But it is going to be a new era and it should not have anything to do with discrimination and racism and who is better at that than others or more sensitive, and I think that I see simply the reason you are going to be approved and serve beautifully on this Court is because you are a very decent man. You are decent man who has given every indication that, in each and every case, you will do a tremendously sincere job with the task that we are going to give you.

I believe you properly declined, where you should have, and in doing that you have gained the respect of the American people.

I wish I had a question, another question, and I know you would be very complete and full in your answer to questions on both sides. I think you have been exceedingly responsive to our chairman.

I do thank him for his extraordinary fairness and that is his singular trait that I have never seen him deviate from, and I appreciate that, and I appreciate the civility of my colleagues in a very helpful exchange, and I thank you.

The CHAIRMAN. Thank you very much, Senator, personally, and I thank you for your questions.

The Senator from Alabama.

Senator HEFLIN. A part of your duties in the Supreme Court, in the event you are confirmed, you will be receiving reports from the Judicial Conference of the United States relative to various recommendations that they might make pertaining to the administration of justice, changes in various rules, such as the Rules of Civil Procedure, and the Rules of Criminal Procedure, and the issue, of course, as a member of the Court in which you can express yourself on the problems that confront the administration of justice as a whole, including all of the Federal courts.

While your experience has been as a member of a court at the State level, nevertheless, you practiced extensively in Federal courts, and so the issue which I am getting at is the administration of justice and the improvement of the structure, as well as the administration of the courts.

Have you had an opportunity in your experience to look at the administration of courts, needed reform, changes that should take place to improve the operation and functioning of the justice system?

Judge SOUTER. Senator, I have been so short of time on the Federal bench that I really have not, although I have made one observation and I think it may be much more specific than you had in mind, but I will pass it on for what it is worth.

I know that I have been living in temporary chambers since I went on the court of appeals, the temporary chambers are in the U.S. District Courthouse in Concord, NH. I was talking one day with the clerk of that court, who told me that his criminal caseload had increased I think threefold or fourfold in the past, oh, 12 to 18 months. I said why is that, and he said as a result of the drug prosecutions. He said what I have been telling counsel is that you are coming down in volume, you are coming down a 4-lane highway and then you are going to get to the U.S. district courtroom and it is not a 4-lane highway, because there are not enough judges here to absorb that kind of increase, as a result of the prosecutorial ac-

tivity, and the expectation is that there is going to be a very serious administrative problem in handling the volume of cases.

What I hope will not happen is what I have been seeing happen on the State level, and I alluded to it the other day, and that is that the demand, the constitutional imperative for the trial of criminal cases in a speedy fashion is squeezing the civil caseload off the dockets of those courts. And if they stay off the dockets long enough, we are going to see, and we are in fact seeing now, the development of an alternative and private system of civil justice in this country.

And while there may be some people—there are undoubtedly are some people who will say fine, if that can simply be passed on to the private sector, let the private sector pick it up and operate it on an entrepreneurial basis, but the price that will be paid for that is that, in my judgment, part of the glue that holds us together as well as we do as a society is the fact of a common system of justice, criminal and civil, and if that common system is lost, then I believe part of the coherence of American society will be lost, too, and I hope that is not what we are going to see down the road.

Senator HEFLIN. Well, it may be, and I am not advocating this, but in order to meet that problem, which I am delighted to see you recognize, that you may well have to divide courts into criminal and civil divisions and you may well have to alternate judges, because you do not want them to get into just a field of specialization alone. I think the general approach of the Federal judiciary at the district court level of being generalist has been very helpful.

Of course, all of those criminal cases and most of the civil cases are determined by jury trials and, of course, that means I think that the generalists, because of that, can function exceptionally well.

We have authorized and the Chief Justice had a Federal Court Study Committee which has just recently made its report. It did a 15-month study. It did not cover nearly all of the aspects that should be and should be on a much longer basis of study. But I foresee that we are going to have major problems in the administration of justice, if we continue the path that we are on, and it is a serious one. We have got to have speedy criminal trials. I do not want to take away from that concept whatsoever.

Nevertheless, overall administration of justice has to be looked at, civil as well as criminal, in that aspect. I hope that you will give some study, and I think you bring a unique background to the Court that maybe some of the other members of the Court do not have, and I hope that you will look at that very carefully.

Judge SOUTER. I will, sir.

Senator HEFLIN. I asked you previously, and I suppose you have now looked at it and I understand you have seen it, case of *Richard* v. *McCaskell*——

Judge SOUTER. Yes.

Judge HEFLIN [continuing]. It was a case where a person was being tried for the fraudulent use of a credit card and entered a nolo contendere plea, and later it was challenged by habeas corpus proceedings and, as a result, the issue came as to whether or not there had been a waiver. Would you explain that case and your reasoning in reaching the decision?

Judge SOUTER. Yes. Thank you, Senator, I did refresh my recollection of that during the break.

Richard v. *McCaskell* was a State habeas corpus case. The facts were that the defendant or the petitioner, actually, had been convicted of fraudulent use of a credit card or shoplifting, on a previous occasion had entered a plea of nolo contendere and had been given a suspended sentence.

She had then been arrested and charged against, and when she was found guilty of a second offense, the district court brought forward the first conviction and the suspended sentence and moved to impose that sentence. She then challenged the validity of the sentence in the first case by filing a petition for writ of habeas corpus, and her claim was that she had not entered a valid waiver of her rights to trial at the time she entered the nolo contendere plea in the first case.

What her request for relief turned on was the need for courts to make a record of the waivers of rights which are implicated by a plea of guilty or nolo contendere. In the absence of a record of such a waiver, the burden is on the State to prove affirmatively that the waiver in the first case was, in fact, a voluntary waiver. Whereas, conversely, if there is an adequate record that the defendant did waive the rights knowingly and intelligently, the burden would be on the petitioner to prove that, in fact, the plea in the first instance was not a voluntary one.

In this case, there was no such record indicating that the court had canvassed the defendant and had obtained from her a personal knowing and intelligent waiver of rights, and, therefore, the court held, in the opinion that I wrote, that it had been error for the trial court in this case to dismiss the petition for the writ.

Now, the State claimed that it could present evidence that there had been, in fact, a voluntary and knowing waiver, but we held that there was no evidence on the record before us from which the trial court could have found that, and we therefore vacated the trial court's order dismissing the write and remanded it.

So, to sum it up, it was as case that recognized that when there is not an adequate record of a waiver of these very fundamental and personal rights which must precede the entry of anything but a plea of not guilty, the burden is on the State to prove that there was such a waiver and, without such proof, the defendant would be entitled to withdraw the plea.

Senator HEFLIN. One other case that you have written about is a case of *State* v. *Colbath,* which was a New Hampshire Supreme Court case having two aspects that were I think interesting, from a viewpoint of the Constitution and individual rights. One dealt with a speedy trial and the other the rape shield. Would you explain that case and your position relative to the issues raised by that?

JUDGE SOUTER. Well, the issue that was raised in that case about the rape shield law went to the point of the rape shield law, which is to bar the introduction of evidence of voluntary sexual activity by the complainant in a rape case, by the victim in a rape case, with anyone other than the defendant.

What the case illustrated was the fact that there can come a time when the rape shield law, which is enacted for good and sufficient reason, to prevent rape victims from being victimized and, in

effect, deterred from complaining and testifying, from fear that their private lives are going to be needlessly spread in front of the public, will nonetheless come into collision with a defendant's right to cross-examine and to present proof favorable to himself.

The general rule had been and has been in New Hampshire, and I think is in most States that have considered it, that when the activity about which a defendant wishes to present evidence is substantially close in time to the time at which the crime itself was charged, that that activity probably does have a sufficient degree of relevance, so that even in the face of a rape shield law, the due process clause requires that the defendant have an opportunity to present such evidence.

In this particular case, the evidence involved the activity of the complainant in a public bar with a number of men, including the defendant, at a time within the hour or two before she and the defendant admittedly left together.

The issue in the case was not whether a sexual act had taken place, but whether it had taken place with consent.

The court was unanimous in holding that the evidence was sufficiently related in time, so that it was probably so relevant or potentially relevant that the rape shield law could not prevail against the due process clause, and we so held in reversing a conviction which had rested on a jury instruction which included the jury from considering such evidence.

Senator HEFLIN. How about the speedy trial aspect of that case?

Judge SOUTER. I only remember that there was a speedy trial issue in that case and that we found that the speedy trial right had not been infringed, but, quite frankly, I do not remember the facts in sufficient detail to know exactly how we analyzed it.

Senator HEFLIN. Well, I think basically that a defendant is supposed to have 9 months; the speedy trial rule is that the defendant has a constitutional right to have a trial within 9 months between arrest and trial, and a full year lapsed in the case. Basically, however, the decision of the court was that the defendant never initiated a speedy trial request and he was out on bail and he suffered no prejudice from it, at least that was the reasons that I remember why the case was determined——

Judge SOUTER. Yes.

Senator HEFLIN. Which brings into issue the Speedy Trial Acts. They are twofold. It is for the advantage of the defendant, but it is also for the advantage of the public, and I do not think we ought to lose sight of that fact.

I have cited in my questioning of your several cases which indicate that you have a respect for individual rights and there are numerous cases that have previously been brought up in which you show a law and order approach, so I think that you have shown a regard for both in the decisions that you have written.

Judge SOUTER. I hope they will never be regarded as mutually exclusive.

Senator HEFLIN. I believe that is all that I have.

The CHAIRMAN. Thank you.

Before I yield to my colleague from Pennsylvania, let me ask: In the rape shield case, you said sufficiently relevant in time. I think I know what you mean by that.