give you a chance to stretch your legs, then come back back and have Senator Simon. That will take us until about 1:30. If Senator Kohl doesn't mind, we will have him come and be the first person after lunch, and we will spend 2 hours after lunch. We will have four people question after lunch. I don't know who the four will be because I am not sure whomever the four in order will be here. That would take us until roughly 4 o'clock, unless any particular Senator has an overwhelming requirement to want to question today.

It is now about 8 minutes of. We will recess until 5 minutes of, come back, and Senator Simon will begin with his questioning.

Judge SOUTER. Thank you, Senator.

[Recess.]

The CHAIRMAN. In order to stop Senator Rudman's press conference, I think we should——[Laughter.]

Actually, I haven't given the witness an opportunity to get back out here yet. He has not been warned. We are about to begin.

Thank you very much, Judge. What we are going to do now, we will go to Senator Simon and then we will either break or, depending on what the Senator from Wisconsin has to entreat me, what he has to say, we will either go to lunch or go to him.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Let me just digress for one moment, Mr. Chairman, if I may have your attention over here.

The CHAIRMAN. I am sorry.

Senator SIMON. That is quite all right. I just wanted to call attention to one thing that Senator Thurmond just mentioned in passing. He said this is the 23d Supreme Court nominee that he is having a hearing on. That is a remarkable record. I wonder if any United States Senator has ever done that.

The CHAIRMAN. I doubt whether anyone has, but I am beginning to tally them up so much that I would like to pass a resolution that there be no more. [Laughter.]

Because I have nowhere near that number, but in half the number of years that I have been there, it has been an incredibly—it seems I have spent most of my life sitting here having the opportunity to be educated. I mean that sincerely.

At any rate, I don't think there is anybody else, I would imagine, that had that many in any one time frame.

Senator SIMON. I would doubt it. I just thought it ought to be noted.

Let me kind of tell you where I am at this point, Judge Souter. On the positive side—and some of these things perhaps some people will think are minor—your use of language is good. You speak clearly and concisely, not in convoluted sentences. We are going to get those kind of opinions out of the Court if you are there. Clearly, you are a listener and you are astute. I like that. Then there is one kind of amorphous quality I will simply call stability that I see in you, and I like that. You have indicated you are willing to stand against popular opinion. And when we look back, for example, on what the Supreme Court did in the case of Japanese Americans in 1942, I want a Supreme Court Justice who is willing to stand up to popular opinion.

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What is less clear for me is in two areas, and that is what I want to question you about. One is whether you are going to be a leader for civil liberties; and, second, whether you will be a leader for those less fortunate. In the area of civil liberties, if I may follow through on the questions of Senator Specter, you indicated that you at least tentatively accept the tripartite test of the *Lemon* case that the Court has used since 1971.

Let me give you a specific example that is long past and just kind of get, without any kind of a commitment, your visceral response. I remember when we had a school prayer issue before the House when I served in that body. Congressman Dan Glickman from Wichita, KS—who happens to be Jewish—told me a story about when he was in the fourth grade. Every morning he was excused while they had prayer, and then he would be brought in. Every morning little Danny Glickman was being told "You're different." All the other fourth graders were being told the same.

Is your feeling that that kind of an exercise violates the *Lemon* test?

Judge SOUTER. Yes. I think to begin with it is an appalling fact. I happen to have a friend who is on the bench who described exactly the same experience to me growing up in Manchester, NH. He was Jewish. He didn't leave the room every morning, but he was cut apart from the rest of his class when the Christian Lord's Prayer was recited.

The fact is the Supreme Court today I think has carried the law to the point where a period of time for silence which may be used for any meditative or non-meditative purpose that a child may want has not been declared to be a violation of *Lemon* v. *Kurtzman.* But I think it is probably equally clear that the use of prayer which has, as you describe it so graphically, the kind of exclusionary effect is by virtue of that very evidence a kind of use of prayer which, under the *Lemon* test, would have presumptive religious purpose and presumptive religious effect. As I understand *Lemon* v. *Kurtzman,* that would certainly violate it.

It also calls to mind the alternative formulations which in some of the recent cases Justice O'Connor has been referring to, and she has been adverting to exactly the phenomenon that you have described. She has been saying what we should be looking for is whether the practice in question and its effect on people has the kind of effect of telling them that you are somehow outside the legitimate scope of our real community. She is looking for that kind of sometimes subtle and sometimes very gross exclusionary effect.

Senator SIMON. When you are 13th on a list of questioners, you have to skip around a bit when it's your turn to question. Following up on what Senator Humphrey asked, in this case where you told Senator Metzenbaum about counseling the couple in Massachusetts, where the statute at that time prohibited all abortions, even if the life of the mother was at stake, did you reflect at all at that point on the wisdom of that statute in Massachusetts? Do you recall?

Judge SOUTER. On that particular afternoon, the immediate problem before me, as I recall, probably did not take me that far. I had a very immediate problem in front of me that afternoon, and I think we probably confined the philosophy to the immediate

danger. But that was a long time ago, and I don't remember the details.

Senator SIMON. I understand that, but afterwards even, not just that afternoon, did you reflect on that?

Judge SOUTER. No one could avoid recognizing the consequences of that statute for the options that were available. That was obvious to all of us.

Senator SIMON. In discussing the right to privacy, you used the phrase "the fundamental marital right to privacy." Let me ask why that is fundamental more than other rights to privacy, including, say, the right to have privacy in a phone conversation or other things.

Judge SOUTER. Well, I used that not as an implicit exclusion of something else but as a subject matter that we have become familiar with. Our approaches to it, our judicial formulations of it have varied back and forth over the years. But going right back to the time of the often disputed cases of *Meyer* v. *Nebraska* and *Pierce* v. *Society of Sisters,* the Court has confronted, whether precisely or imprecisely, the fact that there is a core set of family values which, in the general understanding and the traditional understanding of the American people, are protected. And so we, in fact, have had a great deal of time in this century to be thinking in those terms, and that is the most familiar focus for what we are talking about. But I do not mean that to be a focus which implicitly excludes other interests.

As I said a moment ago, there is no question that the judiciary of the United States is going to be spending a significant amount of time in the years ahead trying to give attention to other claims—indeed, giving attention to other claims and trying to adjudicate.

Senator SIMON. Yesterday, in discussing the right to privacy, there was a discussion of the 9th amendment and the 14th amendment. But in the Constitution there are other provisions which guarantee the right to privacy as well. You can't come into my home without a very specific search warrant. The Constitution says you can't quarter militia in my home.

There is in the Constitution a sense of a right to privacy. That is not a question. I guess I should reverse that. Is there in the Constitution a general sense of the right of privacy?

Judge SOUTER. Well, I think perhaps it is wrong to go back and say you have answered my question for me.

Senator SIMON. Yes.

Judge SOUTER. But you have there. We find, as you point out on the provisions against the quartering of troops, the provisions against unreasonable search and seizures, the provisions against compelled self-incrimination, which gets you out of a kind of physical context. There are, indeed, reflections of what we could in a general way describe as privacy interests there. And as it goes without saying, the great debate has been the extent to which a privacy interest not so specifically recognized must be assumed under the concept of liberty. I have taken the position, although I cannot say here what its extent may ultimately be determined to be or what I would find it to be, yes, there is a core that goes beyond those specific pinpoints.

Senator SIMON. Then if I can, I am going to shift over to the general area of your concern for those who are less fortunate in our society. For one reason or another, I received a letter from the AFL–CIO saying all of the David Souter decisions have been on the side of management, not on the side of the workers. I frankly haven't made an analysis of your record in that regard. Perhaps you have not.

Judge SOUTER. I have not either, no.

Senator SIMON. Does that sound like it is possible?

Judge SOUTER. I think the only thing I can say in the abstract is I have to decide the cases that come to me. I would only ask you to look at those cases and see whether in your judgment they were decided fairly. I do not have a pro-labor or a pro-management agenda. I can say that this gets us somewhat outside the labor area, but I can't help but remember that in one of the early weeks or so following my nomination, there was an article—I think it was in the business section of the Sunday Times—on "Is this a friend of business?" And I remember one of the conclusions in there was that this is not a nominee who is out to rescue business from its bad decisions or from its improvidence. And I hope in any such weighing as you may believe it right to do, you would bear that in mind, too, because I think there is, indeed, a record on that point.

Senator SIMON. There is a newspaper article that quotes you as saying in a speech that affirmative action is affirmative discrimination. And I combine that with your statement, if I jotted it down correctly yesterday, that there is no discrimination in New Hampshire. My guess is that even the two percent or three percent of the blacks in New Hampshire would probably give a different answer than you provided yesterday. My guess is that there are a lot of women in New Hampshire who would give you a different answer. There might be some French Canadians by origin who would give you a different answer.

I am concerned by a statement that says affirmative action is affirmative discrimination, if you were quoted correctly.

Judge SOUTER. I think that—I hope that was not the exact quote because I don't believe that. The kind of discrimination that I was talking about in that speech was discrimination, as I described it and as I recall being quoted in the paper about it, a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, having nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution.

That is to be contrasted in two absolutely essential respects, from on the one hand affirmative action and on the other hand the kind of distributive remedy which it is appropriate for courts and, to a degree yet to be fully developed, appropriate for Congress to consider.

I would suppose it would go without saying today that if we are in the United States to have the kind of society which I described yesterday as the society which I knew or found reflected in my home, there will be a need—and I am afraid for a longer time that we would like to say—a need for the affirmative action which seeks out qualified people who have been discouraged by generations of societal discrimination from taking their place in the mainstream

and in all of America and in all the distribution of its benefits and its burdens. That is an obligation of individuals, and it is an obligation of government.

I think it also goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say undo it. That is a judicial obligation to make good on the 14th amendment.

And as I said a moment ago, one of the developments in American constitutional law which is at the stage, I would say, of exploration now is the development about the particular power of Congress to address a general societal discrimination as opposed to a specific remedy for a specific discrimination. That is a concern which will be played out in constitutional litigation for some time ahead of us.

The CHAIRMAN. Excuse me, may I interrupt for the purpose of clarification?

Senator SIMON. I would yield to the chairman at all times.

The CHAIRMAN. Judge, when you say specific remedy for a specific situation, do you mean specific remedy for a specific individual, or do you mean specific remedy for a specific situation?

Judge SOUTER. Identifiable class within a situation, yes.

Senator SIMON. Societal.

The CHAIRMAN. An identifiable class.

Judge SOUTER. Yes. I think the difficulty that you have—and I mean you and I will have it here—in talking in the abstract is to say, well, how far do you go when you are imposed a judicial remedy.

The CHAIRMAN. No, I am not asking you that.

Judge SOUTER. No, I was just going to say how far you go to the point where you carry yourself across the line from a remedial order to an order which addresses a societal and not a remedial problem. And I don't know how you draw that line in the abstract, but you have to be conscious that you should not be either too shy or too bold in the use of the judicial power.

The CHAIRMAN. To put it in layman's terms, the debate among those on the court and constitutional scholars is whether or not you can remedy a situation for a specific individual, where that individual has to show I have been discriminated against, as opposed to I am part of a class of people that have been discriminated against. That is the debate, at least in part, that is taking place. And when you said specific remedy, I wasn't sure whether you were talking about the individual as you were describing this debate that is taking place right now. So you are not merely limiting the need for government to respond to stop, but as well as undo, to the case where a specific individual is asserting they were a victim of a specific act of prejudice that is outlawed. But you were talking about more broadly. Is that correct?

Judge SOUTER. That is right. I think no such abstract line can be recognized. There are going to be some cases in which the only thing that is going to be proven is going to be a specific act of discrimination. There are going to be other cases, in fact, in what is

proven is, in fact, a far broader but proven discrimination. And the remedy must be tailored to the proof.

The CHAIRMAN. Thank you very much, Judge. I appreciate it.

Senator SIMON. Let me, if I may, rephrase where I think we are going. First of all, while the word "quota" wasn't used, clearly that is not a desirable thing in our society. And we don't want that; the Court doesn't want that.

When you say "undo," sometimes that is not enough. Congress says we have some residual problems from the days of slavery, from other problems that have existed because of discrimination against African-Americans, Hispanics, women, and others. And so Congress takes affirmative action to say we ought to be encouraging—in a constructive way—a more open society where opportunities are here forever.

Without being specific, do those affirmative actions that Congress would take in any way leave you with a feeling of unease?

Judge SOUTER. No, it leaves me with a feeling that we are on the verge of developing law, rather than in a situation in which we can say with clarity that the law has developed and we know what its limits are going to be.

When we address the kind of issue that you raise, Senator, we immediately go back to the *Fullilove* case, in which the Court found that it did indeed pass muster under the congressional power to set-aside, I believe it was a 10-percent minority set-aside in that case.

There is certainly one reading of the recent *Metro Broadcasting* case, in which the Court upheld a—I forget the precise articulation of it, but upheld the use of giving some extra credit to a minority application subject to the FCC, simply by virtue of its minority origin, and approved the use of restricting for sales in those cases to minority buyers.

On the other side of the scale, we know that there is less flexibility available to the State and local governments to do that kind of tailoring to broader societal discrimination, and I think, without question, one of the most significant subjects which is going to be developed in the Court in the foreseeable future is a more precise definition of just what the congressional power is, whether it be under section 5 of the 14th amendment or under Congress' article I power.

Senator SIMON. And section 5 is a fairly sweeping kind of authorization.

Judge SOUTER. It was unprecedented, as you know, at the time it was passed.

Senator SIMON. Finally, just a suggestion that I am going to pass along to you. Growth is one of the things I talked about in my opening remarks. I think it is very important for Senators, I think it is very important for Justices on the Court, to be exposed to things in our society that maybe we have not been exposed to.

If I can use a personal illustration, we do not have any Indian reservations in Illinois. I know there are serious problems and, while we have some native Americans in the city of Chicago, reactively it is a handful of people.

I took the time to go to the Pine Ridge Indian Reservation in South Dakota and found 73 percent unemployment, 65 percent of

the homes with no telephones, 26 percent of the homes with no indoor plumbing, and 8 percent of the homes with no electricity.

Now when an issue about American Indians comes up, it is not an abstraction for me. You know, I think this good, great, rich country ought to be doing better. I do not mean this disrespectfully to your fine background, but I want you to understand perhaps a little more than you now do some of the aches of America.

If you were to get together—and I prefer you to not answer right now, but maybe you will want to respond in the second round, with your friend and mine Warren Rudman, maybe Fred McClure, who was here just a little bit ago, and think about some kind of an agenda, when the Court is not in session, where you would get to understand the west side of Chicago, or perhaps an Indian reservation. I am not going to spell out that agenda. But I think if that were to take place, you would be a better U.S. Supreme Court Justice.

Justice Cardozo has been quoted here this morning. Let me just give you a quote here: "Where does the judge turn for the knowledge that is needed to weigh the social interests that shape the law? I can only answer that he must get his knowledge from experience and study and reflection, in brief, in life itself."

When we get to this second round, I would like any reflections you might have on how David Souter is going to grow, as a Justice, not just sitting on the Court. I think your experience with that young couple at Harvard was a growing experience. I think your being on the hospital board was a growing experience. And when I talk about growing, I think of Justice Hugo Black, who started off as a Ku Klux Klan member, and ended up as one of the great champions of civil liberties.

Anyway, you have my suggestion and I look forward to asking you for any reflections, when we get to the second round.

Thank you, Judge.

Judge SOUTER. Thank you, Senator.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kohl.

Senator KOHL. Well, I am the last questioner before lunch. Judge Souter, can I order you lunch?

Judge SOUTER. Senator, if it is all the same to you, I would rather take the questions and we will have lunch after. [Laughter.]

Senator SIMON. He has heard how parsimonious you are on buying lunch. [Laughter.]

Senator KOHL. All right. Judge Souter, why do you want this job?

Judge SOUTER. I did not seek this job, as you know. I was asked by the President of the United States to do this. What I said to you yesterday afternoon is my answer to that question. If I am confirmed in this office, I will be given the greatest power that anyone in the judiciary of the United States can ever know, and that is, as I said, the power to preserve and to protect.

With it, as with all power, goes a like degree of responsibility, and if I am confirmed in this office, I want to try the best that I can to exercise that responsibility, to give the Constitution a good life in the time that its interpretation will be entrusted to me, to preserve that life and to preserve it for the generations that will be sitting perhaps in this room after you and I are long gone from it.