

# NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

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THURSDAY, SEPTEMBER 13, 1990

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:05 a.m., in room 215, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

## OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR.

The CHAIRMAN. The hearing will come to order.

Welcome, Judge Souter. The committee is delighted to have you here this morning. Let me, before I make my opening statement, just go through very, very briefly the procedure we hope to follow this morning.

As is the custom of the committee, Judge, each member of the Judiciary Committee, on such a solemn and important occasion as this, makes an opening statement. We will limit our opening statements to 10 minutes apiece. But with the number we have here, you can see that is going to take a while, at which time we would then proceed, Judge, to having your colleagues from New Hampshire, Senator Humphrey and Senator Rudman, introduce you. After that point, we will then ask you to stand to be sworn and then to deliver your opening statement.

Now, I expect, in light of the clock and the time and the number of statements, that we will probably break for lunch before you make your opening statement. So I expect the first item of business after we break for lunch will be your opening statement, at which time we will then begin questioning. In order to have some prospect of a genuine exchange on matters of consequence, it has been my practice and my predecessors before me, Chairman Kennedy and Chairman Thurmond, to have that first round of questioning be a half-hour—that each Senator have one-half hour to question you.

I do not anticipate going late tonight or any night during this process, and I do not anticipate that we are going to have to bring a knapsack for any of these proceedings. Today, our lunch break will occur whatever the convenient moment is after Senators have

made their opening statements. If there is still time, we will ask Senators Humphrey and Rudman to make their statements and you be sworn. If not, that will be put over until the afternoon.

I again, Judge Souter, welcome you to this committee.

Seven weeks ago, President Bush discharged one of his most important constitutional responsibilities, one of the most important responsibilities assigned to the Chief Executive of this Nation, by selecting you to be his nominee for Associate Justice to the Supreme Court of the United States.

Today, we, the members of the Judiciary Committee and the Senate as a whole, embark on a solemn task that article II of the Constitution commits to this body: The Senate's responsibility to offer its "advice and consent" to the President's nomination.

As these hearings begin, I believe this committee's role in that process is threefold:

First, and foremost, in my view, we must conduct a fair and thorough hearing that will provide you with a full opportunity to present your constitutional philosophy to the Senate and, I might add, to the Nation;

Second, we must explore those views with you, to try to identify the meaning you would give to our Constitution, if you become "Justice Souter"; and

Third, we must decide—each Senator, bound by his own conscience—whether that constitutional vision is the one that this Nation should have.

These have been our obligations for many years now, obligations that the Constitution makes it our duty to complete. And to fulfill our constitutional duties, Judge Souter, we will need your help.

You come before us without an extensive record that details your views on important constitutional questions of our time. And I say that not critically. I say that as an observation. You are an extremely bright man with an extremely admirable record. But the past responsibilities you have had have not required you to enunciate your views in any detail on major constitutional issues and questions. As a result, we need your help for us to be able to understand your constitutional philosophy, the philosophy that you would bring to the Nation's highest court. We need you to join us in a meaningful and important dialog about the Constitution.

And let me be clear on one point, Judge. As chairman of this committee, I am not asking you for any commitments as to how you would vote on any specific case, nor am I trying to pry nor am I attempting to pry into your personal views on publicly debated issues.

Rather, we want to know what principles you would apply, what philosophies you would employ as you exercise the awesome—and I emphasize awesome—the awesome power you will hold if you are confirmed as an Associate Justice of the Supreme Court of the United States.

The Supreme Court holds far-reaching power over the constitutional rights and daily lives of every American. Throughout the course of our history, its impact—upon what we can do, what we can say, and how we can live—has equaled that of any President or any Congress.

The fact of the matter is that we hold many of the freedoms we enjoy today because of the wisdom and the courage—and I emphasize the courage—and foresight of the 104 Justices who have sat on the Supreme Court.

But there have been moments in our history when the Court, like other institutions in this Nation, has come to a crossroads, moments when the Court's future has confronted its past, moments when its long-term direction is at stake, or at least in question.

It is at these moments in particular when the Court is most shaped by the outlook and philosophy of individuals who serve as Justices. In my view, Judge Souter, we are witnessing just such a moment in our history.

Today, our Nation, our Constitution as interpreted by the Court, is at a crossroads. There are some very fundamental choices to be made:

Will the first amendment's guarantee of freedom of religion continue to protect the rights of all Americans—Protestant and Catholic, Jewish and Moslem—to practice their faith and practice it in a way of their choosing? Or will we begin to change the standard by which we judge whether a religious practice can be impacted upon by a governmental body?

Will the fourth, fifth, and sixth amendments protecting our civil liberties—of a fair trial, of freedom from unreasonable searches—remain intact as it is today? Will it be scaled back, giving government more power, or changed, giving individuals more impact and control?

It is a question, as they say in the vernacular, that is up for grabs today.

Will the power of the 14th amendment's equal protection clause—used to root our discrimination against racial minorities and women in our society—be diminished? Again, will government be given more control?

And will the majestic sweep of the 14th amendment's due process clause, which protects the right of privacy of all Americans, be curtailed, changed, or in any way affected?

Judge Souter, because of the close division on the Court on the meaning of these constitutional guarantees, many of which are divided 5 to 4 or, in essence, now will be 4 to 4, you, Judge Souter, are the single man in this room who can affect in the near term the outcome of all these issues. With this close division, will you have and how will you exercise and determine which way you will vote, deciding which direction the Court will go on a dozen issues we could probably both name? You will have the power to determine which direction the Nation will take, which path we will follow, as we reach this critical crossroads.

Let there be no mistake about it, Judge Souter. If confirmed, the fate of our private lives and our public responsibilities will be placed in your hands in a very significant way.

Judge, I sincerely hope—and expect, quite frankly—that you will join me in a dialog on the Constitution, a dialog in which you respond with specific answers to specific questions, specific questions about the due process clause and its protection of our right to private and individual liberty; the equal protection clause and its guarantees of racial equality and equal rights for women; the first

amendment and its protection of freedom of speech and freedom of religion; and other important constitutional issues of our day.

At this fateful moment in our history, Judge, we have a right to know, a duty to discover, precisely what you, Judge David Hackett Souter, think about the great constitutional issues of our time.

I believe we can engage in a real discussion on these issues while respecting your judicial independence. We value impartiality in our judicial officers, and it is not a function of these hearings to trespass upon any boundaries that are set by or need to be maintained to guarantee that independence.

Yet the office of a Supreme Court Justice inures to no one by birth, no one by right, and no one as a consequence of a nomination by the President of the United States. To attain that post, a nominee has the obligation to persuade the Senate that he or she is the person in whose hands we should agree to vest this awesome power and responsibility.

No one is entitled to be a Supreme Court Justice any more than a member of this committee is entitled to be a U.S. Senator.

Judge, put bluntly, the burden of proof is on you—Judge Souter, the nominee—as it is on us when we stand for election. If a majority of the electorate deems us to be the right person for the job, given the particular time and circumstances facing this country, then we will be. And a Supreme Court Justice can assume his post only if the Senate is persuaded that the nominee is the right person for that position at that particular juncture of American history.

Judge, as I said, the power is awesome, the duty is profound, the obligation is yours, and the responsibility is ours.

No one knows, Judge Souter, what questions the Supreme Court will have to resolve in the year 2024, the year until which you will serve on the Court, God willing, should you be confirmed and serve as long as your predecessor—2024.

Of one thing, though, we can be sure.

If the history of this great Nation is any guide, tomorrow's issues—whatever form they take—will pit governmental power against individual liberty; majority tyranny against personal rights; the danger of discrimination against the dream of equality for all Americans.

For 200 years, the Supreme Court of the United States has served as the court of last resort in such struggles—the final guardian of our fundamental rights.

So it was for our parents and our grandparents, and so I hope it will be for our children and our grandchildren in the 21st century.

If confirmed, you, Judge Souter—more than any other person in this room—will decide what the Constitution means for the next generation. We will long be gone from this bench while you are still sitting on the Supreme Court of the United States, helping decide the fate of this great Nation. To consent to your nomination, we must have considerable guidance as to what kind of Supreme Court, what vision of the Constitution you will provide for our grandchildren.

For the next few days, Judge Souter, open for us a window into your mind, and give us a little bit of a glimpse into your heart.

[The prepared statement of Chairman Biden follows:]