

from the intent of the Convention. Whether we could expect such happy results another time is a question I think everybody had better face.

The CHAIRMAN. Well said.

Senator HEFLIN. I believe my time is about up. Is my time up?

The CHAIRMAN. You still have 2 minutes, Senator.

Senator HEFLIN. Well, I noticed, too, in your opinions on the Supreme Court, trying to review quite a large number of them, that you wrote a lot of concurring opinions and dissenting opinions the first 3 years, but in the last 4 years you have hardly written any other than the opinions that you have written yourself. How do you account for the absence of your writing concurring opinions? Have the issues changed, or is it that you are spending more time doing something else?

Judge SOUTER. No, it is not that I got tired or took up another activity. I would like to think that I probably got a little bit more persuasive with my colleagues in conference. [Laughter.]

Senator HEFLIN. That is a good answer. That is all I have. I wish your colleagues—well, your colleagues probably listen to you a lot more. It is hard to get them to listen here in this forum. [Laughter.]

The CHAIRMAN. The judge longs for those days when he was on the Alabama Supreme Court. But we all do listen to him here, anyway, notwithstanding that.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

I was very interested in the dialog between the two judges, and I have the greatest respect for both of them. That is a very interesting part of what you will be doing. I would think that that obviously is something that you thoroughly enjoy doing. You like that interchange of judge to judge and discussion of distinction upon distinction and case upon case and that kind of—I guess to some it would be excitement. [Laughter.]

But not me. I am fascinated by that because that never appealed to me in my practice of 18 years. When there would be a vacancy and they would say there is a judgeship available, boy, it almost made me cower in the corner. Many people are aware of why that would be, I think. There are certain of us that enjoyed the give and take, and it is always most intriguing to me to hear the discussion of very able lawyers, who I think would have been great jurists—and one who is a great jurist, and that is the judge from Alabama. But enough.

Let me just say I do apologize for being absent on Friday. I was necessarily so. I spent the day with two former Governors, one my predecessor, U.S. Senator Cliff Hanson. And while I was gone, I was able to watch some of the activity later in the day, and then I have seen some tapes of the activity. And I can just tell you that out in the land—and I was with a very diverse group of people from all over the United States, jurists, lawyers, Medal of Honor winners, football players—there is a good feeling about you. There is a good feeling out among those people from all over the United States who have a good sense of who you are. That has come through to them. And I think that that is because you are there, in this very patient way, answering every single question that can

possibly be presented and necessarily blunting some that you just cannot feel that you can respond to which I understand.

But I also understand the intensity of my friend from New Hampshire because I know him well. We came here the same year, and he leaves now and we shall miss him. I will miss him personally as a friend. We have had some great times together on the Judiciary Committee.

This issue of abortion, it has been really the essence of this hearing. I shared with you my views. I think Senator Leahy shared with you some very poignant personal things. Senator Humphrey can share those. It is so curious to me as to how our fine country came to the point where such an intimate and personal and searingly wrenching decision made by a female about her own condition and body and substance is the stuff of full page ads and lobbying of an intensity that you can almost hear whirring, by sometimes very thoughtful people, but sometimes—maybe more often, in my personal opinion—by extremists on both sides.

Where are the people in the middle ground? Who represents them? Who are they, people who anguish in and pray about the terrible choice to be made? And to me it must be the most terrible choice of a lifetime other than another one that the Supreme Court will be dealing with, and very soon, and that is the right to die. That is next on the agenda. The right to life, the right of choice, the right to die, and, as euphemistically and crudely put, “to pull the plug”—a terrible choice.

It is curious to me how it came to this where people come to pray about this terrible choice they make, but that they need, at least in my view, to have all of the legal options open and available to them after the critical choice is made. I am not going to ask you anything more about that, but it just seems to me that you will handle that.

As a person who is personally pro-choice, I don't think that either side should press upon a nominee their personal views. I don't like that. And I don't think that is what the Court is there for, either side.

I guess I was quite impressed by an article in this week's papers—Parade, I believe—by former Chief Justice Warren Burger, who I have a great respect for and have come to know as a friend, about the questions to be asked in these types of proceedings. What are the types of questions to be asked? He had his own pungent view of that, like Warren Burger does about things. He was a remarkable jurist because he laid it right out on the line. But I certainly subscribe to what he said about questions to be asked in these types of proceedings. Are we looking for a superlegislature? And what are we doing when we impress deeply held, intimate, personal views on a nominee and insist and insist and insist and insist that he come up with an answer? I think that is an error. That is my personal view.

I hope you go on the Supreme Court. I think you will. And when you get on there, let me ask you, what will you do when—and I think Senator Grassley spoke to this—I looked at some of the transcripts—when he talked about creating rights and remedying every social wrong. How would you approach a case which comes before you in which a party is clearly deserving of some kind of relief as a

human being, but the Congress has just as clearly refused to enact any legislation that would provide that desired or requested relief? What would you do?

Judge SOUTER. Senator, I would recognize that I was not sitting there with the power to revise the decision of Congress; and that the only power that I was sitting there with was the judicial power; and I would look to the Constitution of the United States.

Senator SIMPSON. And in doing that really be able to remove your own deep personal feelings about the issue confronting you?

Judge SOUTER. We always ask, we constantly ask ourselves, Senator, whether we can do that. We have no guarantee of success, but we know that the best chance of success comes from being conscious of the fact that we will be tempted to do otherwise. And by keeping that in our consciousness, we develop a judicial self-discipline, not a perfection, but of doing the best we can to approach a level of objectivity and to repress a level of purely personal choice.

Senator SIMPSON. Do you feel you have attained that in your professional career?

Judge SOUTER. I believe I have done the best I could, and I think I have done reasonably well. One is never perfect.

Senator SIMPSON. That is a very difficult thing for me to imagine anyone really being able to do. I guess it is because of the combat of politics that goes with that. I think that sometimes it is very difficult for a person to divorce their deep personal feelings and prejudices—and I don't mean that in the racist sense of the word. I mean that in the prejudice sense of the word before it was tilted in that direction.

I think that is a difficult thing to do, and it would require, as you say, a judicial self-discipline. Is that the way you described that?

Judge SOUTER. Yes, sir.

Senator SIMPSON. And that comes from your training? That is something you have learned to do? It is?

Judge SOUTER. We try and we work at it.

Senator SIMPSON. I think, if anything, you have displayed self-discipline in these proceedings, and I could only imagine that that would be something you could attain in decisions as well as here in this nomination proceeding.

I noted, I think it was Justice Brennan, as he wrote, there was a singular series of decisions off and on that were written with regard to immigration, illegal immigration issues, when I happened to be working on the issue in the legislature. In essence, what he would say would be that—Justice Brennan would say that—he would admonish the legislature to do its work. He would say: I will not respond to this portion of the requested relief. This is for the legislature to do. Admonishing Congress, if you will, to do its job.

Now, how do you visualize you would press Congress to do its job when you get to a point and say this decision is not for this Court, this is for the legislature to do? How do you press a legislative body to do its work?

Judge SOUTER. I don't know how you press a legislative body. I think you do it with the same respectful assumption that you would like to be given by the legislative body itself. That is the assumption that when an obligation to act is clear, people who have taken the oaths that we all take will follow them and will act. And

I think probably I would not regard it as my business to lecture so much as my business to record that in a given instance I think the appropriate time to act is there. And I would, beyond that, rest on the sense of obligation of the legislative branch itself.

Senator SIMPSON. Well, I was interested in your remarks as I reviewed them, and the essence of them is, I think—and let me paraphrase, that you said Friday that it was certainly—you didn't use the word "regrettable," but it is unfortunate that if the American people should believe that it is only the Court that really is the vanguard of protection on a constitutional issue, but that it is also equally important that the legislature be doing that, protecting constitutional rights. And I certainly think that is true. But in legislating, whenever one of our colleagues on either side of the aisle rises to say that is unconstitutional, that is usually looked upon as the final futile debate. Why, you can't do that; that is unconstitutional.

I have legislated for 25 years, here and in Cheyenne, WY, and it seemed to me that, oddly enough, in spirited debate, the final refuge is: But that is unconstitutional. And then they just trample right over the top of that poor soul and pass the bill anyway. And that is not good, but at least the issue is addressed, and then we talk about it.

Let me ask you, do you think a judicial decision can be quite instructional to a legislative body or to the Congress on an issue, giving guidance even? Do you think that is possible?

Judge SOUTER. It is certainly the judicial aspiration. I admit that I have read some opinions of my own sometimes, and I have wondered just how much guidance they gave. But that is our aspiration, and it is an aspiration to a very respectful guidance. We are not there to tell legislators how to legislate, but we are there as judges, whatever the court may be, to try to tell legislators and the rest of the State and the rest of the Nation, as best we can and as comprehensively as we can, what we believe the law to be.

Senator SIMPSON. I know that is true. Would you hesitate to lay out some suggested remedies respectfully submitted to the Congress when you come to one of those situations that is unresolvable because of your interpretive theory of judging?

Judge SOUTER. Well, I have had cases of my own in the past in which I have called the legislature's attention to what seemed to me an unresolved statutory problem which the case before us touched upon but which didn't require a solution. The effect of opinions like that is to direct the legislature's attention. But I think what the court has to be very careful about—again, whatever the court may be—is in observing the line between doing that, crossing over the line and start laying out substantive options, because then I think we are beginning to tread into the legislative arena. You can't lay out options very well without somebody thinking that you are winking on one of them. And that is where we have to draw the line.

Senator SIMPSON. I hear that. I think more and more now though, with the number of things we address and the absolute obsessiveness of picking through Supreme Court decisions, every word, every nuance and meaning, that it is—I say to me it is—helpful to have the Supreme Court suggest respectfully, always, of

course, that the Congress do this or that with this statute. That is a helpful thing.

Would you do that?

Judge SOUTER. I would try to respond, I would try to make that kind of a suggestion, so long as it did not cross that line, in effect saying to Congress what it is that Congress ought to do. I think the courts can address the fact that there is a problem without trying to tell the legislature how it ought to solve that problem.

Senator SIMPSON. Well, I think that that is something that is necessary for any court, and with the three branches of Government, we often recommend—we say, well, we think the Supreme Court should do this. We don't hesitate to say that here and would expect the same from the Court.

You were asked about the relationship between the Court and Congress in specific instances, specific issues. If I might ask a more philosophical question, one of the Federalist Papers—and I hope that this has not been asked before because, as I say, I was absent during the entire proceeding on Friday, necessarily so. One of the Federalist Papers described Congress as “the most dangerous branch,” and therefore, the Constitution was crafted with the potential of congressional overreaching fully in mind.

What is your view of Congress in the constitutional scheme? How does the Court balance the needs for representative government, proper compliance by all, including Congress, with the Constitution?

Judge SOUTER. I think the only way it can balance it is simply by keeping in mind that there are constitutional values ultimately to be served and constitutional limits ultimately to be respected. And I will not this afternoon personally adopt the Federalist language on that point, but I will say that for anyone who shared that concern, *Marbury v. Madison* is a happy answer because, by and large, at least there is a judicial reviewability on the question of constitutionality, and it is our obligation to make sure that that, in fact, is the extent of the scope of review.

Senator SIMPSON. There have been some highly technical discussions here on legal issues with regard to, again, trying diligently from all sides to get you into the issue of *Roe v. Wade*. And I think you have done a very adroit and responsible job of dealing with that. But we get into issues there, again, of technicality that go back through remainder-men and contingent remainders and fee tails. I remember those things, fee simple, fee absolute, fee conditional, defeasible fees, determinable fees, and you might imagine that I had a very difficult time in that course. The transcript would reflect that.

Judge SOUTER. I hope you are not going to ask me to define all of those.

Senator SIMPSON. No. The last time we did this exercise, some minion of the Fourth Estate said: Aha, we want to find out what your grade average was in law school. We want the transcript.

The CHAIRMAN. No, don't tell them, Judge.

Senator Simpson. No, no, Joe, I'm in as bad a shape as you are on that. [Laughter.]

And so they asked for the transcripts, and I said, well, I am offended by that. I said I was among the top 20 in my class, to which

this one fellow scurried away and he didn't know that there were only 18 in the class. [Laughter.]

I had to scratch for everything I could dig out of that law school experience, because there were 18 in the class and 5 of them graduated cum laude, which meant that there were only 13 places for me to mess around in. There were five gone before I got to the table. It was a troubling, you know, and difficult time. And I knew I wanted to be a lawyer, and I knew I would get that degree wherever it was that I could get it. I did, and then I did sober up a bit and get serious.

Anyway, let me ask you this: I think of this because of my own personal life. The Al Simpson of 18 is nothing like the Al Simpson of 59, with some very fine, distinctive, solid, stable points in between. What is the difference in philosophy between the David Souter of his entry into the 51st year of life today and the David Souter of 20 years ago just 4 years out of law school? And what do you think about that?

Judge SOUTER. Well, the answer is relative, but I think probably I would sum it up by saying that I have learned something about the wisdom of Benjamin Franklin's advice. When he was addressing the Constitutional Convention and asking them to accept the draft, he said, if I remember him well, he said, "Join with me for a moment in doubting a bit your own infallibility."

Well, I have learned to do that.

Senator SIMPSON. He said, again?

Judge SOUTER. "Join with me in doubting for a minute your own infallibility."

Senator SIMPSON. Well, I like that. Well, I didn't intend to refer to the chairman in any way other than with greatest respect, but, I tell you, whatever he did in law school—and he referred to it first—could never have matched the anguish of mine. I will leave it at that. God, I hope so.

Hearing you answer questions about cases you were involved in, decisions you were involved in, things you did, got me thinking of the things I did in the first 4 years of law practice were absolutely stupid and absurd. And I am just fortunate I didn't take some clients down the tube with me. I remember making it right with one. I just put the money up. I said, you know, I didn't know that was a nonnegotiable note. I thought it was a negotiable instrument you showed me. And he said, "Well, whatever you told me, Simpson, it cost me five hundred bucks." And I remember making that one right.

I wrote a Law Review article called "Indirect Legal Consequences of a Felony," or some other trivia of unknown dimension. And I couldn't even imagine sitting out there trying to define it or what I was thinking about when I did it. I knew I was just doing it to get a grade and hope they wouldn't find out how little I knew of the subject.

So, but that is there for all to witness, that article, and several others that are really quite startling. I hope everyone will read them. They are not published, but they are marvelous. But I hope we will remember this in the midst of all this, and the chairman has been very fair, and now we are winding down.

But if we can keep in mind that there really is one, only one great exercise of the mind here, and it is very simple for lawyers, and that is to see people go on the bench and see people who practice law who will assure a just and fair determination of rights based on the facts and the law of each case that comes before us, and not do the head-of-the-pin dance, or "what would you do?" or the hypothetical. Rule 1 of the Code of Civil Procedure: Simple, just, determination, whatever it is, swift and fair. And that is the issue. And I think that you are highly capable of that, skillfully so.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

For the record, I would like to publicly dissociate myself from the Senator from Wyoming's law school record. The only thing I learned in law school that turned out to be true, Judge, is that the A students go on to be judges and professors, and the B students work for the C students. That is the only axiom I have ever found that turned out to be true. [Laughter.]

And I don't know why everyone is so worried here about the Court overreaching. Bickel went on to point out that the Federalist Papers basically made the assertion—and I think this is Bickel's—it is paraphrasing him if not quoting him. [Laughter.]

Bickel said something to the effect that the Court was the least dangerous branch of the Government. I am not sure why everyone is so concerned about overreaching of the Court if it is the least dangerous branch.

But having said that, let me yield to my colleague from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Souter, when I questioned you yesterday, I mentioned this growth idea, and what you might do as a member of the Court to understand a little more the desperation of some in this country. Have you reflected on that at all? Do you have any ideas?

Judge SOUTER. I have. I don't have an itinerary to lay out, and I know that that is not what you were expecting me to do. But the one thing that was so clear to me when I was thinking about your question afterward is what you yourself suggested when you asked it. You said in so many words that when you had come to the Senate, you didn't know what those things are that would be sort of the objects of your own growth. But suddenly you were presented with them, and it was clear to you that there were blank spaces in your life which you had never concentrated on before. And once you knew that, it was obvious how to go about filling them.

I have had that same experience. I never knew when I started practicing law what I was going to see as problems in society that would occupy a great deal of my time, but suddenly they were there. And without any expectation, you knew what you needed to know or you knew what you didn't know and what you should concentrate on.

I have no doubt that if I should go on the Supreme Court, the stimulation of my colleagues and perhaps even more importantly the stimulation of the issues and the cases that come before us will make the path of what I think I would call an organic growth as clear to me as it has been to you. That is the way my life has