

The CHAIRMAN. OK. I accept that answer. I admit, it is beyond the scope of this hearing, other than tangentially.

Mr. PHILLIPS. But it seems to me that the President did have a greater duty of care than that which he exercised in the selection of Judge Souter, given the kinds of commitments which he made during the 1988 presidential campaign and given the kinds of commitments that were in the Republican Platform.

Let me say also, responding to your question, that while Justice O'Connor—and this has been pointed out by other witnesses—while Justice O'Connor was careful not to preview her vote on *Roe v. Wade*, when she was up for confirmation, she made it quite clear that she found abortion to be morally repugnant.

I found it rather chilling that Judge Souter was not even willing to say that. I know there are many liberal democratic United States Senators who vote for a “pro-choice” position, who still find abortion morally repugnant, but Judge Souter was not even willing to say that.

The CHAIRMAN. That is an interesting observation.

The Senator from Pennsylvania.

Mr. SPECTER. Thank you, Mr. Chairman.

Mr. Phillips, on this question, you and Mr. Joseph Rauh, the leader of the Civil Rights Committee, are in total agreement, that is, on the rejection of Judge Souter.

Mr. PHILLIPS. Well, let me say, with respect to Mr. Rauh, who is an estimable warrior for his views, that I believe he and his colleagues have gotten far more than they deserved in Judge Souter and that those on my side of the aisle have gotten far less.

I would also say that the conservatives in America have a lot to learn from the civil rights movement, because if President Bush or President Carter had named to the Supreme Court a man who is a trustee of a country club, had voted to exclude blacks, that man or woman would, ipso facto, have been disqualified from service on the Supreme Court. I would have voted, had I been a Senator, against a prospective Justice who, as the member of the board of a country club, had voted to exclude blacks from membership.

But here is a man who voted for policies which resulted in the death of many hundreds of unborn children, and I profoundly regret that there are not right-to-life organizations and conservative organizations standing up and at least expressing profound concern about that fact.

Senator SPECTER. Mr. Phillips, I start with the proposition of you and Mr. Rauh in agreement, because it illustrates the difficulty of the committee, a Senator or the Senate in pleasing everyone or perhaps in pleasing anyone.

Mr. PHILLIPS. Senator, with respect, I do not expect you to please everyone, I expect you to do what your conscience directs you to be correct.

Senator SPECTER. Well, I will do it, I have in the past and will here.

I think your testimony is really very important, because you and the National Organization of Women come to the same conclusion, that Judge Souter should not be confirmed, that the Senate should not give its consent, because he displeases you on the abortion

issue, just as he displeases illustratively the National Organization of Women.

I think your testimony is very important here, because it shows the very strong feelings which are held by those who are opposed to abortion. The testimony by the panels yesterday who opposed Judge Souter's confirmation, because they insist on a commitment that *Roe v. Wade* be sustained, was very powerful on the other side. They did not all insist on that commitment. Some drew a lesser line, saying they would be satisfied with a commitment to a liberty principle, and then would be satisfied with the strict scrutiny test, in coming to the conclusion.

But I think it is very important for America to know that there are those who feel very, very strongly on the principles which you have just articulated. I had some questioning yesterday about the sense of where our majority stood and, although the public opinion polls consistently show that a majority of people do not want an elimination of abortion. As soon as you start to put qualifications on it, should there be an abortion by a married woman, married for a long period of time, the first child conceived, without the husband's consent, then the picture starts to show, for whatever value the public opinion polls have.

So, I thank you for your testimony and I just have really one question for you—

Mr. PHILLIPS. Senator, before you ask the question, may I respectfully disagree with your analysis.

Senator SPECTER. Certainly.

Mr. PHILLIPS. I would say that there is a fundamental distinction between the groups such as NOW and NARAL and Planned Parenthood and so forth which urge a "no" vote on Judge Souter. Their position is that they are not absolutely certain that Judge Souter is going to be with them to their satisfaction. I, on the other hand, am absolutely certain on the basis of the record that Judge Souter does have a permissive view toward abortion.

The implication of your prefatory remark was that this is a single-issue concern, and perhaps it may be for NOW or Planned Parenthood. I will let them speak for themselves. To me, this transcends any single issue. To me, the heart of the law is—and I speak as a layman. The heart of the law is that the system of justice is to prevent the shedding of innocent blood. The purpose of the system of justice is to protect the innocent.

The predicate to the Constitution is the Declaration of Independence which says we are endowed by our Creator, which talks about a firm reliance on Divine Providence. I believe we all are created beings and that the unborn child is a created being. And if the rights of that created being are denied by a person appointed to the Court, denied in more than a theoretical way, but denied in the sense that he has actually been complicit in the performance of abortion, I think you have got something very serious.

Now, the next statement that I have could be regarded as inflammatory, and let me make clear that I am not saying that David Souter is Adolph Eichmann. That is not what I am saying. But listen to what I am saying—

Senator SPECTER. You are not saying he is what?

Mr. PHILLIPS [continuing]. Adolph Eichmann. But it would be no more convincing for an Adolph Eichmann to say that his personal views on gas chambers had no bearing on legal decisions he might make as a member of a Nazi high court than it is now plausible for a David Souter to argue that his role as an accomplice to abortion has no bearing on his suitability to be a Justice of the U.S. Supreme Court.

Now, different people have different views on whether, in fact, we have had an abortion holocaust in the United States. I believe we have. And I believe that it is a profound moral disgrace that this has been permitted to occur. But I don't think it is enough to say that this is just another issue. I think it goes to the very heart of David Souter's character and moral philosophy.

Senator SPECTER. Well, as a result of what you have just said, I have a second question.

Mr. PHILLIPS. Yes, sir.

Senator SPECTER. I will ask first, you say that you believe that in what Judge Souter has done he has shown a sympathy for abortion. Is it your personal view—I couldn't ask this of Judge Souter, but I can ask it of you. Is it your personal view that Judge Souter will vote to uphold *Roe v. Wade*?

Mr. PHILLIPS. Senator, it would be speculation. Because Judge Souter approaches legal questions from a positivist perspective rather than from any theory of natural law, even the kind of theory which Senator Biden has endorsed, and as he very articulately put forward during the Bork hearings, it is a matter of guesswork.

Senator SPECTER. Do you have a guess?

Mr. PHILLIPS. No, sir, I don't.

Senator SPECTER. Last question. If you were sure, had a commitment from Judge Souter that he would vote to reverse *Roe v. Wade*, flat commitment that he would reverse *Roe v. Wade* and adopt the position that you articulate that abortion ought to be outlawed, would you change your opposition to his nomination? Or would you recommend that we not consent on the basis that his character is fatally flawed by what he did in permitting abortions in the hospital, as you referred to?

Mr. PHILLIPS. Well, if he said that he thought abortion should be outlawed, then he would be changing his view, and I would recommend his appointment. But merely repealing *Roe v. Wade* will not necessarily prevent the continuation of massive abortions, conceivably in every one of the 50 States. All that that will do is return the process to the State legislatures.

Senator SPECTER. But if he agreed to reverse *Roe*, you would recommend that we consent to his confirmation?

Mr. PHILLIPS. I would take that into account with other factors. The focus of my testimony today and the reason that I decided to request the opportunity to testify relates to his record in authorizing the performance of abortions. But I have to tell you that I am troubled by his answers to other questions.

Frankly, I found his most troubling answer one which he gave to Senator Thurmond at the very beginning of the hearings, when he said that the power of the law comes from the people. I don't believe that. I believe it comes from God. And having read and reread

two or three times David Souter's senior honors thesis, it seems to me that he still believes many of the things that were very much implied as reflecting his beliefs in that senior honors thesis at Harvard. It seems to me that this is a man who totally rejects higher law authority and that he is purely a legal technician.

Now, I would not have come here to testify against him but for the fact that he had been complicit in the performance of abortion because there are many others far more knowledgeable about the law than I, and the issues would have been better addressed by others. But even had he given that assurance concerning which you inquired of me, I still would have been troubled in the context of his other statements.

Senator SPECTER. Well, I thank you, Mr. Phillips, for your very profound testimony.

Mr. PHILLIPS. Thank you, sir.

The Chairman. The Senator from New Hampshire, Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

Welcome, Mr. Phillips.

Mr. PHILLIPS. Thank you, Senator.

Senator HUMPHREY. I, too, am disturbed about Judge Souter's participation in the decision by the Concord Board of Trustees to commence the performance of abortions at that facility. I am disturbed by his view that members of such a board should exercise no moral judgment in overseeing a hospital. A hospital of all places, it seems to me, should be subject, its operations should be subject to moral judgment.

But I am not sure it is dispositive. I am not sure of anything, frankly, about Judge Souter. I don't think anyone is. I think he soft-pedaled his views before this committee. That would only be human after what happened to Judge Bork. Anthony Kennedy certainly soft-pedaled his views and turned out to be far better than his testimony indicated to conservatives, at least, that he would be. So I am hoping that is the case with Judge Souter.

Mr. PHILLIPS. I hope you are right.

Senator HUMPHREY. I will tell you another reason I don't think it is dispositive. You and I have a friend in this very body who, as a State legislator back in the mid-1970's, supported pro-abortion legislation. Why? Because he hadn't really given much thought about it. But once he had, he came to a completely different conclusion. I think you know about whom I am speaking.

It is my experience that a lot of adults, intelligent, thinking adults, have not really thought an awful lot about this because it is human nature not to think about something as ghastly and as grisly as chopping up little babies. And the pro-choice slogan is very appealing. No doubt it was designed by pollsters and consultants. It is very effective. The Americans are for choice. It is democratic to be for choice. But when you think about what the choice is, then you have to come to another conclusion.

My opinion is that Judge Souter, because he has never faced this kind of case, has never really given it deep thought—and I hope I am right on that—he at least indicated with regard to the decision at the Concord Hospital that it did not indicate that he views—that he rules out personhood for the unborn child. I am paraphrasing