

The CHAIRMAN. Thank you very much. Since I came in late, I will recognize Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. I just have a few questions.

First, I would like to ask Haywood Burns, I wonder if you are familiar with the materials that were submitted yesterday by Mr. Rauh, a series of articles and incidents, not only in New Hampshire papers but other national newspapers, that talked about various incidents involving racial unrest in New Hampshire.

Mr. BURNS. Senator, I believe I am familiar with those materials, as well as other materials that would speak to the issue of the presence of discrimination in that State.

Senator KENNEDY. Have you formed any opinion whether you think that those new reports are consistent with Judge Souter's opinion that he presented to the committee that there are no racial problems in New Hampshire?

Mr. BURNS. Senator, as I tried to indicate in my testimony, I find it very difficult to understand how anyone in this day and time could make that statement with regard to any State. I am not picking on New Hampshire. I know you are not either, but after seeing that material and understanding the extent to which there are evidences all around him of racial discrimination, it is hard for me to know how he could not be aware of them or sensitive to them.

The Klan is marching in Portsmouth in full uniform regalia, in Dover and Exeter, town after town in New Hampshire, this year, not some time in the distant past. His own representative in the State legislature has been called on the carpet for his racist remarks with regard to black people. The supreme court in his own State has made rulings with respect to the rights of black workers who were discriminated against in his State. So it is hard for me, sir, seeing that material and looking at other material, to understand how he could feel that there is no discrimination in his State.

Time after time, the debate has gone on in the State about Martin Luther King's birthday being a holiday, and the kind of racist statements that have been made around that particular debate would seem to me to be something that any person who was sensitive, aware, intelligent, in contact, would know about and have some reaction to.

Senator KENNEDY. Of course, the principal locations of blacks in New Hampshire, in Portsmouth, along the coast, that tradition actually goes back to the Revolutionary War. It is one of the oldest communities of blacks in any part of New England. Manchester is somewhat different, and so the significance of a Ku Klux Klan marching in Portsmouth in a small State is not something that people would miss for those obvious reasons. Portsmouth, to my knowledge, has been relatively free—a number of incidents that have been raised yesterday by Mr. Rauh—of a lot of tension, but there is no question that it is an important tradition. Although small in percentage numbers, there is an important tradition in New Hampshire involving blacks more recently.

We heard testimony earlier, again, Mr. Burns, that you were in school with Judge Souter and that your impression of his sensitivity to the issues of the time differs from that expressed by a previous witness. Could you be any more specific?

Mr. BURNS. I would be glad to, Senator. As I indicated, I had no intention of addressing this committee on that matter when I came in this morning, but when I saw my friend here, Mr. Williams, giving his view, I thought I owed it to the committee, since I saw the truth through a different prism, to share my view.

It is not to come before you and to say that the David Souter I knew at that time was a mean-spirited person—he was not—or to say that he was biased. I saw no indication of that. But I think that is too low a standard when we are talking about this seat on the Supreme Court. I think it is too low a standard when we should be concerned with a person's views with respect to the protection of rights.

I was in the same house or dormitory with David Souter as a student. I believe he was 1 year ahead of me. For 2 years we lived in the same house; we ate in the same dining room; and he was a person that I did know at that time. I have not continued my contact with him over the years, and so I am not in a position to comment on how he has changed. But the person that I knew was very different than the one that Mr. Williams described.

Senator KENNEDY. In what respect?

Mr. BURNS. Although I saw no bias nor mean-spiritedness, I did not see any particular compassion or particular concern about the rights of the poor or people of color. This was a time in the 1960's, Senator, when I was in college and he was in college, and the whole country was in an uproar. Our very college and the very house I lived in, Lowell House, was one where we had a lot of concern about those issues. David Souter never did. Or at least he never expressed it or showed it, in fairness.

Senator KENNEDY. Were you involved in any of those meetings, either on the issues involving civil rights or poverty issues?

Mr. BURNS. Yes, Senator.

Senator KENNEDY. As I remember, there was a good deal of activity in most universities, and certainly Harvard is no exception. Hardly an evening goes by when there was not some meeting, some engagement, some discussion, some discussion group. In the earlier exchange, I think the chairman was asking whether there had been any activity by either attending any of these meetings that were talking about these issues or any other rallies involved in sort of the life of the university that was focusing attention or discussion or debate on any of these questions. I think the answer was that he might have attended, but it was more of an official function to try and ensure that order was secured.

Mr. BURNS. Yes, I believe that Mr. Williams was testifying about a time slightly later in time. He was testifying, I think, about a point when they were both at Harvard Law School, and they were in some way involved as freshmen proctors.

Senator KENNEDY. I see.

Mr. BURNS. The time I am testifying about is slightly before that when Mr. Souter and I were both undergraduates. I did not see him at any of those meetings. I did not see him involved in any of those activities.

Now, I hasten to say I don't make this a litmus test, but I just think that, in fairness, if you heard one point of view, you should hear the experience of another person who is appearing before you.

Senator KENNEDY. Well, you had a lot of students that came on down to the march on Washington, Martin Luther King's great speech in the summer of 1963, I believe.

Mr. BURNS. August 28, 1963.

Senator KENNEDY. Let me, if I could, turn to Ms. Ettelbrick and Ms. Vaid, in your written opinion you focus on Judge Souter's joining an opinion that prohibited homosexuals becoming foster adoptive parents. That opinion in itself is troubling, but I would be interested in hearing what implications that opinion has in your view for other issues involving minorities in our society. Ms. Ettelbrick?

Ms. ETTELBRICK. Well, I think the implications are one of—well, let me say this, contradictory to what Judge Souter has testified to in terms of listening to both sides and looking at the evidence and making important constitutional decisions based on the evidence before him. I think the opinion of the justices in the foster parent adoption case belies that view of his. I think that if Judge Souter was willing to totally disregard, as the majority opinion in that decision indicated explicitly—they said, "We note that there are many articles and many social studies, social science studies to the contrary"—to the contrary meaning proving that lesbians and gay men do not per se make bad parents. "We note that all those studies are to the contrary. However, we still think that they are bad role models." That is essentially what this court said.

Obviously, the court disregarded the gross majority of the evidence. The dissent pointed out and reminded the court that most of the social science data and, in fact, the lead of other States was contrary to the court's decision; that, in fact, social science data has pointed out that lesbian and gay parents are no better or no worse than heterosexual parents.

I think the implication for other minorities is that if Judge Souter was willing to totally disregard the evidence presented to the Court in that case, there is no indication I would have that he wouldn't disregard contrary evidence regarding women, people of color, the poor, other kinds of people who are usually not able to impact in the majoritarian process.

Ms. VAID. The only thing I would add to that is that there is another implication. The refusal to recognize that gay and lesbian prospective parents had due process was another troubling part of that decision. Constitutional due process is a broad concept, and I think that the law created an irrebuttable presumption, that any prospective applicant who is gay or lesbian was unfit to parent. It allowed the prospective application absolutely no opportunity to present the merits of their petition, to present the merits of their situation. There was no exception made. That, according to the dissenting judge and in our view, denied due process. So a broader interpretation needs to be made of this decision about Judge Souter's views on the appropriateness of due process.

Senator KENNEDY. My time has just about expired. But if I could ask, Mr. Ryder, in your prepared statement you comment that Judge Souter in his testimony before the committee discussed some questions of constitutional interpretation but not others. Do you want to elaborate on that?

Mr. RYDER. Well, most specifically and the most obvious is, of course, a number of Senators' efforts to get some response even as to the constitutional principles underlying *Roe v. Wade*. That is plainly the most obvious. The War Powers issue is the other most notable instance. This is talking about an action 30 years ago that is dusty history. I think that to have entered into some discussion of the constitutional principles, the issues, is radically different from discussing the outcome of the specific case.

That distinction is fundamental, and as was noted even by those favorable to Judge Souter's confirmation, if there were reasons of propriety, if there were an interpretation of the code of judicial conduct that would have said that one may not comment on issues—not cases, issues—likely to come before the Supreme Court, then I think we would all be subject to disbarment.

Senator KENNEDY. Thank you very much, Mr. Chairman. I thank the panel.

The CHAIRMAN. Thank you.

Senator THURMOND?

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome the members of this group to the committee. I have no questions.

The CHAIRMAN. Thank you.

Senator SIMON?

Senator SIMON. Yes, I apologize for not being here for your statements. I have been involved in a meeting on the Middle East situation that Senator Biden has also been involved in.

Let me just make a note that I think is appropriate at this occasion, Mr. Chairman. Someone who ordinarily has been here who would be testifying today, Althea Simmons, the lobbyist for the NAACP, died the other day. Her funeral service is tomorrow. She made a great contribution over the years to this committee for all kinds of good causes, and I think we should note in the record that this committee has suffered a loss, the NAACP has suffered a loss, and the Nation has suffered a loss from the death of Althea Simmons.

Let me ask just one general question of you. I have been trying to read your testimony here quickly. As I examine the record of Judge Souter—the record being not simply the formal record but also newspaper clippings and other things—I confess I had a considerable amount of unease. Frankly, his testimony reveals a more enlightened Judge Souter. The question is, I guess—and this is a subjective thing that each of us has to consider, and I would be interested in any reactions you may have—is this modification growth or is it political adaptation before the Judiciary Committee? Any reflections?

Ms. VAID. My grandfather always said you are measured by your deeds, not by your words, and I urge this committee to look at the nearly 20 years, I think, of public service that the nominee has. There is a record. There are opinions. The extensive schooling and training and study that he has, indeed, by admission, put in in the last couple of months to prepare for this forum are reflected in his brilliant performance, but we are not here to measure a stylistic performance, I think, as I am sure you acknowledge. We are here to evaluate how he will handle the Constitution.