

criminal law. That is a civil rights holding. That is in favor of rights there. That gives you a clue.

On the exclusionary rule under the New Hampshire Constitution, what you could call the exclusionary rule, he seemed to me to come to the position in one case that the Supreme Court has now come to, and that is a good-faith exception to some defect on a warrant in a search. Although he was not talking about the Federal Constitution, he was talking about the New Hampshire Constitution.

I have got a good feel for the way he approaches. He is a very good writer, incidentally, and that will help a lot. If you can write an opinion or another Law Review article, it will help the lawyers of the country understand what the law is.

That is a long answer to your question.

Senator HEFLIN. Mr. Diamond, you mentioned something that I think is very important, that Mr. Souter was an appointed attorney general and was appointed by the Governor and the executive council. How is that council made up? Do you know?

Mr. DIAMOND. I stand to be corrected, but I think there are five members of the council, and they are elected from districts in the State. I am not from New Hampshire.

The CHAIRMAN. That is correct. I am not either, but I know that one.

Senator HEFLIN. And it is a 2-year term that he would serve at the pleasure of the Governor and that executive council?

Mr. DIAMOND. That is correct. I think it is a 2-year term, but it is the appointment.

Senator HEFLIN. That is all.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Would you please go to Senator Specter and then come back to me?

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I join in thanking you gentlemen for coming here today. You make a very distinguished group of ex-attorneys general who have held some other positions as well. While I never got to that lofty ran, I served as a district attorney, so a number of our paths crossed over.

I don't want to take a great deal of time because we have so many witnesses, but I would like to ask just one question so that you do get some questions here.

Judge Souter was very cautious in his responses, understandably so. On quite a number of occasions, he responded in a way to avoid making any enemies, again, an understandable position. I found one of his answers just a little bit different, a little curious, when he was asked and pressed—not by me but by another Senator—as to some opinion from the Warren court with which he disagreed.

Now, you men were attorneys general at a time when the Warren court was handing down opinions which made life somewhat complicated, and the question that I would ask you relates to any opinion with which you disagreed. While you think about that, let me tell you one which came readily to my mind when the question was posed, but I didn't have a chance to discuss it with Judge Souter because of the shortness of time.

I recall very well the day *Miranda v. Arizona* came down. It was a long opinion, and I remember the day, June 13, requiring warnings be given. I was district attorney of Philadelphia and went to work and got out a warning card by that Friday. It came down on a Monday, as opinions do, and I was really worried about what that case was going to do because it required that police officers give five detailed warnings and extract detailed waivers, as I know you men remember.

Then the following Monday, a decision came down from the Supreme Court. I think it was *Johnson v. New Jersey*, but I haven't reviewed it recently. But the importance of the case was that any case that went to trial after the date of *Miranda* had to have had those warnings. I had hundreds of serious cases, some involving murder with powerful evidence, where the police officers had followed the rules, in effect, the *Escobedo* warnings, substantially lesser than the *Miranda* warnings. And a great many very, very serious cases had to be dismissed because of what I thought was a rule that simply couldn't be complied with, to extract a standard on questioning a defendant on warnings, which no one could have known about because they hadn't been articulated by the Supreme Court when the cases were investigated.

We had one case in May of that year, a robbery murder case. A man confessed, was given the *Escobedo* warnings, traced his apartment, found the gun, and then a month later the *Miranda* warnings came down, and that man couldn't be tried before the *Miranda* warnings came down. So I would ask each of you distinguished lawyers who have had in part your law enforcement responsibility to name, if you would, a decision from the Warren court that you thought was unduly restrictive on law enforcement.

The CHAIRMAN. As your attorney, before you answer, be careful because one of you may be up for confirmation some day, at which time you may have to reconsider the answer you gave.

Senator SPECTER. It also bears on the credibility of your prior testimony.

Mr. BELL. I will go first. I never had the trouble with *Miranda* except the retroactivity feature. *Miranda* has made law enforcement better. It has also protected the rights of the individual in the country. It turned out to be a very good decision. The retroactive question is different. It is hard to sit on a court and find a constitutional right and then say, well, we won't apply that to anyone who has engaged in wrongdoing before the date of this opinion. So you are trying hundreds of people who have been denied a constitutional right. The question is whether it applied to them. You are driven almost to the position that it has to be made retroactive. That was the problem you are speaking of.

The only other opinion that the Warren court handed down in criminal law that I had any trouble with—and I still do have some trouble with—is the exclusionary rule, but that has been adjusted now by a good-faith exception.

Senator SPECTER. Attorney General Gorton.

Senator GORTON. I guess that, while great problems were created for you and your career by the *Miranda* decision, Senator Specter, it is rather difficult to imagine that a decision would reverse a conviction, as it did in the *Miranda* case, and apply to that individual

only. It does not seem logical that it would not apply to other individuals who had not yet been tried, as great as the difficulties as it may have created for law enforcement at the point.

Now, I have a disadvantage in answering your question, not shared by Judge Bell, certainly not shared by Judge Souter—I am not certain about these other two Attorneys General. I had a wonderful job, as attorney general, but in the State of Washington the attorney general has absolutely nothing to do with criminal justice, either in initial prosecutions or in appeals or any other stage of a process that is entirely localized.

So, reactions which I would have had to the judgments of the Warren Court, which, of course, started well before I was attorney general and ended shortly after I took that position, would have been academic.

You put me at a great disadvantage. I would have to tell you that, if we went through case by case, I am sure I could give you a number of cases with which I disagreed, both in criminal procedure, in the abstract sense, and the impact that they may have had on the job which I did at the time.

I also think it is important to say something else, and your question leads to this. I suspect, like Griffin Bell would be, I would rather imagine that I would criticize *Miranda* and felt that it was wrong at the time that it was handed down. I have come to a different view since then, simply by reason of experience and by what I do think, although there have been some difficulties, there have been improvements in law enforcement.

I would be surprised and a little bit suspicious, if you had a nominee for the Supreme Court of the United States before you who was willing to tell you how he would rule on some case that would take place in the future. We give these jobs for life and in a fairly isolated and insulated position, so that they will be free from the strictures of politics to which we are properly subjected, so that they can be scholars, so that they can learn, and they can develop.

As you know, many of us have had occasions to change our minds on political issues and on legal issues, as well. Most of the controversy, not all of them, but most of the controversial decisions of the Warren court were not unanimous. Many of them were 5 to 4. Very frequently at the time, I found the reasoning of the dissenters to be better than the reasoning of the majority, and on some of those I have changed my mind and on some of those I have not. But we can only go through it case-by-case, in order for me to answer your question intelligently at this stage, since I am ten years now from having been an attorney general.

Senator SPECTER. Governor Baliles.

Mr. BALILES. Senator, by the time I became attorney general, at the time I worked with Judge Souter, the Warren court rulings were already on the books. But whether it was a Warren court decision or a subsequent Court decision, I really did not place a lot of stock in what my own personal opinion might be about the decision itself, because, just as the Members of the Senate and many other people in this country, I accept the proposition that when the Supreme Court rules on an issue of law, that is determinative, unless the Constitution is amended or, where appropriate, where Congress has the authority to change the ruling.

So, when the Court decision came down, whether I agreed with it or not, my focus was primarily one of determining what did the Court say, to whom did the decision apply, were there any exceptions, what advice should I give the Governor, the General Assembly, law enforcement officials or State agency administrators. Then I would, on occasion, confer with other attorneys general around the country, with staff, make a determination and give my advice.

My personal feelings really did not have very much to do with the advice I gave, because this was a matter involving the law and not necessarily a personal feeling about the correctness of a Court decision.

Senator SPECTER. General Diamond.

Mr. DIAMOND. Senator, I think that, like Judge Bell, the retroactivity was more of an issue than *Miranda*, but it turned out to be, in our experience, not a significant problem, because most of the cases that were pending at that time, by chance, did not rely upon confessions for the central focus of the prosecution, and so we were not dealing with that particular issue.

The exclusionary rule was probably, from my standpoint, the most difficult—and I think I still feel that way—with regard to the Warren court decisions, and I was very pleased to see a good-faith exception carved by a later Supreme Court, but still have to deal with the issue that in the State of Vermont that good-faith exception is not recognized by our own State law, where Federal issues are not involved.

Senator SPECTER. Thank you very much, gentlemen. My time is up. I think that the answers are really significant, for this reason: When we have gone through these proceedings, we have probed very hard to find where Judge Souter stands on the line of interpretivism versus judicial activism. There has been an enormous amount of criticism of judicial activism, and I have been critical of it in a number of aspects, and there has been a tremendous generalization of criticism about the activist Warren court.

But when Judge Souter was asked about any opinion that he disagreed with, not limited only to law enforcement, but one-man/one-vote and many other lines, he did not cite any case, did not feel comfortable, for a variety of reasons or whatever reason, in not citing a case. And now we have four very experienced and distinguished lawyers, public officials, ex-prosecutors and asked about the expanse of the activist Warren court, and nothing readily leads to mind.

I realize that it is not easy to go back and pick up specific cases, and the one that is mentioned is the exclusionary, and even in Vermont the exclusionary rule is maintained rigidly, without the good-faith exception. So, perhaps this question tells us something about how bad the activist Warren court was, or perhaps how it was not so bad.

Thank you very much.

The CHAIRMAN. Every day, in my view, the wisdom of the Warren court becomes more apparent.

The Senator from Vermont.

Senator LEAHY. Mr. Chairman, I apologize again for being out because of the farm bill conference, but I see four good friends here—Griffin Bell, Slade Gorton, Gerry Baliles and Jerry Diamond. I