

I can tell you that the exploration of what everybody tends to group together under the title of alternate dispute resolution is, I think, an extremely hopeful sign. There is only one thing that I fear, and that is that, as State budgets continue to be squeezed and as money for the judicial system becomes harder and harder to find, in competition with the other claimants for limited State budgets, that there is going to continue to be such a squeeze, particularly in the civil area, where there are no mandatory constitutional standards or few mandatory standards for speedy trial, that in fact private civil litigants are going to get squeezed out of the judicial system, and as they get squeezed out of, simply because the system cannot handle their cases, they are, instead, going to resort, as they are already doing and are doing in my State, basically to private judging, in which parties will get together and they will hire somebody who may be called an arbitrator or may be called by some other title, in effect to decide their cases for them, entirely outside the judicial system, simply so that they can get the cases decided.

If this trend continues, the great fear that I have is that we are going to be creating in the United States essentially two systems of justice, and the only people who are going to be using the civil justice system, if this is carried to extremes, are in fact the people who cannot go outside and spend money out of their pockets to hire a judge or someone in the private sector to adjudicate their cases.

This seems to me an appalling prospect, not only appalling for the judicial system, but appalling for the Nation in the broader sense, that we are going to lose one of the institutions and one of the symbols that binds us together as a Nation, and that is a system of justice open to everyone, and that justice certainly has got to include civil as well as criminal justice.

Senator THURMOND. My time is up. Thank you, Judge.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge, just a few moments ago, in response to questions of Senator Thurmond, you talked about the moral dilemma that some judges might face who are against the death penalty and yet must impose it, and I thought you demonstrated some legitimate concern for those particular judges.

Then you talked about the whole question of the morality of sentencing, in terms of white collar criminals, and I thought you were very eloquent when you talked about the fact that some of those who were involved in white collar crime might expect that they should, at least for the first offense, not do time, and you expressed your own kind of moral concern that that was not correct.

Picking up on that question, let me ask you this, whether, as a matter of your own individual and personal moral beliefs, do you believe that abortion is moral or immoral?

Judge SOUTER. Senator, I am going to respectfully ask to decline to answer that question, for this reason, that whether I do or do not find it moral or immoral, will play absolutely no role in any decision which I make, if I am asked to make it, on the question of what weight should or legitimate may be given to the interest which is represented by the abortion decision.

I think to answer that question and to get into a matter of personal morality of mine, when it would not affect my judgment, would go far to dispel the promise of impartiality in approaching this issue, if it comes before me.

Senator KENNEDY. Well, as you pointed out, it would not affect what you may or may not do in the *Roe v. Wade* case, and I think that is certainly understandable. Something could be moral, and yet not be protected by constitutional law; other things can be immoral and be protected by constitutional right, so this is irrelevant, basically, on the question of how you would rule on *Roe v. Wade*.

Judge SOUTER. It would be irrelevant to my decision, yes.

Senator KENNEDY. Why do you feel hesitancy or reluctance, then, to express what you were willing to express about the morality in the application of the death penalty for individuals who have moral beliefs, and what you are willing to express about your own moral belief when it came to the question of white-collar crime? Why can you not share with us your view about whether abortion is moral or immoral or perhaps moral in certain cases and may be immoral in other kinds of cases? Obviously, you have given a great deal of thought to this? When you were on the New Hampshire Supreme Court, you were concerned about physicians and the rights of physicians not to counsel a patient on the availability of abortions. We know how you feel on the question of morality of that question. You were quite willing to express it.

Judge SOUTER. Well, Senator—

Senator KENNEDY. Why the reluctance now to indicate what your view is on this?

Judge SOUTER. Senator, there are two things here. The first goes to the *Smith v. Coady* concurring opinion that you referred to. That opinion did not rest upon any moral judgment of mine about the morality of the procedure. It represented a perception that those who may be engaged in counseling that could affect that procedure could find themselves, as the result of their moral positions, in an impossible bind if the Court did not allude to what their responsibility should be. That was an expression of my concern about their moral dilemma, not an expression of my moral position on the issue itself.

The other distinction is that the other moral questions that you referred to are not implicated by any case that I see reasonably coming before the Court; whereas, the moral position on the abortion issue is, of course, clearly implicated by the request for *Roe v. Wade* reexamination because people on each side of the issue are impelled by very profoundly felt moral beliefs.

Senator KENNEDY. Well, we won't get into the question of whether we still have a strong division of the country for and against the death penalty or on the question of sentencing. But Sandra Day O'Connor responded to that question, Judge.

Judge SOUTER. With respect, sir, I do not believe I could do so without creating the impression that I could not give a fair hearing to people whose views might differ from mine on that. And I am not familiar with Justice O'Connor's answer on that subject. It may have depended upon prior opinions that she had given.

What I do believe, Senator, is that for me in this forum to start in the most serious discussion, even with you, to an expression of

my views of the morality on that subject would be taken by a substantial number of people as the beginning of a commitment on my part to go in one direction or another. You and I undoubtedly could agree that it should not be so interpreted, and it would not so portend my decision one way or the other.

I do not believe it is realistic to expect that a substantial number of people listening to our discussion would share our views.

Senator KENNEDY. Why is that? Why do you arrogate to yourself the feeling that the American people can't understand that or make a judgment? What do you know and I know that is superior to the common sense of the American people when you are being recommended to serve on a Court that is going to be the guardian of the basic rights and liberties of those people? I find that kind of comment and statement troubling, Judge—

Judge SOUTER. No; I—

Senator KENNEDY [continuing]. To say that I can tell you and you can tell me and we can understand, but the great number of people who are watching this whole hearing can't understand it. I mean, I think that attitude is troublesome.

Judge SOUTER. Well, I am taking you at your word, Senator, that you believe it would not affect my judgment, and I know that you are taking me at my word that it would not affect my judgment. But I believe also—

Senator KENNEDY. And you expect the American people to take that as well.

Judge SOUTER. I believe that there are a great many people who would not accept the view that you and I are willing to hold. And I don't believe that those people should be subjected to the kind of moral discussion which in their view would clearly compromise my objectivity. I think a great many of those people would say I am willing to accept his judgment that his own moral view will not influence his decision in the case. But if he then engages in a public moral disquisition on what that judgment is, it must be because there actually is some indication about what he would do in that discussion.

And I do not think we should ask people, as it were, with a double standard, number one, to accept that the position is irrelevant, and yet at the same time to engage in a discussion of the subject which you and I agree is irrelevant.

Senator KENNEDY. Well, you wouldn't even share with us whether you think in the circumstance of rape or incest that there is a moral question or issue? You wouldn't tell us whether you feel that that was morally repugnant?

Judge SOUTER. I can certainly indicate, as I hope anyone would, that the complexity of the moral equation may change in those circumstances, but I would respectfully be asked to be excused from answering that question.

Senator KENNEDY. I thought you gave us a very moving story yesterday when you indicated that a number of years ago you counseled this student and the anxiety that you went through over that 2-hour period in that closed room. And, clearly, no one asked you what our counsel was, and I think that that is certainly appropriate, nor were you willing to share that counsel with us, which I think was appropriate as well.

But I think that the refusal to answer a basic kind of question on the issue of morality when you have just within 15 minutes talked about the morality of the death penalty and about sentencing white-collar crime, must be troublesome to many women in this country, on this issue which is of such basic and fundamental importance, where there is extraordinary division. Certainly there is in this panel.

Can you understand the anxiety that they might feel that you are not prepared to make even a comment?

Judge SOUTER. Senator, I can understand anxiety on both sides of the issue. I also think it is important to distinguish the significance of the subjects that I was talking about a few moments ago. I was not talking about my personal views on the death penalty. I was talking about the personal concern that a judge who believes the death penalty is wrong would have if he is asked to take a part in its administration.

With respect to the morality of sentencing on white-collar crime, that did not involve a question of whether it is moral to sentence or not. It involved the question of whether sentencing should take place on the basis of evenhanded standards evenhandedly imposed on all sorts and varieties of crime. And upon that matter, I think there is no division within the country.

Senator KENNEDY. Well, you were the one that used "morally" as associated with white-collar crime. I wrote it down. I will let the record rest on it, but you were the one that used the words, the moral issue with white-collar crime.

Judge SOUTER. And I believe there is, indeed, a moral obligation for evenhandedness in criminal sentencing.

Senator KENNEDY. You are sensitive to the issue of morality on death penalty, sensitive to the issue of morality on sentencing of white-collar crime; but on the issue of abortion—I am not asking you at all about *Roe v. Wade*, but on the issue of abortion you are not prepared to make any comment or statement—

Judge SOUTER. On the issue of abortion—

Senator KENNEDY [continuing]. On what is your view, whether it is moral or immoral, or at least whether you have some feel for the outrageous circumstances of rape or incest that you are prepared to make any kind of comment or statement on.

Judge SOUTER. Senator, I think you know from the discussion yesterday afternoon of my concern for the circumstances in which these questions arise. But a discussion of morality in the context of this hearing of the *Roe v. Wade* decision I believe would be interpreted, in effect, as inconsistent with the view I have expressed that my personal views would not play a part in the decision. And I will respectfully ask you to excuse me from answering that question.

Senator KENNEDY. Just to get back very quickly on the matters that we talked about yesterday on the EEOC, the church and state issues that were talked about this morning, literacy tests that we talked about, you indicated that you were acting as the lawyer for the Governor. I reviewed with you the oath. I didn't put it in the record; I will. The oath of office that you take as attorney general talks about upholding the Federal Constitution as well as the State constitution and the statute. It sets out the responsibilities for the

State attorney general as well. But you have taken the position that these cases were brought as a result of representing the Governor.

What I would like to ask you is whether you formed any personal view when you were preparing those cases. Did you form any personal view about their rightfulness or wrongfulness? I think as lawyers we know we take the cases, and we do the best we can as lawyers in those circumstances. But sometimes when the outcome is in, even if we are on one side and we don't prevail, we are kind of relieved that the other side won.

Judge SOUTER. As you rightly say, we can sometimes accept our losses with great equanimity because we recognized that, in fact, the right result has been achieved. Our responsibility in those circumstances is the responsibility to be the best advocates that we can.

As I said this morning, one of the foundations upon which I think the vitality of our constitutional system rests is that there will, in fact, be vigorous litigation to give the courts the best chances that they can have to get it right. And if we play a part in good faith and with vigor in those circumstances, I think we can be proud of ourselves.

Senator KENNEDY. Well, I come back to this, Judge, because I thought yesterday you talked in a very convincing way about each time that you make a ruling or make representation, you are conscious about what the impact is going to be on individuals.

Judge SOUTER. That is correct.

Senator KENNEDY. That was stated a number of times yesterday by yourself. So when I think of what the impact would be of your position, if it had prevailed in opposing or questioning the authority of the Congress on abandoning the literacy tests, or on collecting information in order to be able to strike down discrimination, what the impact would be on blacks, what the impact would be on women, on minorities—I am just wondering whether during that period of time you ever formed an opinion as to what you hoped that that judge would rule?

Judge SOUTER. Senator, I doubtless formed an opinion, but the opinion was related to the case that I was arguing. The question that you make assumes that I was arguing, for example, as advocate for the State in the EEOC case, that the EEOC could never lawfully collect statistics when there was an indication that discrimination had taken place. That, of course, was not the position of the State.

The argument assumes that in the case of literacy tests I might have been arguing that literacy tests should be enforced, even when they were being enforced for discriminatory purposes. In fact, what I was arguing is that a literacy test which had already been declared constitutional when used for nondiscriminatory purposes should be within the power of the State.

Senator KENNEDY. Let me ask this: Do you believe the right result was achieved in those three cases: church/state, the literacy test, the EEOC statistics?

Judge SOUTER. I think the right result for the Nation was, indeed, achieved. The question in the cases before us was: Can you get the right result for the Nation and still leave States which have

done no wrong in the position that they were in? The Supreme Court of the United States said, as a practical matter, Congress is correct to say no.

Senator KENNEDY. Well, do you agree with it?

Judge SOUTER. I accept that decision, yes.

Senator KENNEDY. Well, I am not asking whether you accept it. You have to accept it. I mean, if you—

Judge SOUTER. Well, when I say I accept it, I say I am willing to agree that, in fact, Congress has that power and properly used it in those cases.

Senator KENNEDY. But you don't tell us whether you personally think that that was the right outcome.

Judge SOUTER. Well, if you—sir?

Senator KENNEDY. You are telling us that you accept it, which you have to. If it is 9-0 on the Supreme Court, you have to. I am just asking you personally. Do you think it was right?

Judge SOUTER. Are you asking me whether I think literacy tests should be used—

Senator KENNEDY. I am asking you whether the final result—

Judge SOUTER [continuing]. For any discriminatory purpose?

Senator KENNEDY. No, no. Listen. You are a good listener here. Judge SOUTER. OK.

Senator KENNEDY. In each of the final outcomes of those three cases—the EEOC and the literacy test and the church and state cases—when they were decided did you think that the outcome was right?

Judge SOUTER. I think today the outcome is right.

Senator KENNEDY. Was the outcome right then? Did you believe that the outcome was right then?

Judge SOUTER. On the literacy test, I had a more complex reaction than that. The trouble in the literacy test case was—

Senator KENNEDY. Just answer, Judge, please. Those three, yes or no. Can I get a yes or no?

Senator THURMOND. He can explain it.

Judge SOUTER. The answer is yes with one qualification on the literacy test case, and that was it seemed to me at the time that a State which was acting consistently with the 14th amendment—and the State was—had done no wrong. I think it is correct to say my judgment today is that probably the problem of literacy tests could not have been dealt with as a national problem except in the way that Congress did. But, I would not concede that there was something inappropriate about defending a practice which the Supreme Court of the United States had declared to be constitutional.

Senator KENNEDY. Talking about your position that you took on the literacy, keeping in mind what you said yesterday about the impact of your rulings or your representation on real people, you also said that those who were illiterate, their votes diluted the votes of people who can read. I remember that as well.

Judge SOUTER. That is a mathematical statement, I think.

Senator KENNEDY. It is a what?

Judge SOUTER. I say that is essentially a kind of statement of math.

Senator KENNEDY. What is a statement of math? That if you have people who can't read—as Father Hesburgh pointed out,

when they were considering the 1970 Voting Rights Act, when he said that American people can get information from television and from radio and can make informed judgments, and you were reaching a decision virtually at the same time—you said their votes dilute the votes of people who can read, and now you are telling us it is a matter of math?

Judge SOUTER. Senator, I think what I was referring to in the quotation that you are making is a problem that Father Hesburgh was not referring to. That is, we were concerned—and I think the context in which that was made—you correct me if I am wrong—was the context in which questions were being placed on constitutional amendments in which the questions themselves were of some great length and complexity, so that somebody who could not read simply could not know what was before that person.

Senator KENNEDY. Well, I will let the record be corrected by either one of us. But as one who was around in 1970, the point was made by many of those who represented States where these literacy tests were lifted that we ought to have it nationally, uniform, across the country; let's not target just Southern States. If we want to have something as a matter of national policy, let's do it uniformly. The issue came up about what had been the impact the last 5 years when we had effectively eliminated the literacy tests. And the question was brought up during that time, well, if you have any illiterates, what has happened in those States? What has happened? Has it somehow distorted the whole voting process? And Father Hesburgh, who was the head of the commission at that time, said his commission made the finding that it had not, that people could gain information through other means. I mean, you can have people who work with their hands. You can have poor people who haven't had the benefits of education, formal education, and can be remarkably intelligent and informed.

The real point is when you say that it is really just a question of math, whether it is diluting the vote, you know, I think that that is something I find troublesome.

As I understand, then, on the other two matters—the church/state and EEOC—did you believe at the time that they were the correct decisions?

Judge SOUTER. I would not have been engaging in the particular practice in the church/state issue, and I think it is appropriate to have a national collection standard on the EEOC.

Senator KENNEDY. You know, you demonstrated—and I admired—the quality of resisting and standing up, and I think in response to an earlier question today you said “crusading” on the issue of gambling casinos in New Hampshire.

Judge SOUTER. I am not sure I would use the word “crusade.”

Senator KENNEDY. OK. Well, I think it was asked whether—what was it? Anyway, you took on a tough issue. You took on a tough issue, a controversial issue, and were ready to stick your neck out, which I have a good deal of admiration for. Second, you stood up to the Governor on behalf of your attorney when they went down to investigate certain of the preliminary safety requirements at Seabrook. I understand that there was a confrontation between you and the Governor, or a difference. But at least as I understand it,

you stood your ground, and I think that that is admirable. You obviously felt strongly about it, fulfilling your responsibilities.

I am just wondering how you reacted in those cases, particularly in the church/state issue, after you got the preliminary ruling from Judge Skinner in Boston that found that the declaration was violative of church/state separation, and after they went back to redraft it. The new draft came out and talked about Jesus being a historical figure, I believe.

Judge SOUTER. That was the tenor of it.

Senator Kennedy. "Honored him as an historical figure without regard to the religious issue."

The thing I would ask you is, did it ever occur to you that that was kind of demeaning religion, Christianity? You know, I mean, I think those of us who have observed Good Friday—12 to 3 are the special hours for the churches.

Judge SOUTER. Well, Senator—I am sorry.

Senator KENNEDY. And now we are talking about Jesus as an historical figure. Did that tick into your mind at all? I mean, it just caught me sort of right away when we were looking through this, and I just wondered whether it troubled you at all.

Judge SOUTER. Well, I think, Senator, if that had been my proclamation, I think that would be a very fair objection to it. My own religion is a religion which I wish to exercise in private and with as little public—little expression in the political arena as is possible.

Whether or not my client, at the time, believed it was demeaning, I do not know. I am sure he did not intend it in a demeaning way.

Senator KENNEDY. Mr. Chairman, I don't know what the time-frame is.

The CHAIRMAN. Finish up.

Senator KENNEDY. I have just one area that I would like to direct your attention, and this was in the *Bouselet* case. I think I indicated to you I was going to inquire of you about that.

Judge SOUTER. You did, yes.

Senator KENNEDY. In that case, we had two elderly brothers, 76 and 79 years old, who shared a single full-time job as janitor and they had been doing it for 22 years. Then they lost their jobs and were denied unemployment compensation on the ground that they were not ready, willing, and able to work full-time as required by State law. They felt the statute was not fair and tried to appeal the decision against them. A hearing was held by the State Employment Commission. As I understand it, they didn't have a lawyer at this stage, but they were assigned what is called a lay representative.

They testified that they could not work full-time because one of them had a weak back and the other was suffering from partial blindness and angina. They said they could work 4 hours a day but not 8 hours a day.

Their unemployment benefits were denied by the Commission. They had been paying in unemployment compensation over the years that they had been working.

Judge SOUTER. Well, their employer had been doing so, sir.

Senator KENNEDY. Right. Well, in the State, there is no participation at all by the employee?



Judge SOUTER. I think it is just the employer who pays in.

Senator KENNEDY. Well, in any event, so they got a lawyer to represent them at this point and they took the issue to your court, the New Hampshire Supreme Court. They raised claims under the Federal disability statute and Federal age discrimination law. You wrote an opinion in that case and you rejected their claims.

You know, perhaps the result was the correct one and perhaps it was completely clear under the law you were bound to apply. This case caught my eye because your personal reaction to the claims of the two elderly brothers seemed, quite frankly, so hostile and really so heartless.

The way that you reached the result and the language you used in reaching it is very troubling. Let me read an excerpt from your opinion. I quote, "It is neither common knowledge, nor do the plaintiffs claim, that a weak back, poor eyesight, or angina necessarily prevents an individual who can work 4 hours a day, from working 8. The back was described as going out of joint when least expected and there was no indication that the eyesight got worse in the course of a day. Nor was there any testimony that the risk of angina symptoms varied with the duration as distinguished from the intensity of work."

They are rather harsh words. It seems to me to be remarkable that these two brothers were working at all, quite frankly. [Laughter.]

But you seem to be questioning their willingness or their refusal to work harder. And one of the legal reasons you gave for rejecting their claim was that they had not properly raised them in the State commission hearing. They did not have a lawyer there, of course.

Isn't that rather a technical and excessively legalistic ruling? I mean, why couldn't you just have simply sent the case back to the State agency for a fair hearing of their claims?

Judge SOUTER. There are three things, I think, that I should say in response to that, Senator. The first is one upon which I do not have a sufficiently detailed recollection to say a great deal. But I believe my recollection is correct that when that case first came before us for review, we found what had happened in the lower administrative tribunals sufficiently unclear that we sent it back with an opportunity to modify what had been done or to clarify the record in some way. And if my recollection is correct, this case had come back to us, in effect, a second time.

The second thing is, is there something inappropriate about the factual determination in the case? And I think that is a subject upon which there simply cannot be a sound judgment without recognizing one thing, and that is the fact determination in this case is a fact determination just as in the usual case of an appeal from a trial court. It is a fact determination for the trier of fact and not for the appellate court.

The question is whether the trier of fact had a basis in the evidence for coming to the conclusion that it did reach. So this was not a case in which the unanimous Supreme Court was coming to unsympathetic findings. It was a case in which the Supreme Court was faced with the issue that it is always faced with on appeals of

this sort. Was there an evidentiary basis upon which the finder of fact below could have made the determination that was made?

The third thing that I think should be said is whether there is, in that opinion, an insufficient degree of sympathy appropriate to an appellate court. Let me suggest to you that there are two things in that opinion which I think belie that suggestion. The first one, and this is the lesser of the two, in my judgment, is the fact that everyone on the court recognized what, on behalf of myself and the court, I tried to express, I think, at the end of the opinion—I won't say that it is the absolutely last paragraph, but I think it is in there somewhere—about, in fact, how admirable we believed these two men to be.

Here they were, at their ages, with health which was uncertain, and yet they had worked as hard as they had and still wanted to go on working, if they could, on a part-time basis rather than simply giving up.

And I remember—I don't remember the exact words that we used, but one of the things we did not want to do was to end our opinion without some reference to the fact that we had great respect for the clients—for the petitioners before us.

The second thing that I would suggest in determining the kind of the willingness of the court to hear these people's claims goes to the fact that at the end of the opinion, as you pointed out yourself, the court did, in fact—although it did not feel itself obligated to do so, it did, in fact, take up the equal protection claim and the Federal claim; I think it was under the Rehabilitation Act.

Someone said to me afterwards, if you are really going to be consistent in enforcing your rules about how things must be raised, both at the trial level and brought to you on appeal, why did you make any comment? Why did the court make any comment on those two points?

There was really a two-fold answer to that. One was that at the last level of administrative review, there had been a reference to those points and we believed that there was some utility to be gained by referring to it.

The second reason is one which, in fact, is not in that opinion. But it is one which I know the court felt, and that is we believed—as you suggested we might be able to do, we believed on the record before us and the law before us, we had come to the only decision that we could come to.

We also believed that if we said nothing about the substance of the claims of these two brothers under the equal protection clause and the Rehab Act, they were going to leave our court after that case was over believing that they might very well have had a claim on which they were entitled to win, and yet they had lost it because of some legal technicality or some technicality of the Supreme Court.

And we said, basically, these are two good people; they should not spend the rest of their lives believing that on some kind of a legal technicality of procedure they have lost rights that they otherwise would feel entitled to.

So we went that extra step out of the way and we looked at their claims on the merits, and I think that is reflective, not just on my part but on the part of the entire court, of a sympathy with the

claimants before us that was personal to them and that took into account the respect that we felt for them.

Senator KENNEDY. Well, you wrote the opinion?

Judge SOUTER. Yes, I did.

Senator KENNEDY. And I didn't see in the file the procedure which you referred to.

Judge SOUTER. I don't think it is set out there, no. I am stating that from recollection and I think my recollection is correct.

Senator KENNEDY. Just the material that was provided does not reflect that.

Judge SOUTER. That is correct.

Senator KENNEDY. Nor in the conversation with the attorney did he indicate that to my staff.

Judge SOUTER. My best recollection is there has been a remand.

Senator KENNEDY. I will have the record show whatever way and we will try just to have that.

As I understand, included in your opinion is that the issues on disability and age discrimination had not been raised in a timely fashion.

Judge SOUTER. I believe that is correct. Frankly, the opinion is so complex, I would have to have it before me, but I am sure you are right.

Senator KENNEDY. They were not raised in a timely fashion, and I think any fair reading would indicate that it was not raised at the time of the appeal when they were represented by a lay person. And I think a legitimate question could have been, why not send it back and say, the timely fashion is now, perhaps—it was not raised by a lay person who wasn't even a lawyer—and let them bring it up in the lower court.

Judge SOUTER. Well, I think where your question, in a way, Senator, has the advantage is that—and I want to be very careful about what I say on this because I do not recall the procedural history of it, as I said, in any detail prior to that opinion.

But I think that if the petitioners had said to us, we don't want an appeal right now, what we want to do is to be able to raise claims below which we didn't in the first instance because we didn't have counsel, I think the court would certainly have considered seriously a request to go back.

And the point, as I said earlier, that I simply cannot remember because it has nothing to do with the opinion as we wrote it, is the extent to which such a request was made before the court. The only thing I can remember is—if I remember this correctly, I think there was at least one remand for a clarification of the record, and whether there was an opportunity at that time to enlarge it, I don't remember.

Senator KENNEDY. Well, I would ask, Mr. Chairman, whatever was the factual situation be made a part of the record.

Just the final point is that the outcome of your decision effectively left these two elderly persons that had been working 22 years virtually out in the cold.

Judge SOUTER. Senator, what left them out in the cold was a law passed by the legislature of the State which was not unconstitutional. One of the respects which the judiciary must have for the coordinate branches of the Government is that whether we do or

do not like or sympathize with the results that legislatures sometimes give us, if they are constitutional, they are legislative judgments and they are intended to stand.

Senator KENNEDY. But the issues about the violations of 504 of the Age Discrimination Act which were raised by their attorney—part of the conclusion in reading your brief is that they were not raised in a timely manner because they were not raised when they were represented by a lay attorney. And because they were not raised and were not adjudicated they were left out in the cold. Now, whether they could have been able to make that case in a lower court or not, just the final and bottom line is that was the end of it.

Mr. Chairman, I have taken more than my time.

Senator THURMOND. Mr. Chairman, I think the record ought to show that Judge Souter's decision was a unanimous decision, was it not?

Judge SOUTER. I believe it was.

Senator THURMOND. In that case.

The CHAIRMAN. Well, Judge, we are going to end. I want to tell you that when we come back on Monday, you don't have to worry about my asking you any more questions along the lines I pursued. There will be other issues, but the whole issue of privacy, I think you and I have explored as much as we are going to be able to explore it.

I thank you for your graciousness today and I look forward—  
Senator LEAHY. What time Monday?

The CHAIRMAN. We will reconvene Monday morning at 10 a.m.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. The hearing is adjourned.

[Whereupon, at 5 p.m., the committee adjourned, to be reconvened on Monday, September 17, 1990, at 10 a.m.]