Now, is that inconsistent with my view on *Dionne*? It is not. Just as I said a moment ago, the text is the starting place from which we have to construe the 14th amendment; the text was the starting place from which we had to construe the provision of the New Hampshire Constitution that justice should be available freely and that right or justice should not be purchased.

The question is how much freedom, if you will, from cost was that provision intended to embody. If we read that provision in a totally, literally, expansive sense, we could have said, well, certainly there can be no filing fee for someone who wants to come into court in a civil case. In a sense, there is nothing free if you have to pay $50 to file your case. And we could have gone on through a number of incidents of expense that are accepted in the system and have always been accepted in the system as being costs that could reasonably be levied.

The question before the court was, then, how free did they intend it to be; what kinds of costs were they trying to outlaw? And that, in the context of that particular issue, came down to basically a choice between two principles—the principle against paying anything beyond a filing fee to get into court, on the one hand, saying that anything beyond that would be a violation of the provision; and the other principle, which was the one that I thought was supported by evidence of the original meaning of the framers, that what was trying to be outlawed by that provision was essentially, in a word, bribery. I think the provision was traced back to the kind of fines which the medieval courts dealt with and which were still in people's minds at the time of the adoption, whereby money payments could be made to the courts either to delay a case or to bring about its resolution at the convenience and with the result intended by a given litigant.

And therefore the issue in the *Dionne* case was simply a narrower issue than the issue in *Brown* v. *Board*. The meaning came down to a closer choice between two possibilities. But the ultimate criterion of meaning for me in the *Dionne* case was exactly what I think the ultimate criterion should have been and was for the Supreme Court of the United States in *Brown*—not specific intent, but the principle intended. And of course, those distinctions will grow narrower and narrower the more narrow and exact the language it is that we are construing, but the ultimate criterion remains the same.

Senator SPECTER. Thank you very much, Judge Souter. We'll come back to that when I have some more time.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Our next questioner will be Judge Heflin, Senator Heflin, from Alabama.

Senator HEFLIN. Following up on Senator Specter's question on the *Dionne* case, was the equal protection clause of the Constitution invoked in that issue?

Judge SOUTER. In the *Dionne* case, sir?

Senator HEFLIN. Yes.

Judge SOUTER. No, it was not. The only issue that was raised there was the provision precluding the purchase—or, the requirement that justice be purchased.

Senator HEFLIN. Does your supreme court have a rule, as do some, that in civil cases the court will not address issues unless they were raised in arguments or briefs?

Judge SOUTER. We do have such a rule. I think the only times that we ever depart from them are times in which it would be so misleading to decide a case based on an issue which on our examination we later realized was there and cannot be avoided, that we might be forced to refer to it, although even there the preferred practice, of course, is to call for a reargument so that that can be expressly addressed.

Senator HEFLIN. I have a little problem in the *Dionne* case. It seems to me that—you cite the Magna Carta, which is dealing with selling justice, which was bribery. The New Hampshire framers of their constitution chose to use the word "purchase" as opposed to "sell." Do you see any distinction relative to the choice of that word, which might or could have been construed to be an attempt to change the language from the Magna Carta to a different meaning?

Judge SOUTER. Well, I can see the basis for making the verbal argument although, of course, you can't have a purchase without a sale. So I did not find when I looked really any basis upon which I thought I could really justify a distinction there. And as I think you know from the *Dionne* case, I would not have been unhappy to find that kind of a distinction because I thought the practice involved there was a bad one.

Senator HEFLIN. Of course, from a textual basis, as a method of interpreting, when you see words change that usually has some meaning to it. Well, that's quibbling over a point. I'm not going to spend a lot of time on that.

Let me ask you this. Have you ever been a crusader for a cause?

Judge SOUTER. Yes, I have.

Senator HEFLIN. What cause?

Judge SOUTER. I guess my greatest crusade was the cause against bringing casino gambling into the State of New Hampshire, which I thought would destroy the political fabric of the State. I did not believe that we could maintain—in a State with the resources that we had, I did not believe that we had a very good chance of maintaining the integrity of the law enforcement structure of the State when the economy would have been so totally overbalanced by the amount of money that would have come in for that purpose. And I devoted a considerable period of my time one year as attorney general to that crusade, if you will. It was not entirely popular in some circles. It was an issue upon which the Governor, who had appointed me, and I broke. I am glad it turned out the way it did, and I enjoyed the crusade.

Senator HEFLIN. I gather, too, that you have had an interest in medical issues, as some writer has mentioned, and an aunt of yours had such an interest in it. What has been your interest in medical research and your activities in that regard?

Judge SOUTER. Well, my interest there, Senator, has been perhaps less a research interest than an interest in local administration that brings health care to people. As I said yesterday, it all started when I was asked to serve on the board of a hospital, and it is one of those interests which sort of took off by increments, and I

ended up finding it virtually a second job for a period of about 5 years in my life. But the focus was not a focus on academic research so much as it was a focus upon the kind of administration that gets health care to people and determines the cost that they are going to have to pay for it.

Senator HEFLIN. Is there any other cause that you would say that you have been a crusader for?

Judge SOUTER. Not a public crusader, no. There are some causes to which I have contributed, but causes in which I have come out as a public crusader I think have been limited to those.

One of the things, I can tell you that the inhibitions on crusading when you are occupying the position of attorney general or of judge, of course, are there, as I think you know as well as I do. The number of organizations that a judge finds himself slowly resigning from in order to avoid recusal problems can sometimes be one of the tragedies and in any case one of the prices that we pay for being on the bench. And I have been through that experience, as you know.

Senator HEFLIN. Well, that is 7 years of your life. I mean, there are other years, too.

Judge SOUTER. Well, 12 years, actually; I was 7 on the supreme court——

Senator HEFLIN. That's right.

Judge SOUTER [continuing]. Then I was on the trial court for 5.

Senator HEFLIN. I want to go to the Seabrook demonstration issue. Critics of you contend that you acted too strongly against the demonstration. They contend that after demonstrators were arrested that they were not released on their personal recognizance, that bail was required; that when they refused to post bail that the State was required to house in the different instances as many as 1,400 detainees at enormous cost. The critics go on to say that in trials where first a judge gave suspended sentences that you, according to one critic, rushed to the courthouse to insist on the fact that there be sentences of hard labor; and that in the efforts to pay for the extra costs involved that there was an instance with the Governor's crime commission under an LEAA grant where you urged the crime commission to approve an application to LEAA to seek funds to help pay for the expense; and that then later, the State, through the Governor—perhaps some of your participation—sought contributions from corporations and other people to pay for it. They then cite that before a finance committee hearing on the cost of the Seabrook demonstration that you testified in answer to a legislator's question by saying that under certain circumstances that the State might use police dogs and fire hoses to keep the demonstrators from the site.

Now, I recognize that if you are the attorney general, you have certain responsibilities, and I want to ask you to relate your position as to today. What would be your position today relative to these various issues in regards to the demonstration that took place here yesterday? How should that be treated? How do you view today the demonstrators that hollered out when Senator Grassley was testifying, and we all turned around and looked; we were basically eyewitnesses to it.

Would you give us your opinion on the issue pertaining to personal recognizance versus bail; give us your opinion of what ought to be done if they refuse to make bail; efforts to pay any extra cost; the question pertaining to whether or not there ought to be sentences in regards to those people that demonstrated?

Judge SOUTER. Well, Senator, the first thing that I would have to say is that I wouldn't give any final opinion on what should be done with those demonstrators without hearing them; and the only place that I heard them was in the back of the room. I haven't heard them in a courtroom. I am happy that I haven't heard them in the back of the room again, and I probably will never see them in a courtroom, and I wouldn't make any final judgment about what ought to be done without doing that.

What I think I can usefully do is give you a sense of the significant contrast between what went on here and what went on in the case that I was dealing with when I did have to take a position and did take a number of positions as attorney general of the State.

The first thing you mentioned was the fact that I opposed their release on personal recognizance bail. That is correct. That position was taken on the night that the demonstrators were arrested following the second day of the demonstration.

Now, the arrest occurred because the demonstrators at that time, or the remnant of them—I think there had been about 3,500 or 4,000 there that day, and as it turned out there were about 1,400 left who refused sort of the last and final request to get out before arrests started. At the time the arrests took place, those demonstrators were occupying the parking lot that was used on a working day by the work force that was building the nuclear power plant, and they refused to leave it. One of the reasons that the State police made the decision to arrest—a decision which I was aware of and certainly took no exception to—was that they knew, this being late on a Sunday afternoon, that at 7 on Monday morning the work force was going to arrive in that parking lot, and they knew that if that happened they had an extremely combustible mixture, and what had been in fact a demonstration of civil disobedience was not likely to remain one if that happened.

When, therefore, they were arrested and arraigned at special sittings of the local district courts to determine what the bail should be, the question which confronted the State was: If personal recognizance is granted, what will be the effect of that? And, in fact, the demonstrators had indicated, as I recall it, quite publicly within the armories where they had been brought, that as soon as they were released on personal recognizance they were going to regroup and go back to the parking lot and presumably be there the next morning when the workers arrived.

Therefore, I made a judgment that personal recognizance was, in fact, simply going to render the action of removing of no use, and the next morning we were going to have trouble on our hands. I therefore decided that the appropriate requirement would be some cash bail, conditioned upon good behavior and showing up for court on time. I therefore recommended that cash bail of $100—probably cash or bond, but that $100 be requested.

As I think you know, that very issue was later litigated in a section 1983 action that was brought against a number of State offi-

cials, including me, and the U.S. district court concluded that that was perfectly reasonable bail, that there was not any indication that the people involved could not make it or that it was unreasonable.

I think it is safe to say—well, maybe I shouldn't say, but I think it is safe to say that we do not need or would not need, probably, in the aftermath of yesterday's incident, that particular kind of prudential concern.

The second thing you mentioned was my opposition to suspended sentences and a request for hard labor. I don't know. The first part of that is true, and the second is not, except in a very technical legal sense. I did oppose purely suspended sentences because, as a practical matter, they would not be sentences at all, and I thought they would have no deterrent effect. And I think they would not have had.

I think I may safely say, although there is no record of the court in question that I am aware of, that never in the course of my recommendation did I make any reference to hard labor. The only reference to hard labor that occurs in connection with these cases occurs—or at least it did then—in the New Hampshire statutes. The New Hampshire statutes refer to any incarceration, any incarceration following conviction, whether it be in a house of correction or the State prison, as being at hard labor. I know that in some county houses of correction, of course, as you know, there are work details just as there are in the prisons. But for practical purposes, there is only a very attenuated sense of labor today.

I was not interested in hard labor, and I don't believe I ever used the term. In point of fact, a substantial number—I don't know whether I could say most, but a substantial number of those demonstrators never, in fact, even saw the inside of a house of correction because most of them—because they refused to make bail—spent their 15 days in the National Guard armories where they had been taken awaiting trial. And at the end of that time, as I recall, I ordered them ejected because I didn't think they should be staying in the house of correction longer than they would have stayed if they had gotten the sentence that I had recommended. So, to the best of my knowledge, there was no labor involved in any aftermath.

With respect to the crime commission, I was a member of the Governor's Commission on Crime and Delinquency at that time. I couldn't possibly tell you what the category of money was that might have been available as Federal help for unusual law enforcement expense. But, apparently, there was some such category of it, and because this was a very expensive proposition for the State, I urged and argued very strongly that the crime commission ought to approve an application for it. I couldn't tell you at this point whatever happened to the application. I don't know whether the State got a grant to help defray expense or not.

Senator HEFLIN. It did not. But the issue is that some of your critics say that you argued before that crime commission to the effect of almost threatening them with their existence unless they went forward with——

Judge SOUTER. Well, I—excuse me. I reread one of the newspapers that I had not looked at for 14 years, and I think I found the

passage that you referred to. There was one member of the commission at that time who claimed that I had—I forget whether he used the word "threats" or "extortion" or whatnot as an inducement to the members to vote for it. And I remember in the latter part of that newspaper article the reporter said that he or she could not find anyone else who was in the crime commission at that time who would support that particular view.

I think it is fair to say on the record that that was an eccentric interpretation of what I had said, although there is no question that I had argued very strongly that the commission ought to support the request for the grant. And I have no doubt whatsoever that I indicated that the Governor felt very strongly that the commission ought to do so. It was standard practice to bring such opinions before the commission.

The next issue about seeking contributions to defray expense is, again, luckily once which I trust no one will have to face in response to what happened yesterday around here. My understanding of the sequence of what happened on that is this: The demonstrations took place on the last day of April and the first day of May back in 1977. According to my own records—and I think this is also indicated in one of the discovery affidavits that I filed with the U.S. district court—by the 3rd of May, I had formulated a position on what the State should request in the trial of these cases, which, as I said, was the 15 days and a fine of $200, the fine to be suspended on good behavior.

My appearance before the court that you referred to took place on the 5th of May, which was the middle or the latter part of that week. As I understand it, on the 6th of May, 3 days after I had formulated the State's position and 2 days or 1 day after I had appeared publicly in court to state it—on the 5th of May, the Governor issued sort of a request to the Nation to make contributions to help defray the expense. He sort of went out publicly and passed the hat.

I have no recollection of discussing with the Governor the funding that this was going to cost except for the fact that there was money available in an appropriation known as the emergency fund, which was under the control of the Governor and council. And there was also at that time—and I think it was during that same week—a meeting of the finance committee of the New Hampshire Senate before whom a request for an emergency appropriation had been made to be appended to a pending bill. And I do recall discussing with him my appearance before the Senate. I did appear before the Senate. Some people were relatively happy to vote money and some were not, but that was the extent of my fundraising activity.

I know—rather, I have been reminded in the last couple of weeks as material has been assembled on this—that subsequent to that, the Public Service Co. of New Hampshire, who was the principal owner at that time of the nuclear powerplant, made a contribution to the State of New Hampshire of around $70,000, in round figures. That came, according to the records that I have gotten, late in June. I think it was June 30. At least, that is the date on which I have a record of State action to accept the funds.

If there was any particular appeal to the Public Service Co., it was something that had nothing to do with me or my office. The one thing I do know about it beyond the date is that the amount was determined as the amount necessary to offset the extra law enforcement pay expenses for the weekend of the demonstration. And so far as I know, discussions about any contribution from the Public Service Co. took place between the department of safety, which includes the State police, and the company. In any event, it was the department of safety that made the accounting for funds, and it did not involve me or my office.

The last thing you mentioned would similarly be happily unnecessary and inappropriate in the kind of disturbance we had yesterday morning, and that was police dogs and fire hoses. I was sort of unhappy to hear about the police dogs and fire hoses because I had spent a fair amount of my energy in the week or so prior to this big demonstration indicating that I was not going to use police dogs and fire hoses, and that I wasn't particularly happy to be facing the demonstration, but that a matter of civil disobedience did not call for police dogs and fire hoses.

I think in the course of that senate hearing in which the expenses that was being accrued was not the most popular political subject in the State at the time, one of the senators—in fact, I think it was the senator from my own district—said instead of wasting all this money and putting them through the criminal justice system and convicting and sentencing them, he said, "Why didn't you just drive them away with police dogs and fire hoses?" My recollection is that I said that was, if appropriate, it was only appropriate in a riot situation in which there was no other way to control it. And I said that is not what we had.

So I seem to have gotten metamorphosed from an anti-police dog and fire hose man into a pro-police dog and fire hose man. And I would kind of like to go back to the prior position and leave that as mine on the record.

Senator HEFLIN. All right. Another issue that critics have brought up is your letter pertaining to the parental consent on a minor's abortion, in which, in 1981, you wrote to the chairman of the New Hampshire house committee on health and welfare on behalf of the New Hampshire Superior Court judges.

Now, as I understand it from what Senator Rudman has informed me, you have a system of courts where the New Hampshire Superior Court judges go all over the State. They don't have limited geographical areas that they serve in, and they sort of travel a circuit relative to these matters. On that issue, of course, I read that you don't express any opinion one way or the other on the substantive issue, but it raises a question which has been always raised as to whether judges ought to become involved, in effect, in lobbying legislators. That raises an issue to what extent judges should participate in the legislative process.

Now, I notice in reading further that at a later date, some 7, 8 years later, when you were on the supreme court, this issue arose again, and you as a member of the supreme court referred the person that was asking you about it to the superior court judges, which could indicate that you didn't think as a member of the supreme court that you ought to be involved in what you were in-

volved in when you were a superior court judge. If you would address that, or whatever you want to say about this particular letter.

Judge SOUTER. Yes, sir, I will. That letter actually came back to my attention within, I think, the first week of my nomination, so it was one of the earliest pieces of prior history that I reread. That letter was written by me in my capacity, I think at the time, as chairman of what was known as the legislation committee of the superior court. The superior court did not take, and very scrupulously avoided taking, positions on general social issues—or even law enforcement issues, for that matter—except insofar as they would impinge on the capacity of the court to do its job. To the extent that there was going to be an expansion of jurisdiction without an expansion of judges to handle the business, we would bring that to the attention of the legislature, for example.

On this particular issue, the appropriateness of using a superior court judge as the deciding authority for permitting or refusing an abortion upon a juvenile when parental consent was not available, the court felt very strongly on two grounds that it was an inappropriate position to place the judiciary in. Those grounds were expressed in the letter.

There were some judges who, for reasons of their own moral scruples, would not under any circumstances authorize an abortion as, in effect, a surrogate for parents. There was another group of judges who believed very strongly, not because they opposed abortion personally but because they believed that it was inappropriate for a judge to make what was in their view an unavoidably moral decision for another person, that they should not engage in that kind of an exercise of jurisdiction.

The upshot of these two views was that if the bill was passed, it was a virtual certainty that a significant portion of the superior court bench—which at that time I think in the State was probably around 18 judges—would find itself, for one or the other of those reasons, unable to discharge the function that would have devolved upon them. And I think, as I said in that letter, the court's view was that this is necessarily going to lead to judge-shopping. No minor or no person on behalf of a minor would want to appear in front of a judge whose moral views were known to be opposed to abortion. And at the very least, the result was going to be that a very small number of judges were, in fact, going to find themselves exercising the entire court's jurisdiction in these matters.

It was for that reason that the court, as I recall, unanimously believed that it would be inappropriate for the judges to be given that job. I think I was chairman of the committee at that time, and I drafted a letter to that effect. But that is representative of the limits on lobbying that the judges do. It was lobbying only to the extent of bringing to the attention of the legislature matters which they would not know, but which we as judges felt they had to know if they were going to make intelligent decisions.

Now, you are quite right to recall to my mind the fact that the issue did arise later on when I was on the supreme court. And one of the members of the legislature came to me at that time and said, well, will you sort of reauthorize this letter as a statement of the judicial position. And I said that I could not do so for two reasons.

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