

Hampshire to hold that post. Until our society reaches a level of total equality, such a qualification will always make headlines. Judge Souter made me believe that my gender was not the reason for my appointment. I know that, to him, my sex was not a factor.

I am here today because I respect and admire David Souter. Judge Souter commands the respect and admiration of countless others throughout the State of New Hampshire, regardless of their political philosophies. I have unshakable confidence that Judge Souter, if confirmed, will approach the issues before the U.S. Supreme Court as he did the issues before him as attorney general, not with a preestablished political agenda or ideology, but with superior legal skills, intellect, and unparalleled integrity.

Judge Souter is the best this country has to offer.

Thank you very much.

The CHAIRMAN. Those are four eloquent statements on behalf of a man with whom all four of you or three of the four of you have worked.

Mr. Broderick, have you appeared before Judge Souter?

Mr. BRODERICK. Yes, Mr. Chairman, I have tried cases in front of him when he was on the trial court, and I have argued in front of him in the New Hampshire Supreme Court.

The CHAIRMAN. Ms. Cooper, one of the things that he was questioned on at length by a number of us were cases relating to the Equal Protection Clause and gender discrimination. I assume New Hampshire has no such constitutional provision relating to gender. Were there any cases argued in—

Ms. COOPER. I believe there is a State constitutional provision prohibiting discrimination on the basis of sex.

The CHAIRMAN. Judge Souter indicated, and it seems to me very unclear, that the test, the principle that should be applied in determining whether or not a State, a governmental entity can impact upon what a woman can or cannot do, the level of scrutiny required to impact upon her constitutional right to equal protection under the 14th amendment is somewhere between strict scrutiny and a rational basis test.

As you know, governmental agencies can almost always meet a rational basis test and find it very difficult to pass a strict scrutiny test. He indicated that he thought the test should be somewhere in between, and he indicated, though, that he was not particularly happy with the middle-tier scrutiny. He said it was—I forget his phraseology—fuzzy, not very firm, or whatever.

After having worked with him, do you have any thoughts as to where he is likely to come down on those issues?

Ms. COOPER. I cannot predict how Judge Souter would come down on those issues, Senator. I know that he would approach them with the fundamental sense of fairness and I believe that, based on my personal experience and working with him, that he has great respect for women and for women in the profession.

The CHAIRMAN. As a woman, do you have any, not doubts about his integrity or his capability, but do you wonder where he will come down on issues relating to sex discrimination and on reproductive rights? Does it concern you at all?

Ms. COOPER. Yes, it certainly does. I do wonder. I have concerns and I have questions, but I have ultimate faith in David Souter's

ability to approach those in a professional and skilled manner. He is not—

The CHAIRMAN. Congressman—excuse me, go ahead.

Ms. COOPER. I just wanted to add that he is not insensitive to the issues that affect women.

The CHAIRMAN. Congressman, you served with him on the Supreme Court—

Mr. DOUGLAS. Yes, sir.

The CHAIRMAN [continuing]. You as a Supreme Court Justice and he as a Supreme Court Justice. For how long a period?

Mr. DOUGLAS. From 1983 to 1985, when I resigned to go back into practice, Mr. Chairman.

The CHAIRMAN. He indicated that there was a ninth amendment, which came as a surprise to many of us, and he seemed to imply, although, when pressed, did not give much to back it up, that there were unenumerated rights potentially yet to be discovered in the Constitution.

I had great trouble, along with the Senator from Pennsylvania, I had great difficulty squaring his asserted judicial philosophy with the statements that he made in attempting to explain it. He sounded to me, when he spoke, just like a man who admitted that there was as good deal of subjectivity in application of the Constitution. Could you enlighten us at all on what you believe his judicial philosophy to be?

Mr. DOUGLAS. Well, I would not want to attempt to do that in the sense of summarizing what you folks have heard for 3 days from Judge Souter. I will say that, with regard to the ninth amendment, if the text of the Constitution and the Bill of Rights itself is read, the ninth amendment's very words say that there are rights unenumerated and they are reserved to the people. The writers of the Bill of Rights were concerned, as any group of lawyers would be, what if we forget something, what if we leave something out, we have search warrants and we have got freedom of religion and speech, but we might forget something, and whatever those fundamental and inherent rights are that the citizens have, they are protected in the ninth amendment.

There is a recent book out about the forgotten ninth amendment and it is very helpful reading, because it is one of those amendments that rarely gets used. It was cited in *Griswold*. I am not sure it has been cited much at all since then, possibly, you know, a footnote somewhere, but the ninth amendment is in the text, it is part of the 10 amendments that form the Bill of Rights, and I think all he was saying is that there is a textual recognition in the Bill of Rights itself that you cannot just put blinders on and say unless it is right here in these first eight amendments, the tenth being reserved to the States, it does not exist.

The CHAIRMAN. My time is up. Let me yield to my colleague from South Carolina.

Senator THURMOND. I want to thank the witnesses for coming here today, and you are people who know the judge personally. You worked with him and know him well and I am not going to take more of your time. I appreciate your testimony.