Now, Senator Simpson is next, but he, in his leadership position, is over on the floor of the Senate, so what we are going to do is go to Senator Grassley, and then when it is Senator Grassley's turn, we will go to Senator Simpson.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge, I would like to return to the dialog that we had last Friday morning, and as I review the transcript from Friday morning, I am quite comfortable with most of your responses on the role of a Justice, as one who must be every bit as constrained by the law and the Constitution as we are. I appreciated your statements about having to guard against at all times the temptation to be a knight errant, when dealing with the majestic generalities of the law, and also where you spoke of having to resist the urge to substitute your own values or morality for those of the people's representative. Finally, you spoke not just in terms of liberty, but also ordered liberty.

All of this is, I think, in the best traditions of judicial restraint practiced by Holmes and Harlan—two Justices that you say that you admire. However, you mentioned, not just once but three or four times, a concept that I have never detected in any of your opinions or in any of your testimony up until this point. In fact, as it hit me on Friday, it seems to me more the terminology likely to come from a judicial activist.

Specifically, you spoke of courts "filling vacuums," of courts—and these are your words from page 14—"forced to take on problems which sometimes might better be addressed by the political branches of government." To be candid, I am a little troubled by this vacuum concept, because if we are going to have a Supreme Court that thinks it can fill vacuums every time there is a perceived problem, then I have to agree with my colleague here on my right, Senator Specter, that you are going to be a very busy person, because democratic self-government does not always move with the speed or the consensus or the wisdom of philosopher kings who might best fill those vacuums.

I think Senator Specter is also right, that if you think that you have a warrant to fill vacuums, then you are coming dangerously close to acting like a politician, and then that means that coming before this forum, we have a right as well as a responsibility to see your whole "campaign platform" on a wide array of issues.

Now, I do not want that and I do not think you want that, and I do not think this confirmation process could stand that. Therefore, would you please clarify the use of the term "vacuum" or, even better, rephrase it in favor of something different? [Laughter.]

Judge SOUTER. I think you are giving me a hint, Senator. [Laughter.]

I certainly do not want to start my answer by saying that the last thing in the world I would want to be taken for is a politician. [Laughter.]

But I think I had better go back, as I did a moment ago, to the specific context that I had in mind when I made that statement. Let me start it with a couple of general thoughts.

The first is that the jurisdiction of the Supreme Court of the United States, of the lower Federal courts, of every State court in

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America is derived from the Constitutions that respectively create those courts. It is not derived from perceptions at the moment about what ought to be done.

Courts do not self-define their jurisdictions and they do not have the authority to define them simply when they perceive what they think is a vacuum in the political process which leaves a problem unsolved.

What I had in mind when I made that statement was the example of the 14th amendment example in *Brown*. There are a great many who argued at the time and certainly have argued since that we might have been better off if the *Brown* decision had been not that of the Supreme Court, but had been the——

Senator GRASSLEY. Let me interrupt, before you get too far down that road. Are you saying that the power given to Congress under the 14th amendment, clause 5, can be usurped by the Supreme Court?

Judge SOUTER. Certainly not. The Supreme Court's action in the *Brown* case was derived from the fact that it was charged with enforcing the Constitution, including the provisions of section 1 of the 14th amendment, not section 5. Section 5 is an empowerment of the Congress alone.

But the situation that was presented to the American populace at that time was a situation in which Congress could have taken some action and which the courts, acting under section 1, had a responsibility to take some action.

The fact was that for 58 years, separate but equal was the law of the United States, and no political branch of the Government responded to modify that, including the Congress under its section 5 power, and, therefore, it was incumbent upon the Supreme Court, when *Brown* v. *Board of Education* came down, to apply the equal protection clause as it thought right, and in my judgment, as I have said, I think there is no question, it applied it correctly.

But there is an example of a case, and that is the one that I had in mind, in which there had been no action by the political branches and, therefore, sooner or later, there was no question that a justiciable issue would be brought before the Court and that the Court would say the time has come to act upon it.

But let me leave no mistaken impression in your mind that the jurisdiction of the U.S. Supreme Court to act in that case had nothing whatsoever to do, one way or the other, with what any other branch of the Government did or did not do. The Court's jurisdiction derived from the Constitution and from its obligation to apply section 1 of the 14th amendment, and vacuums do not create jurisdiction.

Senator GRASSLEY. If you are saying that when a State fails to live up to what the 14th amendment says, in terms of equal protection and due process, that the Court can step in, then that is fine. But if you mean that the Court can otherwise fill vacuums, that is another thing.

Judge SOUTER. No; the former is exactly what I mean.

Senator GRASSLEY. Therefore, you do not read the 14th amendment as a kind of admonishment to Congress to solve all social problems, because if we do not, then the Supreme Court will step in and solve them for us?

Judge SOUTER. No. Section 5 of the 14th amendment empowers Congress to implement the provisions of the amendment itself and, as you know, Congress is moving these days to do exactly that.

Senator GRASSLEY. So, the 14th amendment, then, is not some kind of loaded revolver just sitting around waiting to be fired by the Supreme Court any time you become impatient with the people's representatives?

Judge SOUTER. I assure you, I would not regard it in that light. [Laughter.]

Senator GRASSLEY. Well, I also asked you about the criticism of the Court's creating rights inconsistent with the text and tradition of the Constitution, and you responded, on pages 17 and 18, with a discussion of the differences between the creation of rights and the recognition of rights which are implicit in the text of the Constitution.

Judge SOUTER. Yes.

Judge GRASSLEY. This answer came right on the heels of your talking about filling vacuums, when the people's branches or the political branches of Government might be slow to act, so I would like some elaboration. Please give me an example of when you think the Supreme Court improperly created rights and one when you think they properly recognized rights.

Judge SOUTER. Well, I do not want to over-use the example, but I think I cannot give a better example on the proper recognition of rights than *Brown* itself. The Court in that case recognized that the equal protection provisions of the 14th amendment were not confined to those specific problems that were in the minds of the Framers as the objects of its application in 1868. The Court recognized that there was as general concept of equal protection and it was just as applicable to school segregation as to other enterprises.

If you simply read the text of the Constitution and somebody said, well, where does it refer to schools, where does it refer to school desegregation, of course, you would not have found anything there, but I think clearly implicit in the text of the Constitution itself and in the concept of due process was the proper basis for the Court's exercise of its jurisdiction.

Senator GRASSLEY. Well, is it not more true under *Brown* that the Court was striking down a State practice, rather than creating a right——

Judge SOUTER. Well, in order to——

Senator GRASSLEY [continuing]. A nonconstitutional practice by the State of Kansas?

Judge SOUTER. Well, in so doing, the Court had to recognize and did recognize that the right under section 1 of the 14th amendment, the right to the equal protection of the laws, was a right which applied to those particular plaintiffs and applied to the subject of school desegregation. So, in order to strike down the State laws, what the Court had to do was to recognize the right of the plaintiffs, in effect, to strike them down or to have them struck down. So, I think it was doing both, but in order to do so, it had to recognize the plaintiff's right.

Senator GRASSLEY. Well, let me see where I can help you—where you may think that the courts improperly created rights. You have great respect for Harlan and referred to him quite regularly during

these hearings. Harlan, and hopefully you, would think that the Warren court rulings in the areas of criminal procedure or in obscenity might be some cases where the courts created rights.

Judge SOUTER. Well, take the criminal procedure area as an example. I think so much of the difficulty that the States had with some of the Warren court decisions came in part, came in large measure from the difficulty of administering them. One could, I suppose, perfectly well argue today—as many people argued in the 1960's—that there was not a warrant to impose the exclusionary rule, for example, on the States once it was understood that the fourth amendment standards applied to the States.

But the difficulty that the States had under the exclusionary rule—and I can speak from experience here because I was in the trenches in those days. I was an assistant attorney general, and I was concerned with criminal administration. The difficulty that the States were having was the difficulty in learning how to do what the Court had held that the States ought to be doing.

I can remember in those days lecturing at State police training academies on the requirements to demonstrate in applications for search warrants what was known as credibility and reliability of the sources of information, what people in the business refer to as the old twin *Aguilar-Spinelli* tests.

It was very difficult for law enforcement officers and for judges in the field to engage in the kind of very close textual analysis almost of search warrant applications which seemed to be called for by *Aguilar* and *Spinelli*. A great many of those difficulties have been alleviated in the meantime as the Court has moved from the kind of the technicality of those two-pronged tests to a test which looks rather to the overall effect of the warrant and does not rely on that kind of technicality.

The difficulty that we were having was the difficulty in understanding exactly what it was that the Court was requiring and how to go about satisfying it. One of the most telling experiences that I can remember having that illustrates this point was in the course of an argument in the Supreme Court of New Hampshire after the *Spinelli* case had come down. One of the justices on the New Hampshire Supreme Court said to me, "Do you believe that *Spinelli* has changed the law?" I said, "No, I don't." I said, "I think the standards are the same after *Spinelli* as they were before."

And he said, "Well, that is my view, too, but," he said, "you know, not everybody agrees with us." And if you looked at the opinions of the U.S. Supreme Court in the *Spinelli* case, you would see, as I recall, that the Justices themselves could not agree on whether they were coming up with anything new in the *Spinelli* case or not. And that is why I say I think the great difficulties that we labored under some of the Warren decisions was in implementing them, in trying to understand what they meant, and that is why I think I said the other day that in the meantime we have learned to live with a great deal, and lived with them pretty well today.

Senator GRASSLEY. Has there never been an occasion where the Court improperly created rights? And these were your words from last Friday. What did you mean by "improperly created rights?"

Judge SOUTER. Going to the latter part of your question, I think what I was referring to on last Thursday were the—I think we were talking—I don't know, but I think we were talking about the area of criminal procedure again. A lot of the decisions in that period were what I would describe as kind of pragmatic implementing decisions. I think probably everyone would agree that the Court could have gone on reviewing confessions simply on the basis of the voluntariness standard which was implicit in the concept of due process, which the Court had been doing for some time; and that it could have continued to do that without adopting the *Miranda* tests.

What the *Miranda* tests were were intended to be a very pragmatic procedure that would cut down on the likelihood, cut down on the degree of possibility that confessions actually would turn out to be involuntary confessions. Was it right for the Court to say we have just reached the point where the judicial system cannot continue to go on litigating every case for voluntariness under due process? We have got somehow to have a more pragmatic approach to this that is going to cut down on the number of problems.

People of good will could disagree about that, but the fact is, at the time the *Miranda* decision came down, it created a lot of problems for people who didn't know how to respond to it. Those problems are over and done with today. I think most law enforcement officers can respond to it, and anyone who wants to attack *Miranda* today has got, I think, the same kind of pragmatic burden which those had who argued for *Miranda* in the first place. What would be the effect of changing it? Was *Miranda* the creation of a new right, or was *Miranda*, in fact, an experiment by the Supreme Court in how to protect a right?

People can argue back and forth on the terminology. I personally have looked at *Miranda* as a pragmatic decision intended to protect a right, and the only sense in which I think probably you can say there was an extension of a right was that sense which Justice Harlan referred to when he said that what *Miranda* had done was to extend the fifth amendment from the courtroom to the police station. But I think the reason the Court was taking the tack that it was taking was not merely for the purpose, or for the purpose of extending rights so much as in trying to find a pragmatic way to protect those rights. And it was a very difficult pragmatic way at the time the opinion came down, unlike the situation today.

Senator GRASSLEY. Judge Souter, you have said many times and again in your last statement about your admiration for the philosophy and the approach of Justice Harlan. If there is one Harlan message that I would like to leave with you as I conclude my dialog with you, it is this one from the reapportionment cases of 1964, and I quote:

> I believe that the vitality of our political system on which, in the last analysis, all else depends is weakened by reliance on the judiciary for political reform. In time, a complacent body politic will result.

Continuing the quote:

> These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional principle, and that this Court should take the lead in promoting reform when other branches of

Government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a haven for reform movements. The Constitution is an instrument of Government, fundamental to which is the premise that in the diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court does not serve its highest purpose when it exceeds its authority, even to satisfy the justified impatience with the slow workings of the political process.

Now, this to me is classic John Marshall Harlan. Whether or not you would have signed on to his dissent in 1964 is immaterial because, of course, there is no turning back the clock in this area. My point is simply that Harlan has articulated a principle that, it seems to me, leaves no room for vacuum-filling. So I commend that particular bit of Harlan for you to reread and consider as you move to those lonely marble halls just a few blocks from here.

Thank you, and I wish you good luck.

Judge SOUTER. Thank you, Senator.

Senator GRASSLEY. I yield back my time.

The CHAIRMAN. Judge, was one-person, one-vote, rightly decided, Baker?

Judge SOUTER. I think it was. But I will tell you, Mr. Chairman, I think the Harlan dissent was a very powerful dissent. And the truth is I don't have a simple answer to the Harlan dissent. I don't have a simple answer to it today.

As you know, Justice Harlan relied so heavily on the provisions of section 2 of the 14th amendment for saying that that was an indication that any problem of the maldistribution of votes or the apportionment of votes was intended to have a congressional solution period. And yet on the other side, you would be facing the fact that there was less protection for this most fundamental right than there would have been for one of the garden variety economic rights. And that argument of his was a tough argument.

The CHAIRMAN. But you think it was rightly decided.

Judge SOUTER. I think I would have to have gone along with it, yes.

The CHAIRMAN. Thank you.

The Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you.

Judge Souter, I want to go back to a couple of areas that we discussed last week. Excuse my voice. I have a bit of a cold today. We talked at some length about the equal protection clause as it relates to discrimination cases.

In your opening statement, Judge, you stated that part of your role as Supreme Court judge will be to "preserve the Constitution for the generations that will follow." I think that statement is very accurate, and it is the reason why I have spent so much time on this particular issue.

Judge Souter, I have two daughters. One is a lawyer, one is a doctor. I have a son who is a lawyer. I see no reason why my son should be treated any better under the law than my two daughters. I also see no reason why the Court should give the same scrutiny to law that distinguished trucks or automobiles as it does a law that treats men different than women. To do otherwise, in my judgment, I believe would not preserve the Constitution for generations to follow.