I think you have impressed everybody up here, regardless of what our different ideological viewpoints may be. I want to tell you that I believe you are going to make a great Justice of the U.S. Supreme Court. I believe the reason you are is because you are not going to substitute your own notions of what you think the law ought to be for what it really is and for what the elected representatives have put on the books. I think that is going to be a very, very good thing even though both sides up here make tremendous mistakes in legislative enactments.

I just want to wish you the very best and tell you that I very greatly respect the testimony that you have given over these last 3 days. You deserve the respect of everybody in America, and I wish you well on that Supreme Court and I believe that we shouldn't drag this out any longer. We ought to get you on there so that you can sit on the first Monday in October and start participating in a way that I think everybody will be pleased with.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Judge, as you have just learned, one man's innovative ways is strict construction and another man's application of innovative ways is judiciary running rampant. I think you have found that out by talking to us all up here. Judicial activism is in the eye of the beholder. That seems to me—as the Senator from Utah just pointed out, he knows you will be innovative and if you are innovatively conservative you will be a strict constructionist.

Senator HATCH. We will certainly be pleased. [Laughter.]

The CHAIRMAN. If you are innovatively liberal, you will be running rampant and the flip will be reversed. But anyway——

Senator HATCH. Mr. Chairman, can I just say one other thing?

The CHAIRMAN. Sure.

Senator HATCH. I would like to just personally express my appreciation to the chairman. I think—not for his recent comments, because that is really wrong. [Laughter.]

But I would like to express appreciation to him and his staff because I think they have, thus far, run very fair and open hearings here and I think the hearings have run very smoothly because of the chairman and the approach that he has taken. I want to personally be on record as expressing appreciation to him for the leadership he has provided here. I certainly have enjoyed being here.

The CHAIRMAN. That's very gracious.

Senator THURMOND. We are not through yet.

Senator HATCH. No, but that may be the last time I get to say it.

The CHAIRMAN. I appreciate it very much, and the Senator from South Carolina will agree with that or disagree with it based on whether I vote for you or against you. [Laughter.]

The Senator from Vermont, do you have any further questions?

Senator LEAHY. I do have a couple, Mr. Chairman, and I also will concur in the facts. You have run the hearings very fairly and evenly, and you might say when Senator Hatch announced earlier that he was only going to give you a 1-minute lecture, don't feel, Judge, you got the whole load. I suspect that Senator Hatch was directing that lecture as much to some of his 99 colleagues in the Senate as he was to current or potential members of the U.S. Supreme Court.

Also, understand that some of us have heard the lecture before, but whether you live up to it or not will, of course, be in the eye of the beholder and that will change depending upon how you rule in close cases.

Let me go to a couple of specifics. Going over the criminal law cases that you were involved in—and I admit, based on my own past experience, those things have always jumped out at me, I would like to talk about *State* v. *Valenzuela.* I may have not pronounced that the correct way, but I believe you know the case as one where you ruled that the use of a pen register without a warrant was legitimate?

Judge SOUTER. Yes.

Senator LEAHY. For those who are not aware, a pen register traps telephone numbers of outgoing calls. Now, I understand the U.S. Supreme Court reached a similar conclusion in *Smith* v. *Maryland*?

Judge SOUTER. Yes, sir.

Senator LEAHY. So you are basically following what the Supreme Court had decided. Did you follow *Smith* v. *Maryland* because that is the way the Supreme Court ruled or did you follow it because you also agreed with it?

Judge SOUTER. We followed it because we agreed with it. The case in *Valenzuela,* and that is the way I pronounce it too, was a case which was—or an issue in this respect that was raised under the State constitution because the defendants who raised the issue knew that *Smith* had been decided, so that so far as their Federal grounds were concerned they realized that they did not have any possibility of obtaining relief.

The peculiar aspect of the *Valenzuela* case was that in raising the issue under the State constitution of whether or not a pen register recording was a search, they made the assumption that the New Hampshire Supreme Court had accepted as its sort of framework for analyzing search and seizure problems the same basic premise that the U.S. Supreme Court had adopted in *Katz* v. *United States,* which was the reasonable expectation of privacy theory.

In point of fact, the New Hampshire Supreme Court had never adopted that theory as its kind of unifying search and seizure theory. But, in any event, there being no disagreement, we simply took the case on the assumption that assuming arguendo that a *Katz* reasonable expectation of privacy analysis is going to apply, is there any good reason to come out differently under the State constitution on that theory from the way that the U.S. Supreme Court did under the fourth amendment on *Smith* v. *Maryland*?

Senator LEAHY. Well, the reason I asked, Judge, I am just interested in what expectation of privacy you believe a person has with regard to the phone numbers he dials? Now, as I understand, and correct me if I am wrong on this, in that case the defense assumed that article 19 of the New Hampshire Constitution would apply to wiretapping. You said the New Hampshire Supreme Court never actually decided what the appropriate scope of privacy was under article 19.

You did mention *Katz.* In construing article 19 could, you have read it more narrowly? Let us take this step by step. Could you

have construed article 19 more narrowly than the Supreme Court read the fourth amendment in *Katz*?

Judge SOUTER. Well, I don't know whether we could have reasonably or correctly done that, but the issue is, in theory, open in New Hampshire, so that I suppose that as a theoretical possibility, yes. Whether it would be a sound decision when and if the Court reaches it is not something I would make any suggestion on, but in theory, yes.

Senator LEAHY. You don't think the supremacy clause would require you to construe article 19 at least as broadly as the fourth amendment?

Judge SOUTER. I think I would draw this distinction, Senator: the supremacy clause would not require us to construe the State constitution as broadly, but if we construed it in a way that, in fact, afforded less right to a defendant, the New Hampshire Constitution would, in that respect, be inoperable because under the supremacy clause the fourth amendment standard would always be the one that would apply and would govern.

Senator LEAHY. Do you recall—I should have noted and given you a chance to read this before, but do you recall Justice Black's position in the *Katz* dissent?

Judge SOUTER. I have not reread it, but my recollection is that Justice Black said when you are trying to carry the fourth amendment to intangibles like conversations you are carrying it beyond its terms. Justice Black was a very strict textualist, and my recollection is that was the basis for his decision in that case, although I have not read it in a long time.

Senator LEAHY. I have one quote from him which I did pull out which bears out what you say about being very, very strict on this. He said: "Since I see no way in which the words of the fourth amendment can be construed to apply to eavesdropping, that closes the matter for me. I will not distort the words of the amendment in order to keep the Constitution up to date."

He said the fourth amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of persons, houses, papers and effects. He refused to extend it to seizure of a voice by means of a wiretap. Do you agree with that?

Judge SOUTER. Well, Justice Black was saying that you cannot have a search without some tangible to be seized. I guess I do not think that is a self-evident proposition.

Senator LEAHY. Did you agree with his position at the time of *Valenzuela*?

Judge SOUTER. Well, we didn't agree with it, but we were not asked to agree with it. The issue was not placed before us.

Senator LEAHY. The reason I asked that is that in your own decision you singled out Justice Black's dissent and I was wondering what your view was at that time, why you picked out Hugo Black's dissent?

Judge SOUTER. I picked it out simply because we were signaling the bar of the fact that a unifying principle in a decision that would indicate the ultimate scope of the article had never been rendered, and we simply said that when and if the time comes that the Court is asked to adopt, let's say, the reasonable expectation of

privacy analysis, there are competing views. Therefore, those views are going to have to be considered before we make a decision.

But there was no intention there to indicate that the Court was likely to agree with Justice Black or to go in any particular direction.

Senator LEAHY. I am sorry, I didn't hear that last comment.

Judge SOUTER. I was going to say that I think there was nothing in the opinion that was meant to indicate that the Court was likely to agree with Justice Black and to go in his direction if the issue was raised. We simply said that the issue has never been raised and there is disagreement about it.

Senator LEAHY. How do you look at Justice Black's dissent today?

Judge SOUTER. Well, as I said, I haven't reread it before coming in here, but I don't necessarily accept the proposition that you can't have a regulated search without an intangible to be seized. That was Justice Black's premise.

Senator LEAHY. I have two brief followup questions. Senator Biden asked whether under a privacy analysis rather than an equal protection analysis a State could ban the sale of contraceptives to unmarried adults. You responded—and correct me if I'm wrong, as I'm just trying to summarize your response—that it would be a difficult question that would require you to weigh the privacy rights of the individual against the countervailing interest of the State. Is that a fair statement of your response?

Judge SOUTER. Yes, if you found an interest subject to potential protection. As you know, in the *Eisenstadt* case, because it was an equal protection case, the Court did not go through the kind of due process analysis that would inform sort of your first premise there, and I have not gone through it, either.

Senator LEAHY. Does that mean that equal protection——

Judge SOUTER. The case has not been decided.

Senator Leahy [continuing]. Aside, the State could ban the sale of contraceptives to unmarried adults?

Judge SOUTER. The case has not been decided and the privacy analysis that would be its first step simply has not been done. I have not done it and the Supreme Court of the United States has not done it. That is an open question. *Eisenstadt,* as I recall, and I think I said before, I did not reread *Eisenstadt* before coming in here and I wish I had, but my recollection is that *Eisenstadt* went on straight equal protection grounds. I could be wrong on that, but I thought it did.

Senator LEAHY. Last, Judge—I am not trying to get you to change your mind on this—you told Senator Metzenbaum last week that you were not going to tell us what you had counseled the unmarried pregnant student.

Judge SOUTER. Yes.

Senator LEAHY. I raised a question with you this morning of whether that would be different, in light of the changes in the law today, whether your advice would be different, and you said you did not want to go into that. I understand that you are not going to tell us what your advice was, and that is, of course, your choice.

Could you just tell me briefly, because there seems to be a lot of confusion about why you will not tell us what the advice was, and rather than us trying to guess, I wonder if you would just tell us.

Judge SOUTER. Without getting into a long analysis, anything that I could conceivably say could conceivably read as an indication of not only what that advice was, but what I was being asked to address, and I think that would be unfair to the student involved. I think the possible answers to that question could be a revelation of some of the things that the student may have said to me and I think that would be wrong for me to reveal.

Senator LEAHY. Except that you were, of course, the one who raised the fact of the student and obviously did it, feeling that there was no way we would ever know who the student was.

Judge SOUTER. Well, I do not know whether that is so or not.

Senator LEAHY. OK. Thank you.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Thank you.

Senator Simpson.

Senator SIMPSON. Mr. Chairman and the nominee, I will just take literally less than 5 minutes and I promise to do that.

I think that Senator Hatch and I have a unique working relationship with Senator Kennedy. We are the ranking members of our party on two committees or subcommittees with the Senator. His viewpoint is a very passionately held one—very honest, very real—and we have disagreements and that is what politics is about and that is what legislating is about, and I understand it and he described it. I think he used the word "frustration." I think he handled that all very well and I need not comment on it. It was done in a very civil way and I appreciate that.

But these issues, this allusion to discrimination, that somehow you would be prone to discriminate or prone to decide cases in the U.S. Supreme Court that would discriminate I think are totally laid to rest now, or should be.

I would just say that it was frustrating to me, too, to watch *Grove City* and *Ward's Cove,* because the reason *Grove City* took 4 years to do, as Senator Hatch has so well said, is because all we were told is we just want to correct it, put the statute back to where it was. Then we saw a 4-year exercise of overreaching by the overzealous to drag out every old agenda item that they had ever been beaten on. They had been beaten on every one of those issues, but they were trying to drag out these old objectives, old laundry lists, and put them into the legislation. Sadly enough, if you do not agree with that and it is called civil rights, you are then given a few very polite brush strokes that are hoped to indicate that somehow you are a racist, or not quite as sensitive as others in that area. That is a very unfortunate turn, and that is why we had a lot of trouble with *Grove City.* We were ready to put it back where it was, and that is why we had trouble with *Ward's Cove.* And soon you will be there on the bench speaking with the Justices, and many of them will simply scratch their heads, when they see the congressional reaction to *Ward's Cove* and the other civil rights cases, because all they were doing was just some very valid correcting of some imprecise language.