

Judge SOUTER. My response to that, Senator, is that that does not raise, it seems to me—you raise a very serious issue, but you do not raise a justiciable issue. You are raising an issue of the self-definition of the Senate in relation to the President, and it is a matter which should not and cannot come before the Courts.

Senator SPECTER. No, I know I am not raising a justiciable issue, Judge Souter. I am raising questions about how far we can go in asking you questions and a discussion as to the process and where we are going to end up. Those are really very, very important questions. A lot of people have already decided that your nomination process is over. Not everybody, but a lot of people have.

Judge SOUTER. I don't necessarily have that feeling as I sit here in the well of this room, Senator.

Senator SPECTER. Well, I think that is a further testimonial to the high quality of your responses.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Judge, I noted you smiling when the Senator from Pennsylvania said sometimes the Congress deliberately does nothing. I suspect you understand that better than others because sometimes people deliberately say nothing in answer to the questions. [Laughter.]

Judge SOUTER. Sometimes they have to work at it, Senator.

The CHAIRMAN. And you have worked at it very, very well, I must say, with great aplomb. And I thought you defined very well the responsibility of the Senate and your responsibility relative to answering questions. That is why some of us still have not made up our minds about how we are going to vote, myself included.

Senator THURMOND. Mr. Chairman, will you just give me half a minute?

The CHAIRMAN. Surely.

Senator THURMOND. The distinguished Senator referred to John Rutledge not being confirmed. Well, over the years the Senate has made some mistakes, and that is one mistake they made. He was from South Carolina. [Laughter.]

Incidentally, his brother Edward signed the Declaration of Independence. They were both very prominent people. In their homes, standing today in Charleston, if any of you ever go to Charleston, SC, get on Broad Street, and the home of Edward Rutledge is on one side, and right across is the home of John Rutledge. One signed the Declaration, one signed the Constitution.

I just thought I would call that to your attention. [Laughter.]

The CHAIRMAN. I will now yield to the Senator from Vermont on the condition that we don't hear anything about Vermont. I am only kidding, Senator Leahy.

Senator LEAHY. I was waiting for the part where Senator Thurmond was going to give us a list of good hotels to stay in. [Laughter.]

Senator THURMOND. If you promise to go down there and learn about South Carolina we will give you a free hotel accommodation. [Laughter.]

Senator LEAHY. Are you going to go there with me, Strom?

Senator THURMOND. I won't promise you that. We will be glad to have you though. The yankees come down and make the best southerners you ever saw.

Senator LEAHY. I will leave that one.

Where I come from, we think of Massachusetts as a Southern State.

Judge, I know that the chairman has already wished you a happy birthday and I would join in that.

Judge SOUTER. Thank you, sir.

Senator LEAHY. I don't know what I will be doing on my 51st birthday but I suspect that it won't be as memorable for me as yours will be for you. You will probably have a much easier time remembering yours.

Judge SOUTER. I won't forget this one.

Senator LEAHY. Judge, let's go back, if we could, to the Seabrook issue. As attorney general—and, as I recall, you were attorney general at the time I'm talking about—the Governor used public funds to promote a private utility by putting pro-Seabrook petitions—in fact, they were printed and distributed at State cost—in State liquor stores.

Was that an appropriate use of State money?

Judge SOUTER. No. I think it was not.

Senator LEAHY. Were you asked to advise him on that at the time?

Judge SOUTER. No, sir.

Senator LEAHY. According to press accounts, those who were opposed to the Seabrook plant were not given a chance to place their petitions in State liquor stores, is that correct?

Judge SOUTER. I think that—I'm sure that is, yes.

Senator LEAHY. Would that be appropriate? They were denied a chance to do that while public funds were being used to promote this same private business?

Judge SOUTER. Well, I think by the use of the public funds or the use of the stores, in effect, as a forum, in effect, implicates a first amendment right.

Senator LEAHY. So that if the State was using State funds to promote that, those who wanted to use private funds to oppose it ought to have been allowed to do so, is that what you are saying?

Judge SOUTER. The State, in effect, had designated that as a forum, at least, for the collection of views, for expression; to that extent, yes.

Senator LEAHY. Justice Scalia wrote a concurring opinion, in the *Vvitton* trademark case. He noted, and let me quote him, "And no one suggests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation."

Now, going back again to the Seabrook case, where money was raised for the prosecution. If a State is bringing charges is it not the responsibility of the Executive—whether the prosecution or the Governor—to go to the legislature and say, "here is what it's going to cost; give us the funds" rather than "passing the hat," as you described it on Friday?

Judge SOUTER. I think the appropriate place to go is to the legislature and as I think you know, that is where I went.

Senator LEAHY. Yet, the principal owner of Seabrook—the Public Service Company—raised a considerable amount toward the cost of that prosecution, is that correct?

Judge SOUTER. They did in the instance of the 70-some-odd-thousand-dollar payment. Something was said earlier this morning about the possibility of a second one. I'm not aware that they made a second one, but I think \$70,000 is a lot of money.

Senator LEAHY. Now, most of the protesters were part of the so-called Clam Shell Alliance, is that correct?

Judge SOUTER. Yes. What I don't know offhand and certainly have forgotten is the proportion of protesters who were members of the Clam Shell Alliance and those who belonged to other affiliated organizations. But the Clam Shell Alliance was certainly the central organization, as I recall.

Senator LEAHY. And during the time when they were carrying out protests against Seabrook, was the State of New Hampshire carrying out an undercover operation, infiltrating the Clam Shell Alliance?

Judge SOUTER. I was not aware that they were. That was the subject, I was reminded last week, that was the subject of a question to me in a deposition. To the best of my knowledge, no one in the attorney general's office was aware of any activity of that sort. I am not aware now what there was but nobody in the AG's office, I think, was aware of any activity of that sort until a year or more later.

Senator LEAHY. Well, the executive director of the New Hampshire State Police said in a deposition in 1984: "The State had been carrying on undercover surveillance of the Clam Shell Alliance since 1976."

Was there no reporting to you as the chief law enforcement officer of the State about that?

Judge SOUTER. No; there was not. My understanding—

Senator LEAHY. Did you, would you normally check on what the State police were doing in a major area in their intelligence gathering?

Judge SOUTER. Well, it didn't occur to me to ask, I guess, any more than it would occur to me to ask in serious criminal cases whether they were using informants.

My understanding is that what the State police officer was referring to was the use of members within the organization who would report to the State police. There was no wiretapping going on; there was no surveillance by police officers, as such. There was, apparently I gather from the response in the other deposition that you alluded to, that there was someone or some persons who were reporting to the State police on what the plans were.

So that there was nothing that required the State police to get my permission, as for example, there would have been if there had been a wiretap involved or electronic eavesdropping.

Senator LEAHY. According to the deposition, there was undercover surveillance going on, I am told. But you were not aware of such surveillance?

Judge SOUTER. No. In fact, as I said a moment ago, the only thing that even to this day I thought they were referring to, in the period in question in the Seabrook demonstrations, was the passing on of information from somebody within the organization. But, in any event, I do not know of it.

Senator LEAHY. Senator Metzenbaum raised a question this morning about a deposition of James Cruz, the assistant attorney general working on the Seabrook case with Mr. Rath. He said that at a meeting with the Governor on April 26—this was 3 days before the protest began—one possibility that was discussed was that the Public Service Company would be paying some of the bill for the law enforcement effort at the site.

So the idea of getting money from the PSC was discussed by your office prior to the actual demonstration, was it not?

Judge SOUTER. Well, I don't know whether—I am taking that deposition just on its face; that's all I know and I guess just to be careful about what's in the deposition—I don't know whether anybody from my office discussed it, but if it was mentioned at that meeting, then he heard about it.

Senator LEAHY. My concern and the reason I have raised these issues—and you and I have discussed them privately also—is that, as a former prosecutor, I get very concerned if prosecutors do anything that appears that they are in a position of not being impartial when they bring charges, or when they decide they will drop charges, or carry the charges on, or decide what they might seek for sentences.

You were very active in the prosecution. You went to the court after the first person was given a suspended sentence and raised objections to that, saying that you wanted prison terms and were opposed to suspended sentences, and you have given your reasons for that.

My concern is, if a private company was paying for part of the prosecution, part of carrying it on, does that private company become your client rather than the people of New Hampshire?

Judge SOUTER. Well, that private company did not become my client. The difficulty that has to be faced is there is a question raised. Hence, as I was saying in the discussion with Senator Metzenbaum, the appearance of justice is an independent value in its own right.

Senator LEAHY. You discussed the *Dionne* case here and you said that the clause in the New Hampshire Constitution about, in effect, private individuals paying into the court fund was designed to prevent bribery.

But here, there is an ad hoc fund; it was established by the Governor, not by the legislature; it doesn't have the kind of public scrutiny that goes into the development of a statute; it is not limited to contribution from the State on whose behalf you brought the prosecution.

If the fund in *Dionne* was to prevent bribery, does this fund not look as though it goes in just the opposite direction?

Judge SOUTER. Well, I hope it doesn't give the appearance of bribery. The appearance that I am concerned with is the appearance of influence. The fund, as I understand it, both what the Public Service Co. contributed and what other people around the country contributed in small contributions went into the general fund of the State so that there was no, I think, there was no question of anybody being bribed with the money.

But the question that is properly raised with respect to the Public Service contribution is does it give the impression that they

were thereby in a position to exercise undue influence over what should be independent law enforcement decisions?

Senator LEAHY. Did you ever express that concern to the Governor?

Judge SOUTER. I do not recall ever discussing the subject with the Governor. As I said, the only recollection that I had which I mentioned last week was the—well, it wasn't, in fact, even a recollection—the only record that I found last week was on June 30 there was a reference in the minutes of the Governor and counsel that the acceptance of the funds had been proposed. I didn't otherwise recall the incident.

Senator LEAHY. Now, on another subject, you talked with Senator Simon and expressed empathy, which I think we all agree with, for a Jewish friend who grew up in Manchester, NH, and who was, to quote you, "cut apart from the rest of the class each morning when the Lord's Prayer was recited."

But when you were attorney general you publicly defended a law passed by the New Hampshire Legislature which permitted school districts to authorize the recitation of that same prayer in school.

I understand and I accept the sensitivity that you expressed to Senator Simon, but in light of that, how could you publicly support that law?

Judge SOUTER. What I said was that if the law were called into question, in a lawsuit, that I would defend the law. Quite frankly, I think if we had reached the point, which we never did, I think probably I would have had to state to the court, that following *Lemon*, that the law couldn't be enforced.

Senator LEAHY. Well, let me follow on that because the papers had you saying that you would do everything you could to uphold the law at the time.

Judge SOUTER. That's correct.

Senator LEAHY. So is your attitude about it different today than it was then?

Judge SOUTER. Well, I think it's not a matter of attitude, it's a matter of reflection and research. I think if, in fact, the law had been called in question and it had become incumbent upon me to file a brief with the court on the State's position, quite frankly, I don't think we could have found a defensible basis for it. I think we would have confessed constitutional error.

I was ready to do everything I could to defend that or any State statute. But I think if we had gotten to that point, I think we would have to have admitted that there was a constitutional deficiency.

Senator LEAHY. And if the quote in the paper is accurate, "in that case our concern is to do everything we can to uphold the law," that quote would be inconsistent with what you are saying here?

Judge SOUTER. I have no reason to say that the quote isn't accurate and I assume it is accurate, but the standard for any action by an attorney general and my standard was that I would uphold, I would act as an advocate to uphold State action if I could do so in good faith and without taking a frivolous position before the courts.

I think when we had finally gotten through analysis and reflection I don't think we could have found a basis to uphold it and I

think I would have been forced in that situation to say, no, we have got a constitutional defect here.

Senator LEAHY. In the *Abington* case where the judge said the law was patently and obviously unconstitutional, you do not have any problem with that?

Judge SOUTER. No.

Senator LEAHY. You said, Judge, that you would listen respectfully to the school of thought that says the establishment clause was originally intended to have a very narrow scope, only to prevent the literal establishment of a State religion or to prevent Government from favoring one Christian sect over another. The same school of thought says that we should not require Government neutrality on religious matters, that Government action should be permitted as long as it does not tend to create a State religion or coerce people.

Now, let us assume for a moment that this original intent school of thought is historically correct—that, as many argue very strongly, the Framers did have a very narrow view of the establishment clause—would this lead you to modify the principle of neutrality that has been accepted by the Supreme Court for decades?

Judge SOUTER. It would lead me to raise the question but it would not give me the answer. There are basically two other considerations. The first in this, as in any such case, is the claim of precedent. The second consideration which may fall, to a degree, under the claim of precedent, which is, at least, I think worth stating, stating separately, is whether, in fact, assuming that was the view of the Framers, the best way to affect it today is the way that the Court has, in fact, already taken.

So that I do not regard the issue in this or in any other case as simply being a simple issue of what exactly was the original understanding because we are not being asked to adjudicate on a clean slate.

Senator LEAHY. But we are talking about a constitutional doctrine that has been accepted for what, 40 years now?

Judge SOUTER. Yes, sir.

Senator LEAHY. Do you see the necessity of changing that constitutional doctrine?

Judge SOUTER. As I think I said, in any case, say now, I do not approach the Court with any inclination or agenda to do so. I will listen to that argument if it is made before me and I will listen respectfully as I would to any argument that is made before me.

Senator LEAHY. I understand that, Judge. Maybe we are just going past each other on this issue, but I'm not talking about something that seems to be in a rapid state of flux. We are not talking about the tax issues that have been very appropriately raised by other Senators based on cases that have occurred just in the last few months or a year.

Judge SOUTER. No, I appreciate that.

Senator LEAHY. We are talking about something 40 years old. Are you saying that you do not have a view, irrespective of what that view is, are you saying that you do not have a view in your own mind whether that 40-year-old doctrine is correct or not?

Judge SOUTER. I think it would be better for me to say that I do not have the view, if I were to go on the Court, that that doctrine

should be changed. I am not approaching it with an inclination to upset the law in that respect.

Senator LEAHY. Well, let me ask this question, without saying what it is, do you have a view, in your mind, today, as to the correctness of that doctrine or not?

Judge SOUTER. Not a personal view. I have read the opinion in which that view was expressed. I have not done research on it myself, and I do not necessarily adopt it or reject it. I realize that it is there, and it has been put forward by some members of the Court.

Senator LEAHY. Suppose the original meaning of the clause was only to prevent a State religion or Government preference among Christian sects, would you then think it was appropriate for Government to favor Christianity over Judaism or any other religion?

Judge SOUTER. Well, I think any such conclusion as that would make the claim of precedent an extremely crucial one. I mean, I think you are saying is, well, let's assume that we found that the establishment clause had a very narrow intended meaning. Do we ignore, essentially, the development of the law for the last 40—

Senator LEAHY [continuing]. That's right.

Judge SOUTER [continuing]. Or the last 200 years? The answer is, no, we don't deal with constitutional problems that way.

Senator LEAHY. But you are taking account of people's changes in attitudes over those 200 years.

Judge SOUTER. And as particularly embodied in the precedent which exists.

Senator LEAHY. Would you similarly take such changes into account in interpreting other aspects of the establishment clause or other constitutional provisions? I am thinking of due process, equal protection, liberty, things like that.

Judge SOUTER. Certainly.

Senator LEAHY. Judge Souter, on Friday you said that whether you considered abortion either moral or immoral would play absolutely no role in any decision you make on the issue. You said further that with respect to the death penalty there are cases in which—and let me just read it to make sure I have it right—"in which judges' moral views are so strong that they simply cannot preside, and we have to recognize the moral compunctions that a judge would feel in those circumstances, and we have to recognize a right to recuse if a judge feels that way."

You also said in an answer, I believe it was to Senator DeConcini, that you do not support the concept that the death penalty by itself is cruel and unusual punishment.

Judge SOUTER. Given its recognition in the Constitution, I don't think we can start with that, no.

Senator LEAHY. And obviously it leaves you open on an individual case, but as a blank statement of law you don't agree with that.

Judge SOUTER. That is correct.

Senator LEAHY. You have expressed concern about doctors being compelled to advise patients on the abortion issue and judges being forced to decide whether minors should have access to abortion. You have told us that you can empathize with the woman who faces that difficult question and decision.

Now, are your own views on abortion, whatever they might be, so strong that you could not preside over a case dealing with either abortion or parental consent?

Judge SOUTER. No. I think I could deal with those issues.

Senator LEAHY. In the—

Judge SOUTER. Senator, may I just make one word?

Senator LEAHY. Sure.

Judge SOUTER. I don't mean in answering your question in the short way that I did to give any indication of the strength or weakness one way or the other of my feelings. What I mean to say is my feelings are such that I could still deal with those issues.

Senator LEAHY. In the same way that a judge may have a personal feeling on capital punishment but could still preside over a capital case?

Judge SOUTER. That is right. And I think what I was referring to in the several cases that you have alluded to are situations in which judges recognize that their feelings are such that they simply cannot deal dispassionately with those issues or that they cannot do so without breaking their own moral codes.

Senator LEAHY. Just to go back a bit to earlier questions about Seabrook and the establishment clause. We have talked about different things that came up when you were attorney general and statutes that were passed by the legislature and signed into law by the Governor and found unconstitutional.

Did you ever have a time when you went to the Governor or the legislature and said, look, you cannot do this, it is just downright unconstitutional?

Judge SOUTER. I don't ever recall being asked for legislative advice on that. I may very well have done it in the course of testimony, but I don't remember it. I do remember one specific instance in which the Governor discussed proposed action with me and asked for an opinion as to whether it was constitutional or not. I gave him an opinion, and I cannot break into the attorney/client privilege, but I can tell you that he took my advice on the subject.

There were other instances—and these weren't during my tenure as attorney general, so they may be outside the scope of your question. You tell me if they are. But I can recall times during Mr. Rudman's tenure as attorney general when we were asked to give advice on that sort. The one that immediately comes to mind was the limits on permissible State action under the doctrine of *Brandenburg v. Ohio*. Advice on that score was requested by Governor Peterson, who was Governor I think in 1969, as he anticipated a visit of what was called the "Chicago Three"—those were three of the Chicago Seven—to speak at the University of New Hampshire, which was not universally popular. I worked on the memorandum which discussed the constitutional limits of State action in that case, and that advice was taken.

Senator LEAHY. Judge, you have said that the marital right to privacy is a fundamental right. And if I understand correctly the answer you gave to Senator Metzenbaum earlier today, you feel that *Griswold* is settled law. Is that correct?

Judge SOUTER. Well, I have been careful not to endorse the specific holding of *Griswold* or its opinions, but I think I have been very clear in saying that I believe that there is a marital right to

privacy. And we have discussed some of the incidents at its core, including the reproductive right to determine whether or not to conceive a child as certainly being right at the center of it.

Senator LEAHY. Do you believe the idea of marital privacy is settled law?

Judge SOUTER. Well, it is clear to me. I think the only point at which I will quibble about the settled law is, as I think I said in one case last week, I suppose that everyone assumes that if there were a successful attack on *Roe v. Wade*, that would then call into question prior privacy cases. So I suppose one simply cannot say that it is settled in the sense that it is inconceivable that it could be challenged.

Senator LEAHY. You do not have the same sense, to whatever degree you consider privacy in *Griswold* settled—to whatever extent that is—you do not have in your own mind the same sense of settlement on *Roe v. Wade*. Is that correct?

Judge SOUTER. Well, with respect, sir, I think that is a question that I should not answer because I think to get into that kind of a comparison is to start down the road on an analysis of one of the strands of thought upon which the *Roe v. Wade* decision either would or would not stand. So, with respect, I will ask not to be asked to answer that.

Senator LEAHY. But you don't feel the same compunction against answering the same question regarding *Griswold*?

Judge SOUTER. Well, I have drawn a fine line on *Griswold*. I have said that I believe there is, in fact, a marital right to privacy which is at the core of any privacy doctrine. I have not endorsed the *Griswold* decision as such. It is a fine line to draw, Senator.

Senator LEAHY. That is my point.

Judge SOUTER. Yes, it is.

Senator LEAHY. Last week, you told us a very powerful story, a very moving story, about the counseling you gave to a young woman who faced the question of an unwanted pregnancy. Obviously, it is a very personal issue. You counseled that woman. Many, many, many more face the same decision each year. You did not tell us what your advice was, and I understand, from the two or three times you have been asked that question in various forms, you do not intend to tell us what that was.

Might I ask you this: Would your advice to that woman be any different today now that abortion has been legal for nearly 20 years?

Judge SOUTER. With respect, I do not think I can answer that question.

Senator LEAHY. Let me then close with this, at least on this round. You have spoken movingly here and in our private conversations, and I have been very affected by what you have said. I was very impressed by your response when you said—and I hope every judge thinks about this—when you said that any decision a judge makes is going to affect somebody, probably for the rest of his or her life—no matter what your decision is. That is something every judge should keep in mind. Those of us who are prosecutors know that prosecutors should think about it; everybody should.

Applying that principle, what, in your view, would be the effect—not the legal, but the practical consequences of overturning *Roe v. Wade*—the practical consequences?

Judge SOUTER. There would be the obvious practical immediate political consequence that the issue would become a matter for legislative judgment in every State. I think it is safe to say that those legislative judgments would not be uniform. There would be, I daresay, a considerable variety in the scope of protection afforded or not afforded. The issue of federalism would be a complicated issue.

Senator LEAHY. When I was a prosecutor, at that time it was prior to *Roe v. Wade*, or in Vermont, the case of *Beecham v. Leahy, et al.*, cases that changed the laws. Abortion was against the law prior to *Roe*. I prosecuted an abortion case. It was the only abortion case I picked to prosecute.

A call came to me in the middle of the night from the emergency room of our hospital. A young woman who was hemorrhaging nearly died. She did not. She did, however, end up sterile from a botched abortion. Our investigation found that the man arranging the abortions would bring young women from the Burlington area in Vermont, across the border to Montreal. The abortions were then performed by a woman who had learned the procedure while working for the SS at Auschwitz. The man I prosecuted would then blackmail these women after the abortion, either for money or for sex. In this case, it came to our attention because the woman nearly died and was brought into the emergency room; that opened up the whole issue. We found out about it, I conducted an investigation, prosecuted the man, and he went to prison.

I am not asking—and you have stated that you are not going to state how you would rule on *Roe v. Wade*. I mention this incident only from a legislator's point of view based on my experience as a former prosecutor about what the practical effect of outlawing abortion might be.

Judge SOUTER. I appreciate that. Thank you.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. We will recess until 2:15.

[Whereupon, at 1:18 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. Judge, I and my colleagues apologize for starting—I guess we are 12 minutes later—not guess, I know, looking at the clock.

Next time there is a Supreme Court Justice, I would respectfully request that that Justice decide not to announce his retirement until he is certain everything is calm in the world and that we are going to be in recess the whole time so nothing else can interfere with these very important processes. But I apologize, Judge.

Judge SOUTER. No need to, sir.

The CHAIRMAN. Now, we are to go next to our colleague from Alabama, Senator Heflin, but I have been entreated by our colleague from Utah, who says that he would just like a few minutes to correct the record. My friend from Alabama indicated he did not