

the homes with no telephones, 26 percent of the homes with no indoor plumbing, and 8 percent of the homes with no electricity.

Now when an issue about American Indians comes up, it is not an abstraction for me. You know, I think this good, great, rich country ought to be doing better. I do not mean this disrespectfully to your fine background, but I want you to understand perhaps a little more than you now do some of the aches of America.

If you were to get together—and I prefer you to not answer right now, but maybe you will want to respond in the second round, with your friend and mine Warren Rudman, maybe Fred McClure, who was here just a little bit ago, and think about some kind of an agenda, when the Court is not in session, where you would get to understand the west side of Chicago, or perhaps an Indian reservation. I am not going to spell out that agenda. But I think if that were to take place, you would be a better U.S. Supreme Court Justice.

Justice Cardozo has been quoted here this morning. Let me just give you a quote here: "Where does the judge turn for the knowledge that is needed to weigh the social interests that shape the law? I can only answer that he must get his knowledge from experience and study and reflection, in brief, in life itself."

When we get to this second round, I would like any reflections you might have on how David Souter is going to grow, as a Justice, not just sitting on the Court. I think your experience with that young couple at Harvard was a growing experience. I think your being on the hospital board was a growing experience. And when I talk about growing, I think of Justice Hugo Black, who started off as a Ku Klux Klan member, and ended up as one of the great champions of civil liberties.

Anyway, you have my suggestion and I look forward to asking you for any reflections, when we get to the second round.

Thank you, Judge.

Judge SOUTER. Thank you, Senator.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kohl.

Senator KOHL. Well, I am the last questioner before lunch. Judge Souter, can I order you lunch?

Judge SOUTER. Senator, if it is all the same to you, I would rather take the questions and we will have lunch after. [Laughter.]

Senator SIMON. He has heard how parsimonious you are on buying lunch. [Laughter.]

Senator KOHL. All right. Judge Souter, why do you want this job?

Judge SOUTER. I did not seek this job, as you know. I was asked by the President of the United States to do this. What I said to you yesterday afternoon is my answer to that question. If I am confirmed in this office, I will be given the greatest power that anyone in the judiciary of the United States can ever know, and that is, as I said, the power to preserve and to protect.

With it, as with all power, goes a like degree of responsibility, and if I am confirmed in this office, I want to try the best that I can to exercise that responsibility, to give the Constitution a good life in the time that its interpretation will be entrusted to me, to preserve that life and to preserve it for the generations that will be sitting perhaps in this room after you and I are long gone from it.

Senator KOHL. So, this is a job, even though you were not seeking it, that you very much want?

Judge SOUTER. Yes, sir.

Senator KOHL. For the reasons that you have just expressed?

Judge SOUTER. Yes, sir.

Senator KOHL. You will be replacing, as we all know, Justice Brennan. Would you say, in a general way, that you are similar, dissimilar, vastly dissimilar? And how do you think he is going to be remembered and if you would wish to surmise, do you hope you will be remembered?

Judge SOUTER. I will be candid with you, Senator. That last part of the question, I would not be presumptuous enough to answer. We will have to wait and see. But I know how Justice Brennan is going to be remembered. It has nothing to do with Justice Brennan's philosophical position, it has nothing to do with any distinction that may or may not be drawn between him and me. I am not going to draw such a distinction.

Justice Brennan is going to be remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have. No one following Justice Brennan, absolutely no one could possibly say a word to put himself in the league with Justice Brennan. All you can do is to say what perhaps once Justice Brennan said, "I will do the best I can."

Senator KOHL. Judge Souter, you have got a reputation, well-deserved, as a fine writer, and you are a scholar. Usually, those qualities in a person of your kind do result in some substantial writing, and there is not any substantial writing that I am aware of that you have done. Would you care to comment on that?

Judge SOUTER. Well, there are the 200-and-some-odd opinions which have represented a great deal of substantial writing to me, and I will not ask you to read all of those 220-odd opinions.

Senator KOHL. I was referring to public—

Judge SOUTER. That is right. No, in point of fact, I guess there have been two things that have motivated me. One, I describe I guess with caution, but in a fine kind of way they go to what Senator Simon was speaking of a moment ago.

I have loved the judiciary. I have been a trial judge, I have been an appellate judge, and I want to be nothing else. As the years have gone, I have found that my judging has become more all-consuming of me than I once thought it was going to be.

In earlier days, including the days when I was on the trial court and, in fact, before I went on the bench, when I was in public law practice, but still practicing law, one of the things that I wanted to do with my time was to do something other than as a lawyer, and that is why I served on boards and I had experiences, which Senator Simon was right in saying, that changed me. They made me grow.

Beyond that, I will admit that there have been some times when I have been tempted to write on things that concern me professionally very much, and I was once even given almost a cart blanche for a book publication, if I would write something. I have not done it or I did not do it in those instances, because the things that I would have wanted to write about most were the things that were coming before me, as a judge, and, frankly, I was afraid that if I

started writing too much, I was going to end up recusing myself too much, because, as I envisioned what I might have written, it would have been difficult to get into it without starting to take positions and do just what I should not have done.

There are many judges who have handled the business of writing with great subtlety and they have managed to come up with extraordinary outputs, without compromising themselves in what they did on the bench.

The thing in several instances that I would like to have written about I think probably would have either forced me into writing just generality, or into writing things that really would have started disqualifying me, and I chose not to do it.

Senator KOHL. Yesterday, when the protestors did their act, everybody in the room, of course, was startled and turned around or looked ahead to see what was happening, with one exception—you.

Judge SOUTER. Oh, I turned around.

Senator KOHL. Did you?

Judge SOUTER. Yes.

Senator KOHL. OK. I had not noticed that.

Judge SOUTER. Actually, I had some practice for this. I remember that something very similar happened during one of Governor Sununu's inaugurations, and there was a sense of *deja vu* to the whole experience. No, I turned around.

Senator KOHL. In connection with preparation for this hearing, it is our understanding that you have spent 4 or 5 weeks studying very hard to ready yourself for this hearing. You have had meetings and briefing books, and I am sure you have gotten a lot of advice. There are a couple of questions that I would like to ask about that.

Did members of the administration help you prepare for this hearing?

Judge SOUTER. Only in the sense of doing things that I asked to have done. There have been some lawyers, as you know, from the White House Counsel's Office and the Justice Department who have been there to help me. But the ground rules were at the beginning—and they were, in fact, not ground rules that I even had to impose, I mean they were ground rules that were offered and they were the only appropriate ones—were that they would pull together material that I wanted to review. As you can imagine, I have been revisiting a lot of cases, some of which I have read almost on a daily basis certain times in my life and some of which I have not read for a long time.

So, what was agreed upon at the beginning of the process was that we would work together on a suggested topic list. All nominees, obviously, are going to review certain subjects, so they had a topic list much in mind. We discussed it I think the first week of the nomination, and they then collected the kinds of material that I wanted to do my reading.

There have not been the kinds of briefings in the sense of saying, "Judge, this is the law or this is an appropriate position that you ought to maintain the hearings." There has been a very scrupulous regard for the fact that I am the nominee, and not the administration.

Senator KOHL. Well, there are, I believe, four members of the administration sitting right behind you.

Judge SOUTER. That sounds like the right count, yes.

Senator KOHL. And my question is, in terms of the future, in view of the fact that the administration comes to argue in court—and obviously the most disinterested attitude is the one that we need to have—do you think that we could sharpen up that process in the future, to create a larger, a bigger distance from day one, once a person gets nominated, a more independent distance than is what is normal, apparently, in the process, as I understand it?

Judge SOUTER. Well, I—

Senator KOHL. Again, as a person sitting here for the first time, I just get the feeling—and I do not believe you are the kind of a man who would let it happen—that there is too close a relationship here.

Judge SOUTER. I appreciate exactly the issue that you are raising and I think it is good to raise it. I suppose there is no question, that Congress could sort of create an office of legal adjunct to nominees to try to provide the help that we need, and we do need help. I mean I wanted to do a great deal of reading and rereading, as I said, in the time prior to these hearings. One of the things I know is that I could not very efficiently have spent my time alone pulling all the material together in a very usable way. I would have spent a good deal of time just running back and forth between stacks and libraries, so that at least a candidate or a nominee who wanted to approach the hearings as I did, would need some help.

It might be difficult, given the pace of Supreme Court nominations, to make that a very workable proposition. I must say I tend to analogize as closely as I can the role of the people who have helped me in a way, to the people whom I am very used to having help me, and that is the law clerks that I have on the court.

The role which the Justice Department and White House lawyers have played for me has, in fact, been a far less intellectually close one than the role that a judge and his law clerk plays. For example, one of the things that I want my law clerks to do is to argue me out of a position, if they think I am taking the wrong one. So there is a very intense kind of intellectual interchange that goes on or one hopes will go on between judge and clerk.

Yet, when that clerkship is over, that does not—and I think is not thought by anybody—to taint the possibility that some day that clerk can appear before the judge in court. My own personal rule has been, although I never formalized it, that I would not hear a law clerk's argument for at least a year had gone, and so—

Senator KOHL. What I was looking for an answer to is the question, do you think in the future our country would be well advised, from the moment a person is nominated, to create the same distance between the nominee and the administration, as exists between the nominee and Congress, or any other party, for that matter? Why should there be a closer relationship, as there is obviously today? I mean it is clear. It seems to me that your independence, as a Supreme Court Justice, is more clearly apparent, if you are here today without their company.

Judge SOUTER. I see the point that you are making. I am glad to have the opportunity to say that nobody has been subtly or otherwise lobbying me on a particular position.

Senator KOHL. I believe it.

Judge SOUTER. There is no question, a nominee needs help.

Senator KOHL. He also needs independence.

Judge SOUTER. You are absolutely right and, fortunately, these people have given it to me.

Senator KOHL. I understand, yes.

Just a couple of questions on *Roe v. Wade*. In 1973, when it was promulgated, you were in the AG's office—

Judge SOUTER. Yes.

Senator KOHL [continuing]. And it is hard to go back to what you did that day or in the days and weeks after, but I am just presuming that there was conversation between you and your colleagues at that time. Do you recall your feelings about *Roe v. Wade* back when it was promulgated?

Judge SOUTER. I frankly do not remember the early discussions on it. I mean everybody was arguing it. It was probably fodder for more argument among lawyers than any other case, certainly, of its time. The only thing I specifically remember is I can remember not only I, but others whom I knew, really switching back and forth playing devil's advocate on *Roe v. Wade*.

Senator KOHL. You had no opinion about it, other than just to say "wow"?

Judge SOUTER. Oh, I doubtless had an opinion. No, I did not just say "wow."

Senator KOHL. What was your opinion in 1973 on *Roe v. Wade*?

Judge SOUTER. Well, with respect, Senator, I am going to ask you to let me draw the line there, because I do not think I could get into opinions of 1973, without there being taken indications of opinions in 1976.

Senator KOHL. OK. With respect, finally, to *Roe v. Wade* just once more, is it fair to state, even though you are not prepared to discuss it, understandably, that you do have an opinion on *Roe v. Wade*?

Judge SOUTER. I think it would be misleading to say that. I have not got any agenda on what should be done with *Roe v. Wade*, if that case were brought before me. I will listen to both sides of that case. I have not made up my mind and I do not go on the Court saying I must go one way or I must go another way.

As you know, the issue that arises when an established and existing precedent is attacked is a very complex issue. It involves not only the correctness or the incorrectness by whatever lights we judge it of a given decision. It can also involve extremely significant issues of precedent.

Senator KOHL. Yes.

Judge SOUTER. And I do not sit here before you, under oath, having any commitment in my mind as to what I would do if I were on that Court and that case were brought before me.

Senator KOHL. Well, I think that is a significant statement.

I would just like to ask you for a moment about cameras in the court. How do you feel about cameras in the Federal court? How do you feel about cameras in the Supreme Court?

Judge SOUTER. Actually, I have never seen a camera in a Federal court. As you know, I have been a Federal judge for a comparatively short period of time and, as a result of what happened to me last July, my judicial experience on the Federal bench has been cut very short.

The only experience that I have had were with cameras in the New Hampshire Supreme Court, where they are allowed, as long as they are not obtrusive. The experience there was that, after the rule was passed allowing the cameras in, for a period of time there was a spate of great interest in taking photographs in the courtroom, and, you know, any case that rose in interest to sort of 5 on a scale of 10 would carry with it video cameras in the back of the courtroom and so on. That lasted for about 2 years, and I am sorry to say that apparently the news media or the New Hampshire public at that point grew so bored with what they were seeing photographed, that people stopped taking pictures and we have not seen them for very long.

I do not know whether, if this hearing went on for 2 years, the photographers would all clear out or not, but that was the New Hampshire experience.

Senator LEAHY. Do not do that to us, Judge. [Laughter.]

Senator KOHL. How about 2 more days? So, cameras in the Federal court, in your mind you have some ambivalent feelings about it, or do you feel it might be—

Judge SOUTER. Well, I am of two minds, in one respect. The fact is, if the cameras are unobtrusive and they are not making, you know, sound that is distracting, that is one thing. There is still a risk there, and I will get to it. Cameras which are obtrusive in the course of oral argument, so that they really do tend to distract your attention, I think is something that has got to be avoided.

When I am sitting there on a bench, you now, I am very much in the position that the members of this committee are, except that I am in an even tougher one. Several of you have said to me, well, after you leave here, if the Senate confirms you, we will never see you again. You have at least got a few days' worth and you can decide how long it is going to be that you do see me.

When I am sitting as a judge, I am seeing or I am hearing the sides of the case for 20 minutes or half an hour or whatever the case may be. It is a short period of time and I do not want distraction from that case. So, that is why a clicking camera can be difficult in a situation like that. [Laughter.]

That seems to have provoked a great deal of clicking. [Laughter.]

I think I need say no more. [Laughter.]

Senator KOHL. The last question on that is the educational value of cameras in the court, particularly oral arguments at the Supreme Court level—aside from its distraction, there is truly some value. I must say that even before I came to the Senate, I have learned an awful lot through C-Span, and I think that one of the best things we do in this country is to make C-Span one of our prime-time stations. While it is not exactly comparable, bringing the court into the home has some value for children and for adults. Now, I don't know whether it is counterbalanced by your own feelings in terms of the distraction, but I think you would agree with

that, would you not, there is some value in bringing the courts into our home?

Judge SOUTER. There is no question that there is as value there.

Senator KOHL. The last area: Going back to when you were attorney general in New Hampshire, you have been asked many questions about your time and conduct as the attorney general and you have responded, in part, by saying "that was then and this is now," which seems to imply that you feel that there is some sort of a change which has taken place in you between then and now, which would not be unusual. It happens to all people.

So let me ask you what you would do today, Judge Souter, if you were attorney general and you were asked by the Governor to make the same arguments you made then about ethnic statistics, flag lowering, literacy, or even the license plate case, would you do it?

Judge SOUTER. The big difference, you see, is you are rightly keeping me in the role of the lawyer and the advocate. The big difference is that, on those issues, we have got a lot of law today that we did not have then. Just take literacy, for example. At the time Attorney General Rudman and I were engaged in the literacy test case, *Oregon v. Mitchell* had not come down. *Oregon v. Mitchell* was decided, as I think I said yesterday, perhaps 4 months, 6 months after we argued that case. So, there were arguments which were there to be made then and they are not there to be made now.

As I said earlier this morning, the virtue of the system and one of the very responsibilities of the lawyer, as advocate, is to fight out the constitutional issues in a sufficiently illuminating way, to give the courts the help that they need from the adversary process to sharpen those issues and get them right.

So the fact is, I would not be making the same arguments today, but we would not be having the same cases today, either.

Senator KOHL. OK. I respect your answer and I guess I will ask once more, to see if there is some opening of a door, at least this wide, and not certainly good or bad, but just some. I thought you said and I thought I had seen a person today who was not the same person that he was 15 years ago, as none of us are. Hopefully, we all grow, develop, change, mature, get better as we go on in our life. Certainly in our profession we mature, and I still—I want to say that I believe that the man who is sitting here today would have a harder time—if not refuse—defending those cases as the attorney general 15 years ago. I want to believe that, so maybe that is how I will end my own personal questioning of you.

Judge SOUTER. I am content to have you end it there, sir. Thank you. [Laughter.]

Senator SIMON. Mr. Chairman?

The CHAIRMAN. Senator Simon.

Senator SIMON. Just one clarification. In response to Senator Kohl, who asked you about your writing, you said that you wrote 220, and I quote you exactly, "wrote 220-odd opinions." You may want to clarify that just a little. [Laughter.]

Judge SOUTER. Could I strike one word?

Senator SIMON. Yes.

Judge SOUTER. You know which one. [Laughter.]

Thank you, Senator.