

The first is it was the position of the superior court, and I was no longer on the superior court. The second and equally strong one was that if the legislature did not, in fact, take the advice—if that is what the superior court still wanted done, and the legislature did not take the advice—it was virtually inevitable that there would be issues brought before the New Hampshire Supreme Court involving matters of constitutionality, involving claims that judges, in fact, could not avoid this kind of responsibility. And it seemed to me necessary that I not become involved in the kind of legislation that might lead to that sort of an issue, and that I be very careful not to allow the name of the supreme court to be associated with it.

My own guess is that if there literally had been an action brought before the supreme court, it probably would have been in a posture in which I would have felt it necessary to recuse myself. But it still would have been the case that there would have been a supreme court justice taking a position. And so, quite apart from the fact that it was not an issue for the supreme court, there was a very strong reason to keep the supreme court at a distance from the resolution of the issue in case eventually there was litigation about it.

Senator HEFLIN. Mr. Chairman, how much time do I have left?

The CHAIRMAN. You don't have any more time, Senator.

Senator HEFLIN. That takes care of that.

The CHAIRMAN. Thank you, Senator.

Senator Humphrey of New Hampshire.

Senator HUMPHREY. Mr. Chairman, it is now after noon. Anxious as I am to have my turn here, I certainly would not object to your giving our esteemed witness a break, if you would choose to do so.

The CHAIRMAN. I have no objection to that. I have been talking with the witness and his people constantly, checking at every 15 minutes or so. Their preference is as follows—just so you know I am taking care of your brethren from New Hampshire.

Senator HUMPHREY. All right.

The CHAIRMAN. Their preference is that we go through and finish the first round, have you speak, then have Senator Simon and Senator Kohl, and then break, and then have three of us ask questions in the afternoon and then stop.

Do you have objection to that, Senator?

Senator HUMPHREY. None whatsoever, as long as the witness still has a pulse, we can continue.

Judge Souter, one of the things that we few non-lawyers on this committee have noticed is that the lawyers tend to get bogged down in what we regard, at least, as minutia and acrania, not to say that those things are not important sometimes, but for my part, I want to try to back off and approach from a fresh perspective.

I want to start by reciting what for me is the most fundamental statement, indeed the most eloquent statement on human rights ever written: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator"—and I emphasize "creator"—"with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

As you know, and as I will point out for my colleagues, the New Hampshire Bill of Rights, the New Hampshire Constitution, the

first part, the Bill of Rights incorporates that very same concept, not as a lofty expression, but as a concrete part of our Constitution.

I read articles I and II: "All men are born equally free and independent, therefore, all government of right originates from the people is founded in consent and instituted for the general good."

Article II: "All men have certain natural, essential and inherent rights, among which are the enjoying and defending life and liberty, acquiring, possessing and protecting property and," in a word, "seeking and attaining happiness."

Do you agree with the declaration in the first two articles of the New Hampshire Constitution, Judge Souter, that there are certain rights which precede even the State?

Judge SOUTER. Yes, I think, in fact, that is the kind of concept which is recognized and which is reflected in the theory of limited governmental power and which is at the focus of our search for an appropriate meaning to the scope of liberty protections.

Senator HUMPHREY. So, when you say, as you did yesterday, something to the effect that power comes from the people, you do not mean to suggest that a majority of the people have—that a majority of the people may violate, even through government, certain inherent rights of each human being?

Judge SOUTER. I mean, as you suggest, that power can only come from the people, yes.

Senator HUMPHREY. That is not quite my question, though. You made it quite clear in the response to my first question that you believe that there are certain inherent rights that precede the State. My question now is can a majority of people, acting through government, even acting through government, violate such inherent rights?

Judge SOUTER. Well, we know that some of those inherent rights, of course, are reflected in the specific provisions of the Bill of Rights, and I have also said in the course of my testimony today that it is one of the objects, as we now analyze these problems, is one of the objects of the liberty clause, both in the State constitution and in the National Constitution, to define and protect this point beyond which government simply cannot go or cannot go without the most strong justification.

Senator HUMPHREY. Well, I am heartened to hear your subscription to the belief of the Founders that we have certain inherent rights that precede the State.

I want to return again to the Declaration of Independence and pick up where so often people leave off. We all know that famous expression of Jefferson, "life, liberty and the pursuit of happiness." Unfortunately, he got the property part screwed up, but New Hampshire fixed it in their constitution and made it clear that "pursuit of happiness" means, as it was generally meant in those days, the possession and enjoyment of property.

But to get back to that famous expression "for all people for all times, that they are endowed by their creator," and so on, "certain inalienable rights," and then pick up where people so often leave off, because this next part is so important, too, "and that to secure those rights, governments are instituted among men."

Therefore, would you agree with the Founders that the fundamental purpose of government then is to secure those inalienable rights in which we are all endowed by our creator?

Judge SOUTER. That is a fundamental purpose and, as you know from just the structure of the constitution in our own State, that was the purpose which the drafters and the Founders saw fit to express before they had even addressed the question about the appropriate structure of government.

Senator HUMPHREY. Yes, indeed, they put it right up front. By this line of questioning, I do not mean to suggest that there are rights that are unlimited. When one's rights bump up against another's, then immediately we begin to have limits. We call for liberty, not license, and that is I think the concept on which our government was founded and has evolved in very great detail.

Well, Judge Souter, under the Constitution, can there be the right of one human being to take the life of another, except in self-defense, when threatened by that other human being?

Judge SOUTER. Well, we know, Senator, subject to the Constitution, that there traditionally certainly have been circumstances. The example of the death penalty, as you know, is recognized right in the Constitution—

Senator HUMPHREY. Permit me to interrupt there. What I mean was, is there the right of one human being, acting separately, not corporately as society or government, but one human being acting separately to take the life of another, except in self-defense, when threatened by this other human being?

Judge SOUTER. Well, are you asking this as a question of constitutional law, now, not a moral, not a personal moral issue?

Senator HUMPHREY. I will ask it first as a personal moral question.

Judge SOUTER. I can certainly conceive of circumstances in which it would be arguably justifiable to take another's life, even though mine personally was not threatened. There is the object of war, the example of war, the example of protecting one's family. You would protect your child, even though your life was not threatened.

Senator HUMPHREY. Fair enough, but the intent of my question was to focus on a situation where one individual, not acting with authority of government, as one does in war, and I did not anticipate the conditions of a family being threatened. But I am trying to focus on a situation where one human being elects to take the life of another, which other human being does not represent a threat to the life of the first.

Judge SOUTER. I think probably I and everyone in this room would accept the proposition, the general proposition that life, of course, morally should not be taken without justification. Where we would find our points of difficulty might come in either defining the concept of life or defining the very concept of justification that arguably would be brought up in argument.

Senator HUMPHREY. Defining life seems to be a problem that the Supreme Court has encountered, inexplicably, from my point of view, but that is something I will put off for a later time, if I may.

Would you agree with my understanding of *Roe v. Wade* and the subsequent decisions, the progeny, as the lawyers like to say? You know, there is certain lawyer language which is used to justify the

exorbitant hourly fees that they charge, so I will try to keep my language simple.

Judge SOUTER. Those were the millions that I could have been earning, if I—

Senator HUMPHREY. Yes. [Laughter.]

Those other decisions, *Roe* and the ones that followed, would you agree with my understanding that *Roe* and the progeny established an enforceable right to abortion during all nine months, if, for example, the mother asserted continued pregnancy represented a threat to her health, including mental or emotional health?

Judge SOUTER. The extent of recognition in the cases of mental or emotional health is something that I am not clear on the legal development on, but certainly there is recognition of the possibility of abortion to save the life of the mother or to save serious injury to her health.

Senator HUMPHREY. Well, it is much more than that, and I am not mistaken on this point, that *Roe* and progeny establish—the reason I raise this, it is kind of a rhetorical question, really, and I know you are going to stay arms-length from this, and I understand your point of view.

You know, there are a lot of people watching, including young people, for which this is a wonderful lesson in history and in constitutional government, who probably do not understand that *Roe* and the decisions which followed it and reinforced it and expanded it established a right to have an abortion during any time of the nine months of gestation, for the health of the mother, which includes the emotional or mental health. So that if a woman raises the claim that pregnancy affects here emotional health, that is sufficient to secure an abortion.

That, of course, is the massive loophole through which 98 or, say, 95 percent upwards of the abortions in this country are secured. And when you look at the surveys, the interviews with women who have had abortions, they never say that—I should not say never—they rarely say that they sought the abortion because of emotional health or mental health, or even physical health in most cases, but, rather, because they were unmarried or it would interrupt school plans and things like that, which are not insignificant, but I just want to make the point that this is a massive loophole in existing law through which most of these abortions are secured. At least I view it as a loophole; others may not, but I certainly do. That is a critical bit of information, that one can secure abortion during any of the nine months of pregnancy by establishing that claim.

Surely, you will be able to respond to this question: *Roe v. Wade* and progeny did not establish an obligation on the part of any individual or any institution to perform abortions. That is correct, is it not?

Judge SOUTER. Yes, we recognize that, and, of course, those issues have been raised in the funding cases, too.

Senator HUMPHREY. So there is no obligation on the part of anyone, including the Federal Government, as we have known from many challenges, to facilitate abortion in any way, either financially or in any material way, because, as the Court has said, there is no obligation on the part of the government to subsidize the exercise of rights.

Judge, you were a member of the board of trustees of the Concord Hospital from 1971 to 1985. In 1973, the trustees voted to begin performing abortions in that hospital. Have you said for the record how you voted on that issue?

Judge SOUTER. I think I have, but I voted for the resolution, and my recollection is that the specific terms of the resolution allowed abortion consistent with what was then the new legal era inaugurated in the terms of *Roe v. Wade*. My recollection—and this is simply something I am not clear of, after this time, but I think there had previously been probably a hospital or staff bylaw referring specifically to the preexisting New Hampshire statutes—

Senator HUMPHREY. Yes.

Judge SOUTER [continuing]. And that, as a result of *Roe v. Wade*, there was need to revise them.

Senator HUMPHREY. Right. So you voted in support of the policy change, the result of which the hospital began to perform abortions, consistent with the law, of course?

Judge SOUTER. That abortions could be performed within the hospital, and my recollection also is that the resolution was explicit in saying that this did not obligate a given hospital employee or medical staff member to do anything against conscience.

Senator HUMPHREY. Good. Good.

Well, I am not asking you in this next question to comment on *Roe v. Wade*, that is, its correctness, but I would ask you to explain your vote, as a trustee of the Concord Hospital. Clearly, the hospital was under no obligation to begin performing abortions. Why did you choose to support a change in policy such that the hospital began to perform abortions?

Judge SOUTER. Well, the change in policy was to allow doctors who chose to perform abortions as a medical procedure in that hospital, to do so consistently with *Roe v. Wade*. The resolution was not—and I do not think this was the point of your question, but the resolution was not intended to make the performance of abortions a hospital function, as opposed to a function of the medical staff which practiced independently within that hospital.

The reason the hospital took that position and the reason I voted for it was that Concord Hospital was a community hospital, it was not tied to any sectarian affiliation, it served people of all religious and moral beliefs, its medical staff represented all religious and moral beliefs, and so did the patients who went through the hospital.

We did not believe that it was appropriate for us, whatever might be the moral views of a given trustee, to impose those views upon the hospital, when in fact it was the law of the United States that a given procedure was lawful.

It was, of course, a further justification, and I cannot tell you off-hand how much weight that justification played in the minds of any one trustee, but it, of course, was a serious one, and that was, given the fact that the hospital would be available for abortions, if a doctor chose to perform one there.

One of the functions which the hospital was giving to the community was the function of the greatest degree of safety in medical care, and if abortions are going to be performed as, by law, they could be performed, it was appropriate in a nonsectarian hospital

to allow the full range of backup services for the safety of the mother and, indeed, for the safety of all participants, and we felt—and I do now feel—the hospital had an obligation to do that.

Senator HUMPHREY. So you did not feel in that case that it was appropriate to bring to bear any moral judgment, is that what you are saying?

Judge SOUTER. I did not.

Senator HUMPHREY. Does your vote back then in any way indicate that you feel that unborn human beings are not persons?

Judge SOUTER. My vote has no such implication. My judgment with respect to the appropriateness of the procedure in a hospital of which I was a trustee is no more a reflection of a personal moral view of mine, pro or con, than would be any judgment that I was required to make as a judge of a court.

Senator HUMPHREY. It might be fun to explore why you feel such a decision should be value-neutral, why you should not bring your moral judgment to bear in such a situation. I have already used more than half of my time and I want to keep going, but I certainly am willing to yield to you, if you want to reply in any greater depth on that question.

Judge SOUTER. I will leave the questions to you, Senator.

Senator HUMPHREY. Let's look at the other end of the continuum of human life. With respect to the 14th amendment, are there any precedents in our law that have stripped, for example, elderly persons of their right to life, without due process of the law?

Judge SOUTER. I am not aware of what you may be getting at or anything that I could respond to your question.

Senator HUMPHREY. Well, I am not aware of any such precedents. I could be mistaken, but I am not aware of any. My point is that: One retains the protection of the 14th amendment; namely that one may not be deprived of life without due process of law, no matter what one's condition. If one is unconscious, one is still a person and protected by the 14th amendment. Is that not so?

Judge SOUTER. I think there is no question, 14th amendment liberty includes liberty in that situation.

Senator HUMPHREY. Yes. If one—

Judge SOUTER. As you know, it raises very great difficulties.

Senator HUMPHREY. Oh, yes. If one is unable to fend for one's self, unable to speak for one's self, unable to defend for one's self, unable to eat or drink for one's self, unable to attend to toilet necessities, even unable to breathe on one's own, one is still a person and protected by the 14th amendment.

Judge SOUTER. There is no question, that liberty—

Senator HUMPHREY. No question about that.

Judge SOUTER. There is no question, that liberty interests extend to every living human being. In answering that, of course, as I am sure you do not intend, I am not giving opinions about the validity of living wills and things of that sort. But the appropriateness of the 14th amendment is an invocation of right and is open to everyone.

Senator HUMPHREY. Yes. You say the liberty provision of the 14th amendment extends to every living human being. What is the difference between a living human being and a person?

Judge SOUTER. Without being more specific about the legal context, Senator, I don't know that I would see any point in drawing that kind of a distinction. I portend nothing by that answer, but I just think that is the kind of statement that one really cannot make without being misleading, unless one makes it in a very specific context.

Senator HUMPHREY. Well, it is a very important question. It is a pivotal question. I may want to come back to that in a second round.

Yesterday you said you counseled a couple whose union had resulted in conception, in this case an unplanned pregnancy. That was in 1966?

Judge SOUTER. I think that was in 1964 or 1965.

Senator HUMPHREY. My information is that in no State was elective abortion legal until 1977, California being the first State to permit it. I don't want to even approach an intrusion into the privacy relationship in terms of identity or outcome, but did you counsel the couple to remain within the law?

Judge SOUTER. Without invading the privacy which they have a right to expect, I think the only thing, Senator, that I can tell you is that I counseled them against taking the kind of, in fact, dangerous action which one of them had described to me they had in mind.

Senator HUMPHREY. I think I misspoke a moment ago. The first law permitting elective abortion was enacted in 1967. Evidently I said 1977.

Judge, you remember the old television program "Queen for a Day"?

Judge SOUTER. Well, it wasn't something that I spent much of my youth watching, but I have heard the term. [Laughter.]

Senator HUMPHREY. Yes; going back to the days of black and white TV. Let's play Senator for a day.

Judge SOUTER. I still have a black and white TV.

Senator HUMPHREY. I don't doubt it. [Laughter.]

Judge SOUTER. They were right about me on that one, I'll tell you.

Senator LEAHY. We are surprised you have that.

Senator HUMPHREY. Well, I hope you don't watch it much. My theory is that nothing would do more good for this country than for everyone to smash his television set. So I outdo even you on that one because people would begin, especially parents and children would begin talking, and children would begin doing their homework instead of watching and having their minds filled with rubbish every evening from our wonderful networks. That is another subject and another speech.

Let's play Senator for a day, Judge. Put yourself in our shoes, if you will, for a few minutes. If you were up here on this side of the table in the room, what would you be concerned about in confirming or not a Supreme Court Justice? In other words, what is important? What should we be trying to do here? What is it we should be concerned about, and what should citizens be concerned about? What are the dangers inherent in this massive power which the Supreme Court enjoys by virtue of the lifetime tenure of members who are accountable to no one in any practical sense?

This is, again, not so much for my benefit—although I have no doubt I will learn something from your insights—but especially the young people who are tuned in.

The CHAIRMAN. On television.

Senator HUMPHREY. On television; yes. [Laughter.]

I might have to make an amendment to my statement.

Judge SOUTER. Even network television.

Senator HUMPHREY. No, cable; cable. The networks don't bother, too much.

Judge SOUTER. Of course, I would start just where you start, Senator. You have a responsibility to inquire into competence. You have a responsibility to inquire into personal integrity, a responsibility, certainly, to inquire into basic knowledge of the Constitution and its values. Then there is, as is frequently spoken of in connection with the ABA's inquiry, there is an inquiry into judicial temperament.

Senator HUMPHREY. Maybe my question was too broad, and excuse me for interrupting. I would like you to comment on the dangers inherent in a judiciary appointed for life and accountable, really, to no one.

Judge SOUTER. Well, the danger inherent, I suppose, is that the judiciary can devolve into an institution for the expression of purely personal values. The institution itself is one step removed from the democratic process. Fortunately, that is only one step because the democratic process is going on in this room. But—

Senator HUMPHREY. Yes, it is. Permit me again to interrupt. It is a mighty big one step removed. This is our one opportunity. You are going to be over there for decades, for good, I hope and trust and believe. But it is not a small step removed; it is a huge step removed.

Judge SOUTER. Because of that step, as you point out or indicate, subject to impeachment, there is no recall. There is no second-guessing.

I would not be true to my own sense of constitutional principle if I did not say that the Senate ought to be looking for someone who, in seeking the very difficult or in going through the very difficult process sometimes of seeking constitutional meaning, would seek for something outside that judge's personal views for that moment, who would seek to infuse into the Constitution a sense of enduring value, not of ephemeral value, and who would try to rest that process on as objective an inquiry as can be possible, given the great breadth that is necessary when we do search for value, for these massive generalities and magnificent generalities that are committed to us.

But I could not end an answer to that without saying that with the best will in the world to avoid the changing and the ephemeral and the purely personal, a judge in the long run is going to go wrong unless that judge is willing to listen.

The fact is we learn much from what goes on in courtrooms. I think some people tend to look upon—people perhaps who have not been through the judicial process, I think they tend to look at it with suspicion as to whether what goes on in courtrooms, including appellate courtrooms, is really capable of changing judges' minds



or influencing the way they think or forcing them to refine their views.

One of the things I know from personal experience is that the process works. I mentioned yesterday that although I didn't come down with any statistics, I have kept track of my own performance listening to oral arguments and reading briefs. And I can think of instances, some specific and some in general, when my mind has been changed by what I heard and by what I read and by what I thought after an argument. Ultimately, you cannot choose, you must not choose, a judge who is not open to that kind of influence.

Senator HUMPHREY. Yes; I quite agree with that. We all must be able to listen and to change our minds when the facts indicate.

Have you seen any trends in the Supreme Court? The Court changes, of course, in tenor over a long period of time, oscillating back and forth. Have you seen any trends in the Supreme Court decisions in the last 40 years that give you any cause for worry?

Judge SOUTER. There is no question that there have been times when I have been concerned about the wisdom of individual court decisions. I was in law enforcement once, and there were times when I used to chafe over the difficulty that law enforcement had in conforming to some of the Warren court decisions.

One of the things I am glad of is that that is an era which has, in large measure, passed. We do not have the same problems that we had 20 years ago. There are some who would say there is a greater pragmatic appreciation on the Supreme Court. You know, there is also a much greater degree of practical pragmatism in the entities who come before the Court. We have learned to live with much in the last 20 years, and we have lived with it reasonably well.

I am not standing here, leaving aside my position as the nominee, fearful of one trend or another. I could be critical about individual decisions. There are decisions which we will undoubtedly discuss in the course of the next afternoon or the next day or two, some of which I would have come out differently on. Any lawyer and any judge can say that. But I don't have an alarm to raise with you at this moment.

Senator HUMPHREY. Thank you. I may pursue that later, but my time is up. Thank you.

The CHAIRMAN. Thank you.

Judge, let me apologize for getting up and down this morning myself. I happen to be chairman of the European Affairs Subcommittee of the Foreign Relations Committee, and I have drafted an alternative to the War Powers Act, which I have been attempting to negotiate with the administration since it came into office. One of the issues before us now is whether or not there will be a congressional authorization proposed for the action taking place in the Gulf, and I have drafted such a detailed proposal. That is in negotiation among Senators now, and that, coupled with new actions today in the Gulf, have required me to occasionally get up and attend to another duty. But it is not because I don't want to hear every word you have to say. So I do apologize.

Judge SOUTER. No apology is needed, Mr. Chairman.

The CHAIRMAN. Let me propose the following, and this is a moving target here: Let me suggest that when I finish saying this we just stand for 3 minutes to get a seventh-inning stretch here to