

[Recess.]

The CHAIRMAN. The hearing will come to order.

Judge, would you like a soda or some coffee or anything?

Judge SOUTER. No, I am fine. Thank you, sir. I was offered anything I needed out back.

The CHAIRMAN. We have done a little bit of a check here and I think this is consistent with my colleagues and the White House, I think we are all in agreement, which we usually always are. [Laughter.]

That is that this is how we will proceed. I checked with the ranking member, Senator Thurmond, because we do not do anything he does not agree to, and this is what we will do: We will go next to Senator Metzenbaum, then to Senator Simpson, and then to Senator DeConcini, and we will stop after Senator DeConcini, and by that time we will have a consensus.

Is there a preference when you wish to convene tomorrow morning, somewhere between 9 and 10? Before we close out, I will have that, because a lot of the press are asking. I do not—and we have discussed this—I do not intend to go late tomorrow afternoon. We will go into the middle of the afternoon, to the 5 o'clock area, but it will not be a late night tomorrow, and I expect, based on that, as we indicated before, have a reasonable prospect of finishing up early Monday and then begin with our witnesses, but we will see from there.

Again, I thank you. You obviously have one advantage that most witnesses do not have, Judge. You are accustomed to sitting for a long time, and you—

Judge SOUTER. That is the third lesson I learned as a judge. [Laughter.]

The CHAIRMAN. You do it with great aplomb, your physical constitution as well as your understanding of the Constitution are matched.

Judge SOUTER. Thank you, Mr. Chairman.

The CHAIRMAN. Now, let me turn to my colleague from Ohio Senator Metzenbaum, for his questioning.

Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Souter, I want to focus on your view of really what is at stake in the abortion debate. Now, we write the laws in Congress, the Court interprets the laws, but we all must be aware that the laws affect the personal lives and the hopes and the dreams of the people who must live with the laws we make.

I want to start to talk with you on a personal level, not as a constitutional scholar nor as a lawyer. This year, I held hearings on legislation that would codify the principles of *Roe v. Wade*. I heard stories from two women who had had illegal abortions prior to 1973. They were women about your age. They told horrifying stories.

One woman was the victim of a brutal rape and she could not bear raising a child from that rape along side her own two children. Another woman, who was poor and alone, self-aborted. It is a horrible story, just a horrible story, with knitting needles and a bucket.

I heard from a man whose mother died from an illegal abortion when he was 2 years old, after doctors told her that she was not physically strong enough to survive the pregnancy.

I will tell you, Judge Souter, that the emotion that those people still feel, after more than 20 years, is very real, sufficiently strong to have conveyed it to those of us who heard their testimony. Each woman risked her life to do what she felt she had to do. One of those women paid the price.

My real question to you is not how you would rule on *Roe v. Wade* or any other particular case coming before the Court. But what does a woman face, when she has an unwanted pregnancy, a pregnancy that may be the result of rape or incest or failed contraceptives or ignorance of basic health information, and I would just like to get your own view and your own thoughts of that woman's position under those circumstances.

Judge SOUTER. Senator, your question comes as a surprise to me. I was not expecting that kind of question, and you have made me think of something that I have not thought of for 24 years.

When I was in law school, I was on the board of freshmen advisers at Harvard College. I was a proctor in a dormitory at Harvard College. One afternoon, one of the freshmen who was assigned to me, I was his adviser, came to me and he was in pretty rough emotional shape and we shut the door and sat down, and he told me that his girlfriend was pregnant and he said she is about to try to have a self-abortion and she does not know how to do it. He said she is afraid to tell her parents what has happened and she is afraid to go to the health services, and he said will you talk to her, and I did.

I know you will respect the privacy of the people involved, and I will not try to say what I told her. But I spent 2 hours in a small dormitory bedroom that afternoon, in that room because that was the most private place we could get so that no one in the next suite of rooms could hear, listening to her and trying to counsel her to approach her problem in a way different from what she was doing, and your question has brought that back to me.

I think the only thing I can add to that is I know what you were trying to tell me, because I remember that afternoon.

Senator METZENBAUM. Well, I appreciate your response. I think it indicates that you have empathy for the problem. In your writings, as a matter of fact, you reveal real empathy for those who are morally opposed to abortion.

For instance, in 1986, as a State supreme court justice, you wrote a special concurrence in a wrongful birth case called *Smith v. Coat*, outlining, in your words, how a physician with conscientious scruples against abortion—this is a quote:

How a physician with conscientious scruples against abortion and the testing and counseling that may inform an abortion decision can discharge his professional obligation, without engaging in procedures that his religious or moral principles condemn.

As a matter of fact, that was sort of dictum. That was dictum in the case, it was not necessary.

As attorney general, you filed a brief in *Coe v. Hooker*, which emphasized that,

Thousands of New Hampshire citizens possess a very strongly held and deep-seeded moral belief that abortion is the killing of unborn children.

That brief went on to conclude,

It is not accurate to say that the moral feelings of other individuals and groups, both public and private, may not constitutionally interfere with a woman's otherwise unrestricted right to decide to have an abortion.

I start off saying it is not accurate to say that. Now, you obviously indicated a concern for the doctor with conscientious scruples against abortion, you indicated your concern about feelings of individuals and groups, both public and privately. My concern is do you have the same degree of empathy for the woman who must make a difficult decision when faced with an unwanted pregnancy. That is really the thrust of my concern, and I think the thrust of the concern, frankly, Judge Souter, of millions of American women, not really wanting to know how you will vote on a particular case, but wanting to know whether you can empathize with their problem.

Judge SOUTER. If they were to ask me whether I could, I would ask them to imagine what it was like to be in that room that fall afternoon that I described to you. That is an experience which has not been on my mind, because it has not had to be, but I learned that afternoon what was at stake.

I hope I have learned since that afternoon what is at stake on both sides of this controversy. You mentioned my opinion in the *Smith v. Cody* case. I do not know whether that was dictum or not. I did not think it was at the time.

What I thought I was addressing at the time was as moral dilemma which had been created not unnecessarily, but which had necessarily been raised by the majority opinion of my court.

If I were to generalize from that concurrence in *Smith v. Cody*, it would be that I believe I, indeed, can empathize with the moral force of the people whom I addressed, and I can with equal empathy appreciate the moral force of people on the other side of that controversy.

Senator METZENBAUM. My staff just points out to me that each year almost 3.5 million women face that problem of an unwanted pregnancy, much like the woman that you mentioned.

Everybody talks about *Roe v. Wade* as a case. I do not think of it as a case. I think of it as those witnesses who came before my committee. I think of it as women generally. I think of it as my own daughters, who are married, and I can imagine a situation where they might need to have or want to have an abortion. Other women less fortunate than they would not be able to go to a different State, if there were no law.

I think about what would happen if there were no constitutional protection, and I ask you not how you vote on the case, but what are your thoughts as to what would happen to those women in this country who might be able to go, if they had the money, to State x, but not get an abortion, not be able to stay in State y, because that State prohibits abortions.

My concern is what does Judge Souter think about this moral, and it goes beyond being a moral question, it becomes a really heart-wrenching decision that actually goes beyond morality, it goes to the very heart of living, the kind of living that people experience.

Judge SOUTER. I think I have to go back to something that I said to all of the members of the committee when I was speaking at the very beginning, before my testimony this afternoon.

If I have learned one thing, I have learned that whatever we do on any appellate court is not, just as you said it was not, just a case. It affects someone and it changes someone's life, no matter what we do.

One of the consequences undeniably of the situation that you describe would be an inconsistency of legal opportunity throughout this country. Some States would go one way, others would go another. Some would fund abortions, some would not fund abortions. There is no question that that is a consequence that has to be faced.

I do not think that, any more than any other given fact, as tragic as that fact may be, is sufficient to decide a case. We can never decide a case totally that way, and I know you are not suggesting otherwise.

But you remember what I said is the second lesson that I learned as a trial judge, that knowing that any decision we make is going to affect a life and perhaps many lives, we had better use every resource of our minds and our hearts and every strength that we have to get it right. It is the imperative for conscientious judging.

Senator METZENBAUM. Judge, I think you are a very sincere man and I think you are a very moral man. What is bothering me, maybe some others as well, is that you have already expressed concern for the conscientious scruples of physicians in connection with abortion, you have expressed concern for the moral feelings of others in connection with abortions.

The real concern is, would the conscientious scruples of a physician or the moral feelings of others override a woman's decision when and whether or not to have her child.

Judge SOUTER. There is no question that the decision about the future of *Roe v. Wade* does not rest upon an assessment of a physician's moral scruples. The issue of *Roe v. Wade* is one which, as you know, on the merits I cannot comment on.

But there is one thing that I can say, and I do not know how else to say it, is that whatever its proper resolution may be, it is an issue. It is not simply a label for one view, whether that view be in favor of continuing *Roe v. Wade* or in favor of overruling it.

You are asking me at this point have I demonstrated, can I point to something on the record that demonstrates as kind of equality of empathy on either side, and I think the only thing that I can, without self-serving rhetoric, say to you is I have talked and I have counseled with someone on the other side.

I have been the trustee of a hospital which has opened its facilities to people on the other side, people who did not agree with these conscientious doctors, and to the extent that I have a record that goes behind the legal issue in the case, I think you may properly look to that. And you may properly ask, and I hope you will ask yourself, as you and the other members of this committee listen to me over the course of the next few days, you may properly ask whether, on other issues generally, I am open enough to listen.

What you want to avoid is a judge who will not listen, and I will ask you when these hearings are over to make a judgment on me as to whether I will listen or not. I think I have a record as a judge which indicates that I will, and after you and the other members of

this committee have finished examining it, I will ask you to judge me on that basis.

Senator METZENBAUM. We will.

In *Griswold v. Connecticut*, Justice Douglas articulated the very important privacy concerns that were at stake if Connecticut fully enforced its anticontraceptive statute. He asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." This idea is obviously repugnant to everyone.

Surely, the Court has to concern itself with the problems of enforcing statutes regulating reproductive rights. The Court must be willing to reap what it sows, if it overturns *Roe* and permits States to once again criminalize abortion.

I do not have to tell you, until last November, what was occurring in Romania, the draconian regime, the manner in which they enforced their criminal abortion laws, each month police would enter factories to examine women to determine if they were pregnant. No question, that would not happen in this country.

Romanian women who had miscarried were interrogated to make sure they had not had an abortion. We know that will not happen. But if the Supreme Court were to overturn *Roe* and a State passed a statute criminalizing abortion, would it then be constitutional to put a woman in jail for obtaining an abortion?

Judge SOUTER. I think the only answer to that, Senator, is a reference back to the laws that preceded *Roe*. We know that in my own State there were misdemeanor statutes on the book for procuring an abortion. And it was exactly such statutes as that that *Roe* rendered unenforceable.

Senator METZENBAUM. Excuse me, I did not mean to be rude.

Judge SOUTER. I was going to say it was exactly such statutes as that that *Roe* rendered unenforceable.

Senator METZENBAUM. Now, according to news reports at the time you were attorney general, you opposed repealing New Hampshire's criminal abortion statutes which had been passed before *Roe v. Wade*.

The legislative archives of the bill that would have repealed the criminal statutes contain a memorandum from the attorney general's office outlining the effects of *Roe v. Wade*. Although it is unclear when the memo was written, it was likely written soon after *Roe* was decided in 1973, although I am not certain about that.

At that time, you were deputy attorney general. The memo concluded that "the effect of the Supreme Court decision is to invalidate RSA 585:12, 585:13, and to make RSA 585:14 a nullity."

Are you familiar with that memo?

Judge SOUTER. I do not recall the memo, no.

Senator METZENBAUM. Did you agree then, or do you believe now that the Supreme Court's decision in *Roe* rendered the New Hampshire criminal statutes unconstitutional?

Judge SOUTER. The fact is I cannot give you a categorical answer to that. To begin with, it is an issue that I have not even given thought to for, I guess, 17 years and I do not recall the extent to which I may have been aware of that memorandum at the time.

The further reason for the difficulty and a categorical answer is that you may recall that there are questions about the effect of *Roe*

or the *Roe*-type decisions depending on the form of the State statutes in question.

Now, I am going to say something from memory and it may be inaccurate, so I want you to take it with that disclaimer. But my recollection is that the Court's indication of the enforceability of the statute in *Roe v. Wade* was different from its indication of the enforceability that came out of *Doe v. Bolton*.

Quite frankly, Senator, without a reexamination of precisely what they were saying on whether the statute remained partially enforceable to the extent allowable under *Roe v. Wade* as opposed to becoming totally unenforceable, I would have to go back and reread those carefully and parse the New Hampshire statutes, which I have not done.

It is—in one sense I think we are inclined to say, well, that ought to be an easy question, and I do not think it is an easy question.

Senator METZENBAUM. I will change the subject.

The day after President Bush nominated you to the Supreme Court, White House Chief of Staff John Sununu called in an advocate for the right, conservative movement and said that you would—to assure him and the right, that those on the right would be very happy and that Bush selected you over better known conservatives. He called a man by the name of Pat McGuigan. Mr. McGuigan works for or is involved with something called the Coalitions for America; Paul Weirich, national chairman; Eric Licht is the president; library, court/social issues; Stanton, defense and foreign policy; Kingston, budget and economic policy; 721 Group, judicial and legal policy; Siena Group; Catholic Coalition; the Omega Alliance; Young Activist Coalition; Resistance Support Alliance; Freedom Fighter Policy; Jewish Conservative Alliance.

At that meeting, according to the memo that Mr. McGuigan then wrote to Paul Weirich and a number of others, it was stated that Sununu asked, how are you doing? I replied, well, John, you guys could have hit a home run if you had picked Edith Jones, a Texas judge. Instead, you hit a blooper single which has barely cleared the mitt of the first baseman who is backpedaling furiously and almost caught the ball.

Sununu smiled and replied, Pat, you are wrong. This is a home run and the ball is still ascending; in fact, it is just about to leave Earth orbit.

It was not too long after that the Coalition for America announced they were fully supporting your nomination. That original memo that I mentioned specifically provided that there were to be absolutely no leaks allowed.

Judge Souter, what does John Sununu know about you that we do not know? Can you tell us what conversations you have had with him or with others at the White House either before the nomination or since the nomination concerning any matter of issues, points of view, that make it possible for Mr. Sununu to say that it is a home run; the ball is still ascending?

Judge SOUTER. I have never discussed the issue in question with Governor Sununu. After Governor Sununu came to Washington, I did not see him until one day last December. I think it may have been around the 11th or the 12th. I was in Washington that day in

connection with the nomination or the possible nomination to the court of appeals.

The Governor invited me to lunch and I did have lunch with him. We did not discuss any substantive issue that his memorandum referred to. We largely, as I recall, talked politics in New Hampshire. I did not see the Governor again until the day before this nomination.

I did not have discussions with him on the issue that you referred to.

Senator METZENBAUM. How about on other issues? Did you discuss other issues with John Sununu, or others at the White House or connected with representing the White House?

Judge SOUTER. I was going to just try to establish how far back in time we want to go with Governor Sununu.

Senator METZENBAUM. I did not mean to interrupt you.

Judge SOUTER. No. I just wanted to know how far back you want to go in time? To the beginning?

Senator METZENBAUM. Well, anything that would give him sufficient knowledge to this kind of assurance and to call in the representatives of the far right and to assure them that you are going to be OK.

Judge SOUTER. I have not discussed that issue or given any assurance to Governor Sununu.

I presume that Governor Sununu was drawing a conclusion based on what he understood to be principles of judging. But I can assure you that I gave no assurance to him at any time on that matter. And I did not discuss that matter with him at any time.

Senator METZENBAUM. Did you have any discussions with him or any other persons at the White House concerning issues that may or may not come before the Supreme Court?

Judge SOUTER. The only discussion that I had with anyone at the White House in connection with this nomination or, for that matter the circuit nomination, was my conversation with the President which I think lasted about a half an hour on the afternoon that he announced his intent to nominate me. He asked for no assurance on any subject.

Senator METZENBAUM. And at the time you were appointed circuit court of appeals judge, did anybody in the White House inquire of you concerning any of your political views, or views concerning matters that might come before the Supreme Court?

Judge SOUTER. No, Senator. The only conversation I had or conversations, I should say, plural, with anyone at the White House at that time, was during the course of the lunch that I mentioned. Governor Sununu—the lunch was in Governor Sununu's office. He was there and his assistant was there; the Governor's legal counsel, Mr. Gray, and Lee Liverman, who is on his staff.

I was not asked for any statement of position or assurance on any issue in that conversation.

Senator METZENBAUM. Thank you.

Senator Biden, how much time do I have left?

The CHAIRMAN. I do not know. You have 1 minute. That is just about enough time to call Governor Sununu, who is doing a fundraiser in Delaware for my opponent. Maybe we can get a hold of him.

Senator METZENBAUM. Do I understand that we will be in several rounds?

The CHAIRMAN. Yes. What we will do is this. We will have those Senators who have additional questions ask them tomorrow afternoon and/or Monday morning, or whatever the appropriate time is. Yes, there will be an opportunity.

Senator METZENBAUM. I do, Judge Souter, wish to inquire of you concerning church-state issues, but time obviously does not permit it at this moment. Thank you very much for responding to my questions.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Thank you, Senator.

Senator SIMPSON.

Senator SIMPSON. Thank you, Mr. Chairman.

We lawyers often are out doing our business, like correcting the record. So I did want to—you will notice Senator Biden and I this morning, as I pungently gave a comment about his quote and he pungently spliced it back together. So I thought we would just put the whole thing in because we both said exactly that, and it is in the same paragraph. And we have already had that answered, I think, now.

But it is clear that what I said and what Senator Biden said are the exact quote with regard to the specific attitude of questions. So I just wanted to get that on record, because my staff was not on vacation. They were here laboring diligently. They were not at Rehoboth or anywhere.

The CHAIRMAN. Well, mine were not in a hole clawing to get this information, or however you mischaracterized it.

Senator SIMPSON. I was talking about those poor law professors. I think that was the part I should have clarified. Diana and the staff were doing their work, but the poor law professors and the academics, they were clawing and scratching. We have to realize that they have had an arduous summer and an arduous August, without question.

Judge SOUTER. If they were reading my opinions, they were.

Senator SIMPSON. Well, we all did a little of that. In any event, your remarks when you spoke with hardly or nary a note at 2 p.m. today was very impressive. I think to me, as a person who practiced law for 18 years in really what I thought of as the real world—and it was; you know, I have represented some real weird people, and did some real weird cases with some weird results, too, I can tell you that. [Laughter.]

So the thing that impressed me is to hear you able to describe yourself and then hear you describe answers and form answers to pretty piercing questions from Senator Biden, Ted, Howard, Orrin, Strom. All of those—your answers come back with the lucidity of very impressive degree.

I have always had the peculiar view that legislating should be done in a way—as I said earlier, in a way that is understandable to the governed. And certainly I always had a view of the law practice that if your clients could not understand what you had drafted for them, what was the purpose of practicing law?

I know that is a screwy view, but it was mine. In other words, if the client did not know and looked at a contract that you had