Let me conclude, as I said, with three questions; and this will be the end.

Judge, when deciding—and I want to go back to methodology for a minute; slightly different than your overall judicial philosophy. When deciding if there is a fundamental unenumerated right, applying your methodology, you say, in quote: There should be a quest not for evidence, which is a matter of definition or a matter of absolute necessity, has either got to be of narrow compass or of general compass. Rather, it has got to be a quest for reliable evidence, and there may be reliable evidence of great generality. End of quote.

That was in response to my question yesterday about footnote six in the *Michael H.* case.

Judge SOUTER. Yes.

The CHAIRMAN. Now, I have two key questions. How old does this tradition that you are seeking to determine whether or not it has been established have to be before it is considered a tradition worthy of protecting under the Constitution?

And just so this is not viewed by some as some crazy idea, what happens when there is a mixed tradition of a practice having been lawful for some time and then unlawful at a later time in that continuum? Or unlawful and then lawful? How far back do you go to look? And how far forward is it relevant in establishing the tradition?

I am not looking for an exact number of years. But do you look at the whole continuum? Give me a sense of what you look at.

Judge SOUTER. Well, I think it is fair to say that you look at the whole continuum for whatever the evidence may be worth. The whole continuum may tell you something about what you can extrapolate from it as a principle which either is or is not continuous through our history.

I do not think there is a point at which you can say, well, I draw the line and I will consider no evidence after this point or no evidence before this point. But the point is, at whatever historical period the evidence may come into existence, what we are really looking for is a principle of liberty which can reasonably be said to have been assumed in the Constitution.

The CHAIRMAN. The reason I ask the question is we are in the midst of such phenomenal technological change. In this country we are considering items that will be on your agenda in the year 2020, if confirmed, God willing, you are living out the expected, your life expectancy, that relate to everything from genetic engineering to potentially cloning, to surrogate parenthood, all of which by the time you are making decisions in the year 2020 may be very much established traditions. There may be 30 years of it being an accepted and protected practice in the 50 States and territories for surrogate parenthood, something that, although you may find a principle to be protected, clearly was not something that anyone considered not only at the birth of our Constitution but in 1970, let alone 1950. And that is why I asked the question.

So, it will, there could be 30 years of an established practice that could make the tradition, assuming there were a principle found within that tradition, make that a sufficient amount of time to find a protection of such an asserted liberty right. Is that correct?

Judge SOUTER. Well, I guess my only cavil is, I do not, I do not think it is, it is probably right to phrase it by saying that is a sufficient amount of time. That is certainly indicative of the acceptance of a principle during that time, and that is good evidence. The question is, is there any other evidence? Is there evidence to the contrary? Is the evidence of whatever principle may be behind the 30 year or the 50 year or whatever year tradition, a sufficiently reliable indication of an enduring principle of liberty.

The CHAIRMAN. Well, were there more time, I would like to pursue that.

Let me conclude by suggesting, Judge, that during the several days of your testimony—and I, too, have been impressed with your knowledge. I have been impressed with your ability to articulate your position. I have been impressed with the ease with which you were able to make clear the purpose behind, the rationale behind a number of decisions, including even referring to the sense within those opinions that most would spend time in a law library having to look up. And you have done it off the top of your head. I have been truly impressed.

I must also admit I have not changed my mind, but I have, during the period of your testimony, gone from leaning against voting for you, to leaning for voting for you, to leaning against voting for you. And I was being a bit facetious a moment ago when I suggested that the fact that you have those who view themselves—and there is no such animal—as being literalist, those who look only to the text, and if they do not find it there—there are some, but not many who think they are, because they find it very difficult to live with the results that would have been wrought and that methodology been employed—the more you have raised questions in their mind, I acknowledge, the more you settled mine.

I appreciate your willingness to go into the detail you have in terms of your methodology.

I am still, as you know, disappointed that you were willing to go into a good deal of greater detail on matters that related to issues other than procreation than you were with regard to procreation, even though in my view they are unsettled areas as well as the whole question of, that is, the most in dispute.

But for me, the judgment that I am going to have to make is whether or not after rereading your testimony, and this is one of those few cases where I can assure you I will, not all of it, but the parts that relate to the areas of greatest concern to me; whether or not I am convinced that you are a man of open mind with the judicial philosophy, methodology and principled way of approaching how to make these judgments that is consistent with, to paraphrase the Senator from Pennsylvania, an expansive reading of the Constitution that would have allowed you to reach the decisions that I think the vast, vast, vast majority of Americans believe were appropriate for the court to reach.

And I realize that is not your problem; that is mine. I have to make that judgment, and I obviously will. But again, I think it has been a tour de force on your part. I have been impressed and not merely with your recall but also with your willingness as the day has gone on, to, in my view, be more open and expansive in your response relative to your philosophy and to your methodology.

So I thank you very, very much. I know of no reason at this juncture why you would be asked to come back. But I will tell you, since it is a practice of this committee, as you know, to invite witnesses who wish to testify for and against your nomination, and that is historically the way in which it functions, that if anyone, whether they are testifying for you or against you, during the period of the next several days makes assertions, statements or characterizations relative to your philosophy or anything else that you feel you would like to clarify, that I guarantee you that the witness stand is yours again if you wish to take it. And it is not our intention and is not likely that we would ask you to resume any questioning prior to us making a judgment to vote for or against you in the committee.

I would invite you, Judge, if you have any closing comment you wish to make, we would be delighted to hear it.

Judge SOUTER. I promise you, Mr. Chairman, I really will be brief in what I have to say. There are two things that I do want to say.

The first I will address to you, but I will address to you as the chairman of this entire committee. It is one of those things that goes without saying, it would go without saying, but it must be said. And that is you have treated me with such consummate fairness, and the whole committee has, that in whatever court I may sit I hope I will always be able to do as well when I am presiding.

The second thing is to thank you and the committee for something broader than that even. That is, I realize there are many alternatives that you may have or some alternatives that you may have in considering a nomination like this. What I am most grateful for is that you have not only, and you are now not only considering my nomination, but you have made me a part of that great process. I am very proud to have been here. I am very grateful to you for having me, every one of you. Thank you.

The CHAIRMAN. Thank you very much, Judge.

As they say, you will be hearing from us shortly. Thank you very, very much.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Now we will recess for 1 minute here.

[Recess.]

The CHAIRMAN. The hearing will come back to order.

One of my colleagues asked the question, is it possible, under the committee rules, to vote for Souter and against Rudman, and the answer is we will take that under advisement. I am not sure. [Laughter.]

I want to thank Senator Rudman, by the way, for spending as much time as he has here and for being available to answer my questions, as we have tried to work out the mechanics of this hearing. I thank him very much.

Now, our panel who has been waiting here a long, long, long time, as a matter of fact, I suspect the entire day, is the American Bar Association panel: Ralph I. Lancaster, Jr., is the chairperson of the Standing Committee on the Federal Judiciary; and Alice E. Richmond is the first circuit representative of the Standing Committee on the Federal Judiciary, and Jorge Rangel is the fifth circuit representative of the Standing Committee on the Federal Judi-