to do. But the one thing that was so clear to me when I was thinking about your question afterward is what you yourself suggested when you asked it. You said in so many words that when you had come to the Senate, you didn't know what those things are that would be sort of the objects of your own growth. But suddenly you were presented with them, and it was clear to you that there were blank spaces in your life which you had never concentrated on before. And once you knew that, it was obvious how to go about filling them.

I have had that same experience. I never knew when I started practicing law what I was going to see as problems in society that would occupy a great deal of my time, but suddenly they were there. And without any expectation, you knew what you needed to know or you knew what you didn't know and what you should concentrate on.

I have no doubt that if I should go on the Supreme Court, the stimulation of my colleagues and perhaps even more importantly the stimulation of the issues and the cases that come before us will make the path of what I think I would call an organic growth as clear to me as it has been to you. That is the way my life has

worked up to this time, and I have no doubt that it is going to continue.

The one thing I do know from just my experience on the New Hampshire Supreme Court is that one of the fears that we really do have to fear is the fear of isolation, which the disciplines of the judicial power force upon us. And we have to be constantly aware that we cannot seal ourselves away.

Senator SIMON. If I could just comment on that, I think that that growth is not going to be an automatic thing. I think you will have to consciously be working on it. I think it is very easy, whether you are a U.S. Senator or a member of the Supreme Court, to isolate yourself. I think it is much more of a temptation as a member of the Court. And when the Court is not in session, you can attend the seminar in Aspen or the one in Salzburg or somewhere and not really reach out to get a little greater breadth of what is happening in this country. And I don't mean any disrespect to you when I say I think it is extremely important that that is one of the things you consciously be aware of.

Judge SOUTER. Well, it is. You know, you refer in a way—you speak of the country. It is only natural when you have been a State court judge to have that kind of sense of your State as a whole. You know where all the diversity fits in it. And I would assume and hope and expect that the kind of same imperative within ourselves would apply if in your judgment I should face a national jurisdiction.

Senator SIMON. In response to a question I asked on Friday on discrimination and "affirmative discrimination," the phrase that you were quoted as using in the newspaper, your answer in general was an excellent answer. There is one sentence here though that does bother me just a bit, and I simply want to clarify it. I am not asking for a response on your part. You said, "The kind of discrimination that I was talking about in that speech was discrimination—as I described it, and as I recall being quoted in the paper about, a discrimination in a sense that benefits were to be distributed according to some formula of racial distribution." Congress has never ordered any such formula. We have not ordered quotas. Now, the courts may from time to time in order to remedy a specific situation.

Judge SOUTER. As part of the remedial power, yes.

Senator SIMON. Right. Following that, and in a sense following the question of Senator Simpson about how you are different than you were 25 years ago, it was just about 25 years ago you were a law school student, and we were in the middle of the civil rights struggle. Do you recall your reflections at that point in the civil rights struggle?

Judge SOUTER. Yes, to a degree. One of the things that it was difficult for me to understand—this is one of the subjects of my own growth, this is really a growth question, I think, that you asked me—is the entrenchment and the commitment in places other than the places where I lived to the perpetuation of a discriminatory and unjust system.

I had grown up, as you know, in an atmosphere in which the kind of institutionalized discrimination that was of concern to us in those days did not exist on my street or in my town, and you never

really do face those facts of human nature until they are forced in front of you, and they were forced in front of all of us then.

I remember the—I suppose no one in New Hampshire could forget it, but I remember if there was ever one thing that brought that home to us, it was when a boy from Keene, named Jonathan Daniels, was killed one summer, when he had gone I think to Mississippi on a voter registration drive, and suddenly we realized, in the most particularized way, what the Nation faced, and I think we could not have realized it before that time.

Senator SIMON. Let me shift to another area. In 1983, a column appeared in a newspaper—I do not have the name of the newspaper here—by Ed DeCorsi, in which he—and let me just quote a few sentences: “David Souter was New Hampshire’s brilliant young attorney general when he addressed the Newport Chamber of Commerce nearly six years ago.” In his characteristic, clear English, Souter told that Newport audience that:

America’s determination to avoid a strong central government “has dropped from our consciousness in the past two decades.” That determination, he said, was the central theme in the Declaration of Independence. In fact, when the States were considering ratifying the Constitution, the issue was whether a national government could be tolerated at all.

By 1978, our prevailing determination had changed. No longer were we stubbornly resisting a strong central government. We were, instead, resisting anything that would cost us money, and that meant abdicating the local and State control America once cherished.

He cited three instances in which the State had yielded control over governmental expenditures to the Federal Government, which had no constitutional authority in the matter. All of them were causes to be applauded, but he said, “the government to which we now look to provide them is no longer the government we control.” They were the nationwide 55-mile-per-hour speed limit, unemployment benefits for State and local government employees, and providing education for every handicapped person between the ages of 3 and 21.

Now, the last one of those three, providing education—and the technical term in the law is 94-142—I had something to do with creating that, and your neighbor from Vermont, Senator Bob Stafford, was the chief mover over here in the Senate. Prior to the passage of that, the majority of mentally retarded individuals were not being given any help by our public schools, and you had two court decisions or consent decrees that grew out of 14th amendment cases. One was a Pennsylvania case, the *Pennsylvania Association for the Mentally Retarded v. State of Pennsylvania*, and one here in Washington, DC, *Mills v. the Board of Education*.

I would like to tell you that I think that Congress overwhelmingly passed this legislation just purely on the merits, but I think it was also the fact that the Court looked like it was going to say the 14th amendment applies to these people, and I think that is also the reason President Ford signed the legislation.

I would be interested in any reflections you have now—1978, this was 12 years ago—any reflections you might have, looking back, and then, even assuming that you think you disagree with those of us in Congress who enunciate something like that, your posture on the bench. You have stated that, but I would just like to have that reiterated.

Judge SOUTER. Going back to the news account that you referred to, Edward DeCorsi is a person for whom I have unbounded respect, and I appreciated his reference to me in his column.

The only thing that I might question and would question is the possibility of having left the suggestion that in respect to these three subjects, Congress had no constitutional power. Congress does have constitutional power in it.

I know what was on my mind back at that time 12 years ago, and it was pretty well suggested by the remainder of the quote that you referred to, and that was that, because we on the local level simply are not able or willing to face the problems that are in front of us, those problems, in fact, will be faced by someone else and our control, our ability to kind of do our best at home, perhaps with the least amount of money, is simply an ability which we are allowing to be taken away from ourselves, because if we will not solve our problems, Congress will and Congress should.

I am afraid that that rule, if you will, that rule of dwindling responsibility is just as good a rule today as it was back when I first spoke of it.

Senator SIMON. I think you are correct. I hate to use the term "vacuum"—

Judge SOUTER. I stayed away from that word, believe me. [Laughter.]

Senator SIMON. In fact, if local government does not act, the Federal Government inevitably will.

When one of your predecessor nominees was before us, Judge Bork, he stated that what a court adds to one person's constitutional rights, it subtracts from the rights of others.

In my discussion with Judge Bork, I asked about this statement and he told me, and I am quoting, "I think it's a matter of plain arithmetic," to which I responded, "I have long thought it to be fundamental in our society that, when you expand the liberty of any of us, you expand the liberty for all of us." Which one of these equations do you find yourself more comfortable with?

Judge SOUTER. The second one, because I would rather have the right to do something than a right to stop somebody else from doing something.

Senator SIMON. I like that answer.

Recently, some of us in the Senate got together for lunch and we had a little discussion. There was at least a semiconsensus that the basic defense of civil liberties may be shifting back to Congress from the Supreme Court. Do you agree with that assessment, and do you think it is a good thing, if that is taking place?

Judge SOUTER. I am not ready to agree with that. I do not think the—I know the criticism that is being made and I know that Congress has been very well made aware of its power, as we were saying earlier, under section 5 of the 14th amendment, but I would simply be reluctant, on the basis of the evidence that is in at this point, to say that the Supreme Court is trying to wash its hands of protection. I trust that is a day we will not see.

Senator SIMON. You were asked earlier—and I cannot remember, but I think it was by Senator Specter—a little about this process. If I may be more blunt, what is your impression of this process? Right now, it is probably one of a little weariness on your part, but do you think the Nation is served well by how we are handling all of this?

Judge SOUTER. I think the Nation is served well by seeing me and by seeing you. Naturally, not every moment in this process has been totally much to my liking as some, but what I am appreciative of is in being part of a process and a visible one. You are right, the afternoon, it is afternoon and I have been sitting here for a while and I will be here for good while longer, and perhaps I will be back tomorrow, but the fatigue at the hour has nothing to do with the value of the process and I am glad that you have had me here.

Senator SIMON. Finally—and I will not take my full time, Mr. Chairman, I know that will be a great disappointment to you—do you feel in any way inhibited by what you have said here, in terms of your service on the Court, assuming you are approved?

Judge SOUTER. No, because the committee has been very respectful, even in cases in which it may not have agreed about the point at which it has seemed to me necessary to limit my answers for the sake of the integrity of the judicial process, and I have been grateful for that respect.

Senator SIMON. If I can just go back—and this is not a question—to that first question on growth. I am going to take the liberty, if you are approved and after you are sworn in, of sending you a note with a few suggestions that you may reject. At that point, you can do whatever you want, anyway—but I would hope you would consider them, as you look at making David Souter a Supreme Court Justice who is as responsive as possible to the needs of this Nation.

Judge SOUTER. I would like that, even if I do not go to the Supreme Court.

Senator SIMON. Thank you, Judge.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Judge Souter, earlier this summer we celebrated the centennial of the Sherman Act. For over a 100 years, as you know, this landmark measure has protected treasured American principles: competition; fairness; and equality. The antitrust laws are important, because they have led to a flourishing economy and they have also led to lower prices for consumers. These laws, as you know, are nonpartisan. They have been vigorously defended and enforced by both Republican and Democratic Presidents and, as you know, one of the most current advocates of strong antitrust enforcement is your good friend Warren Rudman. And so on his behalf this afternoon, I would like to ask you just a few questions.

In your mind, Judge, how important are the antitrust laws in shaping our economy?

Judge SOUTER. Well, as you know, Senator, I do come from a tradition that involves Senator Rudman, and it is a tradition that goes back to the days in New Hampshire when Senator Rudman was establishing a consumer division in the State of New Hampshire, with jurisdiction over the State antitrust laws and was bringing about the passage of a Consumer Protection Act, which I later, as attorney general, had the responsibility to administer.

I also have been well educated by Senator Rudman over the years in the value of small business. Small business has no better friend than he has, and I think one of the lessons that I have ab-