plain what we are going to do next. We are going to come back. There are some wrap-up questions that could take anywhere from a total of a half an hour to 2 hours. I don't know. My practice has been with every nominee—and I am going to continue it as long as I am the chairman—that as long as Senators have reasonable questions—and I don't think anyone would suggest we have been asking unreasonable questions to this point. I will allow the process to continue. But my guess it—and it is only a guess—that we are talking about somewhere around 7 o'clock—I am guessing—before you would finish.

Now, the ABA, as is the tradition of this committee, at least of late—by late I mean the last several decades, to the best of my knowledge, is always the first public witness. They are prepared to testify today and very much wish to testify today, so I will follow through with them as well. And your own Governor from New Hampshire very much wishes to testify on your behalf and do that today. And so we will take the public witnesses, unless for some reason we go on well beyond 7 o'clock in terms of the committee questioning—which I do not anticipate. Unless we do, we will go to the two public witnesses today and the only two public witnesses, the ABA and the Governor from your home State, in which case we will end the hearing for today.

Now, let's recess for 15 minutes until 10 minutes of.

[Recess.]

The CHAIRMAN. The hearing will please come to order.

Judge, let me begin by touching briefly on an area I don't think is a problem—a problem in the sense that I don't think you will have a problem speaking to, that is, the free speech area—and briefly discuss with you three areas that are the core of free speech doctrine. I would like to discuss a little bit *New York Times* v. *Sullivan*; then prior restraint and speak very briefly to the Pentagon papers and how *Near* v. *Minnesota* was applied; and I would like to speak a little bit about the whole notion of civil disobedience, incitement to violence, *Abrams* and *Brandenburg,* if I could. Again, not seeking an opinion how you will rule on anything in the future, nor looking for a precise judgment as to whether or not you agree with the precise reasoning in any one of the cases, but if you will talk with me a little bit about each. So the issues that I want to talk about are prior restraint, libel, and political speech advocating law-breaking or violence, and what principles control.

Judge, one core issue under the first amendment is when the State can impose what is called prior restraint—that is, prior restraint on a newspaper or on any publication which the State attempts to step in and suppress, like with regard to the Pentagon Papers, which is 1972. The Government wanted to prevent the publication of the Pentagon Papers, as you well remember, by the New York Times and by the Washington Post of classified documents dealing with the activities of the United States in the Vietnam war.

Now, the Government said that publishing the documents would prolong the war by providing harmful information to the North Vietnamese, and the Supreme Court rejected this claim because it was not presumed that publication of the papers would definitely

cause the harm alleged by the Government. The Court thought the Government's claim only amounted to speculation.

Now, Judge, my question is this: Do you agree with the principles enunciated by the Court in the *Pentagon Papers* case with respect to the first amendment doctrine of prior restraint?

Judge SOUTER. Yes, the principle being you have got to prove your harm, and the burden of proof is the highest known in our constitutional law.

The CHAIRMAN. Judge, let me speak a moment now about a case that all public officials say, particularly when there is press around, that they strongly defend; but they all kind of hold their breath, and I am not sure whether they really believe, public officials, elected public officials primarily. That is *New York Times* v. *Sullivan.* As you know, that case is the one in which Justice Brennan, writing for a unanimous Court, said that the public official cannot recover damages for a defamatory false statement unless he proves that the statement was made with what the first amendment experts call "actual malice;" that is, unless the person making the statement knew it was false or acted with reckless disregard for whether or not it was false.

Again, Judge, in the interest of time, without going into detail, unless you would like to, do you agree with the level of protection that the Court accorded the press in its decision in *New York Times* v. *Sullivan?*

Judge SOUTER. I think that level of protection reflects the significance of the libel laws in modern society. I take that decision as a judgment by the Court that that was the only appropriate way to effect the freedom of the press, given the economies of the modern society that the first amendment protects. And I have no reason to gainsay that or second-guess it.

The CHAIRMAN. Now, the last area relating to freedom of speech that I would like to discuss with you is this. As you know, during World War I and the period that followed, the Supreme Court looked at what circumstances speech calling for breaking the law or actual violence could be prohibited by the State. At that time, the majority of the Supreme Court said that this kind of speech calling for violence would and could, in fact, be prohibited even though there was no immediate threat that the law was about to be broken or that violence was about to break out.

Now, in those cases, *Abrams* and *Gitlow,* Justice Holmes and Justice Brandeis, as you well know, wrote their stirring and passionate dissents that everyone who has looked into this area is fully familiar with. They said that the Constitution allows political speech to be stopped only when there is a "clear and present danger of violence and law-breaking." Their dissents were eventually adopted as the correct view by the majority of the Supreme Court, and a similar but somewhat more stringent test was accepted, in fact, by a unanimous Supreme Court in *Brandenburg* v. *Ohio* in 1969. In *Brandenburg,* the Court said that speech calling for violence or law-breaking could be forbidden only if that speech called for and would probably produce imminent lawless action.

Now, Judge, do you agree or disagree with the free speech principles articulated by the Supreme Court in *Brandenburg* and at an

earlier time the dissent articulated by Justices Holmes and Brandeis in the 1920's?

Judge SOUTER. Yes, I have no reason to call them into question. And as I think you may recall from my answer to one of your colleagues today, I have been in the position of giving advice to the executive branch on the implementation of *Brandenburg*.

The CHAIRMAN. That was my last question. I assume that the Chicago Two, two of the seven or three of the seven, whatever it was——

Judge SOUTER. We had three.

The CHAIRMAN. Three. I assume based upon your statement that you made earlier that they ended up speaking at the University of New Hampshire?

Judge SOUTER. Yes, they did. There is one subchapter of that story which I wasn't personally involved in and on which I am a little vague. But, apparently, as I recall it best, late in the day when they were going to speak, some concerns with an evidentiary basis were raised about security, and my best recollection is that both the State and the sponsors of the speech and the speakers ended up before the U.S. district court. And I think the judge of the U.S. district court actually issued an order restricting the time within which the speech should be given for some security reason that I do not now recall. But they did speak.

The CHAIRMAN. Now, Judge, with the time remaining, I would like to go back, as briefly as possible—I don't mean that to in any way curtail your answers, but as succinctly as I can state the question—and speak once again to something that has not been accidental but has been a significant subject and topic of interest, where on the interpretivist spectrum you fall.

I might add, once again, I might state the obvious, that the reason I suspect for that is that there is an intellectually defensible and politically—with a small P; it is not part of any political party organization—politically active school of jurisprudence which has as its core, as one of its advocates said, hopefully creating a new wave of thinking about American jurisprudence, that it generates, it followed, from the perspective of many on this panel—and I suspect many in the Senate—a relatively cramped reading of the Constitution. And I suspect that is why so many of us are coming back and answering it. I am not suggesting—as a matter of fact, I am suggesting the opposite. It appears to me that you don't fall at the extreme end of that interpretivist spectrum. But that is a very important question for me to determine and, quite frankly, one upon which, just as you have to make a judgment for yourself as you have sat there the last several days as to what you should and should not ask, there is no precise guidance for us in the Constitution as individual Members of the Senate precisely what basis upon we should make our judgment. And many of us have very different views as to how that judgment should be made by us individually.

But for me, when I said at the outset I have a keen interest in your views, the views to which I was speaking were your interpretivist views, not how you would come out on any single case. And so I would like to pursue it just a little bit more because I think you have come—I think I understand it. I don't want to mis-state it.

You have explained that your approach is to start with the text of the constitutional provision in question; and then if the text is unclear, the judge should proceed to examine not the original intent, but the original meaning.

Judge SOUTER. That is correct.

The CHAIRMAN. Is that correct?

Judge SOUTER. Yes, and I mentioned that when I speak of original intent, or the intentionalist school, I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted and ratified the provision, and that the provision should be applied only to those instances or problems. I do not accept that view.

The CHAIRMAN. Then I have correctly understood it. Now, Judge, under your approach does the correct interpretation of a constitutional provision, does the meaning, the correct meaning, the correct interpretation, does that change over time?

Judge SOUTER. I think the best way—you know this is one of those difficult issues to talk about only because as you, yourself, suggested at the beginning, it is difficult to state the problem the way we want to. I think the best way to describe it is this way.

Principles don't change, but our perceptions of the world around us and the need for those principles do. I wonder if we do not have, as a good example, and I know we keep coming back to this, but I wonder if we don't have, as an example of how this evolution takes place in *Brown* v. *Board,* itself?

The CHAIRMAN. Good. That is exactly what I was going to ask you to go through with me. Thank you. That would be very helpful.

Judge SOUTER. The majority who decided *Plessy* v. *Ferguson* in 1896 accepted as a matter of fact that in the context in which they were applying the 14th amendment there could be separateness and equality. Whatever else we may see in *Brown* v. *Board,* there is one thing that we see very clearly and that is that the Court was saying you may no longer in applying this separate but equal doctrine, ignore the evidence of non-tangible effects. When you accept that evidence, then you see that you cannot have separateness and equality.

In 1954 they saw something which they did not see in 1896. Now I will say, as I have said before, that I think *Plessy* was wrongly decided, but I also understand that there was a perception which the experience of 58 years had allowed the Court in 1954 to make and they saw an application for a principle which was not seen in 1896, and they saw the factual impossibility of applying the terms of 1896 in 1954.

I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses.

The CHAIRMAN. What really is, in fact, equal protection.

Judge SOUTER. Yes.

The CHAIRMAN. Let's pursue this a little further. Let's talk about the principle, if any, is enshrined in the Constitution, of everyone of us who have the franchise having an equal opportunity not only to exercise it, but it having equal weight.

Now, in *Baker* v. *Carr* which is early 1960's, 1964, 1963, 1964, in that range——

Judge SOUTER. I want to say 1964.

The CHAIRMAN. 1964? They looked back at that principle and applied it differently than it had been applied any time in our history.

Now, again, explain how your interpretivist doctrine as you apply it allows you to reach the conclusion, and I believe you do reach the conclusion, that *Baker* v. *Carr* was correctly decided in 1964, when, in fact, prior to that time, the principle was incorrectly applied. I assume, based on your answer on *Brown*, the principle was always present, but the principle just wasn't properly applied; is that a fair statement?

Judge SOUTER. I think that is a fair statement. As I said to you when we were talking in kind of a short-handed way earlier today, the hurdle in *Baker* was the argument which Justice Harlan raised. One cannot deny the power of Justice Harlan's argument, that section 2 of the 14th amendment indicated an intent not to apply the principle to the situation at hand.

As I said, without underestimating the power of that argument, if I had been on the Court, it seems to me that ultimately I would have had to have rejected it. But once that hurdle was passed, then the principle of equal protection or the applicability of it, it seems to me was reasonably clear.

Senator THURMOND. Now, Judge, keep your voice up if you can.

Judge SOUTER. I am sorry.

The CHAIRMAN. Now, let me try it another way—not try it another way—I mean this is very helpful to me in understanding how you reason these things. I understand how *Bolling* v. *Sharpe* was arrived at essentially, as you used—I don't have your quote, but you said basically: these are a practical bunch of folks. How in the devil could they say the 14th amendment said that you could not have separate but equal schools in the States, yet, you could have separate but equal schools, that is segregated schools, in Washington. Even though the due process clause of the fifth amendment had been around a lot longer than the 14th amendment, the 14th amendment only applied to the States. The Court had to go back and look at the due process clause for its rationale to outlaw segregation—the due process clause of the fifth amendment—to outlaw segregation in Washington, DC.

Now, again, with regard to your interpretivist view, I assume what we are talking about here is that when it is not clear on the face of the document what the words mean and if you look at the fifth amendment and I think most people would not disagree with the proposition that the phrase due process is at least not absolutely clear what it means on its face in every circumstance.

So when you have a phrase like that, due process, then you go back and you look at the time this amendment was drafted to determine the principle enshrined in that phrase, is that correct so far?

Judge SOUTER. That is correct and it's also the case that I suppose there is no provision in the original Bill of Rights that has been sort of any more modified in its understanding than that one has been. We recognize that as a starting point.

The CHAIRMAN. And it has been like a pendulum, its modification, but having said that now again I assume based on your answers it's not that the principle has changed from the time the fifth amendment was made a part of the Constitution until 1954, it is that by 1954 the Court had figured out the proper application of the principle—

Judge SOUTER. Well, I think there are two things.

The CHAIRMAN. Is that fair

Judge SOUTER. I'm sorry. I think there are two things to be said about that. The first is going back to the time of Holmes. Holmes said, look, it is too late in the day for us to take a strictly originalist view—he did not use the term originalist view—of the due process clause.

He said there is, at the very least, or there is a substantive component to due process. He would have or did express it in terms of the principle that the State must demonstrate a rational relationship between the substance of what it legislates and the obtainment of a legitimate governmental object. Holmes said that is something other than pure procedure and we accept the fact that that is the way the clause is being interpreted. We don't turn the clock back. We accept it. So do we all. So do I.

The second thing that to me is interesting about *Bolling* and trying to find the correct application with the principle starting, let's say starting at the Holmes point, is that *Bolling* is so often described as a case which held that due process has an equal protection component. In point of fact, that description of *Bolling* came later. What *Bolling* was doing was, in the first instance—as you said a minute ago let us all be realists—in the first instance, the Court was saying, look we can't have *Brown* here and do nothing about the question of segregation in the public schools.

What the Court did in *Bolling* was not simply to say, look, all along there was an equal protection component in due process. They said something very different. They went through a kind of fairness analysis and ultimately I have always read *Bolling* as coming down to this question. We are going to apply to segregation in the Washington, DC schools the old kind of, the accepted kind of substantive due process analysis that even the conservatives accept. We are going to say is there, at the present time, a legitimate governmental object which is being served by this particular restriction, that is, the restriction on total freedom to attend schools in an integrated basis?

The most interesting thing about *Bolling* is that the Court said, no, that is not a legitimate governmental objective. Hence, the Court solved the problem of segregation not by pretending that due process simply means equal protection but we never noticed it before. They solved it by doing a kind of due process analysis. They said there is no legitimate governmental objective to be served here.

I have sometimes taken, in my own mind I have taken *Bolling* as an example of a general rule that I sometimes invoke and that is a lot of equal protection cases don't have to be equal protection cases. If somebody is being discriminated against on first amendment rights, why don't you go right to the first amendment? Don't worry

about equal protection. Say is there any justification for restricting this person's first amendment right?

Well, something like that was going on in *Bolling* v. *Sharpe*. As you know, subsequently that has been kind of transformed in a way and has been put in this short-handed way saying, oh, well, *Bolling* v. *Sharpe* says there is an equal protection component and that is the accepted view today, but the Court, I think, was more subtle than that in *Bolling*.

The CHAIRMAN. I am not sure I disagree with you on that. Let me pursue this a little further. In the reapportionment cases or the reapportionment case, *Baker* v. *Carr*, if that case had been brought up in the Supreme Court in 1869 would the correct judgment have been, in 1869, the judgment rendered in 1964?

Judge SOUTER. I don't believe that judgment would have been regarded as correct, and it would not have been rendered at that time.

The CHAIRMAN. But do you think that would have been the correct judgment?

Judge SOUTER. I am sorry, the 1964 judgment?

The CHAIRMAN. Yes.

Judge SOUTER. I accept the 1964 judgment as correct. Whether I would have been as prescient in the 19th Century as I think I am post-1964 is something I will make no claim to.

The CHAIRMAN. Well, you understand why——

Judge SOUTER. Sure.

The CHAIRMAN. I am sure you know what I am trying to get at here, which is probably, the audience and the public are probably wondering what are these two guys doing here, because this will come off, at a minimum, arcane, if not totally irrelevant. But I think it is very important because we get eventually down to the question of when you talked about yesterday—what is the phrase you used—let me see if I can find the pad—I don't want to misquote you. When you say in *Dionne* the Court's interpretative task is to determine the meaning of the constitutional language as it was understood when the Framers proposed it and the people ratified it as part of the original constitutional text.

If one were to argue that the meaning of that particular text does not change, then it is very difficult to figure out how you could get from 1869 to 1964 on reapportionment cases

Judge SOUTER. I know.

The CHAIRMAN. And that has always been my—as you acknowledged when you said, you know—I think I am beginning to understand better. What you are saying here is that the principle was there. But as society has moved on and changed, the real meaning and application of that principle has become more apparent as to what that principle is; the application of that principle.

Judge SOUTER. Yes, and we understand the significance of facts that bear on it in a way which we or our predecessors did not understand a century before. *Dionne*—well, this is beside the point. I was going to say *Dionne* is a slightly, I suppose—

The CHAIRMAN. I acknowledge——

Judge SOUTER [continuing]. In a slightly different category from what we are talking about in equal protection because we were dealing with a far more specific——

The CHAIRMAN. By the way I think that is true, because I don't doubt that. When I first read the *Dionne* case, at first I thought, well, wait a minute. Then when I realized the precedents in New Hampshire and the face of the New Hampshire Constitution as compared to some of the more controversial and oft debated phrases within the Constitution that could be given very cramped or expansive interpretation, like equal protection, due process, liberty clause, et cetera, I realize it is not necessarily applicable.

But this is helpful. Look, I remember not from law school but from undergraduate school—I remember a lot more from undergraduate school—from undergraduate school one of the courses I remember taking was American jurisprudence. I remember at the time being struck by Cardozo's judicial philosophy in which he talked about, tried to deal with the same dilemma you and I are attempting to deal with. That is the location of the principle in the Constitution by going back to the time and establishing the principle, as opposed to a specific application, and then how that principle can justify the sort—of how he can say that and still justify changes in application of that principle without seeming to undermine your judicial theory.

He talked about judicial postulance as you may recall. He talked about the fact that there were certain sociological jural-postulates and he compared them to cumulus clouds. He said, if you are lying on a summer's day, as one rolls into view, another one rolls out of view. It is not a massive wholesale change in application of the Constitution, but there are very discreet changes in applications of the very principles that we all like to find precise argumentation for their existence, so that we don't end up in the position of where you have ended up to some extent and I have ended up and all of us, of being one of those awful people who give meaning to the Constitution that is not there.

That is the dilemma that we are really wrestling with here, because none of us want to be one of those judges, or to seek a judge who has no leash, if you will; who is not at least leashed by the Constitution to some degree so that his or her personal values cannot be inserted in the Constitution.

At the same time, we are looking for women and men on the Court who understand, to use the trite phrase often used in high schools, that it is a living, breathing document. That is a fancy way for saying it has been vibrant and lasting for over 200 years, because it has been one of the few documents written by man that has, in fact, been able to overcome the tumultuous changes that have taken place in the values and in the application of those values in the society, and still remain cogent, still have some meaning.

So, as I understand you, you are not suggesting, if we were in a debate, I would be trying to make the case that the flaw in your interpretivist doctrine was that you were, by definition, wrong, because you go back and look at the text of the document and the establishment of the principle at the time, and then you find it difficult to find varied applications of that principle over the 20, 30, 50, 100-year period. But I think you have explained it pretty well, if I understand it, which is that the application of the principle is enlightened by changing facts and circumstances in society.

Judge SOUTER. Of course, it is.

The CHAIRMAN. Is that fair?

Judge SOUTER. I think that is a good way of putting it.

The CHAIRMAN. Well, I want to pursue this a little bit longer. They gave me a sign that 5 minutes is up. I think this is very, very helpful to me. I realize that it is boring to everybody else, and I hopefully think it is of some consequence to those scholars are wondering as much as I am as to how the application of your basic conceptual framework within which you view the Constitution is applied.

With that and without further giving justification for my questioning, why don't I stop and yield to my colleague from South Carolina, and I will come back just for a few minutes after this is over.

Senator THURMOND. Mr. Chairman, I do not think I have anything else at this time. I reserve my rights at a later time.

The CHAIRMAN. Senator Kennedy.

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

I would like, if I could, judge, come back to where we were a couple of days ago on the issues of civil rights and, really, the significance and the importance of article 5 of the 14th amendment.

I believe that very substantial progress has been made, in terms of striking down the barriers of discrimination in the case of race, gender, national origin, and disabilities in recent time. Over the period of the last 30, 35 years, the period since the mid-1950's, this change has been really a result, as you have pointed out repeatedly, of the *Brown* decision. After *Brown,* Congress began to move in these areas, and in the 1960's passed laws in a number of different areas, as you are very familiar with, the right to vote, to ban discrimination in public accommodation, to ban discrimination against the disabled, section 504, banning discrimination in women's education programs. That was title IX, 1972.

What I want to express is some personal frustration with what has been happening in the more recent times by the actions of the Supreme Court in taking a look at both what the intent of Congress was and what the statute stated. Different members have talked about this in related ways, but I would like to approach it in a somewhat different way.

We saw, for example, that in 1972, Congress banned sex discrimination in education programs that receive Federal money. I think there was a general assumption in the 1960's, on the part of Congress and the President, bipartisan in nature, that we were not going to use Federal taxpayers' funds to subsidize discrimination. There were some that, perhaps, had a differing view, but I believe that that was an underlying basis of the Civil Rights Acts that were passed during that period of time, and certainly that was true of the 1972 act. That concept was upheld by a number of the lower courts, until we had the decision in the *Grove City* case.

As you remember, in the *Grove City* case, the basic concept was, if there was not discrimination against women in the admissions office and the student financial assistance office, it did not really make much of a difference if discrimination existed in other parts of the university, particularly in this case with regard to women's athletic activities.