But I will come back to that. My time is up. I yield to my colleague from South Carolina.

I thank you, Judge.

Judge SOUTER. Thank you, sir.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Souter, the Constitution of the United States is now over 200 years old. Many Americans have expressed their views about the amazing endurance of this great document. Would you please share with the committee your opinion as to the success of our Constitution and its distinction as the oldest existing constitution in the world today.

Judge SOUTER. Well, Senator, it is difficult to make a pronouncement which is commensurate with the magnificence of the document. If I have to explain it in a few words I would do it by reference to a very limited number of concepts.

The first reason for the Constitution's success is its insistence and its recognition on the source of power. The source of governmental power is the people.

The second concept which has guaranteed its endurance is that that power is no more granted to government than the people grant to government. The very concept of the National Government is one of limited power, was one of its motivating, one of its very forces of life from the moment that it was presented to the people.

Third, I would look to the concept implicit in that document and as a basis of the bedrock of the structural sense of American constitutionalism that power is divided and that that division of power even granted, is a division of power which must be protected if the entire Government is to remain in the place that it was intended to have.

That structural sense of the division of power encompasses not only what we speak of as the separation of powers doctrine within the National Government, itself, but the concept of the distribution of power in a federal system.

I think the reasons then for the remarkable and blessed endurance of the American Constitution are extraordinarily pragmatic reasons. It rests upon a recognition of where its power comes from and it is structured with a recognition that power will be abused unless it is limited and divided and restrained.

Senator THURMOND. Judge Souter, the 10th amendment to the Constitution provides that powers not delegated to the Federal Government are reserved to the States or the people.

Would you describe your general view about the proper relationship between Federal and State Governments, as well as how would you characterize the States' power to legislate in areas not specifically enumerated to the Congress.

Judge SOUTER. Well, Senator, as we know—certainly you know better than I, having sat in this Congress as you have—there is a great overlap of subject matter in which we know the Congress under article I has authority, and which is equally covered by the States. We are familiar with the doctrines of preemption which have developed over the years and we are familiar, of course, with the provision of the Constitution that in cases of conflict in legislation within both the constitutional competence of the States and

the National Government, the National Government is, of course, going to prevail.

One of the things that I think we have to recognize in dealing with problems of federalism today is a basic political problem which in those areas of overlap the Constitution, itself, cannot solve for us. That is a political problem that arises from the willingness or the unwillingness of the States to exercise the constitutional powers that they have to address the problems that are really before them.

One of the things that I was reminded of in my preparation, my sort of autobiographical inquiry—which has preceded my coming here today and has been going on for the last 7 or 8 weeks—is a speech which I gave years ago in Newport, NH, in which I was talking about—which to most people and to me seemed—an erosion of power all in the direction of the National Government from the States.

But the explanation for that erosion began with the fact that there were problems to be solved which the States simply would not address and the people wanted them addressed and therefore, the people looked to Washington. They looked to Washington, of course, because Washington had the means or exerted the means of raising the money to solve them.

So one of the problems that has to be recognized, as underlying so much of the tension which sometimes gets expressed by focus on the 10th amendment, is, in fact, a political problem and ultimately a fiscal problem.

We know that the concept of the 10th amendment today is something that we cannot look at with the eyes of the people who wrote it. At the very least, two developments in our constitutional history have necessarily changed the significance of the 10th amendment for us.

The first, of course, is the concept of the commerce power which I think—whatever everyone's predilections may be—has grown to a, and has been recognized as having a plenary degree which would probably have astonished the Founders.

The second development which has got to be borne in mind in coming to any approach to the 10th amendment is simply, the 14th. There was, very expressly, authority given to the National Government through the 14th amendment, which again, was inconceivable to the Framers of the 10th.

It is those two developments that have led to the difficulty reflected in a number of cases in recent years, in trying to determine, whether in fact, there is a substantive basis, an objective basis, perhaps I should say, for identifying and protecting State power under the 10th amendment; or whether conversely, the 10th amendment, in effect, has been relegated to the expression of kind of a political truism.

When I was in public practice, the case known as *National League of Cities* v. *Usury* was the law, which recognized a basis for enforcing limitation on national power in name of the 10th amendment under the wage and hour law. Subsequently *National League* was overruled by *Garcia* v. *San Antonio,* which has left the law, at the present time far closer to, in effect, a reflection of the politics of the Congress of the United States.

I do not know what the next step in that chapter may be, but I do know that any approach to the 10th amendment today is an approach which has got to take into consideration constitutional developments outside of the 10th amendment which we cannot ignore, and, as I have said, would have astonished the Framers.

Senator THURMOND. Judge Souter, the famous decision of *Marbury* v. *Madison* is viewed as a basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Would you give the committee your views on this authority?

Judge SOUTER. Well, I suppose for anyone in the year 1990 to speak admiringly of *Marbury* v. *Madison* is a fairly conservative act, so I don't have any trouble in sort of going out on the limb in support of *Marbury* v. *Madison.*

I recognize that the difficulty which may be facing us in assessing the significance of *Marbury* v. *Madison* today is a difficulty in defining the appropriate role of Congress with respect to the appellate jurisdiction of the Supreme Court of the United States. We might all hope that that kind of a contest would not come before us, but we cannot rule it out.

The question, of course, is not whether *Marbury* can be overruled as such, but whether the force of *Marbury* can, in fact, be eroded by limitations upon the appellate jurisdiction of the Supreme Court of the United States. As I am sure you know as well as I, the existing precedent on that is not of very great help to us.

We know that in the one case expressly addressing the Supreme Court's appellate jurisdiction, a post-Civil War case, *McCardle,* the Court seemed to say that there could be such an erosion through the exercise of congressional power, although there are times when I find *McCardle* a somewhat more ambiguous case than some have found it.

On the other hand, we know in the *Klein* case that followed not long after that, which dealt with the jurisdiction of the lower Federal courts not the appellate jurisdiction of the Supreme Court, that the Supreme Court clearly put limits upon what the Congress could do in trying, in effect, to limit jurisdiction for the sake of bringing about particular results or avoiding particular results which were thought to be undesirable.

But those are all post-Civil War cases. They seem to speak with conflicting and certainly not with consistent voices. And they are going to be the preface to any question about the ultimate vitality of *Marbury* in our time. But it is at least comforting to be able to end my response to you as I began it; that subject to that issue which has yet definitively to come before the courts, I trust everyone like me will accept *Marbury* as constitutionally essential to government as we know it.

Senator THURMOND. Judge Souter, the opinion of *Miranda* v. *Arizona* defined the parameters of police conduct for interrogating suspects in custody. Since the decision, the Supreme Court has limited the scope of *Miranda* in certain cases. Do you feel that the efforts and comments of top law enforcement officers throughout the country have had any effect on the Court's views?

Judge SOUTER. Well, of course, Senator, I cannot speak expressly for the Court, but I think those comments must have had some

kind of effect. The legitimacy of that effect, the appropriateness of the Court's listening, I think has got to be assessed from two different standpoints. It is very important that courts not be swayed in any case merely by the politics of the moment. And there is, I think, a laudable tendency—I hope it will always be regarded as laudable—for the Court to keep itself above the momentary furor.

It would be a mistake, however, from that, for a court to be unwilling ever to reexamine the wisdom of something that it had done. This is certainly true when we are dealing with decisions like *Miranda*, which are very pragmatic decisions. Whether one initially agreed or did not agree with *Miranda*, the point of *Miranda* was to produce a practical means to avoid what seemed to be unduly time consuming and sometimes intractable problems encountered in the Federal courts in dealing with claims that confessions were inadmissible on grounds of their involuntariness.

But *Miranda* was a practical case on how to deal with it. The assumption of the Court was that if *Miranda*, in fact, was complied with, a lot of the very difficult voluntariness problems were just going to take care of themselves. When we are dealing with a rule like *Miranda*, which had a very practical objective which, as was said at the time, extended the fifth amendment to the police station for the sake of trying to avoid other more serious problems, of course it is appropriate to consider the practical effect that those decisions have. And I have no doubt that both in the briefs that have been filed before the courts and in the arguments of the specific parties, the satisfaction or the dissatisfaction of law enforcement with the practical effects of that decision have had an influence, and rightly so, on the courts.

By the same token, I think it is important to note that when we look back on a decision which has been on the books as long as *Miranda* has now, we are faced with a similarly, I think, practical obligation, if one wants it modified or expanded or contracted, to ask very practical questions about how it actually works. That is a judicial obligation. If the judiciary is going to be imposing pragmatic rules.

Senator THURMOND. Judge Souter, there are hundreds of inmates under death sentence across the country. Many have been on death row for several years as a result of the endless appeals process. Recently, the Senate passed legislation which would reduce the number of unnecessary appeals. Generally, would you give the committee your views on the validity of placing some reasonable limitations on the number of posttrial appeals that allow inmates under death sentences to avoid execution for years after the commission of their crimes?

Judge SOUTER. Well, Senator Thurmond, I am not familiar with the bill which the Senate has passed, but I am assuming that it was probably in response to the report of the committee headed by Justice Powell a couple of years ago, retired Justice Powell, who was—the committee, rather, was addressing the problem of what you describe rightly as the seemingly endless appellate process and frequently of the confusion in haste which tended to characterize it at the Federal level.

I think there was great wisdom in the recommendation of the Powell committee, because what the Powell committee centered on

was not in the first instance a strict rule of limitation, but on the problem which, in fact, was leading to the resort, frequently at the last moment, to the Federal courts in death penalty cases.

What the Powell committee identified as one of those reasons was the fact that, although counsel is guaranteed to a criminal defendant through the direct appellate process, in most States counsel was, in any event, in the process of collateral review by habeas corpus after the direct appeal process had been exhausted, there was not a mandate under the national Constitution to the States to provide counsel at that level, and most States were not doing so.

The practical result was that in the attempt at collateral review at the State level, death row inmates were, in fact, trying to raise constitutional issues without counsel competent to do so—they were issues of sufficient subtlety that a pro se litigant simply could not handle them—and that time was being consumed in what was really unproductive, almost helpless, litigation in State court collateral review. And it was only when that was exhausted and only when, in fact, an execution date was set that the prisoners would then find it appropriate to try to go into the Federal courts for collateral review.

What the Powell Commission recommended was that if we are going to place reasonable limits on Federal collateral review, we have got to accept the reality that there has got to be some kind of genuinely significant representation by counsel at the very point collateral review can begin, so that it can be worth something both at the State level and at the moment the petitioners enter the Federal scheme. And if that can be provided, if counsel can properly be provided at the initial stages, then it is fair and appropriate to place limitations upon the time in which collateral review can be sought.

I can only say that I think that is an eminently fair approach to the problem.

Senator THURMOND. Judge Souter, you are currently serving as a member of the U.S. Court of Appeals for the First Judicial Circuit. Previously, you served on the New Hampshire Supreme Court for 7 years and the New Hampshire Superior Court for 5 years. How beneficial, in your opinion, will this prior judicial experience be to you if confirmed to sit on the Supreme Court?

Judge SOUTER. Well, Senator Thurmond, for someone who has never sat on the Supreme Court, there is great difficulty in answering that question, because the one thing that I think we all hear about the Supreme Court and its workload is that the combination of the task, the volume of the task, and the responsibility of the task is something for which no one really feels prepared at the beginning of service on that Court. And probably it would be impossible that anyone could be.

There are at least some bits of background which I hope would fit me to work into the responsibilities of the Court as fast as possible if I am confirmed. Although the supreme court on which I sat, without question, did not have the demands on me that the Supreme Court of the United States would have, it shares the problem of all appellate courts in the United States today of having a series of requests for review which, as a practical matter, tend to

exceed the capacity of the court to deal with the depth that the court would like.

In New Hampshire, before I ever went on the New Hampshire Supreme Court, we had gone necessarily to a system of discretionary review because it was impossible to review every request for an appeal on the merits. So I am familiar, in fact, with the business of the Court and the need to set some kind of limits to make any worthwhile adjudication possible.

More than that, though, I think the important thing is what I alluded to in the remarks that I made before the questioning began today. There is one overriding responsibility that any judge on an appellate court has. It will not guarantee that he will get the right result, but it will guarantee that he will try as best he can to get the right results. And that is a recognition that however far removed from the bench of that court, the decision that the court renders, the ruling that the court makes is going to affect a life.

I have learned that lesson, and it is a lesson which, if I am confirmed, I hope will stand me in good stead.

Senator THURMOND. Judge Souter, I believe that judges should impose tough sentences in criminal cases, especially when the crime committed is one of violence. Society demands tough punishment for violent offenders. In the past, victims of those who committed violent crimes have often played a diminished role in the criminal justice system. However, recently, the number of victims who participate in the prosecution of criminal cases has increased.

In your opinion, should victims play a major role in the criminal justice system? If so, to what extent should a victim participate?

Judge SOUTER. Well, Senator, there are certainly two respects in which victims should be recognized in the system, and there is a further interest of victims which the government as a whole should recognize. The most obvious role of the victim, of course, is the role which any victim must play in establishing the fact of the crime. Your central witness, theoretically, in a criminal case is the victim. The victim also, it seems to me, has a claim to the attention of the court in a criminal case if there is, in fact, a conviction.

We try to avoid disparity in sentencing, but one of the subjects which is appropriate to bear in mind is exactly the one that you raised a moment ago, and that was: What was, in fact, the conduct of the defendant? What degree of either mild or outrageous behavior can we assign to the conduct of the defendant in relation to the victim in causing harm? The heinousness of a crime is an appropriate subject in any sentencing decision.

I think going beyond that, one of the happy developments of the law in the last few years is the recognition by the government that after the criminal case is tried, whatever may be the result, the victim is still left, in many cases, in a mess not of the victim's own choosing; and that, in fact, there is a need to provide some help. The victim assistance acts which the States have been passing, it seems to me, is a step in the right direction.

Senator THURMOND. Judge Souter, the doctrine of stare decisis is a concept well entrenched in our legal system and the concept that virtually all judges have in mind when making decisions, especially in difficult cases. I am sure that the issue of prior authority has

been a factor which you have considered many times in your years on the bench.

Could you please briefly state your general view of stare decisis and under what circumstances you would consider it appropriate to overrule prior precedent?

Judge SOUTER. Well, Senator, as you know, the doctrine of stare decisis which we speak of in that shorthanded kind of way is a series of considerations which courts bear in mind in deciding whether a prior precedent should be followed or should not be. Some such doctrine or some such rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-to-case basis.

The problem that the doctrine of stare decisis addresses is the problem of trying to give a proper value to a given precedent when someone asks a court to overrule it and to go another way. And I suppose the complexity of the doctrine is such that, contrary to the terms of your question, I suppose I could talk about it for a very long time. And there may be other members of the committee——

Senator THURMOND. You need not do that.

Judge SOUTER. I was going to say, I think you have made it very clear that that is not what you had in mind, and I don't know whether any other members of the committee may be greater bears for punishment to go into it further than you have or not. Let me, though, in compliance with your terms, just state in a very kind of outline way what I think we should look to, without meaning to be exhaustive.

The first thing, kind of the threshold question that, of course, you start with on any issue or precedent, is the question of whether the prior case was wrong. We don't raise precedential issues unless we are starting with the assumption that there is something inappropriate about the prior decision. Now, that decision may have been right at the time and there now be a claim that, in fact, it is wrong to be applied now. But the first question that we have to ask is: If we were deciding the case today, if we were living in a kind of Garden of Eden and we didn't have the precedent and this was the first case, would we decide it the same way?

If the answer is no, we would not do so, then we look to a series of factors to try to decide how much value we ought to put on that precedent even though it is not one that we particularly like or would think appropriate in the first instance.

One of the factors which is very important I will throw together under the term of reliance. Who has relied upon that precedent, and what does that reliance count for today? Have people——

The CHAIRMAN. Excuse me, Judge. Did you say if the answer is no or if the answer is yes? You said when we look back——

Judge SOUTER. My problem, Mr. Chairman, is I forget what the question was.

The CHAIRMAN. I am sorry. You indicated that one of the things you looked at is whether the prior case was wrongly decided, isn't that correct?

Judge SOUTER. Then the answer should have been yes. I said no?

The CHAIRMAN. Yes. OK. I got it.

Judge SOUTER. Thank you for amending that.

The CHAIRMAN. I was getting confused.

Judge SOUTER. If you are going to ask me for a statutory interpretation, I would be as liberal as that, then you may have me in a corner. But assuming we start with a precedent which is wrong for this time, considered by itself, one of the things we are going to start by looking at is the degree and the kind of reliance that has been placed upon it.

We ask in some context whether private citizens in their lives have relied upon it in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now.

We look to whether legislatures have relied upon it, in legislation which assumes the correctness of that precedent. We look to whether the court in question or other courts have relied upon it, in developing a body of doctrine. If a precedent, in fact, is consistent with a line of development which extends from its date to the present time, then the cost of overruling that precedent is, of course, going to be enormously greater and enormously different from what will be the case in instances in which the prior case either has not been followed or the prior case has simply been eroded, chipped away at, as we say, by later determinations.

Beyond that, we look to such factors as the possibility of other means of overruling the precedent. There is some difference, although we may have trouble in weighting it, there is some difference between constitutional and statutory interpretation precedent, which Congress or a legislature can overrule, so we look to other possibilities.

In all of these instances, we are trying to give a fair weight to the claim of that precedent to be followed today, even though in some respect we find it deficient on the merits.

Senator THURMOND. Judge Souter, former Associate Justice Lewis F. Powell once stated:

> Those of us who work quietly in our marble palace find it difficult to understand the apparent fascination with how we go about our business. However, as our decisions concern the liberty, property and even the lives of litigants, there can be no thought of tomorrow's headlines.

Judge Souter, would you share with the committee your thoughts regarding Justice Powell's statement, especially his comment that "there can be no thought of tomorrow's headlines"?

Judge SOUTER. Senator, I hope there is no judge in the Republic who would not agree with that statement of Justice Powell. If there is one thing that——

Senator THURMOND. That is sufficient. [Laughter.]

Judge SOUTER. You are going to turn me into a laconic Yankee, if you keep doing that, Senator. [Laughter.]

Senator THURMOND. I have just been told that my time is up, Judge Souter. Thank you. I was trying to get in another question, but it is too late.

Judge SOUTER. Thank you, sir.

Senator THURMOND. Thank you.

The CHAIRMAN. Senator Kennedy.

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

I would like to direct the judge's attention to the issue of civil rights. I am sure you understand, as all Americans understand, that the issue of slavery, when it was discussed at the Constitution-