Judge SOUTER. I think the Nation is served well by seeing me and by seeing you. Naturally, not every moment in this process has been totally much to my liking as some, but what I am appreciative of is in being part of a process and a visible one. You are right, the afternoon, it is afternoon and I have been sitting here for a while and I will be here for good while longer, and perhaps I will be back tomorrow, but the fatigue at the hour has nothing to do with the value of the process and I am glad that you have had me here.

Senator SIMON. Finally—and I will not take my full time, Mr. Chairman, I know that will be a great disappointment to you—do you feel in any way inhibited by what you have said here, in terms of your service on the Court, assuming you are approved?

Judge SOUTER. No, because the committee has been very respectful, even in cases in which it may not have agreed about the point at which it has seemed to me necessary to limit my answers for the sake of the integrity of the judicial process, and I have been grateful for that respect.

Senator SIMON. If I can just go back—and this is not a question—to that first question on growth. I am going to take the liberty, if you are approved and after you are sworn in, of sending you a note with a few suggestions that you may reject. At that point, you can do whatever you want, anyway—but I would hope you would consider them, as you look at making David Souter a Supreme Court Justice who is as responsive as possible to the needs of this Nation.

Judge SOUTER. I would like that, even if I do not go to the Supreme Court.

Senator SIMON. Thank you, Judge.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Judge Souter, earlier this summer we celebrated the centennial of the Sherman Act. For over a 100 years, as you know, this landmark measure has protected treasured American principles: competition; fairness; and equality. The antitrust laws are important, because they have led to a flourishing economy and they have also led to lower prices for consumers. These laws, as you know, are nonpartisan. They have been vigorously defended and enforced by both Republican and Democratic Presidents and, as you know, one of the most current advocates of strong antitrust enforcement is your good friend Warren Rudman. And so on his behalf this afternoon, I would like to ask you just a few questions.

In your mind, Judge, how important are the antitrust laws in shaping our economy?

Judge SOUTER. Well, as you know, Senator, I do come from a tradition that involves Senator Rudman, and it is a tradition that goes back to the days in New Hampshire when Senator Rudman was establishing a consumer division in the State of New Hampshire, with jurisdiction over the State antitrust laws and was bringing about the passage of a Consumer Protection Act, which I later, as attorney general, had the responsibility to administer.

I also have been well educated by Senator Rudman over the years in the value of small business. Small business has no better friend than he has, and I think one of the lessons that I have ab-

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sorbed from a long period of my professional lifetime with him, if I needed to absorb that from anyone else, is the importance of a degree of competition which will allow small business to emerge and allow for diversity in the American economy, which it is the object of the antitrust laws to secure, as much as that is possible.

Senator KOHL. Do you agree, Judge Souter, that an important purpose of the Sherman Act is to protect against consolidation of economic power and make sure that consumers are not abused by companies engaged in monopolistic business practices?

Judge SOUTER. There is simply no question about it, either as an historical matter or as a strictly legal matter, as one examines the precedents. The ultimate object of the system, it seems to me, has to be judged on its systemwide effects. I do not think the antitrust laws should even be seen as merely consumer laws or as antibusiness laws, but as laws intended to assure a free and open and competitive economic system for everyone.

Senator KOHL. I believe that the principal beneficiaries of vigorous enforcement of the antitrust laws are consumers, and yet, as you know, over the past few years the courts have made it more difficult for consumers to bring antitrust suits. Do you have any opinions about this trend?

Judge SOUTER. Well, I know I was attorney General at the time of *Illinois Brick*, and so perhaps my reactions go back to those days. By the same token, I suppose I should be weary of making predictions about who is an appropriate plaintiff in an antitrust action, because issues of that sort are going to be before me.

I think the most that I can say is that I do remember the days of *Illinois Brick* and I remember when that decision first came down, and I think you may safely assume that I am sensitive to the concerns that you have just alluded to.

Senator KOHL. Judge Souter, I believe that the people who wrote the Sherman Act, for example, Senator Sherman of Ohio and Senator Spooner of Wisconsin, wanted to help the little guy by preventing large concentrations of corporate power.

I am concerned that some judges and other theorists are willing to disregard entirely this legislative intent, and a few have gone so far as to suggest that the legislative intent of the Sherman Act "shouldn't be controlling at all." Do you believe that this approach—ignoring legislative intent—is a legitimate approach to interpreting statutes, in general; and, in particular, should the courts interpret the Sherman and Clayton Acts without exploring the legislative intent of their authors?

Judge SOUTER. Well, I am afraid we would be ships without anchors, if we tried to do that. In perhaps the more garden variety cases of statutory interpretation, we are used to looking to legislative intent to resolve questions of ambiguity and vagueness, when the statute is not clear on its face.

But when we are dealing with the antitrust laws, we are dealing with one of the most spectacular examples of delegation to the judiciary that our legal system knows, and if that delegation is not going to be, as it were, sort of a delegation of totally free choice to the judiciary, certainly a respect for the legislative intent has got to be our anchor in interpretation.

Senator KOHL. I would like to talk for just a minute about price fixing, because it is of particular concern to me and many others. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits manufacturers from setting the retail price of their products sold in retail stores, but some people have begun to argue that vertical price-fixing should be treated differently from horizontal price-fixing.

As Robert Bork wrote in "The Antitrust Paradox," "It should be completely lawful for a manufacturer to fix retail prices." I have a presumption that you do not agree with that.

Judge SOUTER. Well, I do not start with that presumption. To begin with, of course, with the repeal of the fair trade laws, Congress has indicated its more plenary acceptance of *Dr. Miles* than was true before, so I think we have an expression of congressional philosophy on the issue.

It is perfectly true that, in theory, any manufacturer could also be his own distributor and run his own retail outlets, in which case the price-fixing issue would not arise, but that does not seem to me to be a basis for saying that it should not arise in the economic world in which we live.

I will be candid to say that I do not set myself up as an expert in antitrust matters, as much as I think in some other fields of constitutional law or in statutory law, in which I have a greater background, and I am certainly going to be willing in an appropriate case to consider the economic testimony in determining what cases should be adjudicated on rule of reason basis and what should not.

But I certainly cannot start with the assumption that, in fact, there should be no restraint, no limitation on vertical restraint because it seems to me, as I said, that the congressional expression of policy is otherwise.

Senator KOHL. Just one question on civil rights. Because racial discrimination has been illegal for some time, most institutions do not openly discriminate. This makes it difficult, as you know, to prove intentional discrimination.

Since so much discrimination is now hidden, do you believe that the proper standard for action should be discriminatory impact rather than the higher threshold of discriminatory intent?

Judge SOUTER. Well, of course, as you know, Senator, we are familiar under title VII with the discriminatory impact concept. And I think the best respond to your question is that it is an obviously inappropriate concept for Congress to adopt, and we will administer it.

Senator KOHL. Last question. Let's change direction entirely. Justice Brandeis once said that "You can judge a person better by the books on his shelf than by the clients in his office." And I read a piece in this morning's Chicago Tribune which said that we here who were talking to you were asking all the wrong questions—that if we really wanted to know what kind of a person you were and how your thoughts went from subject to subject and what you have learned from life, we ought to ask you about what you have read because reading has played such an important part in your life. So I would like, as my last question, to ask you about your reading habits, the things that have interested you in life from a reading

point of view, and what some of the things are that you have learned as a result of your reading.

Judge SOUTER. Well, I have a weakness for history in my reading. I think oddly enough—and it wasn't planned with this appearance in Washington in mind, but I think the last two history books that I read were Joseph Lash's book on the New Deal, "Dreamers and Dealers," and Katie Lockheim's book on "The Making of the New Deal." And I didn't realize I would be in Washington quite so soon after I read those books.

I have gone through sort of periods of reading kicks in both American and English history, too. I can remember there have been a couple of summers which I have just sort of set aside and really bored through things. So there is an awful lot of history books on my shelves. Unfortunately, the trouble that I find, as I have spent more and more time on the bench, or at least more and more time in judicial writing, more and more books don't get on read, do not get read. So if the day ever comes that I retire, I am going to have one of the most magnificent unread libraries in New Hampshire. The stuff is all sitting there. And the only consolation I have got is I was reading a life of Lord Melbourne, Philip Ziegler's book on Lord Melbourne a couple of years ago, and he said Melbourne had that problem. He just couldn't stop buying books, and they piled up, and he didn't have time to read them. And Ziegler said that, "Defensively, Melbourne became a believer in the osmotic power of literature to seep through." So I can only hope that he is right.

As I said, I probably read more history than anything else, but I go on novel kicks. I went through a period in which I read everything of Faulkner's, everything of Fitzgerald's. I haven't read everything of Hemingway's. That is one of the things that is sort of there in abeyance.

And then I read sort of whimsically unrelated stuff. My law clerks from time to time think I lead too sheltered a literary life. One of them got me to read "Fear and Loathing in Las Vegas" a little while ago. [Laughter.]

So there are some wild cards on the book list.

Senator KOHL. Thank you.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. You sound like Justice Holmes.

Senator LEAHY. Mr. Chairman, I notice that the National District Attorneys Association is going to testify here in a couple of days. They will be delighted to know about "Fear and Loathing in Las Vegas." [Laughter.]

I would hasten to add that the book is about the Association's meeting in Las Vegas the year before I became a member of the meeting committee.

The CHAIRMAN. Well, I wasn't being facetious when I said Justice Holmes has apparently had similar reading habits, and one of the things that was mentioned, if I recall correctly, is that his wife once said that he read too many books like "Fear and Loathing" of the day. At any rate, you are in very good company.

Speaking of company, I suspect that you would like to keep your own company for a few minutes here and have a bit of a break. So why don't we recess until 10 minutes of. Before we do, let me ex-