Judge SOUTER. Close in time, yes.

The CHAIRMAN. That is the action or activity, the alleged action or activity of the plaintiff, the woman in this case, the woman who was allegedly raped, took place within a time frame that made that action relevant to the defense of the defendant, is that what was meant?

Judge SOUTER. Yes, sir.

The CHAIRMAN. OK. Thank you.

Judge, would you like a short break? I think we are going to be finished, but it will probably be another half hour or more. Would you——

Judge SOUTER. I would be willing to go on testifying. Thank you very much.

The CHAIRMAN. OK.

My colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, I would start at this point with the cases on stare decisis, which is the phrase meaning to follow established principle. This is important in terms of your overall judicial approach, and it may have some special application on the very controversial subject of the abortion case, in terms of how much impact there would be from *Roe* v. *Wade*. I do not intend to ask you about that issue, because, as I said before, I respect your position that you cannot comment on that, because it is likely to come before the Court.

But as you have outlined your analysis of liberty interests and countervailing interests, then you added to that whatever impact there would be on the precedents of stare decisis, and you do have a number of cases from your tenure on the New Hampshire State Supreme Court which bear on this subject.

In the case of the *Petition of Robert Coryea,* you commented that, "Once the statute has been construed, stare decisis calls for a reasonable degree of certainty in applying that construction to future cases, subject always to the legislature's power to modify the statute itself." And while the statute is a little different from a constitutional provision, I think that is a significant case. I will not go into the facts there, but will deal with the facts of two other cases on this issue, because I think they have significance.

In a case by the name of *Cacavas* v. *Main Bonding and Casualty Co.,* you followed a precedent which you said you disagreed with. That was as case which does not involve facts of very great consequences for this proceeding, but the principle is a very important one, because you followed a precedent which you disagreed with.

In that case, you referred to other cases. One was as decision in a case called *Grimes,* where there was a stacking of insurance policies, one policy and two cars, and the *Grimes* case said that stacking of the policies was not permitted. That means stacking is to add the limits of both policies together.

Then, 4 years later, in a case called *Descoteaux*, the court permitted the stacking of insurance policies, and in that case there were slightly different factual situations, there were two policies. And then came the case of *Cacavas,* and you specifically said that you believed in the principle of *Grimes,* but you were following *Descoteaux*, because of stare decisis, not to overrule a precedent.

Now, it is interesting that, in a matter of this sort, where the Supreme Court of New Hampshire in 1984 had overruled a decision of the Supreme Court of New Hampshire from 1980, and the case came up again in 1986, just 2 years later, and the court had seemed perfectly willing to change back and forth, that you found it important to maintain the decision. Why?

Judge SOUTER. Because that case struck me as a classic example of the kind of case in which there has got to be an opportunity for reliance upon what the court does. We were dealing in that case with the issuance of insurance policies. We have obligations to both parties to those policies to come up with a coherent body of law which can be understood and which those parties can rely upon in making their business arrangements.

We simply cannot go back and forth in cases of that sort every couple of years, and, therefore, I believed we were in a situation in which the demand for a reasonable reliance certainly outweighed my concern to go back and sort of rewrite the history of New Hampshire precedent in the way that I would have done, if I had been able to do that in the first place.

Senator SPECTER. Well, as a general proposition, Judge Souter, would you say that reliance on not going back every couple of years would be a principle of general application which would apply even to a case like *Roe* v. *Wade?*

Judge SOUTER. With respect, Senator, I am going to ask not to answer the application to *Roe* v. *Wade*, but I can certainly tell you that the issue of reliance is not an issue which is limited to commercial cases.

Senator SPECTER. There was another very interesting case captioned *State* v. *Meister,* where again the facts are not of overwhelming importance for this proceeding, but it was a petition to annul a record, and the Supreme Court of New Hampshire reversed a lower court, saying that the court had not taken into account all of the factors of rehabilitation.

It was an especially interesting case, because you had written an opinion, as a Superior Court judge, and even though you had been on record as having taken a position which was inconsistent with the court's ruling, you went along with the ruling of the Supreme Court in this *Meister* case. You said at the conclusion of the case: "The consequences of what I believe was an unsound conclusion in that case, are not serious enough to outweigh the value of stare decisis."

So, here articulate a view that it is an unsound conclusion, but follow the precedent, even though it was at variance with what you decided before.

Judge SOUTER. Yes, sir.

Senator SPECTER. What principles of following precedent and stare decisis were involved there which you felt that warranted to uphold the prior case, even though you disagreed with the principles, had you had a chance to look at it from a fresh position?

Judge SOUTER. Well, of course, the most prominent feature of that case was that it was a statutory construction case and I believed that if, in fact, the legislature had disagreed with the statutory construction that the court placed on it, as erroneous as I thought it was—of course, any judge who ever gets overruled is

likely to think that the case that overrules him is erroneous, but I really thought it was in that case—I believe that if the legislature had any disagreement with the court's construction, it would have amended the statute. It had not done so.

I also believed, as I said there, that the consequences of the erroneous ruling were not of cosmic significance, so that it was perhaps an easy case in which to follow stare decisis.

Senator SPECTER. Judge Souter, the research which I have seen says that there has never been a reversal, an overruling of a Supreme Court decision, where an earlier Supreme Court decision had established a fundamental right. My question to you do you know of any occasion where the Supreme Court of the United States has overruled a prior Supreme Court decision which had established what was categorized as a fundamental right?

Judge SOUTER. I do not. I have never done the research, but I do not.

Senator SPECTER. The issue of supremacy of the Federal Government has come up in a couple of contexts, and I believe that there was some earlier testimony about States having different rules on the abortion issue. Senator Leahy asked you a question about, in the wiretap case, whether there was an obligation on the part of the State of New Hampshire to follow the Federal rule, and you said no, there was not, there could be a more restrictive rule, which the New Hampshire Supreme Court would uphold the New Hampshire Constitution on, than a Federal rule.

Is it not similarly true, if a State, say, illustratively, California, which has upheld the right of abortion and has passed a special right of privacy in a constitutional provision could maintain those rights of privacy and right to an abortion, notwithstanding any contrary rule which might be established by the Supreme Court of the United States?

Judge SOUTER. So far as the issue raised in *Roe* v. *Wade* is concerned, the answer to that is correct. Whether there is any basis that could be raised in different litigation, a different claim, based on the rights of the fetus, rather than on the rights of the mother, that, of course, is a totally undecided issue.

Senator SPECTER. Yes, but a State could have a rule which gives greater rights under that State constitution and State law, as, for example, California or any other State, than is required by the Supreme Court of the United States of general applicability?

Judge SOUTER. Yes, if we assume that the subject matter of the rights are the same in each case, whichever gives the greater protection is the one that will prevail.

Senator SPECTOR. Would a variation among the various States be a factor for consideration in *Roe* v. *Wade,* if you would are to comment on that?

Judge SOUTER. I would prefer not to comment on it, sir.

Senator SPECTER. Judge Souter, there was a reference which you made earlier to the decision, your dissent in *Smith* v. *Coat*—no, it is a concurring opinion in *Smith* v. *Coat*——

Judge SOUTER. Yes.

Senator SPECTER [continuing]. Where you took up the issue that a physician did not have an obligation, under the wrongful life or wrongful birth cases, without getting into the details there, so long

as there was a timely referral, and I believe that you had commented that you felt that was an aspect of the case which was involved in what had been raised and had to be decided.

The majority opinion said this: "We do not reach the issue raised in the special concurrence of Judge Souter, because it had not been raised, briefed or argued in the record before us."

There have been a number of cases in the New Hampshire court where, in accordance with the general rule that an issue may be considered and decided by the court, only if it has been appropriately raised, and I would ask for your construction as to why, in the *Smith* v. *Coat* case, you took up the issue and decided it, in light of what the majority in the court said, that it was not properly before the court.

Judge SOUTER. The reason I took the position that I did was that I felt the way the majority opinion had been written, that it was inevitable that this question was raised, and my position was to note that, in fact, the possibility that I pointed out was indeed not foreclosed by the court's decision.

It seemed to me that if we said absolutely nothing on the subject, we had, as a court, raised a moral dilemma and that it was a moral dilemma that was inherent in the effect of our decision and that we should at least point out that there was nothing in our decision which foreclosed the particular course of action that I mentioned in my concurrence as a means of responding to that moral dilemma.

So, I guess the answer boils down to this: It is not that it was an issue that was expressly raised, but it was an issue which seemed to me inherent in the way the court had decided the case and we ought at least to say something about it.

Senator SPECTER. Judge Souter, as you put it, even if it is inevitable that an issue is to come before the court, is it not the customary judicial form to await the arrival of that issue before the court, before deciding it?

Judge SOUTER. Well, there is really an—I will not say an alternative, there is a complimentary principle that we frequently point out, issues which we are reserving or not deciding, for the very reason that we do not want our decisions to be read too broadly and we do not want them to mislead, and I think that is what I was doing in my concurrence there.

Senator SPECTER. There has been a series of very important cases narrowly decided, most recently *Metro Broadcasting* v. *Federal Communications Commission,* where the Supreme Court of the United States, in a 5-to-4 decision, decided that a minority interest was a factor in the decision, in order to have diversification of programming. The case is an important one, because there has been a pitched argument as to whether race ever should be a factor to be decided, contrasted with the generalization that the Constitution is color blind and that race ought not to be a factor.

The *Metro Broadcasting* case decided this year, 5 to 4, looks in the other direction from a case decided last year, *City of Richmond* v. *Croson,* where a 30-percent set-aside was stricken, as an unconstitutional rule, where the city of Richmond had said that 30 percent of the jobs would be available for minorities.

Going back to an earlier case, and perhaps a leader in the field, the *Regents of University of California* v. *Bakke,* the Supreme

Court, speaking through Justice Powell, had stricken a separate admissions policy for minorities, but had said that it is appropriate that race may be one of the factors to be considered.

My question for you is, as a generalization, do you believe that it is appropriate in some circumstances that race is a factor to be considered by the court, in deciding this category of cases?

Judge SOUTER. Well, I think it is inevitable, to this extent: What we are dealing, as you know, in the *Metro*—let us take the contrast between *Metro* and *Croson*—we are dealing there with a contrast between the treatment to be given the congressional power, whether it be under section 5 of the 14th amendment or under its article I power in the case of *Metro,* and in *Croson* the court was dealing with the authority of a lower unit of government, in that case a city council, to take rate into consideration.

The proposition which *Metro* stands for is that the congressional power to engage in this kind of limited remedial action, which does indeed take some account of race, is to be judged under the middle-tier standard of scrutiny, whereas, the power of a lesser unit of government, State, local, county, is to be judged under the higher standard of strict scrutiny.

Therefore *Metro* is one step in what I assume will be a long line of cases that is going to result in the definition of the scope of congressional power over remedial and race conscious with—of remedial legislation with race conscious references.

Bakke of course was a case which struck down the use by the State of California of a strict quota but recognized, at least through Justice Powell's swing opinion, recognized the possibility of taking race into account solely for the purposes of creating diversity.

So, I think for present purposes the most instructive contrast right now is the *Metro* v. *Croson* contrast.

Senator SPECTER. Well, I think that is an illustrative distinction that, where you have a quota system, that is not permissible. But there are some circumstances, as you articulate your answer, as a matter of general principle obviously depending upon what the facts are in a case to come before the court, where it would be appropriate to consider race as one of many factors in coming to a decision.

Judge SOUTER. Yes, sir.

Senator SPECTER. When I had asked you about the war powers resolution on Friday, I asked you to consider that question and would like to renew that discussion at this point. The question which I had asked, as I am sure you will recall, was whether you thought it was unconstitutional or illegal for the Korean war to be pursued in the absence of a congressional declaration of war. And I asked that in the context of getting some idea as to your views of the relative authority of the Congress under its sole prerogative to declare war, contrasted with the President's power as the Commander in Chief.

And of course, this is not an academic subject, because in the events of the day perhaps the most important world event of the day involves what is happening in the Middle East, what is happening in Saudi Arabia. And we all know that the President has ordered U.S. military forces into that area.

There are some complicated questions under the war powers resolution which requires notification to Congress, and the President has given some notice to Congress. But as the President has acted on so many events in the past, has done so without recognizing the constitutionality of the War Powers Resolution. That is an issue which is very difficult to get a Supreme Court decision on because of the issue of case and controversy and the issue of standing. We talked about the fact that in one of the cases, even though 110 Congressmen had brought a case into the U.S. District Court here in Washington, DC, the court had said that there was no standing.

In asking you a question not related to the War Powers Resolution and not related to Vietnam because of the Gulf of Tonkin Resolution, which might arguably be construed to give congressional authorization like a declaration of war, but in going back historically 40 years to June 25 of 1950, the day the Korean war started, it seems to me that that is a fair question in an historical context, test your own thinking on the judicial philosophy behind those two important constitutional provisions.

So I renew the question.

Judge SOUTER. Senator, I have thought about it. I will be candid to say that I did not try to do special research on it, because I did not think that was the point of your question. I am going to give you an answer. I have thought of this carefully, and I am going to give you an answer which is different from any other answer that I have given here; but it is the only honest one I can give you: I do not know. I could go on at great length about where I reach the point of not knowing, but the truth is I do not know. There is no law on the subject that I am aware of that is helpful to me to work from, and I do not know the answer.

Senator SPECTER. That is a very good answer, probably one of the best answers around and few people use. And it has taken a long time in these proceedings in the twilight to have you give an "I don't know" answer. So, I will accept that, because I do not think it would do me much good not to.

Returning to the subject of the supremacy of the judiciary, and there has been one aspect which has not been covered; early on, Senator Thurmond asked you about *Marbury* v. *Madison.* You said that you did not think it was too brash in this day and age to uphold *Marbury* v. *Madison.* That is, for those who do not know it, the 1803 case where it was decided by the Supreme Court that the Supreme Court had the last word on what the Constitution meant. But there are some today who dispute that.

One recent nominee coming before this committee would not answer a question about whether he would uphold *Marbury* v. *Madison.* When the question came to taking away the jurisdiction of the court, you were not definitive; and I think that is a very, very important question. I think that is a rockbed question as well. And when we talked earlier about the taxation case, as much as the taxation case may be disliked, if the Congress has the authority by passing a statute to divest the Supreme Court of jurisdiction, even if, and I will get into the remedy versus the right issue, that we have a constitutional question, it seems to me that *Marbury* v. *Madison* does not have any real substance nor does the ultimate

authority of the Supreme Court of the United States have any real substance.

I think it is very fundamental. We can pass a constitutional amendment on the taxation case, and I think we may do that. There is such a fundamental dichotomy between judicial authority and legislative authority; but we can handle it. But I do ask you whether you think the Congress has the authority to limit the jurisdiction of the Supreme Court.

Judge SOUTER. Senator, the problem which your question raises is what article III means when it speaks of not only regulation but exception by Congress to the appellate jurisdiction of the Supreme Court. As you know, there have been two cases on the subject really, and they do not answer our question for us. One seems to go one way, and one seems to go the other way.

The most that I can say, and perhaps this is saying a lot, is that we do not have to argue about the—we have been using the word fundamental, and I will use it here—the fundamental importance of *Marbury* v. *Madison* as establishing basically the structure of the Government of the United States. And the consequences of assuming that the power to except from the jurisdiction is a power which Congress in effect can exercise in any way it sees fit is basically to deny the possibility of national unity in constitutional interpretation.

I do not—I can only say this, that I do not at this point understand how such a result could be justified.

Senator SPECTER. Judge Souter, that leans in the right direction, but it does not really foreclose it. I pressed Chief Justice Rehnquist hard on this issue, which I infer you know about because of the care of your preparation, and he would answer the question about the lack of congressional authority to take away the jurisdiction of the Supreme Court on first amendment matters. He would not go beyond the fourth amendment or the fifth amendment, inexplicably to me, but I would ask you, as my final question on the subject, would you at least go as far as Chief Justice Rehnquist did in his confirmation hearing, to say that Congress does not have the authority to take away the jurisdiction of the Supreme Court on first amendment issues?

Judge SOUTER. I do not think I can put it that way, because I do not know what distinction I would then draw in refusing to go down the rest of the amendments.

Senator SPECTER. Well, may you will not draw a distinction.

Judge SOUTER. But, no, I think I have gone as far as I can go on an issue which is always theoretically lurking and is perhaps lurking with more than theory at times, when Supreme Court decisions are subject to vigorous challenge. But the significance of the issue is one which I hope you will leave these hearings realizing that I do not underestimate.

Senator SPECTER. Well, I will not pursue that one any further either.

Let me come back to my final area of questioning, which is really the big question. I would have started with this one on my round, but I did not because it would have consumed the entire round. Senator Biden is going to come back to this question. That is really the central question in this entire hearing, and that is your view

on how you decide constitutional questions. And I believe that there is a fair amount more which needs to be considered here.

The trouble that I have with your approach so far, Judge Souter, is that you start from a position of interpretivism, which means interpreting the Constitution. Then on the issue of original intent you move away from that to original meaning. But on original meaning you then have an interpretation which is at variance with what the drafters said. The issue of capital punishment has arisen, and I think it would be accurate to say, or perhaps I should ask you the question: Do you think it would be a permissible interpretation of the eighth amendment prohibition against cruel and unusual punishment to say that the provision precludes the death penalty?

Judge SOUTER. I do not think that as a per se kind of rule we can make that assumption, simply because of the recognition within the document itself that capital punishment exists and a recognition which implies the assumption that the drafters accepted it as legitimate.

Senator SPECTER. Yes, capital punishment was in effect at the time that the eighth amendment prohibition against cruel and unusual punishment was drafted.

Now, we have gotten extensively into the reapportionment cases. The difficulty that I have with the reapportionment case is that, even though you take a principle which you say is different in the sixties, when *Baker* v. *Carr* was decided, and when the *Sims* case was decided, that it is at variance with what the intent was at the time that it was drafted, or *Brown* v. *Board of Education.* There is no question that the drafters of the equal protection clause of the 14th amendment were opposed to the idea of desegregated schools. So that, while you may say that the drafters articulated a principle which has a different application in 1954, when the *Brown* v. *Board* case was decided, contrasted with *Plessy* v. *Ferguson* in 1896, and different from the time the 14th amendment was adopted, can you say fairly that under original intent, which you translate to original meaning, and to a principle, that you can fairly decide the case under that philosophical approach when it is directly at variance or inconsistent with the original intent or original meaning of the drafters?

Judge SOUTER. The answer is yes, for this reason. And I think this reason indicates the point at which you and I have sometimes parted company in the discussion of the consistency of my views. When you are speaking of original intent, as I understand it, and as I understand what you have just said, you are referring to original intent in the sense of the specific intent of the drafters to deal with specific problems and conversely their provable intent not to deal with other specific problems by the application of that particular provision of the 14th amendment. And I do not believe that that kind of specific intentionalism is a valid interpretative canon.

I believe, that is why, as I have said, that is why I have used the terms original meaning or understanding to get away from that sense of specific intentionalism. And once that is done, then I think I have a perfectly consistent position.

Senator SPECTER. My time is up, but if I may just ask one final question, Mr. Chairman, it is this. I can understand your position on original intent and your shift over to original meaning.

Judge SOUTER. Excuse me. I just do not mean to shift. I mean, I start with a sense of original meaning. It is not a retreat from something.

Senator SPECTER. Well, it would take quite a time to go through the interpretivism school, but the interpretivism school really begins with original intent. Now, there has been a dichotomy over to original meaning, and that has been the traditional way that there has been an explanation given for *Brown* v. *Board of Education*, which you have come back to repeatedly.

But the difficulty I see with your philosophical approach here is that you can say they have established a principle of equal protection and it means more than they had specifically in mind, their meaning or their words at that time; and you apply it more broadly to different facts in a different era. But can you apply it in direct contradiction to what the meaning was of the drafters if you are really talking about original meaning and interpretivism?

Judge SOUTER. Not if you have established a meaning which is different or which establishes a different principle from the one that you are applying. But I think once again the reason that there is some perplexity in our exchange is that you say, as you did a moment ago, Senator, you are accepting the view that the equal protection guarantee means more—I think that was your phrase—than it meant at the time it was adopted, than it was intended to mean by the drafters. And what I am saying is not that it in some sense means more. I am saying that its application was not restricted and cannot be restricted to just those specific instances that the drafters intended to deal with at the time they drafted it.

I do not think the principle means more. It is simply that its application is not restricted to the immediate problems that they had in mind to deal with when they adopted that and when they drafted it.

Senator SPECTER. Judge Souter, I can understand the philosophy which says that the principle is applied differently at a later date depending on different facts. But I cannot understand an application of a principle of original meaning which is directly contradictory to what the drafters had in mind. Those who drafted the equal protection clause specifically said that they did not want to desegregate the schools. They had desegregated schools in the District of Columbia, desegregated schools across the country. The Senate Gallery was desegregated. And I think the decision is correct, but where it will lead at the end of perhaps another round or more that your philosophical approach is much closer to Chief Justice Hughes in the *Blyesdale* case, which was the first major Supreme Court decision which said we are going to take up changing circumstances. And that as you have articulated a judicial philosophy, you are really outside of interpretivism, which is fine with me, but it is important to know where you are on a scale of values. When Senator Grassley questioned you at length and pressed you on a number of occasions for one Warren Court decision that you disagreed with, you did not find one.

The worst one was *Miranda*, which you said we have learned to live with.

Now, I am prepared to accept you, interpretivism or noninterpretivism, but I think it is an important point to know where you stand, because your testimony, in my opinion, puts you way outside of the interpretivism school. Your decisions that I have read are much closer to the interpretivism school. There is *Richardson*, in which you find the liberty interest. But most of your cases are consistent with interpretivism and a restrictive construction of the Constitution, but that is not what I hear your testimony to mean.

Judge SOUTER. Senator, it depresses me that you may think that I am in this inconsistency. I think, in the narrowest compass, the reason that you are sort of reading me out of interpretivism is that you are making the assumption that the only brand of originalism, if you will, that is a genuinely interpretist brand is the brand of specific intent. And with respect, I think that is not, I think that is not so.

I think the brand of original meaning or original understanding is in fact a valid interpretivist position. And the only point at which that comes in in any way in conflict, if it is in conflict, with what you describe as the intentions of the framers of the amendment is at the point at which we say, when they drafted a provision which was broader than necessary to perform the specific functions they had in mind, they really meant what they said and we have a broader principle.

Senator SPECTER. My time is past due, so I will yield at this point. Perhaps Senator Biden will reopen the door, and perhaps we can pursue it somewhat further.

The CHAIRMAN. If I may say before I yield, I quite frankly thought that the Judge answered my questions, that the spectrum of interpretivism is very broad—it encompasses Black to Bork, to Ely, to others who are out there. It is a broad spectrum.

With that, let me yield now. Senator Simon is next, but I would like to yield for a moment to the ranking member, Senator Thurmond, who has a couple of things he would like to say. And then I will yield to the Senator from Illinois.

Senator THURMOND. I did not take my last round.

The CHAIRMAN. I understand.

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

Mr. Chairman, we are almost through the hearing today. I am going to leave in a few minutes. I wanted to make a few remarks.

First I want, as ranking member, I want to express my appreciation to all the members of this committee, Democrat and Republican, for the courtesies they have shown to Judge Souter. I think they have all been courteous and respectful, and we deeply appreciate that.

I especially wish to commend Chairman Biden. I have worked with Chairman Biden for a number of years now. When I was chairman, he was ranking member; now he is chairman and I am ranking member. We have always had a fine relationship. I have found him to be courteous and helpful, considerate. I just want to express my appreciation to you for the way in which you have handled this hearing.

The CHAIRMAN. Thank you very much, Senator.