

Originally Processed With FOIA(s):
1998-0206-F[1]

FOIA Number:
1998-0206-F [1]

FOIA MARKER

**This is not a textual record. This is used as an
administrative marker by the George Bush Presidential
Library Staff.**

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Counsels Office, White House
Series: Liberman, Lee S., Files
Subseries: David H. Souter Files

OA/ID Number: 45254
Folder ID Number: 45254-004

Folder Title:
Folder One: David H. Souter - Analysis [1]

Stack:	Row:	Section:	Shelf:	Position:
G	12	11	7	1

*Must look at
states and laws*

I.	<u>Restrictive View Of State Constitution</u>	1
II.	<u>Original Intent</u>	3
	<u>Estate of Dionne</u>	3
	Mass. Lawyer article	7
	Souter trial practice outline	8
III.	<u>Role of Attorney General</u>	11
IV.	<u>Reproductive rights and privacy</u>	13
	A. <u>Coe v. Hooker</u> brief	13
	B. <u>Smith v. Cote</u>	17
	Souter concurrence	18
	C. Opposition to Repeal of Abortion Statute	19
	D. Opposition to Parental consent/Judicial Bypass	23
	Souter letter to Spaulding	24
	E. Concord Hospital	25
	F. Brief on Privacy Rights in <u>U.S. v. N.H.</u>	26
	G. Rights of Gays and Lesbians	29
	<u>Opinion of Justices</u> (day care center)	29
V.	<u>Religious Freedom & Sep. of Church and State</u>	33
	A. Defense of State-sponsored Good Friday Observance	33
	B. <u>Wooley v. Maynard</u>	39
	C. Support for state school prayer	43
VI.	<u>Civil Rights</u>	45
	A. Speeches	45
	B. EEOC (<u>U.S. v. N.H.</u>)	49
	C. State literacy test	65

VIIA.	<u>First Amendment (AG actions)</u>	
	A. "Gag order" on state employees (nuclear power)	77
	B. Public Right-to-Know law (prisons)	79
VIIB.	<u>First Amendment (cases)</u>	81
	Free Speech (<u>Hodgkiss</u> opinion)	81
	Freedom of Press	83
	A. <u>Nash</u>	83
	B. <u>Duchesnaye</u>	89
	C. Other cases (<u>Siel</u> , <u>Keeton v. Hustler</u>)	95
	Freedom of Association	97
	<u>N.H. Disabilities Rights Center</u> , <u>Chapman</u>	97
VIII.	<u>Equal Protection (gender)</u>	103
	A. <u>Meloon v. Helgemoe</u> brief	103
	B. <u>City of Dover</u> opinion	113
IX.	<u>Equal Protection (other)</u>	121
	A. <u>Bosselait</u>	121
	B. <u>DeFlorio</u>	133
X.	<u>Rape Shield cases</u>	135
	A. <u>Colbath</u>	135
	B. <u>Baker</u>	141
XI.	<u>Sex Discrimination case (King v. N.H. Dept. of Resources)</u>	149
XII.	<u>Misc. Op-Eds re: questions</u>	151

Justice David Souter's Criminal Justice Cases

Joseph D. Grano*

David Souter -
Hobby G-1900

At the request of Thomas L. Jipping, Legal Affairs Analyst, Coalitions for America, I have reviewed 72 New Hampshire Supreme Court opinions written by Justice David H. Souter in the areas of substantive criminal law and criminal procedure. I also have examined a few cases not on the list provided me. I chose these additional cases either because the issue presented was related to criminal justice or because Justice Souter wrote a separate opinion. My analysis of this body of case law follows.

I. Overview

Justice Souter is a knowledgeable and conscientious judge who seeks to identify precisely the issues before the court and to treat these issues fairly in accordance with applicable precedent. When statutes are involved, he seeks to ascertain the intended meaning of the provision at issue rather than to achieve his own policy objectives. Indeed, because he refrains from reaching out to decide issues not presented by the parties and from offering gratuitous remarks, Justice Souter's opinions give little insight into his personal values or politics. Clear,

* Distinguished Professor of Law, Wayne State University, Detroit, Michigan.

always well-reasoned, and concise, his opinions contain little, if any, dicta.

In analyzing Justice Souter's opinions, one must keep in mind the nature of the cases that came before him. Because New Hampshire lacks an intermediate appellate court, its Supreme Court decides many appeals that the highest courts of other states would not bother to review. One would expect, therefore, a relatively high affirmance rate in criminal cases, similar to that usually found in the intermediate appellate courts of other states. By the same token, one would expect a lower reversal rate than usually found in state supreme courts that are free to choose, on the basis of difficulty or importance, the cases they will review. One also would expect to find less complexity in, and less dissents from, the opinions of such a court. Although I have not done a statistical analysis, my impression from reading the cases is that these expectations are accurate.

Justice Souter's decisions on federal issues in criminal cases were potentially reviewable by the United States Supreme Court on direct review and by the lower federal courts and again by the United States Supreme Court on habeas corpus review. Independent of any actual review, of course, Justice Souter was bound by oath to apply applicable federal case law, an obligation that he took seriously. I can cite no case from my list in which Justice Souter "cheated" in reading the precedent. This obligation, however, especially when combined with Justice Souter's honesty in applying precedent and his reluctance to offer ex-

traneous remarks, makes it difficult to predict with confidence how Justice Souter would decide cases were he free to define the applicable law. Nevertheless, some insights are possible.

Justice Souter is a "conservative" judge in the criminal justice area in the sense that he does not reverse criminal convictions lightly. While he treats precedent fairly, he does not indulge the facile presumption that controversial precedents, particularly those that departed from historical understandings in imposing limits on law enforcement, should be extended even further. Rather, he places the burden of persuasion where it belongs -- on those who seek such extensions. Moreover, Justice Souter seems to believe that cogent arguments must precede use of the state constitution to impose restrictions on the prosecution that are not required by federal law. That is, he does not regard the so-called "new federalism" as a justification, by itself, for making law enforcement more difficult. When he finds error, Justice Souter is not willing to reverse convictions to achieve a speculative deterrent effect or merely to make a point. Rather, if the error is truly "harmless," -- and again, he is honest in evaluating this -- he will affirm the conviction. One may surmise, therefore, even though his opinions do not contain philosophical excursions, that Justice Souter firmly believes that the interest in ascertaining truth in criminal cases should be sacrificed only for compelling reasons. In this regard, he is considerably different from the justice whom he has been nominated to replace.

From what already has been said, it should come as no surprise that Justice Souter's criminal justice opinions disclose no agenda, other than one to apply the governing law honestly and with common sense. For those who seek a bold judge willing to undo past "mistakes," there may be cause to anticipate some disappointment. One can foresee, for example, Justice Souter failing to supply the necessary vote to overrule a questionable precedent because the case at bar can be decided on a narrower ground.¹ To cite one instance that perhaps supports this assessment, Justice Souter was offered an opportunity to overrule a 1978 state court decision that requires the prosecution to prove the validity of Miranda waivers beyond a reasonable doubt -- a standard subsequently rejected as too high for federal constitutional purposes by the United States Supreme Court. Justice Souter declined the opportunity because the issue was not, in his view, properly before the court and because the state, in any event, satisfied the heavier burden.² While some may see in this cause for concern, such caution, restraint, and commitment to procedural propriety may be what the country most needs given the politicized atmosphere that recently has surrounded both the

¹ One is reminded of Justice White objecting in Illinois v. Gates, 462 U.S. 213 (1983), to the overruling of Spinelli v. United States, 393 U.S. 410 (1969), because, in his view, the case could have been decided favorably to the state under Spinelli.

² State v. Derby, 561 A.2d 504 (1989). In State v. Rathbun, 561 A.2d 505 (1989), however, Justice Souter refused to extend the earlier case to other Miranda issues.

judicial confirmation process in the Senate and the public evaluation of Supreme Court opinions.

From the cases I reviewed, I can find no legitimate basis for either side of the political spectrum opposing this intelligent jurist. Of course, for those who want politics rather than law from the Supreme Court, Justice Souter is not the right person. For those who know better, it should be evident that President Bush has made an excellent selection.

II. Review of Particular Cases

I have not attempted to discuss all, or even most, of Justice Souter's criminal justice opinions. What follows is an analysis of some cases in areas that might provoke particular interest. The discussion, though limited, should prove adequate to reveal the kind of jurist that Justice Souter is.

A. Police Interrogation Issues

Justice Souter wrote two opinions reversing convictions on the basis of issues that pertain to the use of confessions. One involved a challenge to police interrogation. The other, although not turning upon an issue of police interrogation as such, is discussed here because the defendant's response to the police during interrogation gave rise to the issue before the court.

Justice Souter also wrote several opinions affirming convictions in cases that raised police interrogation issues.

In State v. Lamb,³ Justice Souter concluded that the trial judge failed to find, as required by a 1978 state case, that the validity of the defendant's Miranda waiver had been proved beyond a reasonable doubt. Because Lamb was decided before the United States Supreme Court applied the lower preponderance of the evidence standard to Miranda waivers,⁴ it provided no occasion to review the earlier state court holding. (As discussed above, Justice Souter for procedural reasons declined a subsequent opportunity to review the 1978 decision.) Justice Souter's analysis of the record and treatment of precedent was honest and appropriate. While the reversal arguably turned on a "technicality," the technicality was not one of Justice Souter's making.

In State v. Jones,⁵ the second reversal, Justice Souter actually concluded that Miranda had not been violated. Correctly anticipating a later Supreme Court case,⁶ he first ruled that Miranda does not require the police to tell the suspect the crime he is suspected of having committed. He next ruled, again correctly, that the defendant's refusal to sign the statement he gave the police did not invalidate his previous waiver. Never-

³ 484 A.2d 1074 (1984).

⁴ Colorado v. Connelly, 479 U.S. 157 (1986).

⁵ 484 A.2d 1070 (1984).

⁶ Colorado v. Spring, 479 U.S. 564 (1987), a 7-2 decision in which only Justices Brennan and Marshall dissented.

theless, Justice Souter deemed it necessary to reverse the defendant's conviction for attempted murder because the trial judge had answered "no" to the jury's question of whether the defendant's refusal to sign the statement meant that he completely denied its truth. Noting that lawyers would assume that the judge's answer meant only that the refusal was subject to more than one interpretation, Justice Souter nevertheless concluded that a lay jury probably would have taken the judge's unequivocal answer as a resolution of the factual issue. Because the issue of fact was for the jury, a reversal was necessary. Demonstrating both fairness to defendants and judicial integrity, Justice Souter properly concluded that this kind of error could not be deemed "harmless."

In State v. Lewis,⁷ on the other hand, the facts presented a close issue as to whether the police had misled the defendant when they responded to his question about the meaning of waiver. Observing that the court would have agreed with the defendant if it had limited its review to the portion of the record he isolated, Justice Souter concluded that the entire record supported the trial judge's findings that the police did not mislead the defendant and that the defendant had a correct understanding of what it meant to waive his rights. Justice Souter observed, as he did in numerous other cases, that the trial judge's findings should stand unless they are contrary to the manifest weight of

⁷ 533 A.2d 358 (1987).

the evidence. After dismissing other Miranda arguments that posed less difficulty, Justice Souter also rejected the defendant's claim that it was fundamentally unfair for the police to wire his acquaintance and use him as an informant. Referring to the defendant's argument as "obscure," Justice Souter remarked that fundamental unfairness for due process purposes does not occur "simply because a defendant places himself at a disadvantage under circumstances in which there are no substantive constitutional violations."⁸

State v. Bruneau⁹ perhaps is one of the better cases for revealing Justice Souter's reluctance to reverse criminal convictions on the basis of strained constitutional arguments. The defendant, who previously had confessed to his friend about murdering his wife, continued to contact his friend by phone after he had been formally charged with the murder. When the friend informed the police of this, they neither encouraged nor discouraged him to take the long distance calls. The friend took the calls and later informed the police of the defendant's incriminating remarks and threats to witnesses. The defendant argued that this violated his right to counsel under both the state and national constitutions. Rejecting both claims, Justice Souter held, first, that the friend was not acting as an agent of the state at the time of the calls, his private "hopes" of

⁸ Id. at 365.

⁹ 552 A.2d 585 (1988).

benefit not being equivalent to police inducement, and the police "readiness to receive" information not being equivalent to "importunity to obtain" information. Second, Justice Souter held that the friend did not interrogate or deliberately elicit incriminating remarks from the defendant. With regard to another statement admittedly taken in violation of Miranda, Justice Souter held, in accordance with United States Supreme Court precedent, that the statement could have been used, as the trial judge had ruled, for impeachment purposes. Because the defendant failed to make the argument in the trial court, and because, in any event, the defendant had not opened himself to impeachment by actually taking the stand, Justice Souter declined to consider whether a different impeachment rule should govern statements obtained in violation of either the sixth amendment or the state constitution's right to counsel provision rather than in violation of Miranda.

Bruneau came on the heels of (1) a 1983 decision, in which Justice Souter did not participate, that suggested, without holding, that the state constitution's right to counsel provision might give broader protection to defendants than the sixth amendment¹⁰ and (2) a 1984 opinion in which Justice Souter noted in passing that state precedent interpreting the state constitution required the prosecutor to prove an explicit waiver of the

¹⁰ State v. Tapply, 470 A.2d 900 (1983) (reversing defendant's conviction; Justice Souter not sitting).

right to counsel.¹¹ The dictum in these cases notwithstanding, Justice Souter declined in Bruneau to use the defendant's invocation of the state constitution as an excuse to impose further and questionable restraints on the use of a defendant's reliable admissions at trial.

B. Fifth Amendment Issues Not Related to Police Interrogation

Contrary to popular belief, the fifth amendment prohibits not self-incrimination but only "compelled" self-incrimination,¹² and then only self-incrimination of a testimonial or communicative nature. A defendant has no constitutional protection from being compelled to produce physical evidence, such as a handwriting sample or fingerprints, no matter how incriminating such evidence may be.¹³ With their roots in the same common law background, self-incrimination clauses in state constitutions presumably are no broader. At the very least, the burden should be on those who would contend otherwise.

¹¹ State v. Elbert, 480 A.2d 854 (1984) (finding no violation of the fifth or sixth amendments because the defendant initiated conversations about the crime with the police even though he earlier had invoked the right to counsel).

¹² United States v. Washington, 431 U.S. 181, 187 (1977).

¹³ Gilbert California, 388 U.S. 263, 265-67 (1967); Schmerber v. California, 384 U.S. 757, 760-65 (1966).

Justice Souter's opinions evidence a keen appreciation that the protection against compulsory self-incrimination was not intended to protect the defendant from doing anything that harms his chances of acquittal. State v. Cormier¹⁴ perhaps is his best reasoned opinion in this area. In Cormier, Justice Souter's opinion followed South Dakota v. Neville,¹⁵ which had interpreted the fifth amendment, and held that the state's use of the defendant's refusal to take a chemical test for blood alcohol content did not violate the self-incrimination clause in the state constitution. Justice Souter concluded both that the refusal to take the test was not evidence of a "testimonial" nature and that the state did not "compel" the refusal. He reasoned that under governing case law, the legislature simply could have compelled the chemical test, because such a test produces evidence that is physical in nature. What the legislature did here was to give motorists a choice to refuse to take the test -- a choice it did not have to give -- but to impose a cost on the exercise of this choice. Without this cost, the legislature would have emasculated its testing law. Surprisingly, two justices declined to follow Neville and Justice Souter's reasoning.¹⁶

¹⁴ 499 A.2d 986 (1985).

¹⁵ 459 U.S. 552 (1983).

¹⁶ See also State v. Frederick, 566 A.2d 180 (1989) (again following Neville). In State v. Denney, 536 A.2d 1242 (1987), Justice Souter dissented from a holding, based on the state constitution's due process clause, that the defendant's refusal to take the test cannot be used as evidence if the police fail to advise the defendant that his refusal can be used against him. Justice Souter argued, first, that Miranda warnings provided the

In other opinions, Justice Souter held that neither the national nor the state constitution protects against compulsory disclosures in civil commitment proceedings.¹⁷ He also held that a prosecutor's comment at trial about the defendant's trying to pull the wool over the eyes of the police and the jury was not a comment on the defendant's failure to testify.¹⁸ Two other cases raised comment on silence issues. Affirming an attempted murder conviction, Justice Souter concluded that the prosecutor could ask the victim at trial whether the defendant apologized after the shooting, which the defendant claimed was accidental; Justice Souter reasoned that because neither the national nor the state constitution gives self-incrimination protection against private parties, such as the victim, the defendant could not invoke the rule that bars evidentiary use of post-arrest silence following

defendant all the advice that was necessary. More fundamentally, Justice Souter disagreed that any warning pertaining to the evidentiary consequences of refusing to take the test was required. He charged the majority with transforming "the familiar and specific requirement of [Miranda] into a general rule of evidence, unlimited by any reference to the constitutional privilege that Miranda was intended to serve." Id. at 1247 (Souter, J. dissenting). He also faulted the majority for failing to distinguish fundamental unfairness "from what the defendant finds unfortunate." Id. at 1249. In terms of statutory and constitutional construction and the treatment of precedent, the dissent reveals Justice Souter at his analytic best.

¹⁷ State v. Mercier, 509 A.2d 1246 (1986).

¹⁸ State v. Merrill, 484 A.2d 1065 (1984). Griffin v. California, 380 U.S. 609 (1967), prohibits comment on the defendant's failure to testify.

Miranda warnings.¹⁹ In a related ruling, Justice Souter concluded that the prosecutor's evidentiary use at trial of the defendant's boast to the police that he was too sophisticated to confess constituted proper use of a statement rather than impermissible use of the defendant's invocation of his right to silence.²⁰ None of these holdings should be deemed controversial.

C. Search and Seizure

Because of the exclusionary rule, perhaps no one area of criminal procedure produces more litigation, and more hair-splitting, than search and seizure. Though sensitive to constitutional protection, Justice Souter demonstrated a disinclination to engage in the kind of technical Monday morning quarterbacking that too often has brought the criminal justice system into disrepute.

Most searches and arrests require probable cause. Although the United States Supreme Court has cautioned that probable cause is a practical, nontechnical concept that requires an exercise of common sense,²¹ some appellate judges approach the issue as legal

¹⁹ *State v. Brown*, 517 A.2d 831 (1986). The defendant had invoked the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976).

²⁰ *State v. Coppola*, 526 A.2d 1236 (1987).

²¹ *Illinois v. Gates*, 462 U.S. 213 (1983); *Brinegar v. United States*, 338 U.S. 160 (1949).

technicians, giving no deference either to the often hurried judgments the police must make or to the evaluations of magistrates who issue warrants. Not Justice Souter.

In State v. Davis,²² for example, Justice Souter upheld a warrant issued on the basis of a tip from an informant who had agreed to provide information to the police in return for favorable treatment with regard to his own criminal charge. Following Illinois v. Gates,²³ Justice Souter applied a totality of circumstances test to the issue of probable cause. He concluded that "participation in plea bargaining imposes no automatic disqualification of an informer." Looking at the police corroboration of the tip, Justice Souter reasoned that no special insight was needed to understand that the defendant was planning to sell drugs.

In State v. Baldic,²⁴ Justice Souter upheld a finding of probable cause based upon a robbery victim's not too detailed description. "On otherwise deserted streets, and within minutes of a late evening robbery in a small town, the officer saw an individual who matched the victim's description of the perpetrator as a male with bushy hair, and who was wearing a jacket that appeared to be consistent with the victim's description."²⁵

²² 575 A.2d 4 (1990).

²³ 462 U.S. 213 (1983).

²⁴ 551 A.2d. 977 (1988).

²⁵ Id. at 978.

Justice Souter also found significant the defendant's failure to respond to the officer's spotlight. While the defendant, of course, could have been innocent of the robbery, Justice Souter's opinion implicitly recognized both that police often must act on the basis of the evidence they have -- not on what we might wish that they had -- and that police failure to act promptly after a crime often will mean that the crime goes unsolved. Justice Souter's opinion evinces an understanding that probable cause requires the common sense judgments of reasonably cautious police officers.²⁶

State v. Faragi²⁷ provided an interesting twist on the probable cause issue. The defendant appealed a first degree murder conviction alleging, among other things, that his counsel was ineffective for failing to attempt to suppress the murder weapon on grounds of an allegedly illegal search of his home. Justice Souter concluded that the defendant could not possibly have been prejudiced by the lawyer's decision because the warrant that authorized the search was valid. Relying on a lower federal court opinion,²⁸ the defendant argued that it was not reasonable to assume that he kept the murder weapon in his home. Justice Souter opted for a "different generalization": "where the object

²⁶ For similar holdings by Justice Souter, see State v. Chaloux, 546 A.2d 1081 (1988); State v. Maya, 493 A.2d 1139 (1985) (finding reasonable suspicion for a Terry stop after a store burglary).

²⁷ 498 A.2d 723 (1985).

²⁸ United States v. Charest, 602 F.2d 1015 (1st Cir. 1979).

of the search is a weapon used in the crime . . . the inference that the item is at the offender's residence is especially compelling."²⁹ Once again evidencing his appreciation of probable cause as a practical concept, Justice Souter concluded that the warrant application unquestionably established probable cause.

State v. Valenzuela,³⁰ a 3-1 decision, must rank as one the better, and most important, search and seizure opinions written by Justice Souter. The defendants challenged the use of pen registers by the state police that had been installed pursuant to federal court order. (A pen register records the numbers dialed from a phone but does not intercept conversations.) Although the United States Supreme Court in Smith v. Maryland³¹ had held that the use of pen registers was not a "search" for fourth amendment purposes, the defendants claimed that the use of these devices was a search under the state constitution, and an illegal search in this instance because probable cause was lacking. Justice Souter's opinion declined to interpret the state constitution more broadly than the United States Supreme Court had interpreted the fourth amendment.

Justice Souter began by observing that both parties ironically had assumed that the reasonable expectation of privacy test

²⁹ 498 A.2d. at 727, quoting 1 W. LaFave, Search and Seizure 709 (1978).

³⁰ 536 A.2d 1252 (1987).

³¹ 442 U.S. 735 (1979).

from Katz v. United States³² defined the scope of the state constitution's search and seizure provision. He suggested at least the possibility that the state constitution was intended to have a narrower scope than that defined by Katz. Nevertheless, proceeding on the assumption that the Katz privacy test controlled for state constitutional purposes, Justice Souter agreed with the analysis in Smith that pen registers do not fall within the scope of this test. Justice Souter carefully reviewed, argument by argument, the criticisms leveled at the Smith opinion, and he found each criticism lacking in merit. Demonstrating his legal acumen, he refused to rely on the weaker segments of the Smith opinion -- those dealing with subjective privacy expectations and "assumption of the risk." Nevertheless, he reasoned that to reject the Smith analysis in toto would be to cast doubt on a substantial body of search and seizure jurisprudence. The following is just one segment of a lengthy and thorough analysis:

The defendants' position would redefine Katz's privacy by converting it from a defendant's right to be secure against certain means of non-consensual access to his communications and possessions, into a defendant's right to control the use of evidence without regard to how the defendant may have disclosed that evidence to

³² 389 U.S. 347 (1967).

another. It would empower the defendant to enforce a kind of evidentiary copyright, by precluding the government's use of information for a purpose that the defendant did not intend when he communicated with another. Suffice it to say that we could not accept the defendants' position without a wholesale overruling of the agent-informer cases . . . which stand together as an integral limit to Katz's concept of privacy.³³

A few other search and seizure decisions warrant passing comment. In State v. Stiles,³⁴ Justice Souter rejected an argument that a search warrant was tainted by illegal tape recording under a state statute; Justice Souter correctly observed that the agent's own recollection, not the tape recording, was the source of information for the warrant. Those more eager to apply exclusionary rules may not have perceived this distinction. In State v. Cimino,³⁵ Justice Souter rejected a similar "fruit of the poisonous tree" argument, concluding that even if the seizure of pills from a car was illegal, the pills played no role in the

³³ 536 A.2d at 1261. Justice Souter also disposed of several other search and seizure issues. Deserving special commendation is his analysis showing that the defendants had confused stale probable cause and stale information that is used to establish current probable cause: "If such past fact contributes to an inference that probable cause exists at the time of the application, its age is no taint."

³⁴ 512 A.2d 1084 (1986).

³⁵ 439 A.2d 1197 (1985).

probable cause that subsequently developed. In State v. Cote,³⁶ Justice Souter rejected a hair-splitting argument that a search warrant for the defendant's restaurant did not permit a search of the restaurant's basement. In State v. Cannata,³⁷ he upheld a conviction by applying harmless error analysis to the search and seizure claim. Finally, in State v. Koppel,³⁸ Justice Souter dissented from an opinion that invalidated sobriety checkpoint stops as unreasonable searches and seizures under the state constitution. Just this year, Justice Souter's position on this issue was adopted for fourth amendment purposes by the United States Supreme Court.³⁹

D. Admissibility of Eyewitness Identification Testimony

For some kinds of crimes, such as robbery and rape, eyewitness identification testimony can be crucial. The admission of such testimony was viewed entirely as a matter of state evidentiary law until the late 1960's, when the Supreme Court created new exclusionary rules stemming from its application of the sixth amendment right to counsel and the due process clause to pretrial police identification procedures.

³⁶ 493 A.2d 1170 (1985).

³⁷ 543 A.2d 543 (1988).

³⁸ 499 A.2d 977 (1985).

³⁹ Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990).

In State v. Humphrey,⁴⁰ Justice Souter rejected a due process challenge to a pretrial photo display. Carefully examining the record, he demonstrated that the display was not unnecessarily suggestive. In State v. Prisby,⁴¹ Justice Souter refused to consider such a challenge because the defendant had failed to make a timely objection. Perhaps most significantly, however, Justice Souter in State v. Cross⁴² rejected an argument that eyewitness identification evidence should be suppressed, even absent police misconduct, simply because of the danger of unreliability. The federal constitutional exclusionary rules are based on the view that the state has no legitimate interest in contributing to the risk of mistake, as it might do, for example, by conducting an unnecessarily suggestive lineup. While the risk of mistake is inherent in human perception and recall, the additional risk created by unnecessarily suggestive identification procedures is gratuitous. When the police have not engaged in such misconduct, however, the rule is, as it always has been, that the weight, if any, that should be given to a witness's identification is for the jury or trier of fact to decide. Justice Souter in Cross adhered to the common law rule by refusing to create yet another, and even more novel, exclusionary rule

⁴⁰ 531 A.2d 329 (1987).

⁴¹ 500 A.2d 89 (1988).

⁴² 519 A.2d 272 (1986).

that would make judges, rather than juries, the ones to evaluate witness credibility.

E. Guilty Pleas and Trial by Jury

In Richard v. MacAskill,⁴³ Justice Souter reversed a lower court order dismissing the defendant's habeas corpus challenge to a nolo contendere plea to shoplifting. The defendant alleged that his plea taking procedure did not comply with the procedural requirements of Boykin v. Alabama.⁴⁴ Justice Souter concluded that although a technical Boykin violation requires reversal on direct appeal, the defendant cannot prevail on collateral attack (i.e., habeas corpus) unless his plea was unknowingly or involuntarily made. If the defendant has shown a Boykin violation, however, the state has the burden of demonstrating the plea's validity. On the facts presented, Justice Souter concluded both that Boykin had been violated, in that the record did not show the defendant was aware of the rights she was relinquishing, and that the state failed to carry its burden of showing that the defendant understood she had the right to go to trial. Justice Souter remanded the case to give the state an opportunity to carry its burden.

⁴³ 529 A.2d 898 (1987).

⁴⁴ 395 U.S. 238 (1969).

Richard is not wholly satisfactory in that it is difficult to believe that the defendant was not aware of what rights she was relinquishing when she entered her plea. Moreover, much can be said for a rule that presumes defense counsel has communicated with the client. Nevertheless, the United States Supreme Court has mandated procedures that will make evident on the record that the defendant explicitly waived his rights and entered a knowing plea, and there is no disputing that such a record did not exist in this case. Indeed, Justice Souter criticized the trial court because this was the second case in recent years to reveal that the court had made "neither a taped nor a written record." The clear message is that whatever one may think of Boykin, these errors are easy to avoid.

In State v. Hewitt,⁴⁵ Justice Souter similarly applied a rigorous standard to the issue of waiver of trial by jury. During the defendant's trial for forgery, the trial judge decided both to dismiss one of the jurors who might have known the defendant and to continue the trial with eleven jurors, no alternative jurors having been selected. The judge announced his decision to counsel in chambers and again in open court. On the latter occasion, defense counsel, in front of the defendant, responded, "That's fine." With new counsel on appeal, the defendant claimed that the waiver was invalid because the trial judge did not

⁴⁵ 517 A.2d 820 (1986).

follow a "Boykin" procedure to determine that he, the defendant, personally wanted to waive this right.

Relying on the state constitution's jury trial provision, Justice Souter agreed and reversed the conviction. Starting from the premise that "the right to trial by jury is one of central and fundamental importance," Justice Souter concluded that acquiescence in the loss of fundamental rights will not be presumed. Recognizing that a number of federal decisions had permitted the waiver of constitutional rights to be implied, Justice Souter found those decisions inapposite: first, the right at issue here was fundamental; second, the court knew that the right in question was being waived; third, the trial judge could have engaged in a waiver inquiry without requiring the defense to reveal strategic or confidential information. Justice Souter found the right at issue no less important because only one juror was dismissed: "twelve means twelve, and concessions can develop momentum."⁴⁶

Among Justice Souter's opinions, Hewitt stands virtually alone in revealing a willingness to reverse a conviction for an arguably technical reason when there was a choice. As Justice Souter conceded, some federal cases specifically have held that defense counsel's stipulation to a jury of less than twelve is enough to bind the client. Moreover, the likelihood in this case that the defendant would have disagreed seems insubstantial. In

⁴⁶ Id. at 822.

addition, Justice Souter's "slippery slope" concern about allowing any concessions is not fully persuasive. On the other hand, the right to trial by jury is fundamental in an historical sense, waiver of this right not even being permitted at common law and in the early days of this republic. If there are any rights the defendant personally must waive, trial by jury seems an obvious candidate for inclusion. Finally, as in MacAskill, the trial judge easily can avoid posttrial disagreements over waiver simply by asking the defendant whether he knows what he is relinquishing and wants to proceed. The Hewitt holding, that is, imposes no real burden on the criminal justice system.⁴⁷

State v. O'Leary,⁴⁸ which involved both guilty plea and trial by jury issues, demonstrates Justice Souter's unwillingness, even in these two areas, lightly to overturn reliable convictions. Writing for the Court, Justice Souter first held that due process under the state constitution does not prevent the prosecution from rescinding a plea agreement before the defendant has pleaded or otherwise relied upon the agreement.⁴⁹ Second, Justice Souter held that the trial judge did not violate the defendant's right to trial by jury when he told the jury that they need not be concerned with proof of penetration because the

⁴⁷ See also State v. Bailey, 503 A.2d 762 (1985) (due process requires a record to be made of the judge's conferences with jurors; on these facts, failure to make a record was harmless error).

⁴⁸ 517 A.2d 1174 (1986).

⁴⁹ Accord, Mabry v. Johnson, 467 U.S. 504 (1984).

defendant had admitted this element of the crime in his testimony. Sounding a cautionary note, however, Justice Souter added that "[t]here is a quantum difference of constitutional significance between a fact admitted under the conditions present here and a fact merely uncontested." Justice Souter also warned that judges should not assume that the defendant has made an admission if there is any doubt about the matter. Though concurring on harmless error grounds, two justices disagreed with Justice Souter's view that the trial judge did not violate the defendant's right to trial by jury.⁵⁰

F. Ineffective Assistance of Counsel

Ineffective assistance of trial counsel quite understandably is a favorite allegation for disappointed defendants seeking to overturn their convictions either on direct appeal or collateral attack. If not approached realistically, such allegations can play havoc with the strong interest in finality in criminal prosecutions. An appellate judge aware of his or her limited role in this area knows that Monday morning quarterbacking is to be avoided. Legal assistance is ineffective not when the judge disagrees with strategic defense choices but only when those choices, one, are outside the bounds of reasonable disagreement

⁵⁰ See also *State v. Elliot*, 574 A.2d 1378 (1990) (plea is not unknowing because defendant not told conviction would make him liable to be declared a motor vehicle habitual offender).

and, two, prejudice the defendant. Justice Souter's opinions in this area reflect a proper awareness of the appellate court's role.

Justice Souter's opinion in State v. Faragi already has been discussed.⁵¹ Justice Souter used a similar analytic approach in State v. Allegra,⁵² affirming the defendant's forgery conviction but remanding for reconsideration of the sentence. The defendant alleged ineffective assistance of counsel because of counsel's failure to file a motion to quash the indictment on the ground that it charged a misdemeanor, not a felony as it claimed. Agreeing that the indictment incorrectly described the defendant's offense as a felony, Justice Souter disagreed that counsel was ineffective for failing to file a motion to quash. He pointed out that the indictment validly charged the misdemeanor offense, and that felony courts could assume jurisdiction over misdemeanors and probably would have done so in this case. Hence counsel's decision was not the product of professional incompetence. Moreover, because the defendant's sentence did not exceed what a misdemeanor conviction would have authorized, Justice Souter also concluded that the prejudice prong of the ineffective assistance of counsel test was not satisfied.

That Justice Souter approached ineffective assistance of counsel claims with common sense does not mean that he was cava-

⁵¹ See notes 27-29 and accompanying text.

⁵² 533 A.2d 338 (1987).

lier in rejecting such claims. In the same Allegra case, he agreed that reconsideration of the sentence was necessary because the sentence imposed, though within what the misdemeanor statute authorized, may have been influenced by the judge's belief, not corrected by counsel, that the crime was a felony. Although this conclusion did not justify reversal of the sentence under the prejudice prong of the test, Justice Souter, demonstrating his fairness, used the court's supervisory power over the trial courts to order a reconsideration of the sentence. Showing his disinclination for wasting scarce judicial resources, however, Justice Souter observed that the trial judge simply could let the original sentence stand if in fact he had been aware that the offense was only a misdemeanor.

Justice Souter also found in Allegra that counsel was incompetent for failing to object to certain jury instructions. He avoided reversing the conviction outright only by concluding that the prejudice prong of the ineffective assistance of counsel test was not satisfied: the defendant failed to demonstrate a probability that the verdict would have been different.⁵³ Indeed, he thought it highly unlikely that the outcome would have been different. Justice Souter reached this conclusion only after carefully reviewing and analyzing the record. Finally, finding, as in Faragi, that the search warrant at issue was valid, Justice

⁵³ The prejudice prong was imposed in Strickland v. Washington, 466 U.S. 668 (1984).

Souter absolved defense counsel of an additional charge of incompetence for not filing a motion to suppress.

Allegra reveals a judge without a "knee-jerk" response to issues that come before him. Although the temptation is great to become cynical about ineffective assistance claims, Justice Souter proceeded to consider and to address seriously each of the defendant's arguments in Allegra with regard to this issue. He found some of the arguments wholly lacking in merit, some only partially lacking in merit, and one -- that regarding the sentencing -- deserving of some appellate relief. Demonstrating fairness and care, he also eschewed precipitous and reckless use of the "reversal" club that an appellate court carries. More could not be asked of an appellate judge.⁵⁴

G. Rape Shield Law

Loose talk has suggested that the only conviction Justice Souter ever reversed involved the state's rape shield statute. Presumably such hyperbole is supposed to convey a sense of a pro-prosecution judge who is not sensitive to the interests of women. If this is the intended message, it is wrong on both counts. Justice Souter's willingness to reverse convictions when neces-

⁵⁴ See also Hopps v. State Bd. of Parole, 500 A.2d 355 (1985) (rejecting an ineffective assistance of counsel claim predicated on an alleged conflict of interest).

sary already has been demonstrated. Attention here will focus on his decisions applying the rape shield statute.

New Hampshire's rape shield statute bars evidence of "prior sexual activity between the victim and any person other than the defendant."⁵⁵ In State v. Colbath,⁵⁶ the defendant was charged with felonious sexual assault. Having met the complainant at a bar and associated with her there during the afternoon, the defendant took her to his trailer, where sexual intercourse occurred. According to the complainant, the intercourse was forcible; according to the defendant, it was consensual. The defendant claimed that the complainant directed sexually provocative attention not only to him but also to several other men in the bar on the afternoon in question, and there was substantial evidence of this. The trial judge first permitted the defense to produce testimony to this effect, then ruled that such evidence was inadmissible, and then acquiesced nevertheless in the introduction of such evidence. In his instructions, however, the judge explicitly told the jury that the complainant's activities with other men on the day in question was not to be considered on the issue of consent. He relied, at least in part, on the rape shield law.

Justice Souter observed that the instruction could be upheld only if the evidence was excludable. Despite the apparently

⁵⁵ RSA 632-A:6.

⁵⁶ 540 A.2d 1212 (1988).

absolute terms of the statute, earlier cases had held that the statute had to be construed so as not to violate the defendant's constitutional right to confrontation. In particular, State v. Howard,⁵⁷ decided before Justice Souter joined the court, had held that a defendant must be given an opportunity to show that the probative value of such evidence "in the context of [the] particular case outweighs its prejudicial effect on the prosecutrix." Justice Souter concluded that this was such a case.

First, the evidence at issue referred to public acts at the bar, not to private acts of an intimate nature: "evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners." Second, the evidence was particularly strong given that the acts in question occurred closely in time to the alleged assault. Third, in this case, a motive to lie was presented in that the defendant's living companion had caught the defendant and the complainant in his trailer and violently assaulted the latter. "With the sex act thus admitted, with the evidence of violence subject to exculpatory explanation, and with a motive for the complainant to make a false accusation, the outcome of the prosecution could well have turned on a very close judgment about the complainant's attitude of resistance or consent." Furthermore, because the

⁵⁷ 426 A.2d 457 (1981).

privacy interest underlying the statute was virtually absent here, there was little to outweigh the defendant's need for the evidence.⁵⁸ Given that no one has a legitimate interest in mistaken convictions, it should come as no surprise on facts such as these that no justice dissented.

In State v. Baker,⁵⁹ decided before Colbath, Justice Souter showed that application of the principles employed in that case has nothing whatsoever to do with the gender of the complainant. The defendant was convicted of felonious sexual assault of a thirteen year old boy. Writing for a unanimous court, Justice Souter reversed the conviction because the trial court had failed to provide the defendant the hearing required by Howard on the possible admissibility of sexual conduct evidence.

In State v. Goulet,⁶⁰ a case involving a female complainant, the prosecutor commented on the defendant's failure to show that the victim was sexually promiscuous. The trial judge overruled defense counsel's objection on the ground that such evidence could have been admissible despite the rape shield statute. Justice Souter concluded that the term "promiscuity" was broad enough to cover conduct not admissible under the Howard rule. He added, moreover, that Howard did not provide an automatic rule of admissibility; rather, the complainant's claim of personal priv-

⁵⁸ 540 A.2d at 1217.

⁵⁹ 508 A.2d 1059 (1986).

⁶⁰ 529 A.2d 879 (1987).

acy cannot be defeated unless the defendant offers facts demonstrating that probative value outweighs prejudice. Justice Souter construed the Howard rule fairly and narrowly, thus demonstrating his sensitivity to the privacy interests of female complainants. In addition, by concluding that the defense had invited the prosecutor's comment, he also affirmed the defendant's conviction for a brutal sexual assault.⁶¹

H. Miscellaneous

As previously indicated, Justice Souter wrote too many criminal justice opinions to review even most of them. This is somewhat unfortunate, because numerous cases outside the areas already discussed confirm both his intellectual honesty and his intelligence. A few worth reading are mentioned here.

In State v. Springer,⁶² Justice Souter rejected a construction of the state's restitution statute that would have permitted restitution to be ordered to the victim's insurance carrier. Justice Souter carefully reviewed the text of the statute and its legislative history in reaching this conclusion. To the state's argument that such an interpretation would produce an absurd

⁶¹ See also State v. Johnson, 564 A.2d 444 (1989), not involving the rape shield statute, but holding that the judge erred in sequestering the fourteen year old male complainant and, therefore, did not err in permitting him to testify in rebuttal.

⁶² 574 A.2d 1381 (1990).

result, Justice Souter responded that such an argument should be redirected to the legislature. "[W]hen the intent is consistent with the language employed, this court has no interpretive right to disregard it in disparagement of the legislative choice it reflects." Obviously, this is a judge inclined to interpret rather than legislate the law.

In State v. Dufield,⁶³ Justice Souter rejected an argument that voluntary intoxication could be a defense to second degree murder based upon reckless indifference to human life. His reasoned opinion demonstrates keen ability to grapple with some of the difficult jurisprudential issues on the substantive side of the criminal law. In State v. Allen,⁶⁴ Justice Souter similarly wrote an insightful opinion explaining why an indictment for attempted murder need not allege the degree of the murder attempted. Particularly revealing of his judicial outlook was this comment: "We are dealing, after all, with a code of basic human conduct, not with a system of esoteric rules designed to guide specialist professionals."⁶⁵ Were it only true that all judges shared this view.

Finally, numerous decisions show appropriate deference to the findings of the trial judge. Among these are State v. Hart-

⁶³ 549 A.2d 1205 (1988).

⁶⁴ 514 A.2d 1263 (1986).

⁶⁵ Id. at 1267.

ford,⁶⁶ upholding a hung jury mistrial challenged on double jeopardy grounds; State v. Cochran,⁶⁷ upholding a judge's evidentiary decision that probative value outweighed possible prejudicial effect; and State v. Knowles,⁶⁸ deferring to the trial judge's decision to invoke the catch-all exception to the hearsay rule.

III. Conclusion

The above review of Justice Souter's opinions should confirm the assessment of him set forth in the overview section of this analysis, and little would be served by repeating that assessment here. Suffice it to say that in a day when legal issues tend to be examined from the perspective of competing "sides," Justice Souter's opinions reflect that he is neither a "pro-prosecution" nor a "pro-defense" judge. Rather he is a fair and intelligent jurist who, while not inclined to indulge frivolous arguments for reversal, treats serious issues with the seriousness they deserve. He is a judge who believes in "neutral principles," meaning that his decisions are dependent upon the issues in the particular case rather than upon the identity of the parties before the court. Thus, in one case, an application of the rape

⁶⁶ 567 A.2d 577 (1989).

⁶⁷ 569 A.2d 756 (1990).

⁶⁸ 562 A.2d 185 (1989).

shield statute may favor the defendant, in another it may favor the male or female complainant; in one case, an examination of guilty plea requirements may favor the prosecutor, in another it may favor the defendant. Always, however, Justice Souter is wary of reversing convictions for insubstantial reasons. That some may view such a "conservative" approach to reversing convictions as proof of a bias for the prosecution reflects more on the times we live in, and on those who would make such a charge, than it does on Justice Souter's impartiality and legal ability.

NEWS RELEASE

David Souter -
NATIONAL ORGANIZATION
FOR WOMEN *analysis*

Press Office

1000 16th Street, NW, Suite 700

Washington, DC 20036-5705

202/331-0066

202/785-8576 (FAX)

FOR IMMEDIATE RELEASE
SEPTEMBER 19, 1990

CONTACT: DAVID HARWELL
(202) 331-0066

NOW DEMANDS EXTENSION OF SOUTER HEARINGS, APOLOGY FROM SENATE JUDICIARY COMMITTEE

The National Organization for Women today demanded an extension of the Souter confirmation hearings to take testimony on the disastrous consequences that would follow a reversal of Roe v. Wade. NOW also seeks an apology from the Committee for the behavior of some of its members yesterday afternoon toward feminist leaders and women's rights issues.

"The behavior of certain members of the Judiciary Committee trivialized us and our legitimate concerns for women's rights, especially the rights to birth control and abortion," said NOW President Molly Yard. "Committee members need to have a far greater understanding of the critical importance of these rights to women's lives and the life of our country than was demonstrated yesterday."

"The Senators must have a full appreciation of what it would mean to reverse reproductive rights in order to comprehend why they cannot take the risk of confirming David Souter to the Court," Yard concluded.

NOW called for testimony on the impact of illegal abortion from physicians and health care workers as well as from women who have faced problem pregnancies.

The panel of women's rights leaders at yesterday's hearing was not called until late in the afternoon. By the time questioning of the panel began, all of the Democratic Senators except Chairman Biden had disappeared. Of the Senators who remained, Senator Thurmond trivialized, Senator Simpson patronized and Senator Specter attacked the women's rights leaders and their testimony.

(more)



EXTENSION OF SOUTER HEARINGS 2-2-2

"Senator Thurmond began by complimenting the 'ladies' on our appearance and declining to ask even one substantive question," recalled Yard. "Senator Simpson mischaracterized NOW's testimony, attacked our credibility and lectured us like school children on proper behavior in a hearing.

"Senator Specter weighed in by repeatedly quoting a convicted rapist's explicit description of how he and the woman had allegedly fondled each other earlier on the day that he raped her," Yard continued. "He ignored the issue of Judge Souter's stereotyping of the woman and implying she had provoked the assault or fabricated it.

"When Judge Souter was asked what would happen if Roe were reversed, he referred to state legislatures, politics, federalism, enforceability of anti-abortion laws -- everything but women and our lives. The Senators should solicit additional testimony and give serious consideration to more considered and compassionate views before deciding whether to confirm the fifth vote on the Court to take away from American women the right to abortion and perhaps birth control as well," Yard concluded.

In asking for extension of the hearings NOW supports the Leadership Conference on Civil Rights which seeks further questioning of Souter on racial discrimination in New Hampshire. We further request that the hearings deal with Judge Souter's activities against the citizen protest of the Seabrook nuclear plant in New Hampshire. There are serious concerns about Souter's interference with their First Amendment rights.

The women's rights panel included Yard, Feminist Majority President Eleanor Smeal, former Congresswoman Elizabeth Holtzman, NOW Legal Defense and Education Fund Executive Director Helen Neuborne, and Attorney Gloria Allred representing Norma McCorvey who was the Jane Roe of Roe v. Wade.

David Souter -
Analysis

ACTION MEMORANDUM

To: Judicial Nomination Allies
From: Thomas L. Jipping, J.D. *TJ*
Legal Affairs Analyst, Coalitions for America
Re: Nomination of David H. Souter
Date: July 30, 1990

As you know, on July 23 President Bush nominated U.S. Circuit Judge David H. Souter to replace retired Supreme Court Associate Justice William J. Brennan, Jr. Souter was not on among those individuals most often recommended for appointment. It is clear that President Bush tried to strike a balance between conservatism and consentability.

The Left is trying to find valid reasons openly to oppose Souter; they have been unable to do so. Alternatively, the left is trying to split and diminish conservative support; they should not be allowed to do so.

Coalitions for America has nearly completed our own independent analysis of Souter's record. It will be available soon. We have found no reason to oppose him and are finding many reasons to support him. It is important now to begin conservative grassroots support. It is, however, equally important to show the right kind of support.

The appropriate stance to take is a step removed from the individual and focuses on the criteria for a good Justice. President Bush used the same phrase half a dozen times at the press conference announcing Souter's nomination and we should continue using it: America needs a Justice who will interpret the Constitution and not legislate from the bench. Our message should be that it appears David Souter is this kind of Justice. This not only shows positive, yet slightly cautious, support for this nominee, it also puts us all on record about what we expect the next one to be.

Find a few items attached:

1. Generic talking points stressing themes, priorities, criteria. Use them, repeat them, emphasize them. Do not get caught up in the litmus test game, semantic bantering about stray sentences, or reactions to individual concurring opinions. Stress these general points and say that we are increasingly confident that Souter will be the kind of Justice that President Bush said he was nominating.

2. A preliminary Senate target list for letters, calls, etc. This is developed from raw data on nearly a dozen past roll call votes on judicial nominations and supplemented with some intuition and intelligence gathering. Its form does assume that things are/will become polarized. If they do not, the balance will shift toward the "favorable" category.

3. A short memorandum on two "red flag" decisions which conservatives have been discussing. Neither raises any serious cause for concern. Neither does the "advisory letter" printed in today's Washington Post. That letter - which expresses no opinion about abortion, no opinion about parental involvement, and no opinion about Roe v. Wade - reflects a narrow, restrained view of the proper role and function of judges. We support that view.

4. A short biography.

RECOMMENDED IMMEDIATE ACTION

You need to write and call Senators, especially those on the Judiciary Committee, to support the nomination. In doing so, stress the themes, oppose the litmus test, and create high expectations.

You need also (this is an opportunity we have missed in the past) make your voice heard to the Senators as they are home in their states during the August recess, roughly August 10 through Labor Day.

**PLEASE SEND US COPIES OF ANY LETTERS,
REPORTS OF ANY CONTACTS, CALLS, OR
OTHER ACTION YOU ARE ABLE TO DO !!
THIS IS ESSENTIAL TO KEEP TRACK OF THE TROOPS.**

Coalitions for America -- 721 Group

Talking Points for Letters to the Editor, Letters to Senators

(feel free to use as your own)

Presidential Mandate

The Constitution specifically defines two powers in the judicial selection process -- nomination and appointment -- both of which belong to the President. The Senate's role in the judicial selection process is, as a unanimous Supreme Court articulated earlier this year, strictly "limited to advise and consent." When the President submits a superbly qualified conservative nominee to the Senate, the Senate should consent to the nomination. The duty is to the Constitution -- not to a single issue litmus test.

Judicial Review -- Not Judicial Legislation

President Bush said that judges should "not legislate from the bench, but faithfully interpret the Constitution." He wants a strict constructionist who will adhere to the full text of the Constitution, not supplant his or her own view, however seemingly noble, over the actual text of the Constitution.

What the Law Is, Not what It "Ought" to Be

The country needs a Justice who will state what the law is, not what he or she thinks it ought to be. The power of judicial review which the Great Chief Justice John Marshall articulated is the power to interpret existing laws, not create new ones. Judicial review is not a veto power. The Framers of the Constitution mandated that the legislature -- not the court -- make policy. The framers explicitly rejected a proposal to make the judiciary a part of the Council of Revision.

Fidelity to a Written Constitution

Only when a law clearly and unmistakably conflicts with a constitutional provision or premise does the Constitution warrant judges to nullify the law. The province of the judiciary is law--not politics. Chief Justice John Marshall warned us to "never forget that it is a Constitution we are expounding." Jefferson voiced this same sentiment that judges were not to "make the Constitution a blank piece of paper" by taking the Constitution's name in vain to protect their own pet causes and issues. As John Marshall summed it up: "the peculiar circumstances of the moment may render a decision more or less wise, but it cannot make it more or less constitutional." The sole and only question in each and every case is whether the law comports with the text of the Constitution, and only those law which clearly conflict with the actual Constitution are unconstitutional. In a trial, we ask that

the jury be honest, impartial, and free from bias Can't we ask at least -- as the Constitution dictates -- that the same be true for our judges?

"Laws Not Men"

We often hear our nation described as one governed by law not men. No one is above the law -- and that includes Justices. America needs a Justice who will not be above the Constitution but bound by duty to its actual text. Justices should not be blurred by emotions -- the duty is to the law. As Aristotle has said -- "law is reason, free from passion."

We want a Justice who will follow the law, not his or her own emotions. Former Justice William Brennan let his emotions override the Constitution's clear text -- in particular, with the death penalty. The Constitution clearly anticipates in four instances that the death penalty is a constitutionally permissible. Yet, Brennan let his personal notion of justice thwart not only the mandate of the legislature, but also the Constitution. The Constitution does not bar the death penalty if legislatures enact statutes which conform to due process. America needs judges who will faithfully follow the Constitution -- not their own personal visions of justice. Justices cannot pick and choose which parts of the Constitution to interpret -- they must interpret all of the Constitution.

America needs a Justice who will not rewrite the Constitution according to his or her predilections and prejudices. America needs a Justice who will interpret the actual Constitution and all of its text -- and not selectively disregard certain provisions which he or she dislikes. The duty is to the law, the duty is to the Constitution.

The Constitution -- Not Interpretations

America needs a Justice who will fight to defend the Constitution -- not *Roe v. Wade*. When precedent conflicts with the Constitution, the Constitution must win. To quote Justice Felix Frankfurter -- "the ultimate touchstone of the Constitution is the Constitution, not what we have said about it." In other words, the ultimate duty is to the Constitution -- not to precedents which are not ultimately based in the actual words of the Constitution.

Justice is Not One-Sided

As Justice Louis Brandeis has avowed: "Justice is due to the accuser as well as the accused." We often speak of CRIMINAL JUSTICE; yet, the liberals have an extremely myopic view -- seeing only the criminal. It is about time that we have a Justice who will put "justice" back into criminal justice. The very first sentence of the Constitution -- the very first mandate -- is to "establish

Justice." Justice demands "justice" for the victim in addition to the deserved punishment of the criminal.

Presumption of Innocence

The two-fold aim of "justice" is that "the guilty will not escape nor innocent suffer." America needs a Justice who will not let the "guilty escape" due to a mere technicality. In addition, we want a Justice who will not make the innocent suffer in the name of affirmative action. The presumption of innocence should not be used by Justices merely when it is convenient -- it is a permanent rule. Two wrongs do not make a (constitutional?) right. In the recent FCC case, a five Justice majority stated that it was o.k for the government to discriminate against whites -- that it was benign discrimination. As Justice Sandra Day O'Connor retorted in dissent, "'benign racial classification' is a contradiction in terms." Equal protection of the laws extend to ALL citizens, regardless of color. America needs a Justice who will protect the rights of ALL Americans. The Constitution clearly states that the rule is NO DISCRIMINATION -- PERIOD!

Unenumerated Rights

As the Ninth Amendment states, the Bill of Rights is not an exhaustive list of the rights retained by the people. But these rights are to be conferred by a legislature, not invented by the judiciary.

We the People -- Government by the People, Not the Judiciary

In America, the legitimacy of government rests ultimately with the people. In America, the people rule, not nine lawyers -- their duty is to guard rights which are actually in the Constitution, not those concocted out of thin air.

Right to Vote in a Democratic Republic

The most precious American right -- the right to vote -- will not be tossed aside. In our America--the people's right to choose -- the right to vote -- will be taken seriously. In our America, "We the people" -- not the judges -- will rule.

-- David Baloga, Patrick McGuigan

DRAFT AS OF 7-25-90

phone numbers (202-224-****)

Senate Judiciary Committee

Biden	(D-DE)	5042	Thurmond	(R-SC)	5972
Kennedy	(D-MA)	2417	Hatch	(R-UT)	5251
Metzenbaum	(D-OH)	2315	Simpson	(R-WY)	3424
DeConcini	(D-AZ)	3464	Grassley	(R-IA)	0473
Leahy	(D-VT)	4242	Specter	(R-PA)	4254
Heflin	(D-AL)	3419	Humphrey	(R-NH)	1353
Simon	(D-IL)	2152			

(special priority committee targets in BOLD)

SOLID IN FAVOR			LEANING IN FAVOR			LEANING AGAINST *			SOLIDLY AGAINST *		
Armstrong	(R-CO)	5941	Exon	(D-NE)	5922	Bingaman	(D-NM)	5521	Adams	(D-WA)	2621
Bond	(R-MO)	5721	Boren	(D-OK)	4721	Dixon	(D-IL)	2854	Akaka	(D-HA)	6361
Boschwitz	(R-MN)	5641	Breaux	(D-LA)	4623	Graham	(D-FL)	3041	Biden	(D-DE)	5042
Cochran	(R-MS)	5054	DeConcini	(D-AZ)	4521	Nunn	(D-GA)	3521	Bradley	(D-NJ)	3224
D'Amato	(R-NY)	6542	Ford	(D-KY)	4343	Pell	(D-RI)	4642	Bumpers	(D-AR)	4843
Danforth	(R-MO)	6154	Heflin	(D-AL)	3419	Sanford	(D-NC)	3154	Burdick	(D-ND)	2551
Dole	(R-KS)	6521	Johnston	(D-LA)	5824	Chafee	(R-RI)	2921	Conrad	(D-ND)	2043
Domenici	(R-NM)	6621	Shelby	(D-AL)	5744	Jeffords	(R-VT)	5141	Cranston	(D-CA)	3553
Durenberger	(R-MN)	3244	Specter	(R-PA)	4254	Warner	(R-VA)	2023	Daschle	(D-SD)	2321
Heinz	(R-PA)	6324	Cohen	(R-ME)	2523	Reid	(D-NV)	3542	Dodd	(D-CT)	2823
Garn	(R-UT)	5444	Wilson	(R-CA)	3841	Bryan	(D-NV)	6244	Fowler	(D-GA)	3643
Gramm	(R-TX)	2934	Packwood	(R-OR)	5244	Pryor	(D-AR)	2353	Glenn	(D-OH)	3353
Grassley	(R-IA)	3744	Shelby	(D-AL)	5744	Robb	(D-VA)	4024	Harkin	(D-IA)	3254
Hatch	(R-UT)	5251				Bentsen	(D-TX)	5922	Inouye	(D-HA)	3934
Hollings	(D-SC)	6121							Kennedy	(D-MA)	4543
Kassebaum	(R-KS)	4774							Kerry	(D-MA)	2742
Helms	(R-NC)	6342							Kohl	(D-WI)	5653
Humphrey	(R-NH)	2841							Lautenberg	(D-NJ)	4744
Kasten	(R-WI)	5323							Levin	(D-MI)	6221
Lugar	(R-IN)	4844							Metzenbaum	(D-OH)	2315
McCain	(R-AZ)	2235							Mikulski	(D-MD)	4654
McClure	(R-ID)	2752							Mitchell	(D-ME)	5344
McConnell	(R-KY)	2541							Moynihan	(D-NY)	4451
Murkowski	(R-AK)	6665							Byrd	(D-WV)	5244
Nickles	(R-OK)	5754							Riegle	(D-MI)	4822
Pressler	(R-SD)	5842							Rockefeller	(D-WV)	6472
Roth	(R-DE)	2441							Sarbanes	(D-MD)	4524
Rudman	(R-NH)	3324							Simon	(D-IL)	2152
Simpson	(R-WY)	3424							Wirth	(D-CO)	5852
Stevens	(R-AK)	3004							Baucus	(D-MT)	2651
Symms	(R-ID)	5623							Leahy	(D-VT)	4242
Burns	(R-MT)	2644							Sasser	(D-TN)	3344
Coats	(R-IN)	5623							Gore	(D-TN)	4944
Lott	(R-MS)	6253									
Mack	(R-FL)	5274									
Wallop	(R-WY)	6441									
Thurmond	(R-SC)	1300									
Hatfield	(R-OR)	3753									
Gorton	(R-WA)	3441									

BUCK-PAC
Leiberman (D-CT) 4041

* Assuming events become polarized

Mailing address for all Senators:
The Honorable _____
U.S. Senate
Washington, D.C. 20510

MEMORANDUM

To: 721 Group & Allies
From: Thomas L. Jipping, J.D. *T*
Re: Souter Nomination/"Red Flag" Decisions
Date: July 24, 1990

Needless to say, the Souter nomination is something of a "thud" for conservatives. Bush picked someone not on our "short list" who looks somewhat conservative but is a relative unknown. Analyses of this nomination will flourish in the days ahead. Here is a brief memo on the two New Hampshire Supreme Court decisions in which Justice Souter participated that our allies have flagged. Copies of the decisions are attached.

Opinion of the Justices 129 N.H. 290 (May 5, 1987)

In this case, the Supreme Court of New Hampshire, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of House Bill 70. That bill would prohibit homosexuals from adopting, being foster parents, or running day care centers, creating an irrebuttable presumption that they are unfit for these activities. Four justices, including Souter, joined this opinion.

The majority concluded that the proposed statute, as applied to adoption and foster care, would not violate equal protection, procedural or substantive due process, privacy, association, or other rights. The majority concluded that the proposed statute would violate the equal protection clause as applied to operating child care agencies and, therefore, did not evaluate that provision for any other constitutional defects.

I. Federal Equal Protection. The court concluded that homosexuals are not a suspect class requiring heightened scrutiny, do not qualify for "middle tier" scrutiny, and do not have a fundamental right to engage in sodomy. "There is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute." The proper test is whether the legislation is rationally related to a legitimate governmental purpose.

The court generally accepted "the assertion that the provision of appropriate role models is a legitimate governmental purpose." The court concluded: "It is our opinion that the exclusion of homosexuals, as narrowly defined by your resolution, from foster parentage and adoption can be found to be rationally related to the bill's purpose...to provide appropriate role models for children, but we are unable to conclude that such an exclusion vis-a-vis operators of all types of child care agencies is so related."

According to the court, "the source of sexual orientation...is thought to be a combination of genetic and environmental influences." The "role model theory" that persons in the position of parents serve as role models after whom children pattern themselves "most likely holds true in the parent-child or other familial context. We are not satisfied, however, that it would hold true outside such a context....Thus, we are unable to accept the role model theory as providing a rational basis on which to exclude homosexuals as a class from operating all of the types of facilities defined [in state law]."

II. State Equal Protection. Same analysis and conclusion.

III. Federal or State Due Process. The court concluded that there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."

IV. Right to Privacy. The court, following the U.S. Supreme Court's decision in *Bowers v. Hardwick* (1986), concluded that H.B.70 would not violate "any substantive right to privacy under either the State or Federal Constitution."

V. Freedom of Association. "Likewise, there is no infringement upon any right of freedom of association under either the Federal or State Constitution."

The court's decision with respect to adoption and foster care is certainly correct. It rejected the underpinnings of the homosexual agenda, that homosexuals have specific legal "rights" to engage in certain activities. The court's decision that the "role model" theory could not justify the exclusion from homosexuals from operating child care agencies is arguably defensible on strictly legal grounds but arguably indefensible on strictly policy grounds. This decision, and Souter's joining it, is essentially a correct one and should not, by itself, raise any serious concerns. A Justice Brennan or a Justice Marshall might well have joined the single dissenter in this case who thought every restriction on homosexuals in this bill was unconstitutional.

Smith v. Cote
513 A.2d 341 (1986)

In this medical malpractice case, a woman brought a "wrongful birth" claim against her physician for failing to discover the mother's rubella and advise her of the risk of potential birth defects if she became pregnant. She claimed this deprived her of information that would have led her to have an abortion.

The court held that a wrongful birth cause of action may be maintained in New Hampshire, extending its previous recognition of a "wrongful conception" cause of action arising from a negligently performed sterilization. The increased ability to predict and detect fetal abnormalities and the U.S. Supreme Court's decision in *Roe v. Wade* are two factors explaining widespread judicial acceptance of wrongful birth actions.

The plaintiff also brought a "wrongful life" claim, supposedly on behalf of her daughter born with congenital rubella syndrome. Using standard tort principles, the court concluded that "[i]n order to recognize Heather's wrongful life action, we must determine that the fetal Heather had an interest in avoiding her own birth, that it would have been better for *Heather* if she had not been born." The court refused to recognize this claim because of "compelling policy reasons."

Justice Souter joined the majority opinion but wrote a separate opinion to address the issue of "whether, or how, a physician with conscientious scruples against abortion, and the testing and counselling that may inform an abortion decision, can discharge his professional obligation without engaging in procedures that his religious or moral principles condemn. To say nothing about this issue could lead to misunderstanding." He concluded: "It does not follow, however, and I do not understand the court to hold, that a physician can discharge the obligation of due care in such circumstances only by personally ordering such tests and rendering such advice. The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."

The court's recognition of a wrongful birth cause of action is distressing though it is consistent with the pattern across the country. The birth of a child should never be considered a legal wrong warranting compensation for emotional distress and the costs of raising that child. Justice Souter joining the majority indicates he may be a "prudential" conservative in the sense of feeling bound by precedent. Nonetheless, he could legitimately have dissented, distinguishing the court's "wrongful conception" precedent. The obvious question is whether he might feel so bound by precedent that he would resist overruling truly bad precedents. His separate opinion is encouraging and indicates his careful attention to avoiding announcing rules broader than necessary to decide the particular case before the court. That makes him a "prudential" conservative as well. A Justice Brennan, Marshall, or Blackmun might well have said that keeping the abortion option available and attractive means that physicians' right of conscience must give way.

The American Bench (1987)

SOUTER, David Hackett (*Associate Justice, New Hampshire Supreme Court*) Appointed by governor to term beginning 1983. Born Melrose Massachusetts Sept 17, 1939 to Joseph Alexander and Helen Adams Hackett Souter. Episcopalian. Educated at Harvard University B.A. 1961 LL.B. 1966 and Oxford University, England 1961-63. Rhodes Scholar. Member Phi Beta Kappa. Admitted to practice New Hampshire. In legal practice Concord 1966-68. Associate Justice, New Hampshire Superior Court 1978-83.

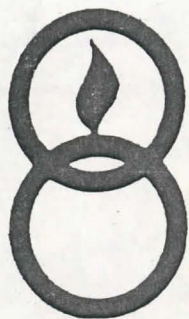
Assistant Attorney General 1968-71. Deputy Attorney General 1971-76 and Attorney General 1976-78 New Hampshire. Member New Hampshire and American Bar Associations. Republican. Trustee Concord Hospital 1973-85 (President Board of Trustees 1978-84). Board of Overseers Dartmouth Medical School since 1981. Member New Hampshire Historical Society (Trustee 1976-85. Vice President 1980-85).

Office: Supreme Court Building, Noble Drive. Concord 03301.

Telephone: (603) 271-3660.

Who's Who in American Law 1990-91 (1989)

SOUTER, DAVID HACKETT, state supreme court justice; b. Melrose, Mass., Sept. 17, 1939; s. Joseph Alexander and Helen Adams (Hackett) S. BA. Harvard U., 1961, LL.B. 1966; Rhodes scholar, Oxford U., 1961-63, MA. 1969. Bar: N.H. Assoc. firm Orr & Reno, Concord, 1966-68; asst. atty. gen. N.H. 1968-71, dep. atty. gen., 1971-76, atty. gen., 1976-78; assoc. Justice Superior Ct. N.H., 1978-83, N.H. Supreme Ct., 1983—. Trustee Concord Hosp., 1973-85, pres. bd. trustees, 1978-84; bd. overseers Dartmouth Med. Sch., 1981-87. Mem. Am. Bar Assn., N.H. Bar Assn., N.H. Hist. Soc. (v.p. 1980-85, trustee 1976-85), Phi Beta Kappa, Republican, Episcopalian. Judicial administration. Home: 34 Cilley Hill Rd Weare NH 03281 Office: Supreme Ct Noble Dr Concord NH 03301



ABA Pro-Aborts Busy
See Page 5

Number Of
Abortion Facilities Shrink
See Page 5

Pro-Life NEA Reformers
See Page 6

national
RIGHT TO LIFE

NEWS

July 31, 1990

Volume 17 Number 15

OFFICIAL PUBLICATION OF THE NATIONAL RIGHT TO LIFE COMMITTEE

\$1.00

Louisiana Pro-Lifers Pushing Hard For Veto Session

By Dave Andrusko

(July 31) -- As **NRL News** goes to press, pro-lifers in Louisiana are urging legislators to hold a veto session to overturn Governor Buddy Roemer's July 27 veto of a very protective pro-life law. Roemer, who still claims to be "pro-life," reneged on a promise to sign an abortion law if it included exceptions for rape and incest as well as to prevent the death of the mother. At his press conference, the governor argued the bill "did not meet even the minimum standards set forth by me long ago."

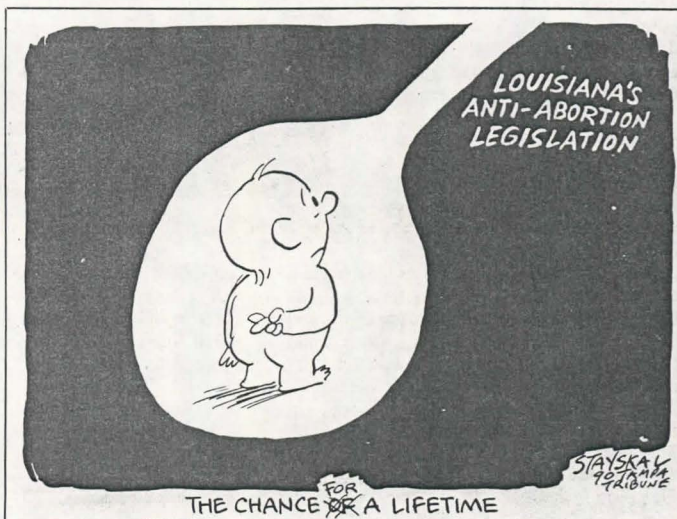
A leading pro-life Democrat, state Senator Mike Cross, told the *New York Times* that "Roemer said he wanted a bill with exceptions for rape and incest, and the legislature gave him one. His action in vetoing the bill is just another example of Roemer saying one thing and then doing just the opposite."

And, in fact, Roemer does continue to add additional exceptions. According to the *New York Times*, Roemer supports abortion to safeguard a woman's health, both physical and mental. "Mental health" is, of course, code for abortion on demand.

Moreover, appearing on *CBS Morning News* July 30, Roemer also strongly suggested he would support abortions for babies with "fetal deformities" and babies with AIDS, said Sharon Fontenot, lobbyist for Louisiana Right to Life Federation. "He has now taken a very hardline pro-abortion position," she said.

To show how far Roemer has come, while a congressman, he both co-sponsored a human life amendment and opposed weakening the Hyde Amendment to add exceptions for rape and incest. On that same *CBS Morning News* program, Roemer agreed his position had changed. He was now only "somewhat pro-life," attributing his change to the fact that his views had "matured," Fontenot said.

Although there has been no veto session in this century, Fontenot said she was "cautiously optimistic" the session would be held. Under the state constitution, the governor sends out a letter to all 144 members of the house and senate. Returning the letter means the legislator will **not** attend a veto



session. If a majority of either body returns the letter, no session will be held. Thus, the Federation is encouraging legislators to refuse to return Roemer's letter (scheduled to be sent out August 1)

The deadline for returning the letter is

August 13. If held, the veto session would begin August 18, 40 days after the regular session.

Fontenot said that she has been told that all measures vetoed by the gover-

► See **LOUISIANA**, Page 9

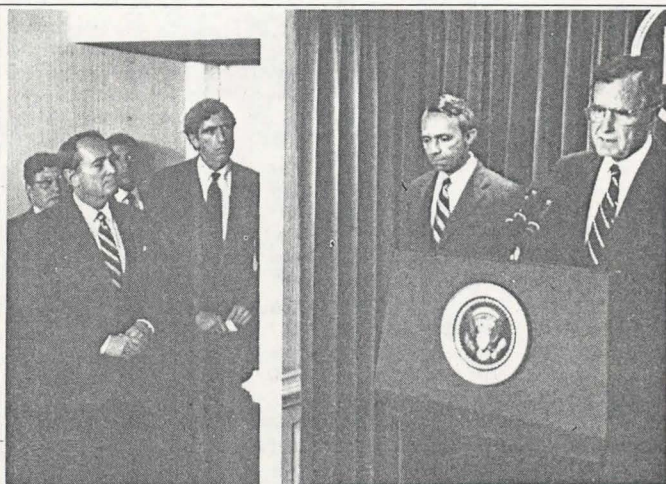
Souter Confirmation Hearings To Begin September 13

By Dave Andrusko

WASHINGTON, D.C. (July 30) -- The Senate Judiciary Committee has set September 13 as the start of confirmation hearings on the nomination of U.S. Court of Appeals Judge David Souter to replace Supreme Court Justice William Brennan, who unexpectedly retired July 20. The official start of the Court's next session is October 1, when the term opens with two weeks of oral arguments.

In nominating Souter, President Bush declared, "Judge Souter is committed to interpreting, not making the law. He recognizes the proper role of judges in upholding the democratic choices of the people through their elected representatives, with constitutional constraints."

His nomination by President Bush caps a meteoric rise for the 50-year-old Souter, routinely described in such superlatives as "astonishingly brilliant," "erudite," and (in President Bush's words), "a remarkable judge of keen intellect and the highest ability." Indeed, Joseph Grandmaison, a former New Hampshire Democratic leader, has quipped that Souter is "about 135 pounds -- and about 120 pounds of



Listening as the President announces his choice of David Souter for the Supreme Court are (left to right) Chief of Staff John Sununu, Attorney General Richard Thornburgh, a secret service agent, White House Counsel C. Boyden Gray, Judge Souter, President Bush.

Photo credit: AP

brain."

Following his 1961 graduation (magna cum laude) from Harvard, Souter won a Rhodes scholarship to Oxford's Magdalen College. He re-

turned two years later to Harvard Law School, graduating in 1966. He then worked for two years at a prestigious private law firm before being named an assistant attorney general in New

Hampshire in 1968. He subsequently became deputy attorney general and, in 1976, attorney general.

In 1978 Souter was appointed by Governor Meldrim Thomson to the New Hampshire Superior Court. Five years later, then-Governor John Sununu tabbed Souter for the New Hampshire Supreme Court, where he served until unanimously confirmed last April by the Senate to sit on the U.S. Circuit Court of Appeals for the First District.

The American Bar Association (ABA) gave Souter its highest rating -- "well qualified" -- for his current position. The ABA began its review process July 24, three days after Bush announced his selection of Souter. Although the ABA House of Delegates adopted a pro-abortion resolution in February, *Newsday* paraphrased the chairman of the ABA's Standing Committee on the Federal Judiciary as saying that "abortion will not be considered in the process and that the ABA's support of abortion rights would not affect its evaluation."

Judge Souter joined in one opinion recognizing a limited cause of action for

► See **SOUTER NOMINATION**, Page 14

 national RIGHT TO LIFE committee, inc.	GELINE WILLIAMS DAVID O'STEEN, Ph.D. DARLA ST. MARTIN	Chairman of the Board Executive Director Associate Executive Director
	J.C. WILLKE, M.D. Publisher	DAVE ANDRUSKO Editor

Official Publication of the
National Right to Life Committee, Inc.

**Contributors: Roger Blanchette, Leslie Bond, Scott Fischbach,
Dan Avila, J.D., James Bopp, Jr., and Lisa Andrusko.**

Suite 500, 419-7th St., N.W., Washington, D.C. 20004. Phone (202) 626-8800.
Known office of publication at Suite 500, 419-7th St., N.W., Washington, D.C. 20004.
Third class postage paid at Washington, D.C. and Martinsburg, W.V.

Permit Number 83 A Non-profit Organization ISSN 0164-7415
Typesetting: Apple Ridge Typesetting, Linden, VA 22642

Managing The News

FROM PAGE 2

But other publications took a different approach. They fastened onto a comment in the majority opinion that more-or-less stated there was a "liberty interest" in refusing life-sustaining treatment, which, we were told, included food and water. (That latter conclusion is highly speculative, as we shall see in a moment.) These papers concluded that it was their civic duty to educate, instruct, and hector the public into giving "advanced notice" of their intentions. Note that the living will was not necessarily the instrument of first choice. As the *Milwaukee Journal* lamented, "Trouble is, the application of these laws generally is limited to terminal conditions and thus would be of little use in a case such as *Cruzan*." (Translated, Nancy would likely survive thirty years unless we starve her to death.) Better "durable power of attorney," a document which gives sweeping powers -- often not spelled out at all -- to designated parties should the individual become incompetent. (For some of the enormous potential -- and real -- abuses associated with such directives, see the story on page 10.) However, that didn't stop a number of papers from actually reproducing a living will and offering a compendium of addresses and phone numbers for pro-euthanasia groups. (A sign of the times? A *Seattle Times* columnist pointed out that, "You can buy living will forms at stationery stores for \$1 or \$2.")

One of journalism's most consistently awful columnists, Anthony Lewis, chipped in with this thought. Eight of the justices, in Lewis' phrase, "said the problem engages the Constitution. That opens **profound possibilities**" (my emphasis). The ironies at work are incredible. Lewis has harangued the Court for its more conservative leanings unmercifully. But let him catch even a scent that the Court might come down his way and Lewis exudes a touching new found faith in the Court: "This extremely sensitive question may in the future be explored in terms of constitutional law -- be illuminated by judges." Clearly the "light" that Lewis is looking for will result in the darkness of death for untold numbers of helpless patients.

Finally, in many of the accounts, people like Nancy Cruzan were described in terms intended to create a new subhuman category, the *sine qua non* of all campaigns of mass extermination. (Remember "products of conception," "vegetables," and "useless eaters"?) They are labeled the "near dead," the "unwelcome product of medical technology" who exist in a "death-in-life" state (or "twilight zone"), "essentially alive but unaware" and "with a weak link to life." Surely who would bother with someone whose existence represents no more than the "technological postponement of death," right?

Yet the pro-death set is reading much more into *Cruzan* than is warranted, as one worried letter-writer to the *New York Times* complained. A "liberty" interest is not a "fundamental right" (which is what the Court in *Roe* labeled the right to abortion). She worried that, "The risk to liberty is in the views of states' rights justices that these individual interests may be invaded by any state action that is not irrational." Plainly, she feared that the Supreme Court will likely uphold a broad-range of protections for incompetents. Also, note that Rehnquist did not say food and water are "medical treatment." He only said that for purposes of the issues raised in *Cruzan*, they could be treated as such. Furthermore, and perhaps most significant, Rehnquist wrote, "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."

No one would argue with the idea that we face a tremendous uphill fight. I can not help but be reminded of where we were in the mid-to-late '70s in the abortion debate. We are up against everybody. Today the Thanatos Syndrome, the lust for death, is spreading. Our job is to contain the infection all the while we are mobilize our own troops and persuading the American public that "death with dignity" is nothing more than code words for the right of the powerful and the perfect to rid society of the less-than-perfect and the utterly powerless.

A tough road ahead? Sure. But remember how far we've come since the utterly bleak days of the '70s in our fight to save the babies. If we persevere, we will awaken the public to the tragic fact that, once again, they have been sold a lethal bill of goods.

dha

Photos

FROM BACK COVER

to speculate on the exact moment "human life" begins and how that relates to abortion. He said he concentrates more on the beauty of creation, and tells questioners to "look at the pictures" and then decide. From what is shown LIFE magazine, the conclusion is inevitable -- these babies are as human as you and I.

Pro-lifers should be warned that, although the fetal development text and Nilsson's remarks affirm the reality of the life of the unborn child, the article on Nilsson by David Van Biema is filled with historical inaccuracies and mis-truths. The photographs themselves present a much better commentary on the abortion debate and human life.

Minnesota Statute

FROM PAGE 4

child as a human being, the court was undermining *Roe v. Wade*.

Rep. Terry Dempsey, a sponsor of the bill in the Minnesota Legislature, told the press he was pleased but not surprised by the U.S. Supreme Court's decision not to review the Minnesota Supreme Court ruling, "The U.S. Supreme Court is of a mind these days of taking a little more stringent view of protecting life," he said.

Lund said he thought the Court declined to hear the case because his client had only been charged but not

convicted under the law. "I suspect in large measure that they didn't feel that it was appropriate to deal with the issue at this point in the proceedings," he told the *Star Tribune*.

He predicted that attorneys for two men who have been convicted will challenge the law on constitutional grounds.

Reprinted with permission from the June/July 1990 issue of **Minnesota Citizens Concerned for Life News-letter**.

Souter Nomination

FROM PAGE 1

"wrongful birth" in New Hampshire. The court held that it was compelled by *Roe v. Wade* to so rule. Although the case should have been decided the other way, it reveals nothing regarding Judge Souter's views on whether *Roe v. Wade* is a correct interpretation of the Constitution.

A letter written in 1981 by Judge Souter -- on behalf of the entire committee of Superior Court judges -- to a state legislator, expressing opposition to enactment of a law permitting state judges to either authorize or deny authorization for an abortion to be performed without parental consent on a minor, also reveals nothing regarding Judge Souter's views on *Roe v. Wade*; or, for that matter, his views regarding abortion.

Souter once sat on the boards of Concord Hospital (1972-85) and of Dartmouth Hitchcock Medical School (1981-87). Reportedly, abortions were performed at both institutions, but Souter's role in these pro-abortion policies remain unclear.

In 1976, while Souter was attorney general, his office filed a brief in the U.S. Court of Appeals for the First District, appealing a district court decision that would force New Hampshire to pay for "elective abortions." The brief opposed the decision, and referred to abortion as the "killing of unborn children," but neither the filing of the brief nor its contents reveal anything about Souter's views on abortion or the constitutionality of *Roe*.

Souter's mode of legal analysis places him in the strict constructionist camp. "A sampling of Souter's opinions show a classic conservative's respect for the text of statutes as written by legislators and interpreted by higher courts, and reluctance to issue sweeping legal pronouncements," wrote Aaron Epstein of

the *Philadelphia Inquirer*.

This unwillingness to stray from the issues at hand, coupled with the fact that a pro-life President has nominated him to the Court, has provoked pro-abortion groups to demand that Souter spell out his views on *Roe v. Wade*.

For example, NOW's Molly Yard said that "American women have the right to know where Judge Souter stands on abortion rights." NARAL's Kate Michelman argued that, "I don't think the public will accept, nor should the Senate confirm, a nominee who does not openly recognize that the Constitution respects an individual's right to privacy and right to choose."

Planned Parenthood's Faye Wattleton said if Souter refuses to respond to specific questions on abortion, "I don't think he deserves to sit on the Court." A collection of pro-abortion groups, calling itself the "National Pro-Choice Coalition," says it will be running newspaper ads nationwide in the near future.

For his part, Judge Souter told reporters that, "I look forward to making my positions clear, to the extent it is constitutionally appropriate," when he testifies before the Senate Judiciary Committee.

Appearing on ABC's "This Week with David Brinkley," Susan Smith, NRLC associate legislative director, said, "Our interest is in seeing a justice appointed to the court who's interested in looking at the Constitution squarely and honestly."

NRLC Executive Director David N. O'Steen, Ph.D., agreed. "Our position has been and remains that any nominee committed to interpreting the Constitution according to its text and history must conclude that *Roe* has no basis in the Constitution."

NOTICE:

**School is starting up again in a few weeks.
Gift subscriptions to school libraries are only
\$10.00 each.**

SUPREME COURT ALERT
NARAL
1101 14TH STREET, NW
WASHINGTON, DC 20005

8/27/90

JULY 23, 1990

THE MOMENT OF TRUTH FOR THE PRO-CHOICE MAJORITY HAS NOW ARRIVED.

THE RESIGNATION OF SUPREME COURT JUSTICE WILLIAM BRENNAN HAS JUST SEVERED THE THIN THREAD ON WHICH OUR RIGHT TO PRIVACY WAS HANGING.

JUSTICE BRENNAN WAS THE GREAT GUARDIAN OF PRIVACY AND A WOMAN'S RIGHT TO DECIDE. THE LOSS OF THIS CHAMPION OF INDIVIDUAL RIGHTS AND CIVIL LIBERTIES IS A DEVASTATING BLOW. HIS RESIGNATION MAY BE THE DEATH KNELL FOR ROE V. WADE. HIS VOTE HAS PROVIDED THE NARROW MARGIN OF DIFFERENCE BY WHICH THE SUPREME COURT--IN A SERIES OF 5-4 VOTES--HAS REFUSED TO COMPLETELY OVERTURN ROE.

WE NOW FACE A SITUATION FAR MORE DANGEROUS, FAR MORE SERIOUS THAN EITHER THE BORK NOMINATION OR THE WEBSTER DECISION. THE RIGHT TO LEGAL ABORTION IS NOW ON THE LINE AS NEVER BEFORE.

THE CRITICAL FIRST STEP IN DETERMINING WHETHER OR NOT ABORTION WILL REMAIN LEGAL NOW RESTS WITH THE U.S. SENATE WHICH MUST CONFIRM OR DENY PRESIDENT GEORGE BUSH'S NOMINEE TO REPLACE JUSTICE BRENNAN. I CAN ASSURE YOU, GIVEN THE STAKES FOR AMERICAN WOMEN, THIS NOMINATION FIGHT WILL DWARF THE BATTLE WE WAGED TO DEFEAT THE NOMINATION OF ROBERT BORK.

WITHOUT AN IMMEDIATE AND MASSIVE PUBLIC OUTCRY, THE PROTECTION JUSTICE BRENNAN PROVIDED WILL VANISH.

THAT IS WHY WITHIN MINUTES OF LEARNING OF THE RESIGNATION I DIRECTED NARAL'S STAFF TO TRIGGER OUR EMERGENCY CONTINGENCY PLANS FOR A NATIONWIDE MOBILIZATION.

MY NEXT STEP IS TO RUSH THIS URGENT MESSAGE TO YOU REQUESTING YOUR IMMEDIATE FINANCIAL HELP. SPECIFICALLY, I NEED YOU TO SEND YOUR EMERGENCY MOBILIZATION CONTRIBUTION TO NARAL AT ONCE.

PLEASE ACT TODAY. WE HAVE NEVER UNDERTAKEN A BATTLE OF THIS MAGNITUDE AND WE NEED YOUR IMMEDIATE HELP. THIS BATTLE COMES ON TOP OF THE ALREADY MASSIVE POLITICAL EXPENDITURES WE MUST MAKE IN KEY SENATE AND GUBERNATORIAL RACES WHERE CHOICE IS A DETERMINING ISSUE.

THE BRENNAN RESIGNATION FOCUSES THE POLITICAL DEBATE MORE SHARPLY THAN EVER. FOR EXAMPLE, JESSE HELMS, ONCE INVINCIBLE, IS NOW VULNERABLE ON THE CHOICE ISSUE AS HE FACES REELECTION IN 1990. WE MUST MAKE CERTAIN THAT THE VOTERS OF NORTH CAROLINA KNOW BOTH HIS PAST RECORD ON CHOICE AND HOW HE STANDS ON THE NEW SUPREME COURT NOMINEE.

--WE NEED FUNDS AT ONCE FOR MEDIA TO BUILD PUBLIC AWARENESS AND BRING PRESSURE ON THE U.S. SENATE. WE CAN DO NOTHING LESS THAN MAKE THE SUPREME COURT NOMINATION THE ISSUE WHICH DEFINES THE 1990 SENATE RACES.

--WE NEED FUNDS TO SUPPORT THE POLITICAL AND LEGAL EFFORTS AROUND THE CONFIRMATION HEARINGS.

--WE NEED EMERGENCY FUNDS FOR ORGANIZERS TO ACTIVATE PHONE BANKS AND MAIL ACTION ALERTS TO THE ONE MILLION AMERICANS WHO JOINED OUR POST-WEBSTER CAMPAIGN. THE STAKES HAVE NEVER BEEN HIGHER.

REMEMBER: THE TOUGH ANTI-ABORTION BILLS PASSED IN GUAM AND PENNSYLVANIA WILL NOW SURELY GO TO THE SUPREME COURT--A NEW SUPREME COURT WITHOUT JUSTICE BRENNAN'S KEY VOTE. AND THE CRITICAL SITUATION IN LOUISIANA BECOMES EVEN MORE DRAMATIC.

EACH OF US MUST DO EVERYTHING IN OUR POWER TO MAKE CERTAIN THAT THE SENATE STANDS UP FOR THE PRO-CHOICE MAJORITY. CALL YOUR SENATORS TODAY. URGE THEM TO REJECT ANY AND ALL NOMINEES WHO REFUSE TO PUBLICLY DECLARE THAT THEY ARE PRO-CHOICE.

IN A FEW DAYS I WILL BE WRITING YOU MORE FULLY ABOUT OUR PLANS AND ADDITIONAL ACTION YOU CAN TAKE. BUT . . . RIGHT NOW PLEASE GIVE AS GENEROUSLY AS POSSIBLE.

PLEASE LET ME HEAR FROM YOU AT ONCE.

THANK YOU.

KATE MICHELMAN
EXECUTIVE DIRECTOR

PLEASE REFOLD THIS ENTIRE PAGE SO THAT THE ADDRESS BELOW SHOWS THROUGH THE WINDOW OF THE ENCLOSED POSTAGE-PAID ENVELOPE.

THIS IS INDEED THE MOMENT OF TRUTH. JUST AS WE STOPPED ROBERT BORK WE MUST STOP ANY NOMINEE WHO IS NOT PRO-CHOICE. TO DO THIS WE MUST BE PREPARED TO MOUNT AN UNPRECEDENTED CAMPAIGN IN THE U.S. SENATE.

TO HELP MAKE CERTAIN NARAL HAS THE FUNDS IT NEEDS TO PUT ITS CONTINGENCY PLANS INTO EFFECT FOR THIS EMERGENCY I AM ENCLOSING MY SPECIAL CONTRIBUTION IN THE AMOUNT OF:

☐ \$15 ☐ \$25 ☐ \$35 ☐ OTHER \$ _____

PLEASE MAKE YOUR CHECK PAYABLE TO NARAL
AND RETURN ALONG WITH THIS FORM TO:
NARAL.

FIRST CLASS PERMIT NO. 10954 WASHINGTON, D.C.
POSTAGE WILL BE PAID BY ADDRESSEE

National Abortion Rights Action League
Post Office Box 14270
Washington, DC 20077-1390



MEMORANDUM

TO: Interested Parties
FROM: Dawn Johnsen, Legal Director
Staff Attorneys: Marcy Wilder, Lois Murphy, Kyra Kazantzis
DATE: August 2, 1990
RE: Judge David Souter's Judicial Philosophy

In reviewing Judge David Souter's record, NARAL's Legal Department has come across an opinion that is, thus far, the most significant in providing insight into his judicial philosophy and how he might rule on critical issues of individual rights, including the right to privacy. In interpreting the New Hampshire Constitution in a dissenting opinion in In re Estate of Dionne, 518 A.2d 178 (1986), Judge Souter used the extremely restrictive judicial philosophy of "original intent," which limits the meaning of a constitutional provision to the specific practices and beliefs that were prevalent at the time the provision was adopted. If the U.S. Supreme Court were to apply this approach, the Court would overrule not only Roe v. Wade, but also other cases involving the fundamental right to privacy, including the right to use contraception. In fact, this is the very approach that was used at the time of Brown v. Board of Education to argue that states should be permitted to continue segregating schools by race.

Judge Souter's opinions do not reveal to what extent he would apply his reasoning in Dionne when interpreting federal constitutional provisions protecting individual rights. Yet this opinion cannot be dismissed as atypical. In response to a Senate Judiciary Committee questionnaire following his recent nomination to the U.S. Court of Appeals for the First Circuit, Judge Souter listed his dissent in Dionne as one of his "ten most significant opinions." Given the profound implications if he were to use an originalist approach as a Supreme Court Justice, Judge Souter must be closely questioned during his Senate confirmation hearings about the Dionne case and his judicial philosophy concerning interpretation of the U.S. Constitution.

Judge Souter's Use of "Original Intent"

In Dionne, the Supreme Court of New Hampshire held that a statute requiring citizens to pay a fee to a judge in exchange for a special court session violated the state constitution, which guaranteed to citizens the right "to obtain justice freely, without being obliged to purchase it." Although this mandatory payment to a judge clearly contradicted the plain language of the constitution and -- in the words of the four justices in the majority -- "smacks of the purchase of justice," Judge Souter alone dissented. He stated that in interpreting the state constitution, the court could look only to the precise practices the framers intended to prohibit in 1784, and he used as his principal evidence of that intent the way in which a similar clause of the Magna Carta of 1215 had been interpreted.

Judge Souter's dogmatic approach to original intent in Dionne is cause for alarm. If Judge Souter's originalist approach were used to interpret the equal protection clause of the Fourteenth Amendment, the relevant evidence would be the prevailing practices at the time of the Amendment's adoption in 1868. Brown v. Board of Education could not have put a halt to the racial segregation of our nation's schools, and women would be afforded no constitutional protection from sex discrimination. In Brown, Chief Justice Earl Warren -- writing for a unanimous Supreme Court -- explicitly rejected an originalist approach, stating, "[w]e cannot turn back the clock to 1868 when the amendment was adopted."

If confirmed, Judge Souter would replace Justice William Brennan, who believed that the true intent of the Framers was for the Constitution to provide broad principles capable of adapting over time to new and unforeseeable circumstances. In Justice Brennan's view, "the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Implications for Roe v. Wade

The doctrine of original intent has been used by ideologically conservative judges, such as Judge Robert Bork and Justice Antonin Scalia, to deny the existence of the fundamental right to privacy and call for the overruling of Roe v. Wade. As Judge Bork stated, "I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended." Accordingly, Bork stated that "Roe, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned." President Bush has made Judge Souter's judicial philosophy a key issue in the confirmation process by citing it as the basis for his nomination. The phrases being used to describe Judge Souter's judicial philosophy -- "original intent," "strict construction" and "judicial restraint" -- are recognized by the most vehement opponents of legal abortion as code words for a predisposition by Judge Souter to overrule decisions protecting the fundamental right to privacy, including the right to choose abortion:

Pro-Life Action League leader Joe Scheidler: "[A]ny judge who truly seeks to follow the original intent of the framers of the Constitution in applying the law will be hard-pressed to find anything in the Constitution to support a right to abortion. Since the care of human life is the first object of good government, David Souter or any other strict constructionist must seek to overturn Roe."

Susan Smith, Associate Legislative Director of the National Right to Life Committee: "President Bush has said that this is a man who is committed to interpreting the Constitution, not legislating from the bench and since Roe v. Wade is really the zenith of judicial activism, I think it's reasonable to assume that a Justice like Judge Souter would continue the erosion of a tragic constitutional error that is Roe v. Wade."

Conclusion

Judge Souter's strict adherence to the doctrine of original intent in the Dionne case, and the Bush Administration's repeated characterization of his judicial philosophy as one of judicial restraint, place in serious question whether Judge Souter, if confirmed, would continue to protect Americans' fundamental right to privacy. It is therefore essential for the Senate Judiciary Committee to question Judge Souter regarding his precise judicial philosophy. Americans must know if Judge Souter will limit our constitutional guarantees to those of centuries past, leaving us without protection from unwarranted governmental intrusion into our most personal decisions.

SUPREME COURT ALERT
NARAL
1101 14TH STREET, NW
WASHINGTON, DC 20005

original

JULY 23, 1990

THE MOMENT OF TRUTH FOR THE PRO-CHOICE MAJORITY HAS NOW ARRIVED.

THE RESIGNATION OF SUPREME COURT JUSTICE WILLIAM BRENNAN HAS JUST SEVERED THE THIN THREAD ON WHICH OUR RIGHT TO PRIVACY WAS HANGING.

JUSTICE BRENNAN WAS THE GREAT GUARDIAN OF PRIVACY AND A WOMAN'S RIGHT TO DECIDE. THE LOSS OF THIS CHAMPION OF INDIVIDUAL RIGHTS AND CIVIL LIBERTIES IS A DEVASTATING BLOW. HIS RESIGNATION MAY BE THE DEATH KNEEL FOR ROE V. WADE. HIS VOTE HAS PROVIDED THE NARROW MARGIN OF DIFFERENCE BY WHICH THE SUPREME COURT--IN A SERIES OF 5-4 VOTES--HAS REFUSED TO COMPLETELY OVERTURN ROE.

WE NOW FACE A SITUATION FAR MORE DANGEROUS, FAR MORE SERIOUS THAN EITHER THE BORK NOMINATION OR THE WEBSTER DECISION. THE RIGHT TO LEGAL ABORTION IS NOW ON THE LINE AS NEVER BEFORE.

THE CRITICAL FIRST STEP IN DETERMINING WHETHER OR NOT ABORTION WILL REMAIN LEGAL NOW RESTS WITH THE U.S. SENATE WHICH MUST CONFIRM OR DENY PRESIDENT GEORGE BUSH'S NOMINEE TO REPLACE JUSTICE BRENNAN. I CAN ASSURE YOU, GIVEN THE STAKES FOR AMERICAN WOMEN, THIS NOMINATION FIGHT WILL DWARF THE BATTLE WE WAGED TO DEFEAT THE NOMINATION OF ROBERT BORK.

WITHOUT AN IMMEDIATE AND MASSIVE PUBLIC OUTCRY, THE PROTECTION JUSTICE BRENNAN PROVIDED WILL VANISH.

THAT IS WHY WITHIN MINUTES OF LEARNING OF THE RESIGNATION I DIRECTED NARAL'S STAFF TO TRIGGER OUR EMERGENCY CONTINGENCY PLANS FOR A NATIONWIDE MOBILIZATION.

MY NEXT STEP IS TO RUSH THIS URGENT MESSAGE TO YOU REQUESTING YOUR IMMEDIATE FINANCIAL HELP. SPECIFICALLY, I NEED YOU TO SEND YOUR EMERGENCY MOBILIZATION CONTRIBUTION TO NARAL AT ONCE.

PLEASE ACT TODAY. WE HAVE NEVER UNDERTAKEN A BATTLE OF THIS MAGNITUDE AND WE NEED YOUR IMMEDIATE HELP. THIS BATTLE COMES ON TOP OF THE ALREADY MASSIVE POLITICAL EXPENDITURES WE MUST MAKE IN KEY SENATE AND GUBERNATORIAL RACES WHERE CHOICE IS A DETERMINING ISSUE.

THE BRENNAN RESIGNATION FOCUSES THE POLITICAL DEBATE MORE SHARPLY THAN EVER. FOR EXAMPLE, JESSE HELMS, ONCE INVINCIBLE, IS NOW VULNERABLE ON THE CHOICE ISSUE AS HE FACES REELECTION IN 1990. WE MUST MAKE CERTAIN THAT THE VOTERS OF NORTH CAROLINA KNOW BOTH HIS PAST RECORD ON CHOICE AND HOW HE STANDS ON THE NEW SUPREME COURT NOMINEE.

--WE NEED FUNDS AT ONCE FOR MEDIA TO BUILD PUBLIC AWARENESS AND BRING PRESSURE ON THE U.S. SENATE. WE CAN DO NOTHING LESS THAN MAKE THE SUPREME COURT NOMINATION THE ISSUE WHICH DEFINES THE 1990 SENATE RACES.

--WE NEED FUNDS TO SUPPORT THE POLITICAL AND LEGAL EFFORTS AROUND THE CONFIRMATION HEARINGS.

--WE NEED EMERGENCY FUNDS FOR ORGANIZERS TO ACTIVATE PHONE BANKS AND MAIL ACTION ALERTS TO THE ONE MILLION AMERICANS WHO JOINED OUR POST-WEBSTER CAMPAIGN. THE STAKES HAVE NEVER BEEN HIGHER.

REMEMBER: THE TOUGH ANTI-ABORTION BILLS PASSED IN GUAM AND PENNSYLVANIA WILL NOW SURELY GO TO THE SUPREME COURT--A NEW SUPREME COURT WITHOUT JUSTICE BRENNAN'S KEY VOTE. AND THE CRITICAL SITUATION IN LOUISIANA BECOMES EVEN MORE DRAMATIC.

EACH OF US MUST DO EVERYTHING IN OUR POWER TO MAKE CERTAIN THAT THE SENATE STANDS UP FOR THE PRO-CHOICE MAJORITY. CALL YOUR SENATORS TODAY. URGE THEM TO REJECT ANY AND ALL NOMINEES WHO REFUSE TO PUBLICLY DECLARE THAT THEY ARE PRO-CHOICE.

IN A FEW DAYS I WILL BE WRITING YOU MORE FULLY ABOUT OUR PLANS AND ADDITIONAL ACTION YOU CAN TAKE. BUT . . . RIGHT NOW PLEASE GIVE AS GENEROUSLY AS POSSIBLE.

PLEASE LET ME HEAR FROM YOU AT ONCE.

THANK YOU.

KATE MICHELMAN
EXECUTIVE DIRECTOR

PLEASE REFOLD THIS ENTIRE PAGE SO THAT THE ADDRESS BELOW SHOWS THROUGH THE WINDOW OF THE ENCLOSED POSTAGE-PAID ENVELOPE.

THIS IS INDEED THE MOMENT OF TRUTH. JUST AS WE STOPPED ROBERT BORK WE MUST STOP ANY NOMINEE WHO IS NOT PRO-CHOICE. TO DO THIS WE MUST BE PREPARED TO MOUNT AN UNPRECEDENTED CAMPAIGN IN THE U.S. SENATE.

TO HELP MAKE CERTAIN NARAL HAS THE FUNDS IT NEEDS TO PUT ITS CONTINGENCY PLANS INTO EFFECT FOR THIS EMERGENCY I AM ENCLOSING MY SPECIAL CONTRIBUTION IN THE AMOUNT OF:

☐ \$15 ☐ \$25 ☐ \$35 ☐ OTHER \$ _____

PLEASE MAKE YOUR CHECK PAYABLE TO NARAL
AND RETURN ALONG WITH THIS FORM TO:
NARAL.

1
:
1

FIRST CLASS PERMIT NO. 10954 WASHINGTON, D.C.
POSTAGE WILL BE PAID BY ADDRESSEE

National Abortion Rights Action League
Post Office Box 14270
Washington, DC 20077-1390



MEMORANDUM

TO: Interested Parties
FROM: Dawn Johnsen, Legal Director
Staff Attorneys: Marcy Wilder, Lois Murphy, Kyra Kazantzis
DATE: August 2, 1990
RE: Judge David Souter's Judicial Philosophy

David Souter —
analysis

In reviewing Judge David Souter's record, NARAL's Legal Department has come across an opinion that is, thus far, the most significant in providing insight into his judicial philosophy and how he might rule on critical issues of individual rights, including the right to privacy. In interpreting the New Hampshire Constitution in a dissenting opinion in In re Estate of Dionne, 518 A.2d 178 (1986), Judge Souter used the extremely restrictive judicial philosophy of "original intent," which limits the meaning of a constitutional provision to the specific practices and beliefs that were prevalent at the time the provision was adopted. If the U.S. Supreme Court were to apply this approach, the Court would overrule not only Roe v. Wade, but also other cases involving the fundamental right to privacy, including the right to use contraception. In fact, this is the very approach that was used at the time of Brown v. Board of Education to argue that states should be permitted to continue segregating schools by race.

Judge Souter's opinions do not reveal to what extent he would apply his reasoning in Dionne when interpreting federal constitutional provisions protecting individual rights. Yet this opinion cannot be dismissed as atypical. In response to a Senate Judiciary Committee questionnaire following his recent nomination to the U.S. Court of Appeals for the First Circuit, Judge Souter listed his dissent in Dionne as one of his "ten most significant opinions." Given the profound implications if he were to use an originalist approach as a Supreme Court Justice, Judge Souter must be closely questioned during his Senate confirmation hearings about the Dionne case and his judicial philosophy concerning interpretation of the U.S. Constitution.

Judge Souter's Use of "Original Intent"

In Dionne, the Supreme Court of New Hampshire held that a statute requiring citizens to pay a fee to a judge in exchange for a special court session violated the state constitution, which guaranteed to citizens the right "to obtain justice freely, without being obliged to purchase it." Although this mandatory payment to a judge clearly contradicted the plain language of the constitution and -- in the words of the four justices in the majority -- "smacks of the purchase of justice," Judge Souter alone dissented. He stated that in interpreting the state constitution, the court could look only to the precise practices the framers intended to prohibit in 1784, and he used as his principal evidence of that intent the way in which a similar clause of the Magna Carta of 1215 had been interpreted.

Judge Souter's dogmatic approach to original intent in Dionne is cause for alarm. If Judge Souter's originalist approach were used to interpret the equal protection clause of the Fourteenth Amendment, the relevant evidence would be the prevailing practices at the time of the Amendment's adoption in 1868. Brown v. Board of Education could not have put a halt to the racial segregation of our nation's schools, and women would be afforded no constitutional protection from sex discrimination. In Brown, Chief Justice Earl Warren -- writing for a unanimous Supreme Court -- explicitly rejected an originalist approach, stating, "[w]e cannot turn back the clock to 1868 when the amendment was adopted."

If confirmed, Judge Souter would replace Justice William Brennan, who believed that the true intent of the Framers was for the Constitution to provide broad principles capable of adapting over time to new and unforeseeable circumstances. In Justice Brennan's view, "the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Implications for Roe v. Wade

The doctrine of original intent has been used by ideologically conservative judges, such as Judge Robert Bork and Justice Antonin Scalia, to deny the existence of the fundamental right to privacy and call for the overruling of Roe v. Wade. As Judge Bork stated, "I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended." Accordingly, Bork stated that "Roe, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned." President Bush has made Judge Souter's judicial philosophy a key issue in the confirmation process by citing it as the basis for his nomination. The phrases being used to describe Judge Souter's judicial philosophy -- "original intent," "strict construction" and "judicial restraint" -- are recognized by the most vehement opponents of legal abortion as code words for a predisposition by Judge Souter to overrule decisions protecting the fundamental right to privacy, including the right to choose abortion:

Pro-Life Action League leader Joe Scheidler: "[A]ny judge who truly seeks to follow the original intent of the framers of the Constitution in applying the law will be hard-pressed to find anything in the Constitution to support a right to abortion. Since the care of human life is the first object of good government, David Souter or any other strict constructionist must seek to overturn Roe."

Susan Smith, Associate Legislative Director of the National Right to Life Committee: "President Bush has said that this is a man who is committed to interpreting the Constitution, not legislating from the bench and since Roe v. Wade is really the zenith of judicial activism, I think it's reasonable to assume that a Justice like Judge Souter would continue the erosion of a tragic constitutional error that is Roe v. Wade."

Conclusion

Judge Souter's strict adherence to the doctrine of original intent in the Dionne case, and the Bush Administration's repeated characterization of his judicial philosophy as one of judicial restraint, place in serious question whether Judge Souter, if confirmed, would continue to protect Americans' fundamental right to privacy. It is therefore essential for the Senate Judiciary Committee to question Judge Souter regarding his precise judicial philosophy. Americans must know if Judge Souter will limit our constitutional guarantees to those of centuries past, leaving us without protection from unwarranted governmental intrusion into our most personal decisions.

David Souter
a - jms

SUPREME COURT NOMINATION DAVID H. SOUTER

TALKING POINTS

* David Souter is **superbly qualified** to be on the Supreme Court

- B.A. *magna cum laude*, Harvard 1961
- LL.B., Harvard 1966
- Rhodes Scholar, Oxford 1961-63
- New Hampshire Assistant Attorney General, 1968-71
- New Hampshire Deputy Attorney General, 1971-76
- New Hampshire Attorney General, 1976-78
- New Hampshire Superior Court, 1978-83
- New Hampshire Supreme Court, 1983-90
- U.S. Court of Appeals for the First Circuit, 1990

* David Souter has a conservative, restrained view of the role of judges and courts; he has a consistent record of **applying the law** rather than his own preferences; President Bush said David Souter would "interpret" the law rather than "legislate from the bench." **This is the kind of Justice David Souter will be.**

* A conservative activist is no better than a liberal activist; **the rule of law is most important.**

* David Souter is committed to respecting past decisions. A conservative judge should be. He has shown, however, that **he is willing to overrule precedents** that are "manifestly devoid of reasoned support" or have "no intellectually realistic basis."

* 63 of Justice Souter's majority opinions were appeals of criminal convictions; **he upheld more than 93% of these criminal convictions (57).**

* In the family law area, **Justice Souter consistently upheld the legislature's policies to strengthen family relationships** rather than impose any new-fangled notions or redefine the "family" as courts all over the country are doing today.

* **Justice Souter regularly applied traditional rules in the interpretation of both statutes and constitutional provisions:** the goal is to determine the intended meaning of those who drafted the document.

* David Souter has a conservative judicial philosophy: he sticks close to the law and the facts; he does not invent new concepts or stretch established ones to the breaking point; he applies the law rather than his own preferences; he takes an "intentionalist" approach to interpreting legal documents. Any judge with this philosophy would likely believe that *Roe v. Wade*, the decision finding a virtually unlimited "right" to abortion in the Constitution, was incorrectly decided. David Souter has indicated that he is willing to overrule especially bad precedents that have no reasoned support or intellectual basis.

* The Constitution describes two powers in relation to judicial selection: nomination and appointment. **The Constitution gives both powers to the President.** Consistent with the scheme of "checks and balances," the Constitution gives a role of "advice and consent" to the Senate.

* The Senate's "advice and consent" role should be limited to qualifications and overall judicial philosophy, not politics and future voting patterns of nominees. The all-out political assault on Robert Bork in 1987 was a radical departure from the traditional understanding of the Senate's role.

* If the Senate determines whether to consent to an appointment by how that nominee will vote or how the appointment will affect the political "balance" of the Court, it will threaten the independence of the judiciary. **Judicial independence is vital to the preservation of liberty.**

* The liberals said in 1987 that Judge Bork's paper trail was a liability. In 1990, they seem to be saying that Judge Souter's lack of a paper trail is a liability. They cannot have it both ways. **A political "litmus test" approach will decrease the quality of those who choose public service in the federal judiciary.**

* The liberals attack attempts to remove jurisdiction from the Court over areas like abortion as "political tampering." Yet they see no problem in imposing a political litmus test on judicial nominees over this same issue. They cannot have it both ways.

* **President Bush said he was nominating someone who would interpret the law and not legislate from the bench. That is kind of Justice America needs on the Supreme Court and it looks like David Souter will be that kind of Justice.**

To: Judicial Nomination Allies
From: Thomas L. Jipping, J.D.
Legal Affairs Analyst, Coalitions for America
Re: The Souter Nomination, Abortion, and the "Precedent Thing"
Date: August 9, 1990

Virtually all the discussion of the Souter nomination has focused on what we do not know (abortion) rather than on what we do know (lots of other things). I want to pass along my perspective on the issue of precedent and some other observations which make me quite positive about this nomination, even on the abortion issue. **Please keep this memorandum to yourselves.** Please use and disseminate our larger analysis of Judge Souter's record.

THE PRECEDENT THING

The point at which the issue of Judge Souter's devotion to precedent becomes important is when that commitment bumps into an important constitutional precedent which was clearly wrongly decided. Will a Justice Souter stick with precedent or will he "do the right thing" and vote to overrule a decision like *Roe v. Wade*? For several reasons, I believe that, in an appropriate case brought by an effective litigation strategy, he will likely do the right thing.

Let us remember the most obviously relevant fact: David Souter is replacing William Brennan, the most radical member of the Supreme Court for the past 34 years. He was a sure vote for unlimited abortion, the Constitution notwithstanding. I am quite confident of at least one thing: David Souter is no William Brennan.

Much has been made of Judge Souter's devotion to the principle of *stare decisis*. Certainly adherence to precedent is a mark of judicial restraint. Most observers and commentators have failed, however, to grasp the inherent difference between a state common-law court system and a federal statutory and constitutional court system. In the state court system, where Judge Souter applied the common law for more than a decade, precedent is of overwhelming importance. That law is judge-made.

In the federal system, however, the law to be applied is legislative in nature; there is no federal common law. Precedent is important and if a court interprets a statute in ways the legislature finds inappropriate, the legislature can change the statute. In the constitutional context, precedent is least binding because interpretive mistakes cannot be readily corrected; the court must be willing to look at its own precedents and correct its own obvious mistakes. As Justice Louis Brandeis observed: "But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."¹

¹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 293, 406 (1932). Two scholars, writing in 1957, cited 90 such decisions. Blaustein & Field, "Overruling' Opinions in the Supreme Court, 57 *Michigan Law Review* 151, 161 (1958). The pattern continued through the Burger Court years. See Stevens, "The Life Span of a Judge-

This principle is regularly affirmed by the Supreme Court, even when choosing to re-affirm questionable or controversial precedents.² Any judge moving from a state court to a federal court necessarily re-shapes his perspective and understanding of this doctrine. Judge Souter will no doubt do so as well.

Justice Souter wrote **in dissent** that a precedent he called "manifestly devoid of reasoned support" should be overruled where "persuasive authority counsels for...repudiation."³ In another case, Justice Souter, writing for a unanimous court, overruled a precedent after stating that "we perceive no intellectually realistic basis" to distinguish the standard in that case with the standard in a constitutional amendment on a similar topic.⁴

The Supreme Court's decision in *Roe v. Wade*⁵ is "manifestly devoid of reasoned support" according to both pro-abortion and pro-life commentators. Professor Mark Tushnet writes that "[m]ost academic commentators probably believe that, as a matter of sound public policy, access to abortions should be relatively unrestricted. But none has been able to provide conclusive arguments that the Supreme Court correctly found that policy in the Constitution."⁶ A recent article organized much of the critical literature into no less than 12 different lines of attack.⁷ Dean John Hart Ely, openly claiming to be pro-abortion, wrote that the decision "is bad constitutional law, or rather...is not constitutional law and gives almost no sense of an obligation to try to be."⁸ Another pro-abortion scholar

Made Rule," 58 *New York University Law Review* 1 (1983).

² In *Akron v. Akron Center for Reproductive Health*, 416 U.S. 432 (1983), the Court expressly approved this principle that *stare decisis* is least binding in constitutional cases even though it re-affirmed *Roe v. Wade*, 410 U.S. 113 (1973).

³ See *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1199-1201 (N.H. 1988) (Souter, J., dissenting).

⁴ *In re Sanborn*, 545 A.2d 726, 735 (N.H. 1988).

⁵ 410 U.S. 113 (1973).

⁶ Tushnet, "The Supreme Court on Abortion: A Survey," in J. Butler & D. Walbert (eds.), *Abortion, Medicine, and the Law* (New York: Facts on File Publications, 3rd ed. 1986), at 165.

⁷ See Horan, Forsythe & Grant, "Two Ships Passing in the Night: An Interpretivist Critique of the White-Stevens Colloquy on *Roe v. Wade*," 6 *St. Louis University Public Law Review* 229, 230 n.8 (1987).

⁸ Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale Law Journal* 920, 947 (1973).

writes that "even people who approve of the result have been dissatisfied with the Court's opinion."⁹ Other scholars have concluded that virtually "every aspect of the historical, sociological, medical, and legal arguments Justice Harry Blackmun used to support the *Roe* legal holdings has been subjected to intense scholarly criticism."¹⁰ Likewise, Professor Robert Destro has concluded that "[t]he reasoning of the Court has been examined and found to be wanting legally, historically, scientifically, and philosophically."¹¹

Judge Souter is a meticulous and long-time student of history. This interest and ability will serve to support the intentionalist approach and to determine when a wrongly decided precedent is "manifestly devoid of reasoned support." *Roe v. Wade* is again a good example. That decision was based on the Court's reading of the history of abortion, not on its reading of the Constitution. An avalanche of scholarship has shown this effort to be revisionist at best.¹² Judge Souter will be better equipped to more fully understand the faulty underpinnings of a decision like *Roe* than anyone currently on the Court. That historical acumen also strengthens the trend toward more application of the "intentionalist" approach to constitutional interpretation.

Another factor to bear in mind is that, although it appears David Souter is by disposition a rather reclusive individual, Justice Souter is hardly going to gravitate toward the ever-decreasing left wing of the Court. Rather, he will tend to join the conservative "bloc" led by Chief Justice William Rehnquist and Justice Antonin Scalia. To the extent that "judicial education" occurs (at least with new justices), it will cut in our favor.

Someone with a judicial philosophy focused squarely on the rule of law and based on a narrow view of the role of the federal judge can only oppose *Roe v. Wade* on the merits. Judge Souter's own articulated standards for overruling precedent can be met in this case. His historical acumen cuts in our favor. Those on the present Court to whom he will inevitably gravitate are the very ones already indicating their willingness to overrule *Roe*. All of this, plus a shift in a state judge's common law perspective on precedent add up to at least something other than a blind devotion to precedent for its own sake.

⁹ Regan, "Rewriting *Roe v. Wade*," 77 *Michigan Law Review* 1569, 1569 (1979).

¹⁰ Horan & Balch, "Roe v. Wade: No Justification in History, Law, or Logic," in D. Horan, E. Grant & P. Cunningham (eds.), *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Washington, D.C.: Georgetown University Press, 1987), at 58.

¹¹ Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 *California Law Review* 1250, 1340 (1975).

¹² See, e.g. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in D. Horan, E. Grant & P. Cunningham (eds.), *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Washington, D.C.: Georgetown University Press, 1987), at 137-58; Dellapenna, "The History of Abortion: Technology, Morality, and Law," 40 *University of Pittsburgh Law Review* 359 (1979); Horan & Marzen, "Abortion and Midwifery: A Footnote in Legal History," in T. Hilgers, D. Horan & D. Mall (eds.), *New Perspectives on Human Abortion* (Lanham, MD: University Publications of America, 1981), at 199-204; Krason & Hollberg, "The Law and History of Abortion: The Supreme Court Refuted," in J. Butler & D. Walbert (eds.), *Abortion, Medicine, and the Law* (New York: Facts on File Publications, 3rd ed. 1986), at 196-225; Witherspoon, "Reexamining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," 17 *St. Mary's Law Journal* 29 (1985).

Let us not forget that Justice Scalia was branded a "surprise liberal" during his very first term on the Court. I got calls from normally level-headed conservative allies asking what Scalia was doing, how he could turn on us, etc.

Let us also not forget that even Scalia and the others on the Court who we know are willing to overrule *Roe* will themselves only do so in the appropriate case. They are not sitting up there lathering for the first opportunity to trash that decision. I believe this is particularly true with Souter. His respect for precedent counsels for the right case raising the right issue in the right way. Whether *Roe* is overruled depends as much (or more) on the legislative/litigation strategy being pursued "out here" as it does on a litmus test for David Souter.

I believe strongly that, in abortion cases which do not directly and specifically attack *Roe* itself, a Justice Souter will continue the trend begun last year in *Webster v. Reproductive Health Services*¹³ to uphold life-protective legislation even with *Roe* still on the books. The days of stinging defeats for such statutes in the Supreme Court are over. This, of course, puts the burden on grassroots electoral and legislative politics.

In sum, I am confident that David Souter will be a Justice who can provide the fifth vote to overrule *Roe v. Wade*, given the appropriate case and litigation strategy. That part, of course, is up to us.

¹³ 109 S.Ct. 3040 (1989).

Coalitions for America

Paul M. Weyrich
National Chairman

Eric Licht
President

M. Kimberly Roberts
Director

Library Court
Social Issues

Stanton
Defense & Foreign Policy

Kingston
Budget & Economic Policy

721 Group
Judicial & Legal Policy

Carroll Group
Catholic Coalition

The Omega Alliance
Young Activist Coalition

Resistance Support Alliance
Freedom Fighter Policy

Jewish/Conservative Alliance

721 Second Street
Capitol Hill
Washington, D.C. 20002
(202) 546-3003

DAVID H. SOUTER: THE DEFINITION OF JUDGING

An analysis of
President George Bush's nomination of

DAVID H. SOUTER

to be an associate justice on the
Supreme Court of the United States

by

Thomas L. Jipping, M.A., J.D.

Legal Affairs Analyst

August 1990

EXECUTIVE SUMMARY

When he nominated U.S. Circuit Judge David H. Souter to be an associate justice of the U.S. Supreme Court, President George Bush said that his nominee would "interpret" the law rather than "legislate from the bench." In doing so, President Bush was not distinguishing between different forms or styles of judging; he was distinguishing judging from something else altogether.

In our constitutional system of limited republican government, the judiciary is as much governed by the rule of law as the executive and legislative branches. An independent judiciary, set apart from politics institutionally and in approach to its task, is essential to safeguard liberty. The very act of judging itself is defined by application of the law rather than the preferences of the judge, no matter where that process may lead.

Since the nomination, attention has been almost exclusively focused on a single issue about which we know virtually nothing: abortion. Judge Souter's record as a justice on the New Hampshire Supreme Court, however, is a rich source of insight and information about his judicial philosophy. That record paints a consistent picture of a conservative jurist passionately devoted to the rule of law and properly conducting the act of judging.

A careful jurist, Judge Souter takes a narrow view of the role of the judge. He respects precedent, strives to decide cases based on the facts without reaching unnecessary issues and without announcing rules broader than necessary to the task before him, and consistently applies traditional rules of jurisdiction, statutory construction, and constitutional interpretation.

Judge Souter is eminently qualified to serve on the U.S. Supreme Court. His judicial philosophy is exactly as President Bush described it: interpreting, not legislating. He is a judge, after all, not a politician.

In fulfilling its constitutional role of advice and consent, the U.S. Senate in 1987 shifted radically from examining qualifications to checking out a nominee's politics, from conducting a searching inquiry into judicial philosophy to narrowly testing how a nominee would vote once on the bench. This is not only a dangerous aberration from traditional practice, it directly threatens the independence of the judiciary and literally demands that a nominee bias himself in public on issues that may well come before him as a judge.

In 1987, the Senate seemed to say that a "paper trail" was a liability. At least the most liberal members of that chamber are today seeming to say that the lack of a "paper trail" is a liability. Those liberals condemn attempts to regulate the Court's appellate jurisdiction in areas like abortion as "political tampering" but today feel free to impose their own political litmus test upon nominees to the bench in areas like abortion. This is hypocrisy, nothing more and nothing less.

The Senate should aggressively conduct a properly focused investigation of this superb nominee and consent unanimously to his appointment before the Court's October 1990 Term begins.

DAVID H. SOUTER: THE DEFINITION OF JUDGING

On July 23, 1990, President George Bush exercised his power under Article II, Section 2¹ of the United States Constitution and formally nominated U.S. Circuit Judge David H. Souter to be an associate justice of the Supreme Court of the United States.

This analysis is intended to assist the U.S. Senate in fulfilling its constitutional "advice and consent" role in considering Judge Souter's nomination.²

JUDGE SOUTER'S RESUME

David Hackett Souter was born in Melrose, Massachusetts, on September 17, 1939. He received his B.A. *magna cum laude* from Harvard in 1961 and continued his education as a Rhodes Scholar at Oxford University, England. A member of Phi Beta Kappa, he received his law degree from Harvard in 1966 and joined the Concord, New Hampshire, law firm of Orr & Reno.

After just two years of legal practice, David Souter entered public service. He served as Assistant Attorney General from 1968 to 1971, Deputy Attorney General under then-Attorney General Warren Rudman until 1976, and Attorney General until 1978. Moving to the judicial branch, he served as an associate justice of the New Hampshire Superior Court for five years and, by appointment of then-Governor John Sununu, an associate justice of the New Hampshire Supreme Court from 1983 to 1990. President Bush nominated Justice Souter to be a judge on the U.S. Court of Appeals for the First Circuit in February 1990.³ The American Bar Association rated him "well qualified" for this post and the U.S. Senate unanimously consented to his appointment. He began service on May 25, 1990.⁴

¹ Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint...all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

² The author gratefully acknowledges the valuable research assistance of Michael L. Pendleton (University of Baltimore School of Law); Paul R. Jensen (Duke University School of Law); David M. Baloga (American University); Jeffrey L. Handwerker (Rutgers College); and Peter D. Crawford, Jr. (Williams College).

³ See 58 U.S.L.W. 2448 (February 6, 1990).

⁴ See "Judicial Milestones," *The Third Branch*, July 1990, at 4.

Judge Souter is a member of the New Hampshire and American Bar Associations, a member of the board of trustees of Concord Hospital from 1973 to 1985 (president, 1978-1984), a member of the board of overseers of Dartmouth Medical School from 1981 to 1987, and a member of the New Hampshire Historical Society (trustee, 1976-1985; vice president, 1980-1985). His service on legal and judicial committees has included the New Hampshire Police Standards and Training Council, the Governor's Commission on Crime and Delinquency, and the New Hampshire Bar Association Committee to Recommend Codification of Rules of Criminal Procedure.

SOURCES OF INFORMATION

Information about David Souter and his views derives from several sources. Determining the information's significance, however, requires attention to the particular source. State attorneys general, for example, may file briefs and make arguments which reflect the views of their governor-client rather than their own. Opinions by a five-member court, especially in cases involving sensitive or controversial issues, rarely indicate exactly the views of individual members of the court and never reveal the negotiating, coalition-building, agreements, or concessions that took place during the process of producing a majority opinion. Advisory opinions, frequently given by state courts but never by federal courts, are entirely abstract and can differ substantially from opinions in actual cases following the identification of concrete issues, filing of legal briefs, trials or appellate argument, etc. Votes, as well as lines of reasoning or analytical approaches, are always the product of an actual case. Each case, of course, is unique.

JUDGE SOUTER'S RECORD WHAT WE DON'T KNOW: ABORTION

Perhaps the most contentious single issue surrounding the Souter nomination is one on which virtually nothing concrete exists: abortion. Pro-life and pro-abortion activists agree that this nomination will at least affect the Court's abortion jurisprudence.

In 1973, the Court voted 7-2 in *Roe v. Wade*⁵ to create a virtually unlimited right to abortion. The dissenters, William Rehnquist and Byron White, remain on the Court. In 1975, John Paul Stevens replaced William Douglas, leaving the balance essentially intact. In 1981, Sandra Day O'Connor replaced Potter Stewart. Stewart had voted with the *Roe* majority; O'Connor has made it clear that she at least opposes *Roe*,⁶ though has not indicated she would flatly overrule the decision. In 1986, Antonin Scalia replaced William

⁵ 410 U.S. 113 (1973).

⁶ In *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), Justice O'Connor harshly criticized the *Roe* trimester framework as "unworkable" and "on a collision course with itself."

Rehnquist when President Ronald Reagan elevated Rehnquist to Chief Justice; Scalia is clearly a vote to overrule *Roe*. In 1987, Anthony Kennedy replaced Lewis Powell. Powell supported *Roe*, writing the 1983 *Akron v. Akron Center for Reproductive Health*⁷ decision reaffirming it. Kennedy is generally viewed as a vote to overrule *Roe*. Therefore, the pro-*Roe* majority has shrunk from 7-2 in 1973, to 6-3 in 1986, to 5-4 today.

David Souter has never presided over an abortion case, never written judicial opinions or scholarly articles on the subject, never spoken his mind about it. As such, activists on both sides can only look at the slim bits of his record that bear even tangentially on the subject. They reveal nothing of substance about those views. In the interest of a thorough and balanced evaluation of this nomination, those bits of information are listed here.

- * "Abortion opponents attacked Souter for serving on the boards of two New Hampshire medical facilities where abortions are performed."⁸
- * The Manchester *Union Leader* reported that, while state attorney general, Souter opposed a bill which included provisions repealing the state's strict anti-abortion law. He stated: "Quite apart from the fact that I don't think unlimited abortions ought to be allowed, if the state of New Hampshire left the situation as it is now, I presume we would become the abortion mill of the United States."⁹ The article pointed out that Souter was representing Meldrim Thomson, New Hampshire's strongly pro-life governor, and that his remarks did not necessarily reflect his own views.
- * In 1981, a pro-abortion member of the New Hampshire House of Representatives requested an opinion from the Superior Court about a pending bill requiring parental consent for abortions on minors but authorizing a "judicial bypass" of the parents' wishes. Justice Souter wrote a letter on behalf of the court to the relevant committee chairman recommending that the legislature "not authorize the exercise of judicial choice by justices of the Superior Court to determine whether an abortion should be performed upon a pregnant, immature minor whose parents do not consent to that course of action."
- * The letter expressed no opinion about parental consent: "The judges do not believe it is appropriate for the court to take a position on the basic question addressed by the bill, whether parental consent should be required before an abortion may be performed upon an unmarried minor."

⁷ 462 U.S. 416 (1983).

⁸ Mauro and Hall, "Groups Press for Souter's Abortion View," *USA Today*, July 27, 1990, at 8A.

⁹ "Souter: In 1977 Interview, He Said He Opposed Unlimited Abortions," *Manchester Union Leader*, August 4, 1990, at 1.

- * The letter addressed only the "judicial bypass" provision, allowing a judge to authorize an abortion for an immature minor which would be in her "best interests."
- * The letter objected to the judicial bypass provision because it required making "fundamental moral decisions about the interests of other people without any standards to guide the individual judge." The individual judge's "predilections" rather than articulated "rules and stated norms" would result in judges engaging in inappropriate "acts of unfettered personal choice."
- * The letter objected to the judicial bypass provision because of the "necessarily moral character" of the decision judges would have to make and the "resulting disparity of responses." In sum, "a principled and consistent application of the quoted provision would be impossible."
- * One journalist concluded: "While the 1981 letter may have been useful to abortion-rights supporters [in defeating the proposed legislation], it also reflected a view of the role of judges that is in line with the philosophy espoused by Bush and his predecessor, Ronald Reagan."¹⁰ The bottom line is that this letter said nothing about *Roe v. Wade*, nothing about parental consent, and nothing about abortion.
- * A state regulation prohibited the use of Medicaid funds to pay for elective abortions. A U.S. district court permanently enjoined this regulation and the state appealed. The brief on the merits, dated March 10, 1976, was filed with the U.S. Court of Appeals for the First Circuit under Attorney General Souter's name by the brief's author, Assistant Attorney General Richard Wiebusch. The following statement appears on page 41 of the brief: "Plaintiffs cannot in good faith dispute that thousands of New Hampshire citizens possess a very strongly held and deep-seated moral belief that abortion is the killing of unborn children." Wiebusch also wrote and filed, under Souter's name, a separate memorandum supporting the state's motion for suspension of the injunction pending appeal. The following statement appears on page 6: "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." Wiebusch has told reporters that Souter had "nothing to do with this brief. This wasn't his language. He didn't preapprove it....I didn't even talk with him about the case until after we lost it."¹¹

¹⁰ Broder and Marcus, "Souter Letter Opposed Role in Parental Consent Bill," *Washington Post*, July 26, 1990, at A13.

¹¹ Weyrich, "Souter 'Smoking Gun' on Abortion Denied," *Washington Times*, July 31, 1990, at A6.

* In *Smith v. Cote*,¹² Justice Souter joined an opinion in which the New Hampshire Supreme Court¹³ recognized for the first time a cause of action for "wrongful birth."¹⁴ The court stated that the U.S. Supreme Court's decision in *Roe v. Wade* "is controlling"¹⁵ and felt the issue before it was "whether, given the existence of the right of choice recognized in *Roe*, our common law should allow the development of a duty to exercise care in providing information that bears on that choice."¹⁶ Justice Souter concurred specially to address a significant issue not specifically raised by the questions of law transferred by the superior court. He raised the hypothetical of the pro-life physician and wrote that "I do not understand the court to hold...that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."¹⁷ Clearly, whatever one's evaluation of the court's legal analysis concerning the relevance of *Roe*, the court assumed that decision's relevance without any comment as to its validity.

That's all there is on the issue. The bottom line is that we do not have any clear and specific evidence of Judge Souter's personal or judicial position on abortion or the validity of the Supreme Court's decision in *Roe v. Wade*. As with so many other issues and so many other nominees, we must use intuition and judgment based on what we do know about this nominee and his judicial philosophy.

¹² 513 A.2d 341 (N.H. 1986). This case involved questions of law transferred to the state supreme court from the superior court.

¹³ Chief Justice King did not participate in this decision.

¹⁴ In such a case, a woman sues her doctor for failing to inform her of facts that might prompt her to choose abortion, thus rendering the birth a legal "wrong" for which she claims compensation.

¹⁵ *Smith*, 513 A.2d at 346.

¹⁶ *Id.* at 344.

¹⁷ *Id.* at 355.

JUDGE SOUTER'S RECORD WHAT WE DO KNOW: THE "GRAB BAG"

While virtually nothing is known about Judge Souter's specific personal or judicial views on abortion, a significant body of judicial decisions exists covering a wide range of issues. Focusing, as the media and most activists have, exclusively on the unknown ignores the known and the consistent picture it paints of the "conservative mindset" of this "careful jurist."¹⁸

"During his seven years on the New Hampshire Supreme Court, David Hackett Souter wrote more than 200 opinions reflecting the grab bag of issues that are the staple of state supreme courts--focused more often on mundane and technical legal issues than questions of sweeping constitutional magnitude."¹⁹ The *Washington Post* compared Judge Souter's record on the New Hampshire Supreme Court with retired Justice William Brennan's record on the New Jersey Supreme Court.²⁰ Justice Souter authored 217 opinions including 187 majorities, 13 concurrences, and 17 dissents. Justice Brennan authored 232 opinions including 210 majorities, four concurrences, and 18 dissents.

Three of Justice Souter's 187 majority opinions were appealed to the U.S. Supreme Court. The Court refused to review any of them.²¹ Of his 187 majority opinions, 179 (95.7%) were for a unanimous court and eight (4.3%) were for a divided court. "Divided" means any decision attracting a separate, even a concurring, opinion by another Justice. Justice Batchelder, known as the most liberal member of the bench at that time, wrote a separate opinion in seven of these eight cases.

As state attorney general, David Souter filed petitions for review by the U.S. Supreme Court in three cases. The Court refused to review any of them.²²

¹⁸ Marcus, "Souter: Conservative Mindset, Careful Jurist," *Washington Post*, July 25, 1990, at A6.

¹⁹ Broder and Dewar, "Bush Opens Drive for Court Nominee," *Washington Post*, July 25, 1990, at A6.

²⁰ "Predicting a Justice's Future," *Washington Post*, August 1, 1990, at A18.

²¹ *Town of Nottingham v. Bonser*, 552 A.2d 58 (N.H. 1988), cert. denied, 109 S.Ct. 3163 (1989); *Appeal of Bosselait*, 547 A.2d 682 (N.H. 1988), cert. denied, 109 S.Ct. 797 (1988); *State v. Valenzuela*, 536 A.2d 1252 (N.H. 1987), cert. denied, 485 U.S. 1008 (1988).

²² *Rumney v. New Hampshire*, 397 U.S. 1051 (1970); *Heine v. New Hampshire*, 396 U.S. 1012 (1970); *Bentley v. New Hampshire*, 394 U.S. 1051 (1969).

While on the New Hampshire Superior Court trial bench, Justice Souter took an opportunity in 1981 to describe his views on criminal sentencing. In the context of sentencing a man convicted of negligent homicide in the deaths of three teenagers while driving drunk, Justice Souter said in part:

I want to speak explicitly on something which I think about and which the counsel for the defendant quite rightly said I should think about, and that is the purposes of sentencing.

To start off with, one of them is the perception in the world around us that the defendant has been justly dealt with in relation to what he did. There should be a proportion observed in sentencing, and trivial cases should not be dealt with with severity. And flagrant cases should not be dealt with leniently.

Secondly, one considers the effect usually referred to as the reformatory effect likely on the defendant from the sentence....I don't believe that very many sentences on many--very many--criminals are likely to have much reformatory effect after the first offense....[I]f the defendant does not receive a heavy sentence, one may reasonably guarantee that it's not going to have any reformatory effect.

[The t]hird consideration is deterrence....And [the] fourth consideration is public protection. I don't know whether this defendant's alcoholism is ever going to be controlled. But I think the circumstances justify trying to protect the public from the effects of that alcoholism for about as long as it is possible.²³

Judge Souter's "record" is comprised almost entirely of his actions while in public service in New Hampshire. The most substantive portion of this record is found in the body of opinions he authored while an associate justice on the New Hampshire Supreme Court. This section will explore opinions by Justice Souter drawn from the following categories:

- A. Evidence
- B. Labor Law
- C. Family Law
- D. First Amendment - Libel
- E. First Amendment - Freedom of Association
- F. Fourth Amendment - Search and Seizure
- G. Fifth Amendment - *Miranda* Rights
- H. Fifth Amendment - Self Incrimination
- I. Sixth Amendment - Speedy Trial
- J. Criminal Procedure - Due Process
- K. Criminal Procedure - Deposing a Child Victim/Witness
- L. Miscellaneous

²³ The text of this statement is excerpted in "Souter's Stern Judgment on Sentencing," *Legal Times*, August 6, 1990, at 10-11.

In each of these substantive areas, Justice Souter evidenced a consistent commitment to apply the law, stick close to the facts, and avoid imposing his own preferences or notions of good social policy. He did not stretch settled rules to achieve specific outcomes. He did not redefine settled terms to "bring them up to date." He regularly deferred to legislative enactments within the constraints imposed by common law and constitutional mandates. His record is described by President Bush's repeated phrase: Justice Souter interpreted the law, he did not legislate from the bench.

This analysis is necessarily selective in terms of both its categories and cases. It includes areas raising issues of wide interest and likely relevance to issues Justice Souter might confront on the U.S. Supreme Court. It avoids, for example, the substantial number of zoning and insurance cases the state high court regularly addressed. It does address various constitutional issues. Conclusions reached here as to Judge Souter's judicial philosophy would not be appreciably altered by a searching examination of other substantive areas of case law.

A. Evidence. Two cases demonstrate how Justice Souter carefully applied New Hampshire's "rape shield law."²⁴ In doing so, he demonstrated his commitment to maintaining the due process rights of criminal defendants rather than imposing his personal feelings about some abstract sense of "justice." The Supreme Court of New Hampshire had held that a rape defendant must have the opportunity to demonstrate that the evidence's probative value outweighs its prejudicial effect.²⁵

In *State v. Colbath*,²⁶ Justice Souter, writing for a unanimous court, reversed a conviction for aggravated felonious sexual assault and remanded for a new trial. The trial judge had instructed the jury that evidence of the complainant's sexually provocative behavior in a bar with men other than the defendant within hours of the incident was irrelevant. Justice Souter wrote that in this case, "the jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group."²⁷

²⁴ This statute bars the admission of evidence of "[p]rior consensual sexual activity between the victim and any person other than the [defendant]." New Hampshire Revised Statutes Annotated 632-A:6.

²⁵ *State v. Howard*, 121 N.H. 53 (1981).

²⁶ 540 A.2d 1212 (N.H. 1988).

²⁷ *Id.* at 1217.

In *State v. Baker*,²⁸ Justice Souter, writing for a unanimous court, reversed a conviction for felonious sexual assault because the trial court had denied a hearing to assess the "probative vs. prejudicial" question in order to save time. Justice Souter wrote: "What is more important, in any event, is that a...hearing is a due process requirement, which must be given a higher priority than efficiency in the use of jurors' and witnesses' time."²⁹

In *State v. Knowles*,³⁰ Justice Souter, writing for a unanimous court, affirmed a conviction for driving under the influence, second offense. The defendant's mother had told an investigating officer at the scene where a car had snapped a utility pole that despite her efforts to dissuade the defendant from driving, he "drove off and hit the pole." At trial, she disavowed any knowledge of the incident and the defense moved to exclude as hearsay her statement to the officer. The trial judge admitted the statement under the "catch-all" exception to the rule against hearsay. Justice Souter, affirming this ruling, wrote that "we cannot say the trial judge was clearly wrong in thinking the police had done as much as they reasonably should have on the evening of the event."³¹

B. Labor Law. In *Panto v. Moore Business Forms, Inc.*,³² Justice Souter, writing for a unanimous court, answered two questions certified to the justices by the U.S. District Court for the District of New Hampshire. The plaintiff worked for 12 years as an at-will employee.³³ In preparation for lay-offs, the employer unilaterally promulgated to its employees a written policy statement announcing the employer's intention to continue salary and benefits for a limited period after the lay-off. Applying traditional contract concepts,³⁴ Justice Souter held that promulgation of this statement "may be treated as an offer subject to an employee's acceptance, to be expressed by the continued performance

²⁸ 508 A.2d 1059 (N.H. 1986).

²⁹ *Id.* at 1062.

³⁰ 562 A.2d 185 (1989).

³¹ *Id.* at 186.

³² 547 A.2d 260 (N.H. 1988).

³³ This means that "either party was free to end the relationship with or without cause at any time." *Id.* at 262.

³⁴ Justice Souter cited New Hampshire precedents dating back to the 1860s.

of his duties, upon which an enforceable unilateral contract term will be formed."³⁵ Therefore, the necessary elements of proof are unilateral offer, acceptance, and consideration.³⁶ Justice Souter viewed this as more like a case involving deferred compensation than a "handbook case" in which at-will employees seek to enforce terms in a handbook existing from the time they were hired.

In *Appeal of White Mountain Education Association*,³⁷ Justice Souter, writing for a unanimous court, affirmed a decision by the Public Employee Labor Relations Board dismissing an action on behalf of a discharged school custodian. That complaint alleged the custodian was fired in retaliation for his union membership. The board initially found for the employee, ordering reinstatement without back pay. On rehearing, the board dismissed the complaint altogether. Justice Souter noted that a party who has not applied for a rehearing before the agency may not take an appeal to the state supreme court. This means that "[w]hen a decision on any issue is reversed on rehearing, the newly losing party must apply for a further rehearing and satisfy [statutory requirements] before appealing to this court."³⁸ The court nevertheless chose not to dismiss the appeal because "it appears that each party erroneously assumed that the association's earlier motion for rehearing satisfied the [statutory requirements] as a condition for this appeal."³⁹ On the merits, the court held that the burden is on the union to prove "some minimal degree of retaliatory motivation."⁴⁰ The court refused to "place a burden on an employer to justify his action upon a mere claim of retaliation or upon the complainant's introduction of any evidence of retaliation."⁴¹

C. Family Law. In the area of family law, Justice Souter consistently maintained his commitment to the rule of law while achieving results that furthered New Hampshire's interest in upholding parental rights and strengthening family unity. He did not second-guess the legislature. He did not substitute any personal preferences about the meaning or definition of "family" or any "enlightened" notions about "domestic arrangements" in the 1980s. Rather, he faithfully applied the law.

³⁵ *Panto*, 547 A.2d at 264.

³⁶ *Id.* at 269.

³⁷ 486 A.2d 283 (N.H. 1984).

³⁸ *Id.* at 286.

³⁹ *Id.*

⁴⁰ *Id.* at 288.

⁴¹ *Id.*

In *In re Noah W.*,⁴² Justice Souter, writing for a unanimous court, held that a finding of abuse by a district court is a prerequisite to a probate court's termination of parental rights. He utilized "the standard of statutory construction by reference to the plain meaning of the language employed."⁴³ His conclusion stemmed in part from his observation that the legislature's objectives included "the preservation of family unity" and corresponding protection of parental rights, as well as "the reunification of families that have been split by dispositional orders in abuse cases."⁴⁴

In *In re Adam E.*,⁴⁵ Justice Souter, writing for a unanimous court, held that while a district court judge in New Hampshire can terminate parental rights, "the order must include a statement of conditions on which the parent may regain custody and a plan of services to help the parent and the child."⁴⁶ Even though the court acknowledged that, in that case, there appeared very little chance that the family could be reunited because of the mother's mental illness, it nonetheless preserved procedural safeguards against the unconditional termination of parental rights.

In *In re Jason C.*,⁴⁷ Justice Souter, writing for a unanimous court, affirmed a lower court ruling that two unmarried adults may not jointly petition to adopt a child. Striving for a construction "consistent with legislative intent," Justice Souter concluded that "it was the legislature's intent to confine adoption to applicants who will probably provide a unified and stable household for the child."⁴⁸

In *Matter of Matthew G.*,⁴⁹ Justice Souter, writing for a unanimous court, affirmed the denial of a mother's petition to terminate the parental rights of her former husband because of abandonment. In addition to maintaining jurisdictional rules of timeliness,⁵⁰ the court held that a finding of abandonment does not itself require considering the "best

⁴² 549 A.2d 1210 (N.H. 1988).

⁴³ *Id.* at 1211.

⁴⁴ *Id.* at 1212.

⁴⁵ 480 A.2d 160 (N.H. 1984).

⁴⁶ *Id.* at 161.

⁴⁷ 533 A.2d 32 (1987).

⁴⁸ *Id.* at 33.

⁴⁹ 469 A.2d 1365 (N.H. 1983).

⁵⁰ The plaintiff claimed error in the introduction of hearsay evidence. The record did not disclose any objection at trial. Therefore, citing a case from 1862, Justice Souter held that the "attempt to raise the issue is untimely." *Id.* at 1366.

interest of the child." Noting that "a determination of abandonment is essentially factual," the court decided that "the conclusion of what is in the child's best interest is not an evidentiary fact" and "has no logical tendency to prove that the parent in question abandoned the child."⁵¹

D. First Amendment - Libel. In the area of libel, Justice Souter's analysis and application of the law has been clear and thorough in every case. He has not exhibited a knee-jerk approach that anyone can print what he chooses without being held accountable. He has made the necessary distinctions between different forms of printed material and has not hesitated to correct a trial judge's too-hasty decision to deny a plaintiff the opportunity for his day in court.

In *Duchesnaye v. Munro Enterprises, Inc.*,⁵² Justice Souter, writing for a unanimous court, affirmed a superior court judgment in favor of the plaintiff with respect to an editorial.⁵³ The paper printed an editorial which, if read in conjunction with a factually correct news story, "could be understood to describe the plaintiff as needing psychiatric help for instability, and it could be read to imply that the plaintiff had made obscene telephone calls."⁵⁴ Justice Souter applied the rule that "a statement in the form of an opinion may be read to imply defamatory facts, and it is actionable if it is actually understood that way."⁵⁵

In *Nash v. Keene Publishing Corp.*,⁵⁶ Justice Souter, writing for a unanimous court, reversed the trial court's summary judgment for the defendant newspaper and remanded for trial. The newspaper printed a letter imputing behavior, "as well as personal limitations and proclivities, that would be highly undesirable in a police officer" written by an individual whom the plaintiff officer had arrested and restrained.⁵⁷ Although it was the newspaper's stated policy not to print "allegations we are unable to verify independently,"

⁵¹ *Id.*

⁵² 480 A.2d 123 (N.H. 1984).

⁵³ The court found in favor of the newspaper with respect to a news story.

⁵⁴ *Duchesnaye*, 469 A.2d at 124.

⁵⁵ *Id.* at 125. The U.S. Supreme Court recently ruled the same way. See *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846 (June 21, 1990).

⁵⁶ 498 A.2d 348 (N.H. 1985).

⁵⁷ *Id.* at 350.

it failed to substantiate statements in the letter and later published an apology. Justice Souter concluded that it was error for the trial court to find that the letter must necessarily be read as "a non-actionable expression of opinion."⁵⁸ He also found that the officer's status as a "public official" for purposes of a libel action⁵⁹ must be left to the jury.⁶⁰

In *Keeton v. Hustler Magazine, Inc.*,⁶¹ a woman sued *Hustler* for publishing defamatory material. By the time she brought suit, only New Hampshire's 6-year statute of limitations remained intact. Even though the plaintiff was a resident of New York, the defendants were residents of Ohio, and 99% of the libelous material was circulated outside of New Hampshire, she brought suit there and won a \$2 million judgment. On appeal, the chief judge of the U.S. Court of Appeals for the First Circuit certified two questions to the New Hampshire Supreme Court. The court unanimously agreed to adopt the "single publication" rule for cases of multistate dissemination of defamatory material. The majority also applied New Hampshire's statute of limitations to the entire action for damages arising in all 50 states. While accepting the basic rule that procedural issues are to be decided by the law of the forum state, Justice Souter in dissent wrote that there is "nothing inherently persuasive in characterizing a statute [of limitations] as merely procedural....Nor is there anything persuasive in the reasoning of our prior cases that have so held."⁶² Examining precedents dating back to 1940, Justice Souter concluded that the court's 1978 decision in *Gordon v. Gordon*,⁶³ which held that a limitation statute is procedural, was an aberration that failed to appropriately address the issue and ignored prior case law. As a result, Justice Souter wrote that "the *Gordon* rule is manifestly devoid of reasoned support, and...persuasive authority counsel[s] for the repudiation of *Gordon*."⁶⁴

⁵⁸ *Id.* at 352.

⁵⁹ A public official cannot recover for libel "without clear and convincing proof that the defendant had acted with actual malice [either with knowledge of the falsity or with reckless disregard for the truth] in publishing a false and defamatory statement concerning the plaintiff's official conduct." *Id.*

⁶⁰ *Id.* at 353.

⁶¹ 549 A.2d 1187 (N.H. 1988).

⁶² *Id.* at 1198.

⁶³ 118 N.H. 356 (1978).

⁶⁴ *Keeton*, 549 A.2d at 1199.

E. First Amendment - Freedom of Association. In *In re Chapman*,⁶⁵ the court held that active opposition by the Board of Governors of the State Bar Association⁶⁶ to tort reform legislation was not within the mandate of the Association's constitution.⁶⁷ "Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate." The court viewed this mandate narrowly to include "those matters which are related **directly** to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession."⁶⁸ Justice Souter joined Justice Brock's opinion, but concurred specially. He wrote that when "the compulsory organization uses dues or fees to finance political or ideological activities that are not **reasonably** related to the responsibilities that justify the compulsion to join, it infringes on the first amendment rights of members who dissent from the organization's positions."⁶⁹ This suggests that Justice Souter's view of what must justify using compulsory dues and fees for activities unrelated to the central mission of a compulsory organization may have been more relaxed than the majority.

F. Fourth Amendment - Search and Seizure. Justice Souter's opinions in this area demonstrate that he has avoided the imaginative bias of many liberal judges that readily deems necessary and appropriate investigative efforts by law enforcement officials to be unconstitutional "searches." Such judges often appear to presume that a search is automatically "unreasonable." As in other areas, Justice Souter rigorously and even-handedly applied the law but resisted invitations to impose extra-legal standards or "gut feelings" of "fairness," thereby thwarting legitimate law enforcement activities.

In *State v. Valenzuela*,⁷⁰ Justice Souter, writing for a 3-1 majority,⁷¹ holding that use of a "pen register" to record numbers dialed from the defendant's telephone was not a "search" for constitutional purposes, affirmed a conviction of the controlled substances law. He confined the analysis according to "the posture in which the parties have presented it,"

⁶⁵ 509 A.2d 753 (N.H. 1986).

⁶⁶ The New Hampshire bar is a "unified" or "integrated" bar. Membership is compulsory in order to practice law in the state.

⁶⁷ The U.S. Supreme Court recently reached a similar conclusion with regard to the integrated California bar. See *Keller v. State of California*, 58 U.S.L.W. 4661 (June 4, 1990).

⁶⁸ *Chapman*, 509 A.2d at 759 (emphasis added).

⁶⁹ *Id.* at 761-62 (emphasis added).

⁷⁰ 536 A.2d 1252 (N.H. 1987), *cert. denied*, 485 U.S. 1008 (1988).

⁷¹ Justice Thayer did not participate in this case. Justice Batchelder dissented because he would find that the use of a "pen register" to obtain numbers dialed from the defendant's telephone was a constitutional "search" and, therefore, must be based on a finding of probable cause. *Id.* at 1268.

utilizing principles from the U.S. Supreme Court's Fourth Amendment jurisprudence.⁷² He carefully distinguished between the routine voluntary communication of electronic data like the number dialed from the protected contents of a telephone conversation. Justice Souter held that "there is no violation of constitutional privacy when the telephone operator acts as a government informer by communicating what a defendant has addressed to the operator, and we therefore find no violation when the 'hearer' is not an operator but a machine receiving functionally equivalent information communicated by a defendant and directed to the company."⁷³ His analysis also reflected a thorough knowledge of criminal procedure, for example, the difference between "stale probable cause" and "stale information."⁷⁴ Justice Souter found that the judge issuing the search warrant in the case was neutral despite having given advice to the police. Nevertheless, he added "a further word about it, with an eye to the future. Legal advice to police officers ought to come from city or county attorneys, or from the attorney general's office, not from judges."⁷⁵ This again reflects Justice Souter's dual devotion to applying the law and to maintaining the proper role for judges in our legal and political system.

In *State v. Koppel*,⁷⁶ the court held that roadblocks used to detect and apprehend drunk drivers were an "unreasonable search and seizure" and reversed the trial court's denial of the defendants' motion to suppress evidence obtained when they were arrested. The majority went beyond the traditional "balancing test" between the value of a roadblock to the public and its burden on individual drivers to announce a new test weighted in favor of the latter and requiring that the value of the roadblock must "significantly" advance the public interest. Justice Souter dissented, placing his emphasis on whether a particular search was "unreasonable" rather than on the knee-jerk assumption that any search is unreasonable by definition. He wrote: "Even assuming that such a weighted balancing test is appropriate, I could not join in the conclusion that the majority reach, for I believe that the evidence indicates that the value of the roadblocks in this case did significantly outweigh the minimal disadvantage to the drivers whose cars were stopped."⁷⁷ He concluded: "Contrasting this significant public benefit with the minimal private intrusion, I conclude that the roadblocks in question did not result in unreasonable seizures."⁷⁸ He

⁷² In doing so, Justice Souter again demonstrated his careful attention to the proper and limited role of the appellate judge. He did not purport to announce a new rule that the state constitution's protection against unreasonable searches and seizures must necessarily be understood according to the U.S. Supreme Court's Fourth Amendment holdings. Nor did he cast any doubt on existing state high court precedents. *Id.* at 1257.

⁷³ *Id.* at 1262.

⁷⁴ *Id.* at 1264.

⁷⁵ *Id.* at 1266.

⁷⁶ 499 A.2d 977 (N.H. 1985).

⁷⁷ *Id.* at 984.

⁷⁸ *Id.* at 985.

addressed the majority's "slippery slope" argument that roadblocks to find drunk drivers today will mean stopping pedestrians to find shoplifters tomorrow by stating that "[m]easures that would be reasonable in policing activities of great risk would not be reasonable as intrusions into the characteristically safe and innocent pursuits of social life."⁷⁹

G. Fifth Amendment - *Miranda* Rights. In these cases, Justice Souter consistently demonstrated a commitment to apply applicable standards, but also to resist either substituting his judgment for that of the trial court as found in the record or extending rules of law beyond their conceptual limits. In short, he gave criminal defendants a fair appeal but ruled against them if the law required it.

In *State v. Coppola*,⁸⁰ Justice Souter, writing for a unanimous court, affirmed a conviction for burglary and aggravated felonious sexual assault. The defendant had, prior to his arrest, responded to police questions with a boast about being street-wise and refusing to confess to anything. He claimed that this boastful statement amounted to an invocation of his right against self-incrimination under the 5th and 14th Amendments to the U.S. Constitution and that, therefore, it could not be used against him at trial. Justice Souter refused to "expand [the Supreme Court's decision in] *Jenkins [v. Anderson]*"⁸¹ beyond recognition by equating any occasion to remain silent in response to police questioning with an inducement [to remain silent].⁸² The most significant flaw in the defendant's argument was "the factual unreality of equating his taunt to the police with an invocation of his constitutional right to remain silent....While post-*Miranda* invocations of a right to silence are insolubly ambiguous...pre-*Miranda* refusals to confess are not."⁸³

In *State v. Elbert*,⁸⁴ Justice Souter, writing for a unanimous court,⁸⁵ affirmed a conviction for attempted first-degree murder and use of a firearm in the attempt to commit a felony. The defendant had fled to New York after committing the acts in question. Police officers from New Hampshire retrieved him and, while in Connecticut, read him his *Miranda* rights. He waived those rights and made statements to the officers which were admitted into evidence at trial. The court held that the evidence supported the trial court's

⁷⁹ *Id.*

⁸⁰ 536 A.2d 1236 (N.H. 1987).

⁸¹ 447 U.S. 231 (1980).

⁸² *Coppola*, 536 A.2d at 1239.

⁸³ *Id.*

⁸⁴ 480 A.2d 854 (N.H. 1984).

⁸⁵ Justice Douglas did not participate in this case.

finding of each necessary element -- the defendant initiated discussion of the charges prior to any waiver of *Miranda* rights, he understood and waived those rights, and he made a statement voluntarily.⁸⁶

In *State v. Lewis*,⁸⁷ Justice Souter, writing for a unanimous court,⁸⁸ affirmed a conviction for robbery and second-degree murder after finding that the defendant voluntarily waived his *Miranda* rights and that admission of his confession did not violate his right to due process. Police officers had spoken twice to the defendant before the arrest, in each case giving him the appropriate *Miranda* warnings. They did so again before questioning him after the arrest. "The defendant signed a waiver of the applicable rights and made a confession that was later introduced into evidence at trial."⁸⁹ Justice Souter applied the "beyond a reasonable doubt" standard under state law, even though the U.S. Supreme Court recently held "that the State need prove waiver only by a preponderance of the evidence."⁹⁰ Finding that "the issue is a close one,"⁹¹ the court meticulously reviewed each statement involved in the giving and waiving of *Miranda* rights. Noting that the defendant was 28 years old, had a high school education, and was found free of drugs or alcohol, the court concluded that the evidence pointed to "a correct understanding of waiver."⁹² The court dismissed other arguments against finding waiver by stating that "the defendant is seeking to extend *Miranda* beyond its conceptual justification, on the basis of an argument divorced from reality."⁹³

In *State v. Derby*,⁹⁴ Justice Souter, writing for a unanimous court, affirmed a conviction for felonious sexual assault. A police officer read defendant his *Miranda* rights and defendant initialed each statement to indicate his understanding, and then signed a waiver and an agreement to answer questions. His subsequent incriminating statements were introduced at trial. Justice Souter readily applied rules limiting the court's subject

⁸⁶ *Elbert*, 480 A.2d at 859.

⁸⁷ 533 A.2d 358 (N.H. 1987).

⁸⁸ Justice Batchelder did not participate in this case.

⁸⁹ *Lewis*, 533 A.2d at 360.

⁹⁰ *Id.* at 361. See *Colorado v. Connelly*, 107 S.Ct. 515 (1986).

⁹¹ *Lewis*, 533 A.2d at 361.

⁹² *Id.* at 363.

⁹³ *Id.* at 364.

⁹⁴ 561 A.2d 504 (N.H. 1989).

matter jurisdiction, finding that certain issues were not properly raised.⁹⁵ Even though the defendant suffered from several ailments and was receiving half a dozen medications, the court acknowledged that this evidence had been before the trial court and upheld its finding that the defendant had voluntarily waived his *Miranda* rights.

H. Fifth Amendment - Self Incrimination. In a rare split decision, Justice Souter demonstrated his willingness to depart from his colleagues when he felt the law required it. In *State v. Cormier*,⁹⁶ the court, by a 3-2 vote, affirmed a conviction for operating a motor vehicle while under the influence of intoxicating liquor. The defendant claimed that evidence she refused to submit to a chemical blood-alcohol test⁹⁷ violated her right against self-incrimination under the state constitution.⁹⁸ Justice Souter first held the constitutional protection applied only to "evidence by a defendant that is of testimonial character"⁹⁹ and does not apply to "physical evidence such as a sample of defendant's blood...or to demonstrations provided by the performance of field sobriety tests."¹⁰⁰ The refusal in the present case was "an act of choice to suppress physical evidence" and, therefore, non-testimonial.¹⁰¹ Justice Souter also held that, whether testimonial or not, the evidence in question had not been "compelled."¹⁰²

In another split decision, the court in *State v. Denney*¹⁰³ reversed a conviction of driving while intoxicated, holding that admission of evidence that the defendant had declined to take a blood alcohol test violated his right to due process where the arresting officer gave the standard *Miranda* warnings but did not specifically notify him that his

⁹⁵ The defendant relied not only on the Fifth and Fourteenth Amendments to the U.S. Constitution, which imposes a "preponderance" standard to prove waiver, but also on the parallel provision of the state constitution, which imposes a "beyond a reasonable doubt" standard. Justice Souter rejected the state's argument that the court overrule its precedent establishing the stricter standard as improperly raised. *Id.* at 505.

⁹⁶ 499 A.2d 986 (N.H. 1985).

⁹⁷ New Hampshire statutory law permits introduction of such evidence. New Hampshire Revised Statutes Annotated 265:84.

⁹⁸ Article 15, part I, states that no one shall "be compelled to accuse or furnish evidence against himself."

⁹⁹ *Cormier*, 499 A.2d at 987.

¹⁰⁰ *Id.* at 988. Chief Justice King, joined by Justice Douglas, dissented and would have held that the constitutional right against self-incrimination did apply because the state provision is broader than the federal provision and applies to evidence, as in the present case, that is "testimonial" in nature.

¹⁰¹ *Id.*

¹⁰² Justices Batchelder and Brock concurred specially to write that their vote to affirm the conviction was based on "the analysis that the defendant is not 'compelled' to make a testimonial assertion." *Id.* at 991.

¹⁰³ 536 A.2d 1242 (N.H. 1987).

refusal could be used against him in court. Justice Souter dissented and concluded that the *Miranda* warnings alone were enough to satisfy the due process requirement since one of those warnings is that anything an individual says can and will be used against him in court. Justice Souter went further, criticizing the majority's "more fundamental error...in holding that due process requires such a warning at all."¹⁰⁴

I. Sixth Amendment - Speedy Trial. In *State v. Tucker*,¹⁰⁵ Justice Souter, writing for a unanimous court, affirmed the conviction of a fugitive from prosecution in spite of a ten-month delay between arrest and trial. With "no suggestion of deliberate delay"¹⁰⁶ and "the want of any indication of actual prejudice to the conduct of the defense,"¹⁰⁷ the delay alone did not violate the Constitution.

J. Criminal Procedure - Due Process. Consistent with his decisions in other areas of criminal law and procedure, Justice Souter applied the law consistently and dispassionately. He resisted creative attempts to challenge convictions through "back door" arguments and would not tolerate the legal fictions that lawyers so often raise in hopes of getting appellate judges to disregard lower court decisions and overturn convictions on specious grounds. Rather, Justice Souter insisted on rigorous application of jurisdictional requirements and "called a spade a spade" when identifying and evaluating issues before the court.

In *State v. Goding*,¹⁰⁸ the court affirmed a conviction of driving while intoxicated, second offense. The defendant had initially been tried and convicted on DWI-first offense in district court.¹⁰⁹ He exercised his right to a fresh trial in superior court; a mistrial was declared after the jury failed to reach a verdict on the DWI-second offense charge. He was retried and convicted on the DWI-second offense charge. The majority rejected the defendant's due process claim, based on alleged prosecutorial vindictiveness, that the state is constitutionally prohibited from increasing the charge in superior court after the defendant has been tried and convicted of a lesser charge in district court. Justice Souter dissented from this portion of the majority opinion, writing that the defendant had not "adequately raised any due process issue distinct from a claim of double jeopardy."¹¹⁰

¹⁰⁴ *Id.* at 1246.

¹⁰⁵ 561 A.2d 1075 (N.H. 1989).

¹⁰⁶ *Id.* at 1077.

¹⁰⁷ *Id.* at 1078.

¹⁰⁸ 513 A.2d 325 (N.H. 1986).

¹⁰⁹ The prosecutor did not have the necessary proof of the prior offense in his possession and could not try the defendant on the DWI-second offense charge.

¹¹⁰ *Goding*, 513 A.2d at 331.

K. Criminal Procedure - Deposing a Child Victim/Witness. In *State v. Heath*,¹¹¹ Justice Souter, writing for a unanimous court, answered four questions transferred by the superior court following the defendant's indictment for aggravated felonious sexual assault on a seven-year-old boy. Between the incident and the indictment, the legislature passed into law a measure restricting a defendant's right to depose young victims and to provide for use of videotaped depositions. As in other cases, Justice Souter began by determining the "common usage" of the statute's critical terms.¹¹² The court held that the statute did not impose an absolute bar to discovery depositions of witnesses in criminal cases who are under 16 years of age. Rather, a companion provision allows the trial court to order videotaped depositions in lieu of trial testimony.¹¹³ "Legislative history indicates...that the mandate to follow the 'manner' of trial was not intended to preclude discovery questions."¹¹⁴ A court can disallow deposition discovery of a young victim or witness without violating constitutional standards of due process or equal protection.¹¹⁵

L. Miscellaneous. Many decisions, of course, do not fit neatly into specific categories or can be assigned to more than one. Several of these are significant and continue the pattern established in the foregoing opinions of Justice Souter as a careful and conservative jurist who follows the law and the facts while resisting the temptation to dictate results based on his own preferences or irrationally expand accepted doctrines and principles.

In *In re "K,"*¹¹⁶ Justice Souter, writing for a unanimous court,¹¹⁷ reversed a superior court order requiring a hospital to produce a nurse's report and minutes of a committee meeting. The hospital claimed the documents were privileged under a New Hampshire statute. Justice Souter began his analysis by stating: "The principal issue being the applicability of the statutory privilege to the documents in question, our first concern is with the words of the statute."¹¹⁸ The court, noting that "the statute's drafting is imprecise,"

¹¹¹ 523 A.2d 82 (N.H. 1986).

¹¹² *Id.* at 85.

¹¹³ *Id.*

¹¹⁴ *Id.* at 86.

¹¹⁵ *Id.* at 87.

¹¹⁶ 561 A.2d 1063 (N.H. 1989).

¹¹⁷ Justice Johnson did not participate in this case. Justice Batchelder wrote a short special concurrence.

¹¹⁸ *In re "K,"* 561 A.2d at 1065.

further conducted a "search for the legislature's probable intent."¹¹⁹ It concluded that the statutory reference to "a hospital committee organized to evaluate...." must be understood "by reference to [a committee's] functional responsibility."¹²⁰ "Those committees...would include one on infection control."¹²¹

In *Opinion of the Justices*,¹²² the court, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of a proposed bill that would prohibit homosexuals from adopting, becoming foster parents, or operating child care agencies. Justice Souter joined the opinion.¹²³ The court examined the proposal under several different theories.

- * Under the equal protection clause of the federal or state constitution, the court concluded that homosexuals are not a "suspect class." There exists no "fundamental right to engage in homosexual sodomy....There is, further, no such right to adopt, to be a foster parent, or to be a child care operator....[T]he proper test to apply...is whether the legislation is 'rationally related to a legitimate governmental purpose.'"¹²⁴ The bill's fully legitimate purpose was providing appropriate parental role models for children. The court concluded that prohibiting adoption or foster care by homosexuals was rationally related to this purpose; prohibiting operation of a child care agency was not because this activity did not "approximat[e] a familial or parent-child arrangement."¹²⁵
- * Under the due process clause of the federal or state constitution, there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore

¹¹⁹ *Id.* at 1066.

¹²⁰ *Id.*

¹²¹ *Id.* at 1067.

¹²² 530 A.2d 21 (N.H. 1987).

¹²³ Such opinions never indicate individual authorship. Justice Batchelder separately stated that any restriction in the bill on the activities of homosexuals was unconstitutional. This is likely the result that Justice William Brennan, whose seat on the U.S. Supreme Court Judge Souter was nominated to fill, would have reached.

¹²⁴ *Opinion of the Justices*, 530 A.2d at 24.

¹²⁵ *Id.* at 25. Because of this conclusion, the court did not further address the constitutionality of the prohibition against homosexuals operating child care agencies.

required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."¹²⁶

* The court rejected any argument based on the so-called "right to privacy" or freedom of association under either the state or federal constitution.

In *State v. Grondin*,¹²⁷ Justice Souter, writing for a unanimous court,¹²⁸ reversed a superior court order dismissing an indictment for violating a motor vehicle habitual offender order. The defendant had been convicted three times for driving after suspension of his license. After a hearing, at which the defendant was represented by counsel, the superior court entered an order prohibiting him from driving until his license was restored. He later moved the superior court to vacate the order, claiming the guilty pleas underlying his prior convictions were made without benefit of counsel. The superior court granted the motion. Justice Souter applied a prior supreme court decision holding that a defendant charged with violating a habitual offender order may not attack that finding absent proof he had been unrepresented by counsel at that hearing. Justice Souter was careful to make the assumptions necessary to decide that particular case and avoid appearing "unduly ready to reach constitutional issues that might not require decision."¹²⁹

In *In re Sanborn*,¹³⁰ Justice Souter, writing for a 4-1 majority, reversed a probate court order dismissing a petition for involuntary civil commitment. A man charged with second-degree murder was found incompetent to stand trial. The state filed a petition for involuntary civil commitment "on the ground of mental illness posing a danger to others."¹³¹ The probate judge concluded that the state had failed to prove dangerousness beyond a reasonable doubt and dismissed the petition. The court overruled its previous decision in *Proctor v. Butler*,¹³² which had established the reasonable doubt standard for civil commitment, and held that "the clear and convincing standard must hereafter be employed in civil commitment cases."¹³³ The citizens of New Hampshire had approved a constitutional amendment in 1984 establishing the clear and convincing standard for

¹²⁶ *Id.* at 26.

¹²⁷ 563 A.2d 435 (N.H. 1989).

¹²⁸ Justice Johnson did not participate in this case.

¹²⁹ *Grondin*, 563 A.2d at 436.

¹³⁰ 545 A.2d 726 (N.H. 1988).

¹³¹ *Id.* at 728.

¹³² 117 N.H.927 (1977).

¹³³ *Sanborn*, 545 A.2d at 733.

commitment in cases of criminal insanity. The court unanimously concluded that "we perceive no intellectually realistic basis for holding that due process can require a burden of proof [for civil commitment cases] that is different from the State's burden when it seeks commitment after a verdict of not guilty by reason of insanity to a criminal charge."¹³⁴

Judge Souter's views on civil rights are unknown. His record on the state bench yields no evidence. While Attorney General of New Hampshire, Souter urged the U.S. Supreme Court to review a decision by the U.S. Court of Appeals for the First Circuit upholding a federal agency's requirement that the state submit a racial breakdown of its employees. New Hampshire, per Attorney General Souter, argued that this race-conscious view violated the Constitution's mandate of color-blindness. A newspaper report stated that, as attorney general, Souter referred in a speech to "affirmative action" programs as "affirmative discrimination."¹³⁵

JUDGE SOUTER'S JUDICIAL PHILOSOPHY

This wide-ranging look at Justice Souter's decisions from the New Hampshire Supreme Court intentionally avoids an analysis according to political "outcome" or simplistic references to "winners" and "losers." A judicial decision which stretches concepts to the breaking point, plays fast and loose with the facts, and neglects traditional notions of jurisdiction can be no more acceptable to conservatives because it affirms a criminal conviction than it can be to liberals because it finds a due process violation or reverses a conviction. The integrity and independence of the judiciary, the validity of the act of judging itself, depends on a foundational commitment to the rule of law. That commitment must be above raw politics, it must resist forcing a pre-determined result "peg" through a differently shaped process "hole." Especially in the context of constitutional law, where a decision by unelected judges can trump the decision of elected political branches, the commitment to the rule of law is paramount.

When President Bush nominated Judge Souter, he stated that this nominee would "interpret the Constitution" and not "legislate from the bench." This is another way of describing a commitment to the rule of law. The evidence supports the President's assessment. In various ways, Judge David Souter is a careful jurist who puts the rule of law and the integrity of the process of judging above everything else.

Judge Souter is a careful jurist who resists rules broader than necessary to accomplish the task before him. He gives proper deference to the public policies established by the people's political representatives and only voids them when absolutely necessary. He does not force the law to say what is really his own preference or opinion.

¹³⁴ *Id.* at 735.

¹³⁵ See Marcus, "Souter, as State Official, Opposed U.S. Racial Breakdown Rules," *Washington Post*, August 1, 1990, at A4.

This sometimes leads to results that conservatives like; in other cases, it produces a tally that liberals favor. Overall, however, Judge Souter rigorously - though not inventively - applies the law, wherever that process may take him.

Judge Souter is tough on criminals, some say. He is also tough on lawyers, insisting that they do their job in preparing and presenting appeals. He will not do their work for them. He will not accept "legal fictions," which are really bald requests for political results masquerading as legal arguments. He puts arguments under the spotlight and lawyers to their proof. He applies jurisdictional requirements consistently and even-handedly. And, again, he is content wherever that process may take him.

Consistent with his focus on the rule of law and his narrow view of the proper role of judges, Judge Souter accepts and consistently applies the traditional standards of interpretation. In statutory construction, his standard gives "reference to the plain meaning of the language employed."¹³⁶ In such cases, he writes, "our first concern is with the words of the statute."¹³⁷ If those are ambiguous, the central focus is on a "search for the legislature's probable intent."¹³⁸ In constitutional cases, he regularly applies the "clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption.'"¹³⁹

Another mark of judicial restraint is the refusal to reach unnecessary constitutional issues. That is, if a case can be decided on statutory rather than constitutional grounds, a court should take that narrower course. Justice Souter has indeed followed this tenet as well. In *State v. Grondin*,¹⁴⁰ for example, he was careful to make the assumptions necessary to avoid appearing "unduly ready to reach constitutional issues that might not require decision."¹⁴¹

Judge Souter described his own judicial philosophy in the Senate Judiciary Committee questionnaire he submitted at the time of his nomination to the U.S. Court of Appeals. He wrote:

The obligation of any judge is to decide the case before the court, and the nature of the issues presented will largely determine the appropriate scope of the principle on which its decision should rest. Where that principle is not provided

¹³⁶ *In re Noah W.*, 549 A.2d 1210, 1211 (N.H. 1988).

¹³⁷ *In re "K,"* 561 A.2d 1063, 1065 (N.H. 1989).

¹³⁸ *Id.* at 1066.

¹³⁹ *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986) (Souter, J., dissenting), quoting *Opinion of the Justices*, 44 N.H. 633 (1863).

¹⁴⁰ 563 A.2d 435 (N.H. 1989).

¹⁴¹ *Id.* at 436.

and controlled by black letter authority or existing precedent, the decision must honor the distinction between personal and judicially cognizable values. The foundation of judicial responsibility in statutory interpretation is respect for the

enacted text and for the legislative purpose that may explain a text that is unclear. The expansively phrased provisions of the Constitution must be read in light of its divisions of power among the branches of government and the constituents of the federal system.

APPROPRIATE LINES OF QUESTIONING

The Constitution identifies two powers involved in the selection of federal judges. The Constitution grants both of these - nomination and appointment - to the President. Consistent with the overall scheme of "checks and balances" which serves to limit concentration of government power, the Senate has a role of "advice and consent" which accompanies the President's appointment power.

The battle over the 1987 nomination of Judge Robert H. Bork marked a radical aberration in the traditional understanding of the Senate's advice and consent role. That traditional understanding was that the Senate should focus on a nominee's judicial philosophy and overall qualifications. The Bork battle introduced the notion that the Senate could also investigate and evaluate a nominee's positions on political issues, his specific views on existing Supreme Court precedents and doctrines, and how that nominee would vote in future cases.

"Judicial philosophy" refers to a nominee's approach to the Constitution, to constitutional interpretation, to the role of the courts in the American political and legal system, and to the proper function and definition of judges and judging. A huge array of questions bearing on various aspects of a nominee's judicial philosophy is available to the members of the Senate Judiciary Committee.

A classic example of the difference between judicial philosophy and politics comes from Raoul Berger, retired Charles Warren Senior Fellow in American Legal History at Harvard Law School. Professor Berger, a political liberal through-and-through, is the most distinguished defender and expositor of the "intentionalist" school of constitutional interpretation. He follows this process, this approach to judging, consistently to whatever outcome it produces, whether he personally likes it or not. He writes: "I'm for abortion...but along with almost all academics, I don't think the Constitution guarantees it."¹⁴²

¹⁴² Quoted in P. McGuigan & D. Weyrich, *Ninth Justice: The Fight for Bork* (Washington, D.C.: Free Congress Research & Education Foundation, 1990), at 33.

By going beyond qualifications and philosophy to politics and outcomes, the Senate went beyond an "advice and consent" role in the judicial **selection** process to an active role in the judicial **decisionmaking** process. The Senate went beyond serving as a check on the President's appointment power and claimed for itself an independent power in substantively shaping the federal judiciary.

A Department of Justice study concludes:

What distinguished the Bork, and to a lesser extent the Kennedy confirmation proceedings, therefore, was the equating of criticism of the judicial reasoning of a case with criticism of its substantive results, the confusion of political opinion with judicial philosophy, the use of statistical track records as evidence of judicial philosophy, and the attempts to obtain preconfirmation commitments on certain issues from the nominees. The assumption underlying much of this approach was that judicial philosophy and political philosophy are essentially identical, and that a nominee's political views will direct or even determine his judicial decisions. Indeed, the proceedings suggested not only that the judicial decisionmaking process is political, but that it ought to be.

*To the extent such thinking has become prevalent in the Senate, the courts, academia, and in society generally, it threatens to compromise the independence of the Judicial Branch, and thus to undermine the legitimacy of its authority. Because an independent, apolitical judiciary is a vital part of our constitutional system, this in turn has implications for the structure and workings of our entire democratic system of government.*¹⁴³

Interest groups, whether liberal or conservative, are wrong to call for any kind of political litmus test. President Bush was entirely correct in not imposing one in making this nomination; the Senate must not impose one when fulfilling its role of advice and consent. Nothing less than the independence and integrity of the judiciary is at stake. Supreme Court Justice John Paul Stevens addressed a session of the recent annual meeting of the American Bar Association and echoed this theme. "Justice Stevens cautioned that for a President or senators to pin down a nominee in advance [on specific issues or future votes] discouraged open-mindedness on the part of the judge, gave an appearance of impropriety, and threatened an independent judiciary."¹⁴⁴

¹⁴³ *By and With the Advice and Consent of the Senate: The Bork and Kennedy Confirmation Hearings and the Implications for Judicial Independence* (Washington, D.C.: U.S. Department of Justice, Office of Legal Policy, 1989), at 4.

¹⁴⁴ Margolick, "Souter Hearings Won't Be Useful for Predictions, One Justice Says," *New York Times*, August 8, 1990, at A14.

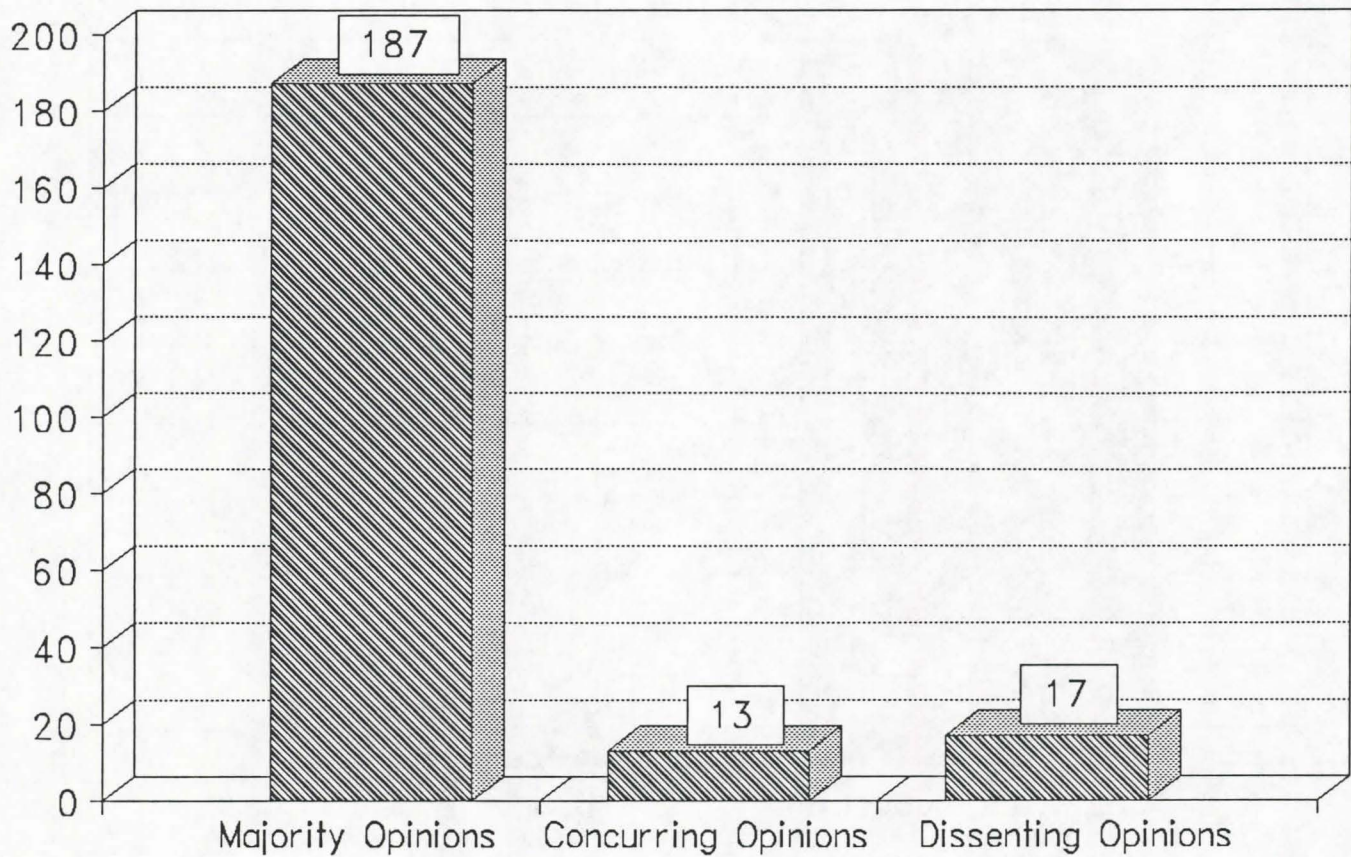
Those who condemn efforts to regulate the appellate jurisdiction of the Supreme Court as "political tampering" but who call for application of a political "balance" approach to filling vacancies on the Court are disingenuous at best and lack any integrity at worst.

The Senate must exercise its role of advice and consent in a way that respects the unique nature and place of the judiciary in our constitutional framework. Questions that require a nominee to bias himself publicly on issues that may well come before him later as a judge essentially demand that he violate in advance his oath to support and defend the Constitution. Litigants deserve as neutral, detached, and non-political a judiciary as we can preserve for them.

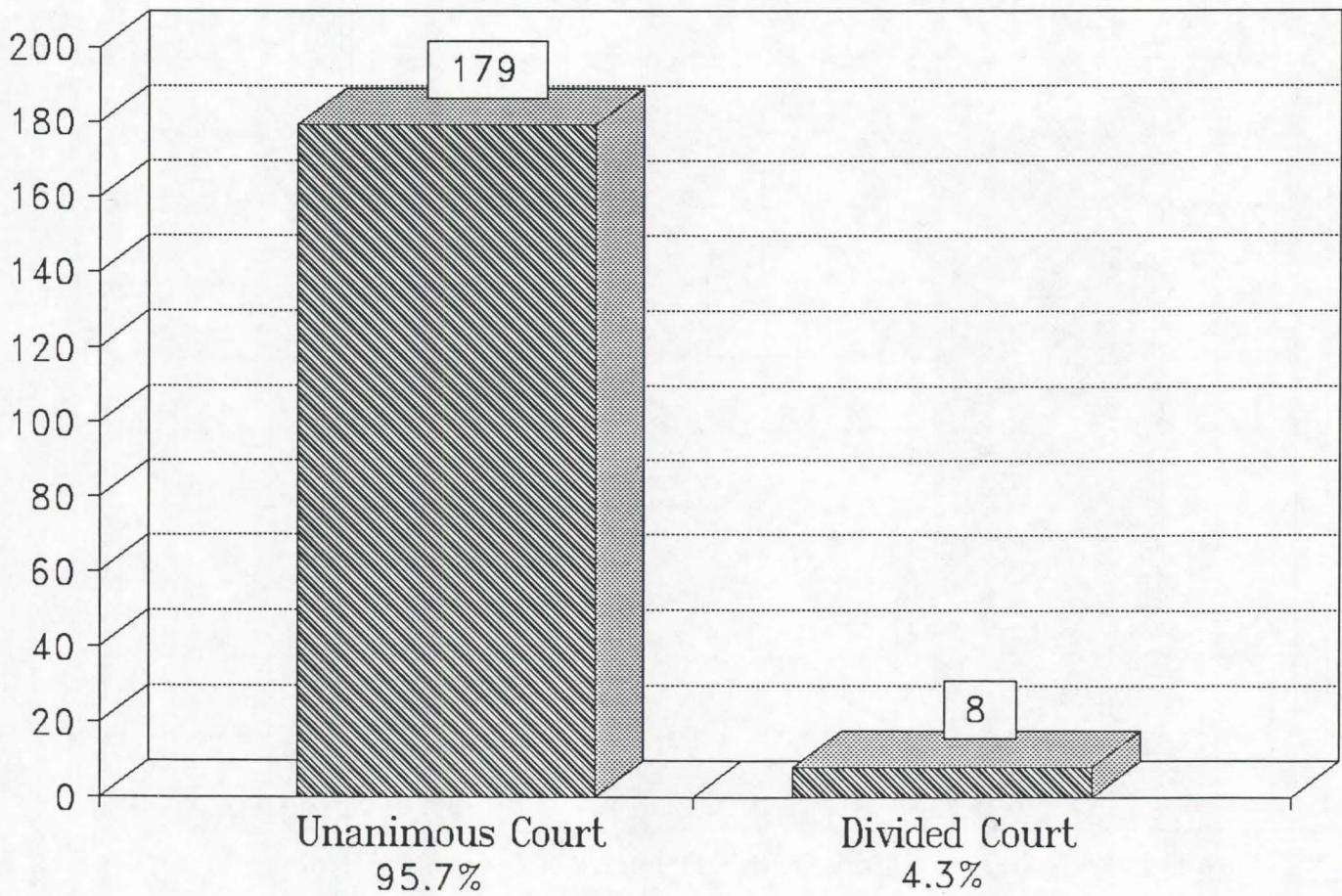
CONCLUSION

President Bush has nominated a conservative jurist with a clear and consistent record of judging rather than legislating. He faithfully applies the law rather than his own preferences. That is, he is a judge, not a politician. An independent, restrained judiciary that remains a co-equal branch of the federal government requires nothing less. The Senate must not turn this superb nomination into its own version of "Court packing" and thereby threaten the integrity of the institution itself.

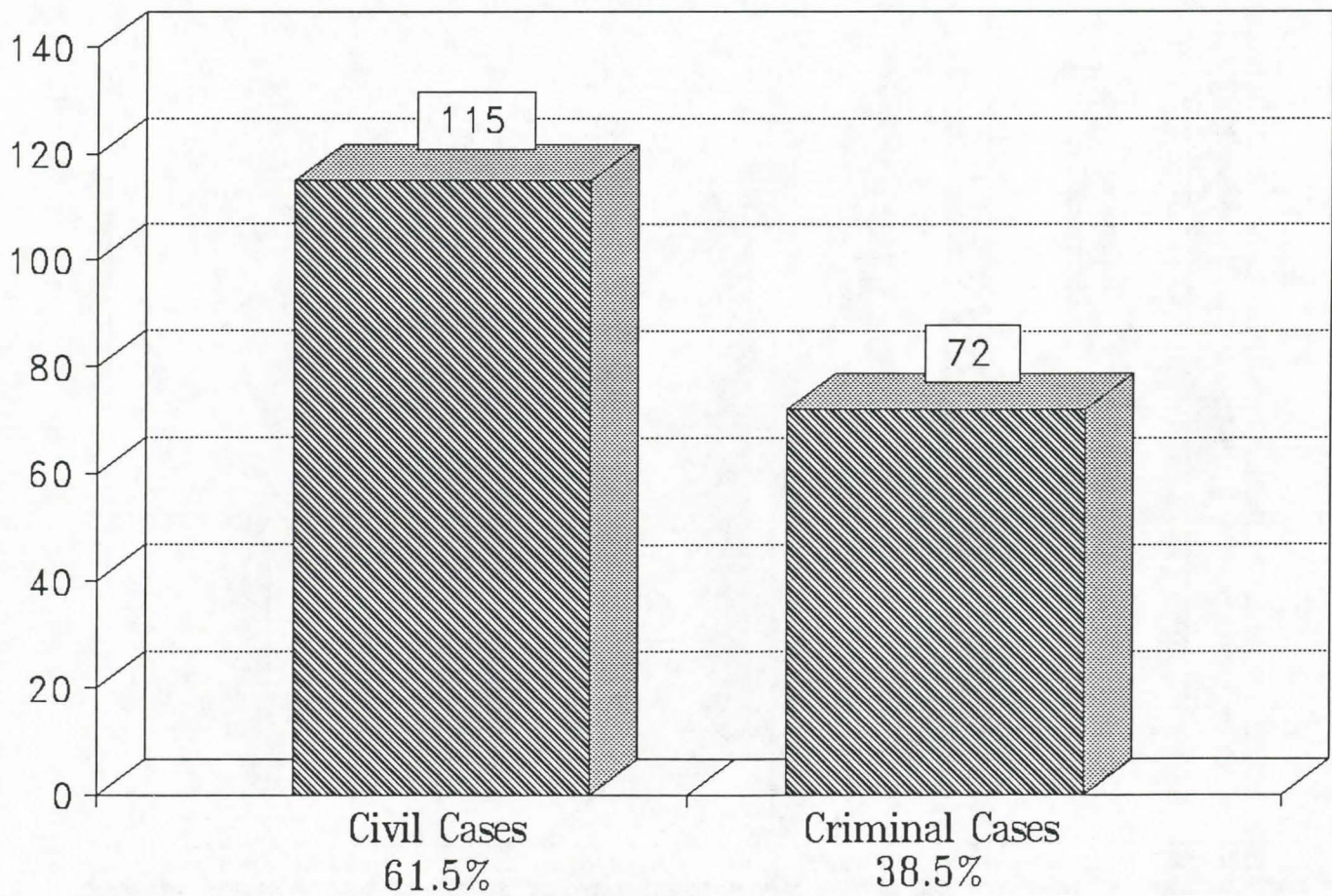
Justice David H. Souter
New Hampshire Supreme Court
Total Case Breakdown 1983-1990



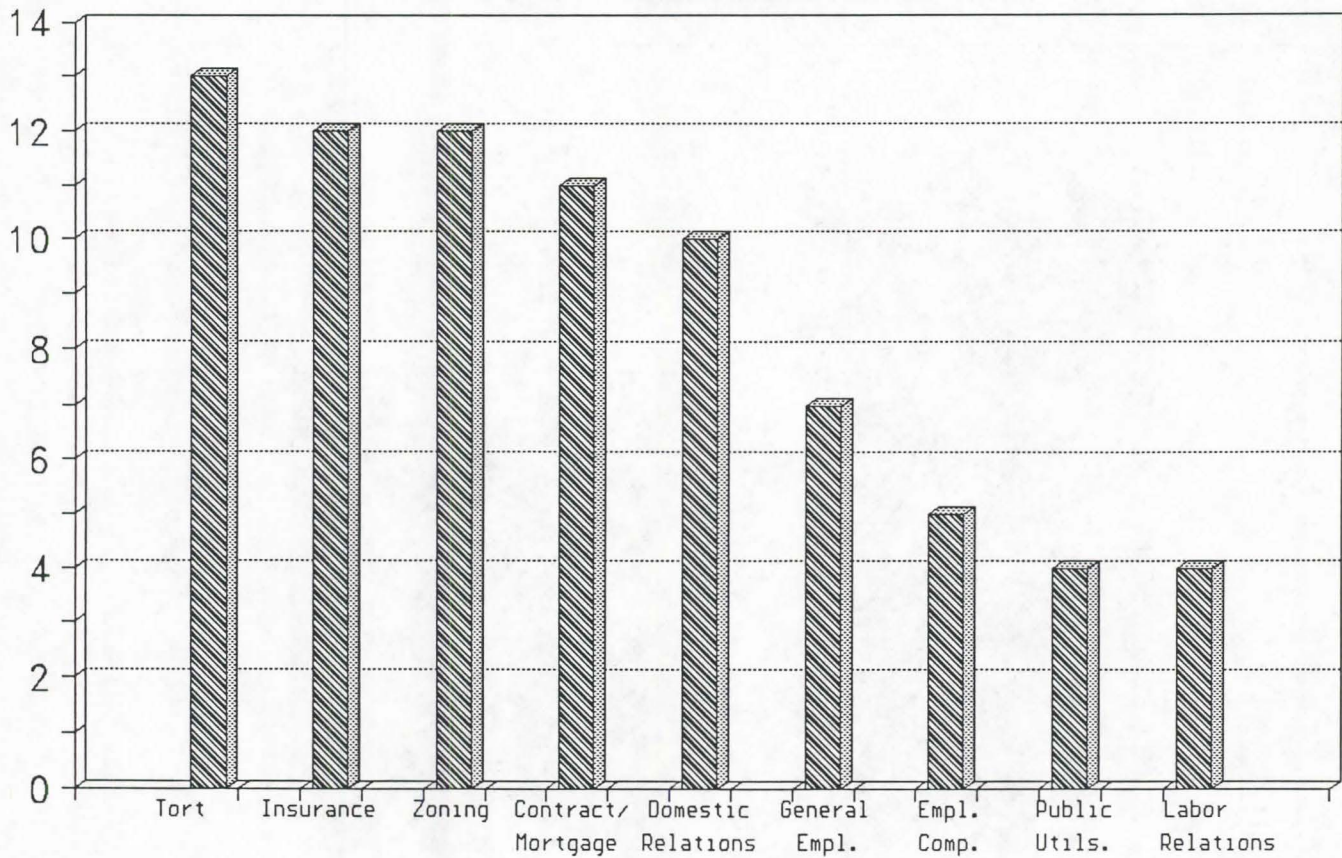
Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990



Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990



Justice David H. Souter
New Hampshire Supreme Court
Civil Case Breakdown 1983-1990

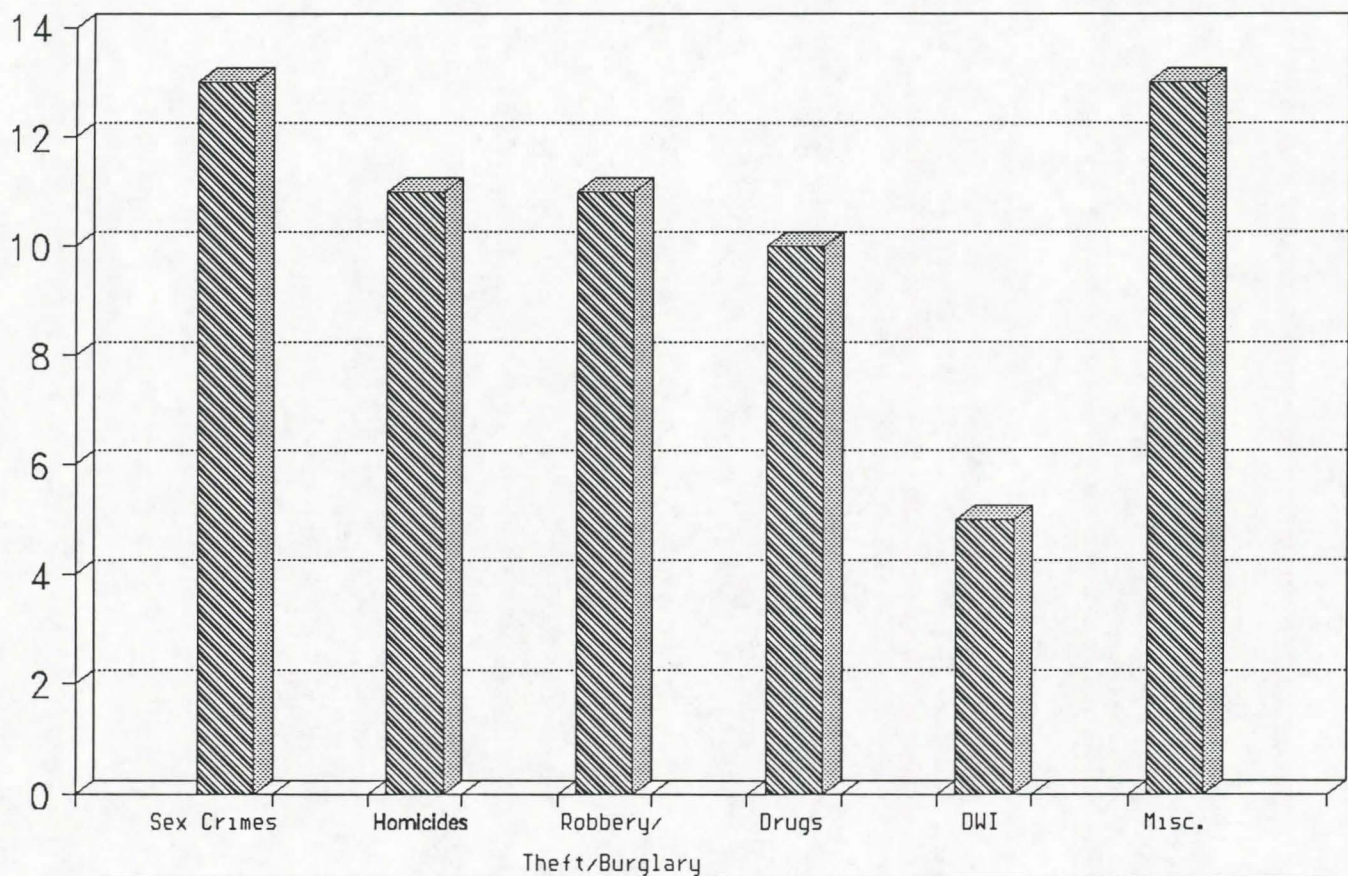


(NOTE: 30 civil cases which do not fall under the above categories, have been omitted.)

Justice David H. Souter

New Hampshire Supreme Court

Criminal Appeal Breakdown 1983-1990



Total criminal appeals = 63; Other criminal cases = 9; Total criminal cases = 72

JUSTICE DAVID H. SOUTER
New Hampshire Supreme Court
Majority Opinion Tabulation
1983-1990

CRIMINAL CASES

Offense	Cases	Convictions Affirmed	Reversed/Remanded
Automobile	1	1	
Drugs	10	10	
Homicide (including attempt)	11	10	1
Sex Crimes	13	11	2 ¹
Robbery/Theft/ Burglary	11	11	
DWI	5	5	
Receiving Stolen Property	3	2	1
Fugitive	1	1	
Assault	2	2	
Arson	2	2	
Forgery	2	2	
Leaving the Scene	1	1	
Attempted Escape	1	1	
	-----	-----	-----
	63 ²	59 (93.7%)	4 (6.3%)

Miscellaneous Criminal Cases (parole, indigency, etc.) 9

TOTAL CRIMINAL CASES = 72

¹ Each of these decisions, *State v. Colbath*, 540 A.2d 1212 (N.H. 1988), and *State v. Baker*, 508 A.2d 1059 (N.H. 1986), is discussed in the Coalitions for America analysis, *David H. Souter: The Definition of Judging*.

² Twelve of these decisions are discussed in *David H. Souter: The Definition of Judging*.

CIVIL CASES

Category	Cases
Landlord/Tenant	1
Tort	13
Contract/Mortgage	11
Public Utilities	4
Probate	2
Insurance	12
Employment	7
Zoning	12
Domestic Relations (divorce, parental rights)	10
Trade Regulation	1
Habeas	1
Taxation	5
Labor Relations	4
Unemployment Comp.	7
Education	1
Eminent Domain	2
Civil Rights	1
Attorney Discipline	1
Libel	2
Involuntary Civil Commitment	3
Miscellaneous	15

TOTAL CIVIL CASES = 115³

³ Ten of these cases are discussed in *David H. Souter: The Definition of Judging*.

David Souter -
Analysis

HUGH C. NEWTON AND ASSOCIATES
PUBLIC RELATIONS

618 SOUTH LEE STREET (OLD TOWNE), ALEXANDRIA, VIRGINIA 22314 TELEPHONE: (703) 549-5825
214 MASSACHUSETTS AVE., N.E., SUITE 520, WASHINGTON, D.C. 20002 TELEPHONE: (202) 544-0011

Contact: Tom Jipping (202) 546-1173
Hugh Newton (202) 544-0011

Record Shows: "Conservative Jurist...Devoted to Rule of Law"

COALITIONS URGE SENATE APPROVAL OF
JUDGE SOUTER TO SUPREME COURT

WASHINGTON, D.C., August 21 - Coalitions for America today urged the Senate to conduct a properly focused investigation of Circuit Court Judge David H. Souter "and consent unanimously to his [Supreme Court] appointment before the Court's October 1990 term begins."

Thomas L. Jipping, M.A., J.D., legal affairs analyst for the broad-based organization of conservative business, defense and social issues groups, said in a comprehensive analysis of President Bush's Supreme Court nominee released at a news conference here today, "Since the nomination, attention has been almost exclusively focused on a single issue about which we know virtually nothing: abortion. Judge Souter's record as a justice on the New Hampshire Supreme Court, however, is a rich source of insight and information about his judicial philosophy. That record paints a consistent picture of a conservative jurist passionately devoted to the rule of law and properly conducting the act of judging. "He rejected the notion that 'we just don't know anything about this nominee.'"

"A careful jurist, Judge Souter takes a narrow view of the role of the judge. He respects precedent, strives to decide

cases based on the facts without reaching unnecessary issues and without announcing rules broader than necessary to the task before him, and consistently applies traditional rules of jurisdiction, statutory construction, and constitutional interpretation.

"President Bush has nominated a conservative jurist with a clear and consistent record of judging rather than legislating. He faithfully applies the law rather than his own preferences. That is, he is a judge, not a politician. An independent, restrained judiciary that remains a co-equal branch of the federal government requires nothing less. The Senate must not turn this superb nomination into its own version of 'Court packing' and thereby threaten the integrity of the institution itself."

THE RECORD

In the 31-page analysis is the first substantive review of Judge Souter's record. It examines his record as an associate justice on the New Hampshire Supreme Court is explored in the following categories: Evidence; Labor Law; Family Law; Libel and the First Amendment; Freedom of Association and the First Amendment; Search and Seizure; Miranda Rights, Self Incrimination; Speedy Trial; Criminal Procedure-Due Process; Criminal Procedure - Deposing a Child Victim/Witness; and miscellaneous.

The analysis organizes much of the relevant information that does exist about this nominee and concludes: "Interest groups, whether liberal or conservative, are wrong to call for any kind

of political litmus test. President Bush was entirely correct in not imposing one in making this nomination; the Senate must not impose one when fulfilling its role of advice and consent. Nothing less than the independence and integrity of the judiciary is at stake." Supreme Court Justice John Paul Stevens addressing a session of the recent annual meeting of the American Bar Association echoed this theme. As reported in the New York Times, August 8, Justice Stevens cautioned that for a President or senators to pin down a nominee in advance [on specific issues or future votes] discouraged open-mindedness on the part of the judge, gave an appearance of impropriety, and threatened an independent judiciary."

Jipping writes, "Those who condemn efforts to regulate the appellate jurisdiction of the Supreme Court as 'political tampering' but who call for application of a political 'balance' approach to filling vacancies on the Court are disingenuous at best and lack any integrity at worst.

"The Senate must exercise its role of advice and consent in a way that respects the unique nature and place of the judiciary in our constitutional framework. Questions that require a nominee to bias himself publicly on issues that may well come before him later as a judge essentially demand that he violate in advance his oath to support and defend the Constitution. Litigants deserve as neutral, detached, and non-political a judiciary as we can preserve for them."

Coalitions for America

David Soule -
analyst

Paul M. Weyrich
National Chairman

Eric Licht
President

M. Kimberly Roberts
Director

Library Court
Social Issues

Stanton
Defense & Foreign Policy

Kingston
Budget & Economic Policy

721 Group
Judicial & Legal Policy

Carroll Group
Catholic Coalition

The Omega Alliance
Young Activist Coalition

Resistance Support Alliance
Freedom Fighter Policy

Jewish/Conservative Alliance

721 Second Street
Capitol Hill
Washington, D.C. 20002
(202) 546-3003

STATEMENT OF THOMAS L. JIPPING, J.D.

Legal Affairs Analyst
Coalitions for America

National Press Club
August 21, 1990

Good morning. My name is Thomas L. Jipping and I am the legal affairs analyst for Coalitions for America, a broad-based alliance of dozens of business, defense, and social issues groups. We have been at the forefront of judicial reform efforts for more than a decade.

Since President Bush nominated U.S. Circuit Judge David Souter on July 23, many activists as well as the media have stuck to the refrain that "we don't know anything about this nominee." This is simply not true. It is amazing that well-funded organizations with large staffs that can produce tons of propaganda almost instantly on other issues seem unable to locate Judge Souter's large public record.

Coalitions for America set out to answer the question "who is Judge David Souter." The result is this study, *David H. Souter: The Definition of Judging*. Judge Souter authored 217 opinions while an associate justice on the New Hampshire Supreme Court. 187 of these were majority opinions, 96% of them for a unanimous court. It is about time we discussed what we do know about Judge Souter rather than what we don't know.

When he introduced Judge Souter at the press conference announcing the nomination, President Bush said that his nominee would interpret the law and not legislate from the bench. Our analysis of the record paints the same picture. We conclude:

Since the nomination, attention has been almost exclusively focused on a single issue about which we know virtually nothing: abortion. Judge Souter's record as a justice on the New Hampshire Supreme Court, however, is a rich source of insight and information

about his judicial philosophy. That record paints a consistent picture of a conservative jurist passionately devoted to the rule of law and properly conducting the act of judging.

A careful jurist, Judge Souter takes a narrow view of the role of the judge. He respects precedent, strives to decide cases based on the facts without reaching unnecessary issues and without announcing rules broader than necessary to the task before him, and consistently applies traditional rules of jurisdiction, statutory construction, and constitutional interpretation.

David Souter has been nominated to be a Supreme Court justice. He is not running for Congress. He is not a guest on the next Barbara Walters Special. The independence of the judiciary will no longer be a bulwark of individual liberty if the Senate attempts to transform its role of "advice and consent" into a separate power to create a federal judiciary in its own image. The Constitution provides for two powers relevant to judicial selection - nomination and appointment - and gives both of these powers to the President. The Senate's role is a check and a balance for the appointment power, not a separate power altogether. That role has traditionally been limited to a focus on a nominee's qualifications and judicial philosophy, not on personal politics, expected voting performance, or the ideological "balance" of the Court.

Judge David Souter is eminently qualified to serve on the Supreme Court. His judicial philosophy is exactly what that institution and the American people need: a commitment to the rule of law. Judge David Souter has no agenda, he will not legislate from the bench, he will not impose his personal views as if they

were the law. In short, his appointment will enhance rather than undercut our system of self-government within constitutional constraints.

It is simply false to continue saying that we just don't know anything about Judge David Souter. We know plenty. Those who plead ignorance just don't like what they have seen in the record and want to have the Senate Judiciary Committee create a "paper trail" at the hearing. They want to impose a political litmus test which threatens the integrity and independence of the judiciary itself. There's no reason to do it because the public record is filled with relevant information and insight into this superb nominee. Coalitions for America is pleased to share the results of our analysis with all interested parties and we call on the Senate to conduct an aggressive and properly focused hearing and to consent unanimously to Judge Souter's appointment. I'll be glad to answer any questions.

SUPREME COURT NOMINATION DAVID H. SOUTER

TALKING POINTS

*** David Souter is superbly qualified to be on the Supreme Court**

- B.A. *magna cum laude*, Harvard 1961
- LL.B., Harvard 1966
- Rhodes Scholar, Oxford 1961-63
- New Hampshire Assistant Attorney General, 1968-71
- New Hampshire Deputy Attorney General, 1971-76
- New Hampshire Attorney General, 1976-78
- New Hampshire Superior Court, 1978-83
- New Hampshire Supreme Court, 1983-90
- U.S. Court of Appeals for the First Circuit, 1990

*** David Souter has a conservative, restrained view of the role of judges and courts; he has a consistent record of applying the law rather than his own preferences; President Bush said David Souter would "interpret" the law rather than "legislate from the bench." This is the kind of Justice David Souter will be.**

*** A conservative activist is no better than a liberal activist; the rule of law is most important.**

*** David Souter is committed to respecting past decisions. A conservative judge should be. He has shown, however, that he is willing to overrule precedents that are "manifestly devoid of reasoned support" or have "no intellectually realistic basis."**

*** 63 of Justice Souter's majority opinions were appeals of criminal convictions; he upheld more than 93% of these criminal convictions (57).**

*** In the family law area, Justice Souter consistently upheld the legislature's policies to strengthen family relationships rather than impose any new-fangled notions or redefine the "family" as courts all over the country are doing today.**

*** Justice Souter regularly applied traditional rules in the interpretation of both statutes and constitutional provisions: the goal is to determine the intended meaning of those who drafted the document.**

*** David Souter has a conservative judicial philosophy: he sticks close to the law and the facts; he does not invent new concepts or stretch established ones to the breaking point; he applies the law rather than his own preferences; he takes an "intentionalist" approach to interpreting legal documents. Any judge with this philosophy would likely believe that *Roe v. Wade*, the decision finding a virtually unlimited "right" to abortion in the Constitution, was incorrectly decided. David Souter has indicated that he is willing to overrule especially bad precedents that have no reasoned support or intellectual basis.**

* The Constitution describes two powers in relation to judicial selection: nomination and appointment. **The Constitution gives both powers to the President.** Consistent with the scheme of "checks and balances," the Constitution gives a role of "advice and consent" to the Senate.

* The Senate's "advice and consent" role should be limited to qualifications and overall judicial philosophy, not politics and future voting patterns of nominees. The all-out political assault on Robert Bork in 1987 was a radical departure from the traditional understanding of the Senate's role.

* If the Senate determines whether to consent to an appointment by how that nominee will vote or how the appointment will affect the political "balance" of the Court, it will threaten the independence of the judiciary. **Judicial independence is vital to the preservation of liberty.**

* The liberals said in 1987 that Judge Bork's paper trail was a liability. In 1990, they seem to be saying that Judge Souter's lack of a paper trail is a liability. They cannot have it both ways. **A political "litmus test" approach will decrease the quality of those who choose public service in the federal judiciary.**

* The liberals attack attempts to remove jurisdiction from the Court over areas like abortion as "political tampering." Yet they see no problem in imposing a political litmus test on judicial nominees over this same issue. They cannot have it both ways.

* **President Bush said he was nominating someone who would interpret the law and not legislate from the bench. That is kind of Justice America needs on the Supreme Court and it looks like David Souter will be that kind of Justice.**

To: Judicial Nomination Allies
From: Thomas L. Jipping, J.D.
Legal Affairs Analyst, Coalitions for America
Re: The Souter Nomination, Abortion, and the "Precedent Thing"
Date: August 9, 1990

Virtually all the discussion of the Souter nomination has focused on what we do not know (abortion) rather than on what we do know (lots of other things). I want to pass along my perspective on the issue of precedent and some other observations which make me quite positive about this nomination, even on the abortion issue. **Please keep this memorandum to yourselves.** Please use and disseminate our larger analysis of Judge Souter's record.

THE PRECEDENT THING

The point at which the issue of Judge Souter's devotion to precedent becomes important is when that commitment bumps into an important constitutional precedent which was clearly wrongly decided. Will a Justice Souter stick with precedent or will he "do the right thing" and vote to overrule a decision like *Roe v. Wade*? For several reasons, I believe that, in an appropriate case brought by an effective litigation strategy, he will likely do the right thing.

Let us remember the most obviously relevant fact: David Souter is replacing William Brennan, the most radical member of the Supreme Court for the past 34 years. He was a sure vote for unlimited abortion, the Constitution notwithstanding. I am quite confident of at least one thing: David Souter is no William Brennan.

Much has been made of Judge Souter's devotion to the principle of *stare decisis*. Certainly adherence to precedent is a mark of judicial restraint. Most observers and commentators have failed, however, to grasp the inherent difference between a state common-law court system and a federal statutory and constitutional court system. In the state court system, where Judge Souter applied the common law for more than a decade, precedent is of overwhelming importance. That law is judge-made.

In the federal system, however, the law to be applied is legislative in nature; there is no federal common law. Precedent is important and if a court interprets a statute in ways the legislature finds inappropriate, the legislature can change the statute. In the constitutional context, precedent is least binding because interpretive mistakes cannot be readily corrected; the court must be willing to look at its own precedents and correct its own obvious mistakes. As Justice Louis Brandeis observed: "But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."¹

¹ *Bumet v. Coronado Oil & Gas Co.*, 285 U.S. 293, 406 (1932). Two scholars, writing in 1957, cited 90 such decisions. Blaustein & Field, "Overruling' Opinions in the Supreme Court, 57 *Michigan Law Review* 151, 161 (1958). The pattern continued through the Burger Court years. See Stevens, "The Life Span of a Judge-

This principle is regularly affirmed by the Supreme Court, even when choosing to re-affirm questionable or controversial precedents.² Any judge moving from a state court to a federal court necessarily re-shapes his perspective and understanding of this doctrine. Judge Souter will no doubt do so as well.

Justice Souter wrote **in dissent** that a precedent he called "manifestly devoid of reasoned support" should be overruled where "persuasive authority counsels for...repudiation."³ In another case, Justice Souter, writing for a unanimous court, overruled a precedent after stating that "we perceive no intellectually realistic basis" to distinguish the standard in that case with the standard in a constitutional amendment on a similar topic.⁴

The Supreme Court's decision in *Roe v. Wade*⁵ is "manifestly devoid of reasoned support" according to both pro-abortion and pro-life commentators. Professor Mark Tushnet writes that "[m]ost academic commentators probably believe that, as a matter of sound public policy, access to abortions should be relatively unrestricted. But none has been able to provide conclusive arguments that the Supreme Court correctly found that policy in the Constitution."⁶ A recent article organized much of the critical literature into no less than 12 different lines of attack.⁷ Dean John Hart Ely, openly claiming to be pro-abortion, wrote that the decision "is bad constitutional law, or rather...is not constitutional law and gives almost no sense of an obligation to try to be."⁸ Another pro-abortion scholar

Made Rule," 58 *New York University Law Review* 1 (1983).

² In *Akron v. Akron Center for Reproductive Health*, 416 U.S. 432 (1983), the Court expressly approved this principle that *stare decisis* is least binding in constitutional cases even though it re-affirmed *Roe v. Wade*, 410 U.S. 113 (1973).

³ See *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1199-1201 (N.H. 1988) (Souter, J., dissenting).

⁴ *In re Sanborn*, 545 A.2d 726, 735 (N.H. 1988).

⁵ 410 U.S. 113 (1973).

⁶ Tushnet, "The Supreme Court on Abortion: A Survey," in J. Butler & D. Walbert (eds.), *Abortion, Medicine, and the Law* (New York: Facts on File Publications, 3rd ed. 1986), at 165.

⁷ See Horan, Forsythe & Grant, "Two Ships Passing in the Night: An Interpretivist Critique of the White-Stevens Colloquy on *Roe v. Wade*," 6 *St. Louis University Public Law Review* 229, 230 n.8 (1987).

⁸ Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale Law Journal* 920, 947 (1973).

writes that "even people who approve of the result have been dissatisfied with the Court's opinion."⁹ Other scholars have concluded that virtually "every aspect of the historical, sociological, medical, and legal arguments Justice Harry Blackmun used to support the *Roe* legal holdings has been subjected to intense scholarly criticism."¹⁰ Likewise, Professor Robert Destro has concluded that "[t]he reasoning of the Court has been examined and found to be wanting legally, historically, scientifically, and philosophically."¹¹

Judge Souter is a meticulous and long-time student of history. This interest and ability will serve to support the intentionalist approach and to determine when a wrongly decided precedent is "manifestly devoid of reasoned support." *Roe v. Wade* is again a good example. That decision was based on the Court's reading of the history of abortion, not on its reading of the Constitution. An avalanche of scholarship has shown this effort to be revisionist at best.¹² Judge Souter will be better equipped to more fully understand the faulty underpinnings of a decision like *Roe* than anyone currently on the Court. That historical acumen also strengthens the trend toward more application of the "intentionalist" approach to constitutional interpretation.

Another factor to bear in mind is that, although it appears David Souter is by disposition a rather reclusive individual, Justice Souter is hardly going to gravitate toward the ever-decreasing left wing of the Court. Rather, he will tend to join the conservative "bloc" led by Chief Justice William Rehnquist and Justice Antonin Scalia. To the extent that "judicial education" occurs (at least with new justices), it will cut in our favor.

Someone with a judicial philosophy focused squarely on the rule of law and based on a narrow view of the role of the federal judge can only oppose *Roe v. Wade* on the merits. Judge Souter's own articulated standards for overruling precedent can be met in this case. His historical acumen cuts in our favor. Those on the present Court to whom he will inevitably gravitate are the very ones already indicating their willingness to overrule *Roe*. All of this, plus a shift in a state judge's common law perspective on precedent add up to at least something other than a blind devotion to precedent for its own sake.

⁹ Regan, "Rewriting *Roe v. Wade*," 77 *Michigan Law Review* 1569, 1569 (1979).

¹⁰ Horan & Balch, "Roe v. Wade: No Justification in History, Law, or Logic," in D. Horan, E. Grant & P. Cunningham (eds.), *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Washington, D.C.: Georgetown University Press, 1987), at 58.

¹¹ Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 *California Law Review* 1250, 1340 (1975).

¹² See, e.g. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in D. Horan, E. Grant & P. Cunningham (eds.), *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Washington, D.C.: Georgetown University Press, 1987), at 137-58; Dellapenna, "The History of Abortion: Technology, Morality, and Law," 40 *University of Pittsburgh Law Review* 359 (1979); Horan & Marzen, "Abortion and Midwifery: A Footnote in Legal History," in T. Hilgers, D. Horan & D. Mall (eds.), *New Perspectives on Human Abortion* (Lanham, MD: University Publications of America, 1981), at 199-204; Krason & Hollberg, "The Law and History of Abortion: The Supreme Court Refuted," in J. Butler & D. Walbert (eds.), *Abortion, Medicine, and the Law* (New York: Facts on File Publications, 3rd ed. 1986), at 196-225; Witherspoon, "Reexamining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," 17 *St. Mary's Law Journal* 29 (1985).

Let us not forget that Justice Scalia was branded a "surprise liberal" during his very first term on the Court. I got calls from normally level-headed conservative allies asking what Scalia was doing, how he could turn on us, etc.

Let us also not forget that even Scalia and the others on the Court who we know are willing to overrule *Roe* will themselves only do so in the appropriate case. They are not sitting up there lathering for the first opportunity to trash that decision. I believe this is particularly true with Souter. His respect for precedent counsels for the right case raising the right issue in the right way. Whether *Roe* is overruled depends as much (or more) on the legislative/litigation strategy being pursued "out here" as it does on a litmus test for David Souter.

I believe strongly that, in abortion cases which do not directly and specifically attack *Roe* itself, a Justice Souter will continue the trend begun last year in *Webster v. Reproductive Health Services*¹³ to uphold life-protective legislation even with *Roe* still on the books. The days of stinging defeats for such statutes in the Supreme Court are over. This, of course, puts the burden on grassroots electoral and legislative politics.

In sum, I am confident that David Souter will be a Justice who can provide the fifth vote to overrule *Roe v. Wade*, given the appropriate case and litigation strategy. That part, of course, is up to us.

¹³ 109 S.Ct. 3040 (1989).

Coalitions for America

Paul M. Weyrich
National Chairman

Eric Licht
President

M. Kimberly Roberts
Director

Library Court
Social Issues

Stanton
Defense & Foreign Policy

Kingston
Budget & Economic Policy

721 Group
Judicial & Legal Policy

Carroll Group
Catholic Coalition

The Omega Alliance
Young Activist Coalition

Resistance Support Alliance
Freedom Fighter Policy

Jewish/Conservative Alliance

721 Second Street
Capitol Hill
Washington, D.C. 20002
(202) 546-3003

DAVID H. SOUTER: THE DEFINITION OF JUDGING

An analysis of
President George Bush's nomination of

DAVID H. SOUTER

to be an associate justice on the
Supreme Court of the United States

by

Thomas L. Jipping, M.A., J.D.

Legal Affairs Analyst

August 1990

EXECUTIVE SUMMARY

When he nominated U.S. Circuit Judge David H. Souter to be an associate justice of the U.S. Supreme Court, President George Bush said that his nominee would "interpret" the law rather than "legislate from the bench." In doing so, President Bush was not distinguishing between different forms or styles of judging; he was distinguishing judging from something else altogether.

In our constitutional system of limited republican government, the judiciary is as much governed by the rule of law as the executive and legislative branches. An independent judiciary, set apart from politics institutionally and in approach to its task, is essential to safeguard liberty. The very act of judging itself is defined by application of the law rather than the preferences of the judge, no matter where that process may lead.

Since the nomination, attention has been almost exclusively focused on a single issue about which we know virtually nothing: abortion. Judge Souter's record as a justice on the New Hampshire Supreme Court, however, is a rich source of insight and information about his judicial philosophy. That record paints a consistent picture of a conservative jurist passionately devoted to the rule of law and properly conducting the act of judging.

A careful jurist, Judge Souter takes a narrow view of the role of the judge. He respects precedent, strives to decide cases based on the facts without reaching unnecessary issues and without announcing rules broader than necessary to the task before him, and consistently applies traditional rules of jurisdiction, statutory construction, and constitutional interpretation.

Judge Souter is eminently qualified to serve on the U.S. Supreme Court. His judicial philosophy is exactly as President Bush described it: interpreting, not legislating. He is a judge, after all, not a politician.

In fulfilling its constitutional role of advice and consent, the U.S. Senate in 1987 shifted radically from examining qualifications to checking out a nominee's politics, from conducting a searching inquiry into judicial philosophy to narrowly testing how a nominee would vote once on the bench. This is not only a dangerous aberration from traditional practice, it directly threatens the independence of the judiciary and literally demands that a nominee bias himself in public on issues that may well come before him as a judge.

In 1987, the Senate seemed to say that a "paper trail" was a liability. At least the most liberal members of that chamber are today seeming to say that the lack of a "paper trail" is a liability. Those liberals condemn attempts to regulate the Court's appellate jurisdiction in areas like abortion as "political tampering" but today feel free to impose their own political litmus test upon nominees to the bench in areas like abortion. This is hypocrisy, nothing more and nothing less.

The Senate should aggressively conduct a properly focused investigation of this superb nominee and consent unanimously to his appointment before the Court's October 1990 Term begins.

DAVID H. SOUTER: THE DEFINITION OF JUDGING

On July 23, 1990, President George Bush exercised his power under Article II, Section 2¹ of the United States Constitution and formally nominated U.S. Circuit Judge David H. Souter to be an associate justice of the Supreme Court of the United States.

This analysis is intended to assist the U.S. Senate in fulfilling its constitutional "advice and consent" role in considering Judge Souter's nomination.²

JUDGE SOUTER'S RESUME

David Hackett Souter was born in Melrose, Massachusetts, on September 17, 1939. He received his B.A. *magna cum laude* from Harvard in 1961 and continued his education as a Rhodes Scholar at Oxford University, England. A member of Phi Beta Kappa, he received his law degree from Harvard in 1966 and joined the Concord, New Hampshire, law firm of Orr & Reno.

After just two years of legal practice, David Souter entered public service. He served as Assistant Attorney General from 1968 to 1971, Deputy Attorney General under then-Attorney General Warren Rudman until 1976, and Attorney General until 1978. Moving to the judicial branch, he served as an associate justice of the New Hampshire Superior Court for five years and, by appointment of then-Governor John Sununu, an associate justice of the New Hampshire Supreme Court from 1983 to 1990. President Bush nominated Justice Souter to be a judge on the U.S. Court of Appeals for the First Circuit in February 1990.³ The American Bar Association rated him "well qualified" for this post and the U.S. Senate unanimously consented to his appointment. He began service on May 25, 1990.⁴

¹ Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint...all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

² The author gratefully acknowledges the valuable research assistance of Michael L. Pendleton (University of Baltimore School of Law); Paul R. Jensen (Duke University School of Law); David M. Baloga (American University); Jeffrey L. Handwerker (Rutgers College); and Peter D. Crawford, Jr. (Williams College).

³ See 58 U.S.L.W. 2448 (February 6, 1990).

⁴ See "Judicial Milestones," *The Third Branch*, July 1990, at 4.

Judge Souter is a member of the New Hampshire and American Bar Associations, a member of the board of trustees of Concord Hospital from 1973 to 1985 (president, 1978-1984), a member of the board of overseers of Dartmouth Medical School from 1981 to 1987, and a member of the New Hampshire Historical Society (trustee, 1976-1985; vice president, 1980-1985). His service on legal and judicial committees has included the New Hampshire Police Standards and Training Council, the Governor's Commission on Crime and Delinquency, and the New Hampshire Bar Association Committee to Recommend Codification of Rules of Criminal Procedure.

SOURCES OF INFORMATION

Information about David Souter and his views derives from several sources. Determining the information's significance, however, requires attention to the particular source. State attorneys general, for example, may file briefs and make arguments which reflect the views of their governor-client rather than their own. Opinions by a five-member court, especially in cases involving sensitive or controversial issues, rarely indicate exactly the views of individual members of the court and never reveal the negotiating, coalition-building, agreements, or concessions that took place during the process of producing a majority opinion. Advisory opinions, frequently given by state courts but never by federal courts, are entirely abstract and can differ substantially from opinions in actual cases following the identification of concrete issues, filing of legal briefs, trials or appellate argument, etc. Votes, as well as lines of reasoning or analytical approaches, are always the product of an actual case. Each case, of course, is unique.

JUDGE SOUTER'S RECORD WHAT WE DON'T KNOW: ABORTION

Perhaps the most contentious single issue surrounding the Souter nomination is one on which virtually nothing concrete exists: abortion. Pro-life and pro-abortion activists agree that this nomination will at least affect the Court's abortion jurisprudence.

In 1973, the Court voted 7-2 in *Roe v. Wade*⁵ to create a virtually unlimited right to abortion. The dissenters, William Rehnquist and Byron White, remain on the Court. In 1975, John Paul Stevens replaced William Douglas, leaving the balance essentially intact. In 1981, Sandra Day O'Connor replaced Potter Stewart. Stewart had voted with the *Roe* majority; O'Connor has made it clear that she at least opposes *Roe*,⁶ though has not indicated she would flatly overrule the decision. In 1986, Antonin Scalia replaced William

⁵ 410 U.S. 113 (1973).

⁶ In *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), Justice O'Connor harshly criticized the *Roe* trimester framework as "unworkable" and "on a collision course with itself."

Rehnquist when President Ronald Reagan elevated Rehnquist to Chief Justice; Scalia is clearly a vote to overrule *Roe*. In 1987, Anthony Kennedy replaced Lewis Powell. Powell supported *Roe*, writing the 1983 *Akron v. Akron Center for Reproductive Health*⁷ decision reaffirming it. Kennedy is generally viewed as a vote to overrule *Roe*. Therefore, the pro-*Roe* majority has shrunk from 7-2 in 1973, to 6-3 in 1986, to 5-4 today.

David Souter has never presided over an abortion case, never written judicial opinions or scholarly articles on the subject, never spoken his mind about it. As such, activists on both sides can only look at the slim bits of his record that bear even tangentially on the subject. They reveal nothing of substance about those views. In the interest of a thorough and balanced evaluation of this nomination, those bits of information are listed here.

- * "Abortion opponents attacked Souter for serving on the boards of two New Hampshire medical facilities where abortions are performed."⁸
- * The Manchester *Union Leader* reported that, while state attorney general, Souter opposed a bill which included provisions repealing the state's strict anti-abortion law. He stated: "Quite apart from the fact that I don't think unlimited abortions ought to be allowed, if the state of New Hampshire left the situation as it is now, I presume we would become the abortion mill of the United States."⁹ The article pointed out that Souter was representing Meldrim Thomson, New Hampshire's strongly pro-life governor, and that his remarks did not necessarily reflect his own views.
- * In 1981, a pro-abortion member of the New Hampshire House of Representatives requested an opinion from the Superior Court about a pending bill requiring parental consent for abortions on minors but authorizing a "judicial bypass" of the parents' wishes. Justice Souter wrote a letter on behalf of the court to the relevant committee chairman recommending that the legislature "not authorize the exercise of judicial choice by justices of the Superior Court to determine whether an abortion should be performed upon a pregnant, immature minor whose parents do not consent to that course of action."
- * The letter expressed no opinion about parental consent: "The judges do not believe it is appropriate for the court to take a position on the basic question addressed by the bill, whether parental consent should be required before an abortion may be performed upon an unmarried minor."

⁷ 462 U.S. 416 (1983).

⁸ Mauro and Hall, "Groups Press for Souter's Abortion View," *USA Today*, July 27, 1990, at 8A.

⁹ "Souter: In 1977 Interview, He Said He Opposed Unlimited Abortions," *Manchester Union Leader*, August 4, 1990, at 1.

- * The letter addressed only the "judicial bypass" provision, allowing a judge to authorize an abortion for an immature minor which would be in her "best interests."
- * The letter objected to the judicial bypass provision because it required making "fundamental moral decisions about the interests of other people without any standards to guide the individual judge." The individual judge's "predilections" rather than articulated "rules and stated norms" would result in judges engaging in inappropriate "acts of unfettered personal choice."
- * The letter objected to the judicial bypass provision because of the "necessarily moral character" of the decision judges would have to make and the "resulting disparity of responses." In sum, "a principled and consistent application of the quoted provision would be impossible."
- * One journalist concluded: "While the 1981 letter may have been useful to abortion-rights supporters [in defeating the proposed legislation], it also reflected a view of the role of judges that is in line with the philosophy espoused by Bush and his predecessor, Ronald Reagan."¹⁰ The bottom line is that this letter said nothing about *Roe v. Wade*, nothing about parental consent, and nothing about abortion.
- * A state regulation prohibited the use of Medicaid funds to pay for elective abortions. A U.S. district court permanently enjoined this regulation and the state appealed. The brief on the merits, dated March 10, 1976, was filed with the U.S. Court of Appeals for the First Circuit under Attorney General Souter's name by the brief's author, Assistant Attorney General Richard Wiebusch. The following statement appears on page 41 of the brief: "Plaintiffs cannot in good faith dispute that thousands of New Hampshire citizens possess a very strongly held and deep-seated moral belief that abortion is the killing of unborn children." Wiebusch also wrote and filed, under Souter's name, a separate memorandum supporting the state's motion for suspension of the injunction pending appeal. The following statement appears on page 6: "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." Wiebusch has told reporters that Souter had "nothing to do with this brief. This wasn't his language. He didn't preapprove it....I didn't even talk with him about the case until after we lost it."¹¹

¹⁰ Broder and Marcus, "Souter Letter Opposed Role in Parental Consent Bill," *Washington Post*, July 26, 1990, at A13.

¹¹ Weyrich, "Souter 'Smoking Gun' on Abortion Denied," *Washington Times*, July 31, 1990, at A6.

* In *Smith v. Cote*,¹² Justice Souter joined an opinion in which the New Hampshire Supreme Court¹³ recognized for the first time a cause of action for "wrongful birth."¹⁴ The court stated that the U.S. Supreme Court's decision in *Roe v. Wade* "is controlling"¹⁵ and felt the issue before it was "whether, given the existence of the right of choice recognized in *Roe*, our common law should allow the development of a duty to exercise care in providing information that bears on that choice."¹⁶ Justice Souter concurred specially to address a significant issue not specifically raised by the questions of law transferred by the superior court. He raised the hypothetical of the pro-life physician and wrote that "I do not understand the court to hold...that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."¹⁷ Clearly, whatever one's evaluation of the court's legal analysis concerning the relevance of *Roe*, the court assumed that decision's relevance without any comment as to its validity.

That's all there is on the issue. The bottom line is that we do not have any clear and specific evidence of Judge Souter's personal or judicial position on abortion or the validity of the Supreme Court's decision in *Roe v. Wade*. As with so many other issues and so many other nominees, we must use intuition and judgment based on what we do know about this nominee and his judicial philosophy.

¹² 513 A.2d 341 (N.H. 1986). This case involved questions of law transferred to the state supreme court from the superior court.

¹³ Chief Justice King did not participate in this decision.

¹⁴ In such a case, a woman sues her doctor for failing to inform her of facts that might prompt her to choose abortion, thus rendering the birth a legal "wrong" for which she claims compensation.

¹⁵ *Smith*, 513 A.2d at 346.

¹⁶ *Id.* at 344.

¹⁷ *Id.* at 355.

JUDGE SOUTER'S RECORD WHAT WE DO KNOW: THE "GRAB BAG"

While virtually nothing is known about Judge Souter's specific personal or judicial views on abortion, a significant body of judicial decisions exists covering a wide range of issues. Focusing, as the media and most activists have, exclusively on the unknown ignores the known and the consistent picture it paints of the "conservative mindset" of this "careful jurist."¹⁸

"During his seven years on the New Hampshire Supreme Court, David Hackett Souter wrote more than 200 opinions reflecting the grab bag of issues that are the staple of state supreme courts--focused more often on mundane and technical legal issues than questions of sweeping constitutional magnitude."¹⁹ The *Washington Post* compared Judge Souter's record on the New Hampshire Supreme Court with retired Justice William Brennan's record on the New Jersey Supreme Court.²⁰ Justice Souter authored 217 opinions including 187 majorities, 13 concurrences, and 17 dissents. Justice Brennan authored 232 opinions including 210 majorities, four concurrences, and 18 dissents.

Three of Justice Souter's 187 majority opinions were appealed to the U.S. Supreme Court. The Court refused to review any of them.²¹ Of his 187 majority opinions, 179 (95.7%) were for a unanimous court and eight (4.3%) were for a divided court. "Divided" means any decision attracting a separate, even a concurring, opinion by another Justice. Justice Batchelder, known as the most liberal member of the bench at that time, wrote a separate opinion in seven of these eight cases.

As state attorney general, David Souter filed petitions for review by the U.S. Supreme Court in three cases. The Court refused to review any of them.²²

¹⁸ Marcus, "Souter: Conservative Mindset, Careful Jurist," *Washington Post*, July 25, 1990, at A6.

¹⁹ Broder and Dewar, "Bush Opens Drive for Court Nominee," *Washington Post*, July 25, 1990, at A6.

²⁰ "Predicting a Justice's Future," *Washington Post*, August 1, 1990, at A18.

²¹ *Town of Nottingham v. Bonser*, 552 A.2d 58 (N.H. 1988), cert. denied, 109 S.Ct. 3163 (1989); *Appeal of Bosselait*, 547 A.2d 682 (N.H. 1988), cert. denied, 109 S.Ct. 797 (1988); *State v. Valenzuela*, 536 A.2d 1252 (N.H. 1987), cert. denied, 485 U.S. 1008 (1988).

²² *Rumney v. New Hampshire*, 397 U.S. 1051 (1970); *Heine v. New Hampshire*, 396 U.S. 1012 (1970); *Bentley v. New Hampshire*, 394 U.S. 1051 (1969).

While on the New Hampshire Superior Court trial bench, Justice Souter took an opportunity in 1981 to describe his views on criminal sentencing. In the context of sentencing a man convicted of negligent homicide in the deaths of three teenagers while driving drunk, Justice Souter said in part:

I want to speak explicitly on something which I think about and which the counsel for the defendant quite rightly said I should think about, and that is the purposes of sentencing.

To start off with, one of them is the perception in the world around us that the defendant has been justly dealt with in relation to what he did. There should be a proportion observed in sentencing, and trivial cases should not be dealt with with severity. And flagrant cases should not be dealt with leniently.

Secondly, one considers the effect usually referred to as the reformatory effect likely on the defendant from the sentence....I don't believe that very many sentences on many--very many--criminals are likely to have much reformatory effect after the first offense....[I]f the defendant does not receive a heavy sentence, one may reasonably guarantee that it's not going to have any reformatory effect.

[The t]hird consideration is deterrence....And [the] fourth consideration is public protection. I don't know whether this defendant's alcoholism is ever going to be controlled. But I think the circumstances justify trying to protect the public from the effects of that alcoholism for about as long as it is possible.²³

Judge Souter's "record" is comprised almost entirely of his actions while in public service in New Hampshire. The most substantive portion of this record is found in the body of opinions he authored while an associate justice on the New Hampshire Supreme Court. This section will explore opinions by Justice Souter drawn from the following categories:

- A. Evidence
- B. Labor Law
- C. Family Law
- D. First Amendment - Libel
- E. First Amendment - Freedom of Association
- F. Fourth Amendment - Search and Seizure
- G. Fifth Amendment - *Miranda* Rights
- H. Fifth Amendment - Self Incrimination
- I. Sixth Amendment - Speedy Trial
- J. Criminal Procedure - Due Process
- K. Criminal Procedure - Deposing a Child Victim/Witness
- L. Miscellaneous

²³ The text of this statement is excerpted in "Souter's Stern Judgment on Sentencing," *Legal Times*, August 6, 1990, at 10-11.

In each of these substantive areas, Justice Souter evidenced a consistent commitment to apply the law, stick close to the facts, and avoid imposing his own preferences or notions of good social policy. He did not stretch settled rules to achieve specific outcomes. He did not redefine settled terms to "bring them up to date." He regularly deferred to legislative enactments within the constraints imposed by common law and constitutional mandates. His record is described by President Bush's repeated phrase: Justice Souter interpreted the law, he did not legislate from the bench.

This analysis is necessarily selective in terms of both its categories and cases. It includes areas raising issues of wide interest and likely relevance to issues Justice Souter might confront on the U.S. Supreme Court. It avoids, for example, the substantial number of zoning and insurance cases the state high court regularly addressed. It does address various constitutional issues. Conclusions reached here as to Judge Souter's judicial philosophy would not be appreciably altered by a searching examination of other substantive areas of case law.

A. Evidence. Two cases demonstrate how Justice Souter carefully applied New Hampshire's "rape shield law."²⁴ In doing so, he demonstrated his commitment to maintaining the due process rights of criminal defendants rather than imposing his personal feelings about some abstract sense of "justice." The Supreme Court of New Hampshire had held that a rape defendant must have the opportunity to demonstrate that the evidence's probative value outweighs its prejudicial effect.²⁵

In *State v. Colbath*,²⁶ Justice Souter, writing for a unanimous court, reversed a conviction for aggravated felonious sexual assault and remanded for a new trial. The trial judge had instructed the jury that evidence of the complainant's sexually provocative behavior in a bar with men other than the defendant within hours of the incident was irrelevant. Justice Souter wrote that in this case, "the jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group."²⁷

²⁴ This statute bars the admission of evidence of "[p]rior consensual sexual activity between the victim and any person other than the [defendant]." New Hampshire Revised Statutes Annotated 632-A:6.

²⁵ *State v. Howard*, 121 N.H. 53 (1981).

²⁶ 540 A.2d 1212 (N.H. 1988).

²⁷ *Id.* at 1217.

In *State v. Baker*,²⁸ Justice Souter, writing for a unanimous court, reversed a conviction for felonious sexual assault because the trial court had denied a hearing to assess the "probative vs. prejudicial" question in order to save time. Justice Souter wrote: "What is more important, in any event, is that a...hearing is a due process requirement, which must be given a higher priority than efficiency in the use of jurors' and witnesses' time."²⁹

In *State v. Knowles*,³⁰ Justice Souter, writing for a unanimous court, affirmed a conviction for driving under the influence, second offense. The defendant's mother had told an investigating officer at the scene where a car had snapped a utility pole that despite her efforts to dissuade the defendant from driving, he "drove off and hit the pole." At trial, she disavowed any knowledge of the incident and the defense moved to exclude as hearsay her statement to the officer. The trial judge admitted the statement under the "catch-all" exception to the rule against hearsay. Justice Souter, affirming this ruling, wrote that "we cannot say the trial judge was clearly wrong in thinking the police had done as much as they reasonably should have on the evening of the event."³¹

B. Labor Law. In *Panto v. Moore Business Forms, Inc.*,³² Justice Souter, writing for a unanimous court, answered two questions certified to the justices by the U.S. District Court for the District of New Hampshire. The plaintiff worked for 12 years as an at-will employee.³³ In preparation for lay-offs, the employer unilaterally promulgated to its employees a written policy statement announcing the employer's intention to continue salary and benefits for a limited period after the lay-off. Applying traditional contract concepts,³⁴ Justice Souter held that promulgation of this statement "may be treated as an offer subject to an employee's acceptance, to be expressed by the continued performance

²⁸ 508 A.2d 1059 (N.H. 1986).

²⁹ *Id.* at 1062.

³⁰ 562 A.2d 185 (1989).

³¹ *Id.* at 186.

³² 547 A.2d 260 (N.H. 1988).

³³ This means that "either party was free to end the relationship with or without cause at any time."
Id. at 262.

³⁴ Justice Souter cited New Hampshire precedents dating back to the 1860s.

of his duties, upon which an enforceable unilateral contract term will be formed."³⁵ Therefore, the necessary elements of proof are unilateral offer, acceptance, and consideration.³⁶ Justice Souter viewed this as more like a case involving deferred compensation than a "handbook case" in which at-will employees seek to enforce terms in a handbook existing from the time they were hired.

In *Appeal of White Mountain Education Association*,³⁷ Justice Souter, writing for a unanimous court, affirmed a decision by the Public Employee Labor Relations Board dismissing an action on behalf of a discharged school custodian. That complaint alleged the custodian was fired in retaliation for his union membership. The board initially found for the employee, ordering reinstatement without back pay. On rehearing, the board dismissed the complaint altogether. Justice Souter noted that a party who has not applied for a rehearing before the agency may not take an appeal to the state supreme court. This means that "[w]hen a decision on any issue is reversed on rehearing, the newly losing party must apply for a further rehearing and satisfy [statutory requirements] before appealing to this court."³⁸ The court nevertheless chose not to dismiss the appeal because "it appears that each party erroneously assumed that the association's earlier motion for rehearing satisfied the [statutory requirements] as a condition for this appeal."³⁹ On the merits, the court held that the burden is on the union to prove "some minimal degree of retaliatory motivation."⁴⁰ The court refused to "place a burden on an employer to justify his action upon a mere claim of retaliation or upon the complainant's introduction of any evidence of retaliation."⁴¹

C. Family Law. In the area of family law, Justice Souter consistently maintained his commitment to the rule of law while achieving results that furthered New Hampshire's interest in upholding parental rights and strengthening family unity. He did not second-guess the legislature. He did not substitute any personal preferences about the meaning or definition of "family" or any "enlightened" notions about "domestic arrangements" in the 1980s. Rather, he faithfully applied the law.

³⁵ *Panto*, 547 A.2d at 264.

³⁶ *Id.* at 269.

³⁷ 486 A.2d 283 (N.H. 1984).

³⁸ *Id.* at 286.

³⁹ *Id.*

⁴⁰ *Id.* at 288.

⁴¹ *Id.*

In *In re Noah W.*,⁴² Justice Souter, writing for a unanimous court, held that a finding of abuse by a district court is a prerequisite to a probate court's termination of parental rights. He utilized "the standard of statutory construction by reference to the plain meaning of the language employed."⁴³ His conclusion stemmed in part from his observation that the legislature's objectives included "the preservation of family unity" and corresponding protection of parental rights, as well as "the reunification of families that have been split by dispositional orders in abuse cases."⁴⁴

In *In re Adam E.*,⁴⁵ Justice Souter, writing for a unanimous court, held that while a district court judge in New Hampshire can terminate parental rights, "the order must include a statement of conditions on which the parent may regain custody and a plan of services to help the parent and the child."⁴⁶ Even though the court acknowledged that, in that case, there appeared very little chance that the family could be reunited because of the mother's mental illness, it nonetheless preserved procedural safeguards against the unconditional termination of parental rights.

In *In re Jason C.*,⁴⁷ Justice Souter, writing for a unanimous court, affirmed a lower court ruling that two unmarried adults may not jointly petition to adopt a child. Striving for a construction "consistent with legislative intent," Justice Souter concluded that "it was the legislature's intent to confine adoption to applicants who will probably provide a unified and stable household for the child."⁴⁸

In *Matter of Matthew G.*,⁴⁹ Justice Souter, writing for a unanimous court, affirmed the denial of a mother's petition to terminate the parental rights of her former husband because of abandonment. In addition to maintaining jurisdictional rules of timeliness,⁵⁰ the court held that a finding of abandonment does not itself require considering the "best

⁴² 549 A.2d 1210 (N.H. 1988).

⁴³ *Id.* at 1211.

⁴⁴ *Id.* at 1212.

⁴⁵ 480 A.2d 160 (N.H. 1984).

⁴⁶ *Id.* at 161.

⁴⁷ 533 A.2d 32 (1987).

⁴⁸ *Id.* at 33.

⁴⁹ 469 A.2d 1365 (N.H. 1983).

⁵⁰ The plaintiff claimed error in the introduction of hearsay evidence. The record did not disclose any objection at trial. Therefore, citing a case from 1862, Justice Souter held that the "attempt to raise the issue is untimely." *Id.* at 1366.

interest of the child." Noting that "a determination of abandonment is essentially factual," the court decided that "the conclusion of what is in the child's best interest is not an evidentiary fact" and "has no logical tendency to prove that the parent in question abandoned the child."⁵¹

D. First Amendment - Libel. In the area of libel, Justice Souter's analysis and application of the law has been clear and thorough in every case. He has not exhibited a knee-jerk approach that anyone can print what he chooses without being held accountable. He has made the necessary distinctions between different forms of printed material and has not hesitated to correct a trial judge's too-hasty decision to deny a plaintiff the opportunity for his day in court.

In *Duchesnaye v. Munro Enterprises, Inc.*,⁵² Justice Souter, writing for a unanimous court, affirmed a superior court judgment in favor of the plaintiff with respect to an editorial.⁵³ The paper printed an editorial which, if read in conjunction with a factually correct news story, "could be understood to describe the plaintiff as needing psychiatric help for instability, and it could be read to imply that the plaintiff had made obscene telephone calls."⁵⁴ Justice Souter applied the rule that "a statement in the form of an opinion may be read to imply defamatory facts, and it is actionable if it is actually understood that way."⁵⁵

In *Nash v. Keene Publishing Corp.*,⁵⁶ Justice Souter, writing for a unanimous court, reversed the trial court's summary judgment for the defendant newspaper and remanded for trial. The newspaper printed a letter imputing behavior, "as well as personal limitations and proclivities, that would be highly undesirable in a police officer" written by an individual whom the plaintiff officer had arrested and restrained.⁵⁷ Although it was the newspaper's stated policy not to print "allegations we are unable to verify independently,"

⁵¹ *Id.*

⁵² 480 A.2d 123 (N.H. 1984).

⁵³ The court found in favor of the newspaper with respect to a news story.

⁵⁴ *Duchesnaye*, 469 A.2d at 124.

⁵⁵ *Id.* at 125. The U.S. Supreme Court recently ruled the same way. See *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846 (June 21, 1990).

⁵⁶ 498 A.2d 348 (N.H. 1985).

⁵⁷ *Id.* at 350.

it failed to substantiate statements in the letter and later published an apology. Justice Souter concluded that it was error for the trial court to find that the letter must necessarily be read as "a non-actionable expression of opinion."⁵⁸ He also found that the officer's status as a "public official" for purposes of a libel action⁵⁹ must be left to the jury.⁶⁰

In *Keeton v. Hustler Magazine, Inc.*,⁶¹ a woman sued *Hustler* for publishing defamatory material. By the time she brought suit, only New Hampshire's 6-year statute of limitations remained intact. Even though the plaintiff was a resident of New York, the defendants were residents of Ohio, and 99% of the libelous material was circulated outside of New Hampshire, she brought suit there and won a \$2 million judgment. On appeal, the chief judge of the U.S. Court of Appeals for the First Circuit certified two questions to the New Hampshire Supreme Court. The court unanimously agreed to adopt the "single publication" rule for cases of multistate dissemination of defamatory material. The majority also applied New Hampshire's statute of limitations to the entire action for damages arising in all 50 states. While accepting the basic rule that procedural issues are to be decided by the law of the forum state, Justice Souter in dissent wrote that there is "nothing inherently persuasive in characterizing a statute [of limitations] as merely procedural....Nor is there anything persuasive in the reasoning of our prior cases that have so held."⁶² Examining precedents dating back to 1940, Justice Souter concluded that the court's 1978 decision in *Gordon v. Gordon*,⁶³ which held that a limitation statute is procedural, was an aberration that failed to appropriately address the issue and ignored prior case law. As a result, Justice Souter wrote that "the *Gordon* rule is manifestly devoid of reasoned support, and...persuasive authority counsel[s] for the repudiation of *Gordon*."⁶⁴

⁵⁸ *Id.* at 352.

⁵⁹ A public official cannot recover for libel "without clear and convincing proof that the defendant had acted with actual malice [either with knowledge of the falsity or with reckless disregard for the truth] in publishing a false and defamatory statement concerning the plaintiff's official conduct." *Id.*

⁶⁰ *Id.* at 353.

⁶¹ 549 A.2d 1187 (N.H. 1988).

⁶² *Id.* at 1198.

⁶³ 118 N.H. 356 (1978).

⁶⁴ *Keeton*, 549 A.2d at 1199.

E. First Amendment - Freedom of Association. In *In re Chapman*,⁶⁵ the court held that active opposition by the Board of Governors of the State Bar Association⁶⁶ to tort reform legislation was not within the mandate of the Association's constitution.⁶⁷ "Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate." The court viewed this mandate narrowly to include "those matters which are related **directly** to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession."⁶⁸ Justice Souter joined Justice Brock's opinion, but concurred specially. He wrote that when "the compulsory organization uses dues or fees to finance political or ideological activities that are not **reasonably** related to the responsibilities that justify the compulsion to join, it infringes on the first amendment rights of members who dissent from the organization's positions."⁶⁹ This suggests that Justice Souter's view of what must justify using compulsory dues and fees for activities unrelated to the central mission of a compulsory organization may have been more relaxed than the majority.

F. Fourth Amendment - Search and Seizure. Justice Souter's opinions in this area demonstrate that he has avoided the imaginative bias of many liberal judges that readily deems necessary and appropriate investigative efforts by law enforcement officials to be unconstitutional "searches." Such judges often appear to presume that a search is automatically "unreasonable." As in other areas, Justice Souter rigorously and even-handedly applied the law but resisted invitations to impose extra-legal standards or "gut feelings" of "fairness," thereby thwarting legitimate law enforcement activities.

In *State v. Valenzuela*,⁷⁰ Justice Souter, writing for a 3-1 majority,⁷¹ holding that use of a "pen register" to record numbers dialed from the defendant's telephone was not a "search" for constitutional purposes, affirmed a conviction of the controlled substances law. He confined the analysis according to "the posture in which the parties have presented it,"

⁶⁵ 509 A.2d 753 (N.H. 1986).

⁶⁶ The New Hampshire bar is a "unified" or "integrated" bar. Membership is compulsory in order to practice law in the state.

⁶⁷ The U.S. Supreme Court recently reached a similar conclusion with regard to the integrated California bar. See *Keller v. State of California*, 58 U.S.L.W. 4661 (June 4, 1990).

⁶⁸ *Chapman*, 509 A.2d at 759 (emphasis added).

⁶⁹ *Id.* at 761-62 (emphasis added).

⁷⁰ 536 A.2d 1252 (N.H. 1987), *cert. denied*, 485 U.S. 1008 (1988).

⁷¹ Justice Thayer did not participate in this case. Justice Batchelder dissented because he would find that the use of a "pen register" to obtain numbers dialed from the defendant's telephone was a constitutional "search" and, therefore, must be based on a finding of probable cause. *Id.* at 1268.

utilizing principles from the U.S. Supreme Court's Fourth Amendment jurisprudence.⁷² He carefully distinguished between the routine voluntary communication of electronic data like the number dialed from the protected contents of a telephone conversation. Justice Souter held that "there is no violation of constitutional privacy when the telephone operator acts as a government informer by communicating what a defendant has addressed to the operator, and we therefore find no violation when the 'hearer' is not an operator but a machine receiving functionally equivalent information communicated by a defendant and directed to the company."⁷³ His analysis also reflected a thorough knowledge of criminal procedure, for example, the difference between "stale probable cause" and "stale information."⁷⁴ Justice Souter found that the judge issuing the search warrant in the case was neutral despite having given advice to the police. Nevertheless, he added "a further word about it, with an eye to the future. Legal advice to police officers ought to come from city or county attorneys, or from the attorney general's office, not from judges."⁷⁵ This again reflects Justice Souter's dual devotion to applying the law and to maintaining the proper role for judges in our legal and political system.

In *State v. Koppel*,⁷⁶ the court held that roadblocks used to detect and apprehend drunk drivers were an "unreasonable search and seizure" and reversed the trial court's denial of the defendants' motion to suppress evidence obtained when they were arrested. The majority went beyond the traditional "balancing test" between the value of a roadblock to the public and its burden on individual drivers to announce a new test weighted in favor of the latter and requiring that the value of the roadblock must "significantly" advance the public interest. Justice Souter dissented, placing his emphasis on whether a particular search was "unreasonable" rather than on the knee-jerk assumption that any search is unreasonable by definition. He wrote: "Even assuming that such a weighted balancing test is appropriate, I could not join in the conclusion that the majority reach, for I believe that the evidence indicates that the value of the roadblocks in this case did significantly outweigh the minimal disadvantage to the drivers whose cars were stopped."⁷⁷ He concluded: "Contrasting this significant public benefit with the minimal private intrusion, I conclude that the roadblocks in question did not result in unreasonable seizures."⁷⁸ He

⁷² In doing so, Justice Souter again demonstrated his careful attention to the proper and limited role of the appellate judge. He did not purport to announce a new rule that the state constitution's protection against unreasonable searches and seizures must necessarily be understood according to the U.S. Supreme Court's Fourth Amendment holdings. Nor did he cast any doubt on existing state high court precedents. *Id.* at 1257.

⁷³ *Id.* at 1262.

⁷⁴ *Id.* at 1264.

⁷⁵ *Id.* at 1266.

⁷⁶ 499 A.2d 977 (N.H. 1985).

⁷⁷ *Id.* at 984.

⁷⁸ *Id.* at 985.

addressed the majority's "slippery slope" argument that roadblocks to find drunk drivers today will mean stopping pedestrians to find shoplifters tomorrow by stating that "[m]easures that would be reasonable in policing activities of great risk would not be reasonable as intrusions into the characteristically safe and innocent pursuits of social life."⁷⁹

G. Fifth Amendment - *Miranda* Rights. In these cases, Justice Souter consistently demonstrated a commitment to apply applicable standards, but also to resist either substituting his judgment for that of the trial court as found in the record or extending rules of law beyond their conceptual limits. In short, he gave criminal defendants a fair appeal but ruled against them if the law required it.

In *State v. Coppola*,⁸⁰ Justice Souter, writing for a unanimous court, affirmed a conviction for burglary and aggravated felonious sexual assault. The defendant had, prior to his arrest, responded to police questions with a boast about being street-wise and refusing to confess to anything. He claimed that this boastful statement amounted to an invocation of his right against self-incrimination under the 5th and 14th Amendments to the U.S. Constitution and that, therefore, it could not be used against him at trial. Justice Souter refused to "expand [the Supreme Court's decision in] *Jenkins [v. Anderson]*"⁸¹ beyond recognition by equating any occasion to remain silent in response to police questioning with an inducement [to remain silent]."⁸² The most significant flaw in the defendant's argument was "the factual unreality of equating his taunt to the police with an invocation of his constitutional right to remain silent....While post-*Miranda* invocations of a right to silence are insolubly ambiguous...pre-*Miranda* refusals to confess are not."⁸³

In *State v. Elbert*,⁸⁴ Justice Souter, writing for a unanimous court,⁸⁵ affirmed a conviction for attempted first-degree murder and use of a firearm in the attempt to commit a felony. The defendant had fled to New York after committing the acts in question. Police officers from New Hampshire retrieved him and, while in Connecticut, read him his *Miranda* rights. He waived those rights and made statements to the officers which were admitted into evidence at trial. The court held that the evidence supported the trial court's

⁷⁹ *Id.*

⁸⁰ 536 A.2d 1236 (N.H. 1987).

⁸¹ 447 U.S. 231 (1980).

⁸² *Coppola*, 536 A.2d at 1239.

⁸³ *Id.*

⁸⁴ 480 A.2d 854 (N.H. 1984).

⁸⁵ Justice Douglas did not participate in this case.

finding of each necessary element -- the defendant initiated discussion of the charges prior to any waiver of *Miranda* rights, he understood and waived those rights, and he made a statement voluntarily.⁸⁶

In *State v. Lewis*,⁸⁷ Justice Souter, writing for a unanimous court,⁸⁸ affirmed a conviction for robbery and second-degree murder after finding that the defendant voluntarily waived his *Miranda* rights and that admission of his confession did not violate his right to due process. Police officers had spoken twice to the defendant before the arrest, in each case giving him the appropriate *Miranda* warnings. They did so again before questioning him after the arrest. "The defendant signed a waiver of the applicable rights and made a confession that was later introduced into evidence at trial."⁸⁹ Justice Souter applied the "beyond a reasonable doubt" standard under state law, even though the U.S. Supreme Court recently held "that the State need prove waiver only by a preponderance of the evidence."⁹⁰ Finding that "the issue is a close one,"⁹¹ the court meticulously reviewed each statement involved in the giving and waiving of *Miranda* rights. Noting that the defendant was 28 years old, had a high school education, and was found free of drugs or alcohol, the court concluded that the evidence pointed to "a correct understanding of waiver."⁹² The court dismissed other arguments against finding waiver by stating that "the defendant is seeking to extend *Miranda* beyond its conceptual justification, on the basis of an argument divorced from reality."⁹³

In *State v. Derby*,⁹⁴ Justice Souter, writing for a unanimous court, affirmed a conviction for felonious sexual assault. A police officer read defendant his *Miranda* rights and defendant initialed each statement to indicate his understanding, and then signed a waiver and an agreement to answer questions. His subsequent incriminating statements were introduced at trial. Justice Souter readily applied rules limiting the court's subject

⁸⁶ *Elbert*, 480 A.2d at 859.

⁸⁷ 533 A.2d 358 (N.H. 1987).

⁸⁸ Justice Batchelder did not participate in this case.

⁸⁹ *Lewis*, 533 A.2d at 360.

⁹⁰ *Id.* at 361. See *Colorado v. Connelly*, 107 S.Ct. 515 (1986).

⁹¹ *Lewis*, 533 A.2d at 361.

⁹² *Id.* at 363.

⁹³ *Id.* at 364.

⁹⁴ 561 A.2d 504 (N.H. 1989).

matter jurisdiction, finding that certain issues were not properly raised.⁹⁵ Even though the defendant suffered from several ailments and was receiving half a dozen medications, the court acknowledged that this evidence had been before the trial court and upheld its finding that the defendant had voluntarily waived his *Miranda* rights.

H. Fifth Amendment - Self Incrimination. In a rare split decision, Justice Souter demonstrated his willingness to depart from his colleagues when he felt the law required it. In *State v. Cormier*,⁹⁶ the court, by a 3-2 vote, affirmed a conviction for operating a motor vehicle while under the influence of intoxicating liquor. The defendant claimed that evidence she refused to submit to a chemical blood-alcohol test⁹⁷ violated her right against self-incrimination under the state constitution.⁹⁸ Justice Souter first held the constitutional protection applied only to "evidence by a defendant that is of testimonial character"⁹⁹ and does not apply to "physical evidence such as a sample of defendant's blood...or to demonstrations provided by the performance of field sobriety tests."¹⁰⁰ The refusal in the present case was "an act of choice to suppress physical evidence" and, therefore, non-testimonial.¹⁰¹ Justice Souter also held that, whether testimonial or not, the evidence in question had not been "compelled."¹⁰²

In another split decision, the court in *State v. Denney*¹⁰³ reversed a conviction of driving while intoxicated, holding that admission of evidence that the defendant had declined to take a blood alcohol test violated his right to due process where the arresting officer gave the standard *Miranda* warnings but did not specifically notify him that his

⁹⁵ The defendant relied not only on the Fifth and Fourteenth Amendments to the U.S. Constitution, which imposes a "preponderance" standard to prove waiver, but also on the parallel provision of the state constitution, which imposes a "beyond a reasonable doubt" standard. Justice Souter rejected the state's argument that the court overrule its precedent establishing the stricter standard as improperly raised. *Id.* at 505.

⁹⁶ 499 A.2d 986 (N.H. 1985).

⁹⁷ New Hampshire statutory law permits introduction of such evidence. New Hampshire Revised Statutes Annotated 265:84.

⁹⁸ Article 15, part I, states that no one shall "be compelled to accuse or furnish evidence against himself."

⁹⁹ *Cormier*, 499 A.2d at 987.

¹⁰⁰ *Id.* at 988. Chief Justice King, joined by Justice Douglas, dissented and would have held that the constitutional right against self-incrimination did apply because the state provision is broader than the federal provision and applies to evidence, as in the present case, that is "testimonial" in nature.

¹⁰¹ *Id.*

¹⁰² Justices Batchelder and Brock concurred specially to write that their vote to affirm the conviction was based on "the analysis that the defendant is not 'compelled' to make a testimonial assertion." *Id.* at 991.

¹⁰³ 536 A.2d 1242 (N.H. 1987).

refusal could be used against him in court. Justice Souter dissented and concluded that the *Miranda* warnings alone were enough to satisfy the due process requirement since one of those warnings is that anything an individual says can and will be used against him in court. Justice Souter went further, criticizing the majority's "more fundamental error...in holding that due process requires such a warning at all."¹⁰⁴

I. Sixth Amendment - Speedy Trial. In *State v. Tucker*,¹⁰⁵ Justice Souter, writing for a unanimous court, affirmed the conviction of a fugitive from prosecution in spite of a ten-month delay between arrest and trial. With "no suggestion of deliberate delay"¹⁰⁶ and "the want of any indication of actual prejudice to the conduct of the defense,"¹⁰⁷ the delay alone did not violate the Constitution.

J. Criminal Procedure - Due Process. Consistent with his decisions in other areas of criminal law and procedure, Justice Souter applied the law consistently and dispassionately. He resisted creative attempts to challenge convictions through "back door" arguments and would not tolerate the legal fictions that lawyers so often raise in hopes of getting appellate judges to disregard lower court decisions and overturn convictions on specious grounds. Rather, Justice Souter insisted on rigorous application of jurisdictional requirements and "called a spade a spade" when identifying and evaluating issues before the court.

In *State v. Goding*,¹⁰⁸ the court affirmed a conviction of driving while intoxicated, second offense. The defendant had initially been tried and convicted on DWI-first offense in district court.¹⁰⁹ He exercised his right to a fresh trial in superior court; a mistrial was declared after the jury failed to reach a verdict on the DWI-second offense charge. He was retried and convicted on the DWI-second offense charge. The majority rejected the defendant's due process claim, based on alleged prosecutorial vindictiveness, that the state is constitutionally prohibited from increasing the charge in superior court after the defendant has been tried and convicted of a lesser charge in district court. Justice Souter dissented from this portion of the majority opinion, writing that the defendant had not "adequately raised any due process issue distinct from a claim of double jeopardy."¹¹⁰

¹⁰⁴ *Id.* at 1246.

¹⁰⁵ 561 A.2d 1075 (N.H. 1989).

¹⁰⁶ *Id.* at 1077.

¹⁰⁷ *Id.* at 1078.

¹⁰⁸ 513 A.2d 325 (N.H. 1986).

¹⁰⁹ The prosecutor did not have the necessary proof of the prior offense in his possession and could not try the defendant on the DWI-second offense charge.

¹¹⁰ *Goding*, 513 A.2d at 331.

K. Criminal Procedure - Deposing a Child Victim/Witness. In *State v. Heath*,¹¹¹ Justice Souter, writing for a unanimous court, answered four questions transferred by the superior court following the defendant's indictment for aggravated felonious sexual assault on a seven-year-old boy. Between the incident and the indictment, the legislature passed into law a measure restricting a defendant's right to depose young victims and to provide for use of videotaped depositions. As in other cases, Justice Souter began by determining the "common usage" of the statute's critical terms.¹¹² The court held that the statute did not impose an absolute bar to discovery depositions of witnesses in criminal cases who are under 16 years of age. Rather, a companion provision allows the trial court to order videotaped depositions in lieu of trial testimony.¹¹³ "Legislative history indicates...that the mandate to follow the 'manner' of trial was not intended to preclude discovery questions."¹¹⁴ A court can disallow deposition discovery of a young victim or witness without violating constitutional standards of due process or equal protection.¹¹⁵

L. Miscellaneous. Many decisions, of course, do not fit neatly into specific categories or can be assigned to more than one. Several of these are significant and continue the pattern established in the foregoing opinions of Justice Souter as a careful and conservative jurist who follows the law and the facts while resisting the temptation to dictate results based on his own preferences or irrationally expand accepted doctrines and principles.

In *In re "K,"*¹¹⁶ Justice Souter, writing for a unanimous court,¹¹⁷ reversed a superior court order requiring a hospital to produce a nurse's report and minutes of a committee meeting. The hospital claimed the documents were privileged under a New Hampshire statute. Justice Souter began his analysis by stating: "The principal issue being the applicability of the statutory privilege to the documents in question, our first concern is with the words of the statute."¹¹⁸ The court, noting that "the statute's drafting is imprecise,"

¹¹¹ 523 A.2d 82 (N.H. 1986).

¹¹² *Id.* at 85.

¹¹³ *Id.*

¹¹⁴ *Id.* at 86.

¹¹⁵ *Id.* at 87.

¹¹⁶ 561 A.2d 1063 (N.H. 1989).

¹¹⁷ Justice Johnson did not participate in this case. Justice Batchelder wrote a short special concurrence.

¹¹⁸ *In re "K,"* 561 A.2d at 1065.

further conducted a "search for the legislature's probable intent."¹¹⁹ It concluded that the statutory reference to "a hospital committee organized to evaluate...." must be understood "by reference to [a committee's] functional responsibility."¹²⁰ "Those committees...would include one on infection control."¹²¹

In *Opinion of the Justices*,¹²² the court, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of a proposed bill that would prohibit homosexuals from adopting, becoming foster parents, or operating child care agencies. Justice Souter joined the opinion.¹²³ The court examined the proposal under several different theories.

- * Under the equal protection clause of the federal or state constitution, the court concluded that homosexuals are not a "suspect class." There exists no "fundamental right to engage in homosexual sodomy....There is, further, no such right to adopt, to be a foster parent, or to be a child care operator....[T]he proper test to apply...is whether the legislation is 'rationally related to a legitimate governmental purpose.'"¹²⁴ The bill's fully legitimate purpose was providing appropriate parental role models for children. The court concluded that prohibiting adoption or foster care by homosexuals was rationally related to this purpose; prohibiting operation of a child care agency was not because this activity did not "approximat[e] a familial or parent-child arrangement."¹²⁵
- * Under the due process clause of the federal or state constitution, there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore

¹¹⁹ *Id.* at 1066.

¹²⁰ *Id.*

¹²¹ *Id.* at 1067.

¹²² 530 A.2d 21 (N.H. 1987).

¹²³ Such opinions never indicate individual authorship. Justice Batchelder separately stated that any restriction in the bill on the activities of homosexuals was unconstitutional. This is likely the result that Justice William Brennan, whose seat on the U.S. Supreme Court Judge Souter was nominated to fill, would have reached.

¹²⁴ *Opinion of the Justices*, 530 A.2d at 24.

¹²⁵ *Id.* at 25. Because of this conclusion, the court did not further address the constitutionality of the prohibition against homosexuals operating child care agencies.

required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."¹²⁶

* The court rejected any argument based on the so-called "right to privacy" or freedom of association under either the state or federal constitution.

In *State v. Grondin*,¹²⁷ Justice Souter, writing for a unanimous court,¹²⁸ reversed a superior court order dismissing an indictment for violating a motor vehicle habitual offender order. The defendant had been convicted three times for driving after suspension of his license. After a hearing, at which the defendant was represented by counsel, the superior court entered an order prohibiting him from driving until his license was restored. He later moved the superior court to vacate the order, claiming the guilty pleas underlying his prior convictions were made without benefit of counsel. The superior court granted the motion. Justice Souter applied a prior supreme court decision holding that a defendant charged with violating a habitual offender order may not attack that finding absent proof he had been unrepresented by counsel at that hearing. Justice Souter was careful to make the assumptions necessary to decide that particular case and avoid appearing "unduly ready to reach constitutional issues that might not require decision."¹²⁹

In *In re Sanborn*,¹³⁰ Justice Souter, writing for a 4-1 majority, reversed a probate court order dismissing a petition for involuntary civil commitment. A man charged with second-degree murder was found incompetent to stand trial. The state filed a petition for involuntary civil commitment "on the ground of mental illness posing a danger to others."¹³¹ The probate judge concluded that the state had failed to prove dangerousness beyond a reasonable doubt and dismissed the petition. The court overruled its previous decision in *Proctor v. Butler*,¹³² which had established the reasonable doubt standard for civil commitment, and held that "the clear and convincing standard must hereafter be employed in civil commitment cases."¹³³ The citizens of New Hampshire had approved a constitutional amendment in 1984 establishing the clear and convincing standard for

¹²⁶ *Id.* at 26.

¹²⁷ 563 A.2d 435 (N.H. 1989).

¹²⁸ Justice Johnson did not participate in this case.

¹²⁹ *Grondin*, 563 A.2d at 436.

¹³⁰ 545 A.2d 726 (N.H. 1988).

¹³¹ *Id.* at 728.

¹³² 117 N.H.927 (1977).

¹³³ *Sanborn*, 545 A.2d at 733.

commitment in cases of criminal insanity. The court unanimously concluded that "we perceive no intellectually realistic basis for holding that due process can require a burden of proof [for civil commitment cases] that is different from the State's burden when it seeks commitment after a verdict of not guilty by reason of insanity to a criminal charge."¹³⁴

Judge Souter's views on civil rights are unknown. His record on the state bench yields no evidence. While Attorney General of New Hampshire, Souter urged the U.S. Supreme Court to review a decision by the U.S. Court of Appeals for the First Circuit upholding a federal agency's requirement that the state submit a racial breakdown of its employees. New Hampshire, per Attorney General Souter, argued that this race-conscious view violated the Constitution's mandate of color-blindness. A newspaper report stated that, as attorney general, Souter referred in a speech to "affirmative action" programs as "affirmative discrimination."¹³⁵

JUDGE SOUTER'S JUDICIAL PHILOSOPHY

This wide-ranging look at Justice Souter's decisions from the New Hampshire Supreme Court intentionally avoids an analysis according to political "outcome" or simplistic references to "winners" and "losers." A judicial decision which stretches concepts to the breaking point, plays fast and loose with the facts, and neglects traditional notions of jurisdiction can be no more acceptable to conservatives because it affirms a criminal conviction than it can be to liberals because it finds a due process violation or reverses a conviction. The integrity and independence of the judiciary, the validity of the act of judging itself, depends on a foundational commitment to the rule of law. That commitment must be above raw politics, it must resist forcing a pre-determined result "peg" through a differently shaped process "hole." Especially in the context of constitutional law, where a decision by unelected judges can trump the decision of elected political branches, the commitment to the rule of law is paramount.

When President Bush nominated Judge Souter, he stated that this nominee would "interpret the Constitution" and not "legislate from the bench." This is another way of describing a commitment to the rule of law. The evidence supports the President's assessment. In various ways, Judge David Souter is a careful jurist who puts the rule of law and the integrity of the process of judging above everything else.

Judge Souter is a careful jurist who resists rules broader than necessary to accomplish the task before him. He gives proper deference to the public policies established by the people's political representatives and only voids them when absolutely necessary. He does not force the law to say what is really his own preference or opinion.

¹³⁴ *Id.* at 735.

¹³⁵ See Marcus, "Souter, as State Official, Opposed U.S. Racial Breakdown Rules," *Washington Post*, August 1, 1990, at A4.

This sometimes leads to results that conservatives like; in other cases, it produces a tally that liberals favor. Overall, however, Judge Souter rigorously - though not inventively - applies the law, wherever that process may take him.

Judge Souter is tough on criminals, some say. He is also tough on lawyers, insisting that they do their job in preparing and presenting appeals. He will not do their work for them. He will not accept "legal fictions," which are really bald requests for political results masquerading as legal arguments. He puts arguments under the spotlight and lawyers to their proof. He applies jurisdictional requirements consistently and even-handedly. And, again, he is content wherever that process may take him.

Consistent with his focus on the rule of law and his narrow view of the proper role of judges, Judge Souter accepts and consistently applies the traditional standards of interpretation. In statutory construction, his standard gives "reference to the plain meaning of the language employed."¹³⁶ In such cases, he writes, "our first concern is with the words of the statute."¹³⁷ If those are ambiguous, the central focus is on a "search for the legislature's probable intent."¹³⁸ In constitutional cases, he regularly applies the "clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption.'"¹³⁹

Another mark of judicial restraint is the refusal to reach unnecessary constitutional issues. That is, if a case can be decided on statutory rather than constitutional grounds, a court should take that narrower course. Justice Souter has indeed followed this tenet as well. In *State v. Grondin*,¹⁴⁰ for example, he was careful to make the assumptions necessary to avoid appearing "unduly ready to reach constitutional issues that might not require decision."¹⁴¹

Judge Souter described his own judicial philosophy in the Senate Judiciary Committee questionnaire he submitted at the time of his nomination to the U.S. Court of Appeals. He wrote:

The obligation of any judge is to decide the case before the court, and the nature of the issues presented will largely determine the appropriate scope of the principle on which its decision should rest. Where that principle is not provided

¹³⁶ *In re Noah W.*, 549 A.2d 1210, 1211 (N.H. 1988).

¹³⁷ *In re "K,"* 561 A.2d 1063, 1065 (N.H. 1989).

¹³⁸ *Id.* at 1066.

¹³⁹ *In re Estate of Dionne*, 518 A.2d 178 (N.H. 1986) (Souter, J., dissenting), quoting *Opinion of the Justices*, 44 N.H. 633 (1863).

¹⁴⁰ 563 A.2d 435 (N.H. 1989).

¹⁴¹ *Id.* at 436.

and controlled by black letter authority or existing precedent, the decision must honor the distinction between personal and judicially cognizable values. The foundation of judicial responsibility in statutory interpretation is respect for the

enacted text and for the legislative purpose that may explain a text that is unclear. The expansively phrased provisions of the Constitution must be read in light of its divisions of power among the branches of government and the constituents of the federal system.

APPROPRIATE LINES OF QUESTIONING

The Constitution identifies two powers involved in the selection of federal judges. The Constitution grants both of these - nomination and appointment - to the President. Consistent with the overall scheme of "checks and balances" which serves to limit concentration of government power, the Senate has a role of "advice and consent" which accompanies the President's appointment power.

The battle over the 1987 nomination of Judge Robert H. Bork marked a radical aberration in the traditional understanding of the Senate's advice and consent role. That traditional understanding was that the Senate should focus on a nominee's judicial philosophy and overall qualifications. The Bork battle introduced the notion that the Senate could also investigate and evaluate a nominee's positions on political issues, his specific views on existing Supreme Court precedents and doctrines, and how that nominee would vote in future cases.

"Judicial philosophy" refers to a nominee's approach to the Constitution, to constitutional interpretation, to the role of the courts in the American political and legal system, and to the proper function and definition of judges and judging. A huge array of questions bearing on various aspects of a nominee's judicial philosophy is available to the members of the Senate Judiciary Committee.

A classic example of the difference between judicial philosophy and politics comes from Raoul Berger, retired Charles Warren Senior Fellow in American Legal History at Harvard Law School. Professor Berger, a political liberal through-and-through, is the most distinguished defender and expositor of the "intentionalist" school of constitutional interpretation. He follows this process, this approach to judging, consistently to whatever outcome it produces, whether he personally likes it or not. He writes: "I'm for abortion...but along with almost all academics, I don't think the Constitution guarantees it."¹⁴²

¹⁴² Quoted in P. McGuigan & D. Weyrich, *Ninth Justice: The Fight for Bork* (Washington, D.C.: Free Congress Research & Education Foundation, 1990), at 33.

By going beyond qualifications and philosophy to politics and outcomes, the Senate went beyond an "advice and consent" role in the judicial selection process to an active role in the judicial decisionmaking process. The Senate went beyond serving as a check on the President's appointment power and claimed for itself an independent power in substantively shaping the federal judiciary.

A Department of Justice study concludes:

What distinguished the Bork, and to a lesser extent the Kennedy confirmation proceedings, therefore, was the equating of criticism of the judicial reasoning of a case with criticism of its substantive results, the confusion of political opinion with judicial philosophy, the use of statistical track records as evidence of judicial philosophy, and the attempts to obtain preconfirmation commitments on certain issues from the nominees. The assumption underlying much of this approach was that judicial philosophy and political philosophy are essentially identical, and that a nominee's political views will direct or even determine his judicial decisions. Indeed, the proceedings suggested not only that the judicial decisionmaking process is political, but that it ought to be.

*To the extent such thinking has become prevalent in the Senate, the courts, academia, and in society generally, it threatens to compromise the independence of the Judicial Branch, and thus to undermine the legitimacy of its authority. Because an independent, apolitical judiciary is a vital part of our constitutional system, this in turn has implications for the structure and workings of our entire democratic system of government.*¹⁴³

Interest groups, whether liberal or conservative, are wrong to call for any kind of political litmus test. President Bush was entirely correct in not imposing one in making this nomination; the Senate must not impose one when fulfilling its role of advice and consent. Nothing less than the independence and integrity of the judiciary is at stake. Supreme Court Justice John Paul Stevens addressed a session of the recent annual meeting of the American Bar Association and echoed this theme. "Justice Stevens cautioned that for a President or senators to pin down a nominee in advance [on specific issues or future votes] discouraged open-mindedness on the part of the judge, gave an appearance of impropriety, and threatened an independent judiciary."¹⁴⁴

¹⁴³ *By and With the Advice and Consent of the Senate: The Bork and Kennedy Confirmation Hearings and the Implications for Judicial Independence* (Washington, D.C.: U.S. Department of Justice, Office of Legal Policy, 1989), at 4.

¹⁴⁴ Margolick, "Souter Hearings Won't Be Useful for Predictions, One Justice Says," *New York Times*, August 8, 1990, at A14.

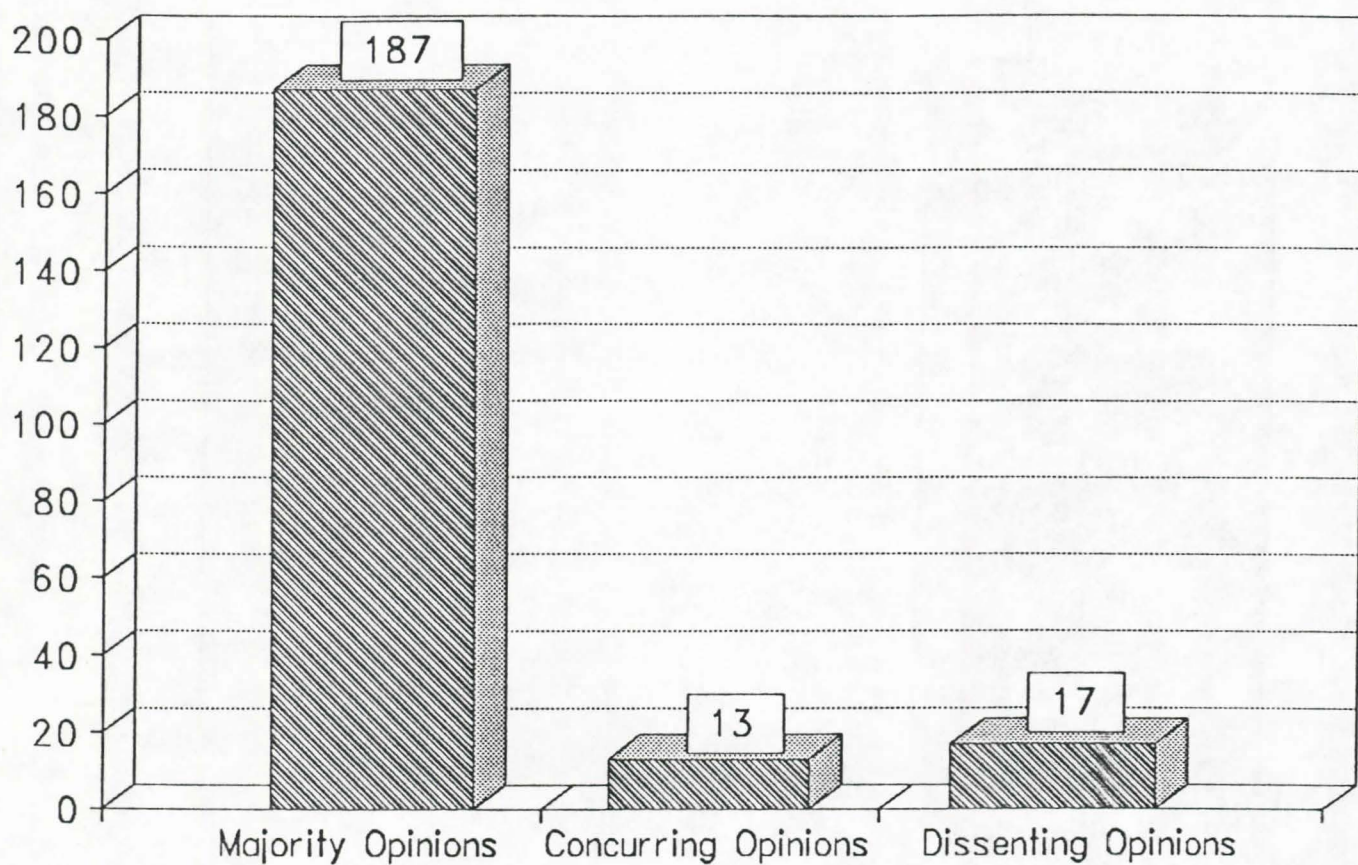
Those who condemn efforts to regulate the appellate jurisdiction of the Supreme Court as "political tampering" but who call for application of a political "balance" approach to filling vacancies on the Court are disingenuous at best and lack any integrity at worst.

The Senate must exercise its role of advice and consent in a way that respects the unique nature and place of the judiciary in our constitutional framework. Questions that require a nominee to bias himself publicly on issues that may well come before him later as a judge essentially demand that he violate in advance his oath to support and defend the Constitution. Litigants deserve as neutral, detached, and non-political a judiciary as we can preserve for them.

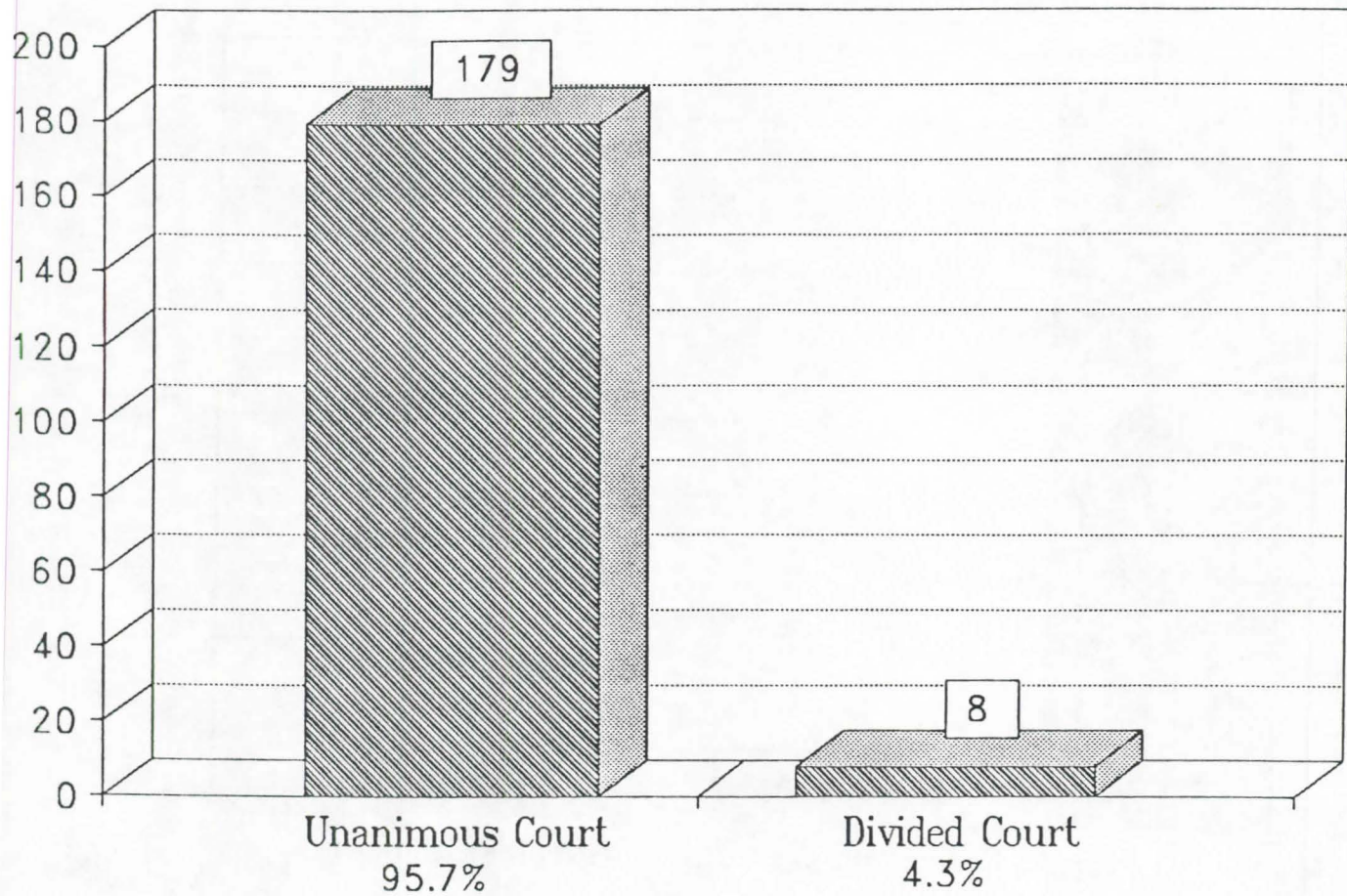
CONCLUSION

President Bush has nominated a conservative jurist with a clear and consistent record of judging rather than legislating. He faithfully applies the law rather than his own preferences. That is, he is a judge, not a politician. An independent, restrained judiciary that remains a co-equal branch of the federal government requires nothing less. The Senate must not turn this superb nomination into its own version of "Court packing" and thereby threaten the integrity of the institution itself.

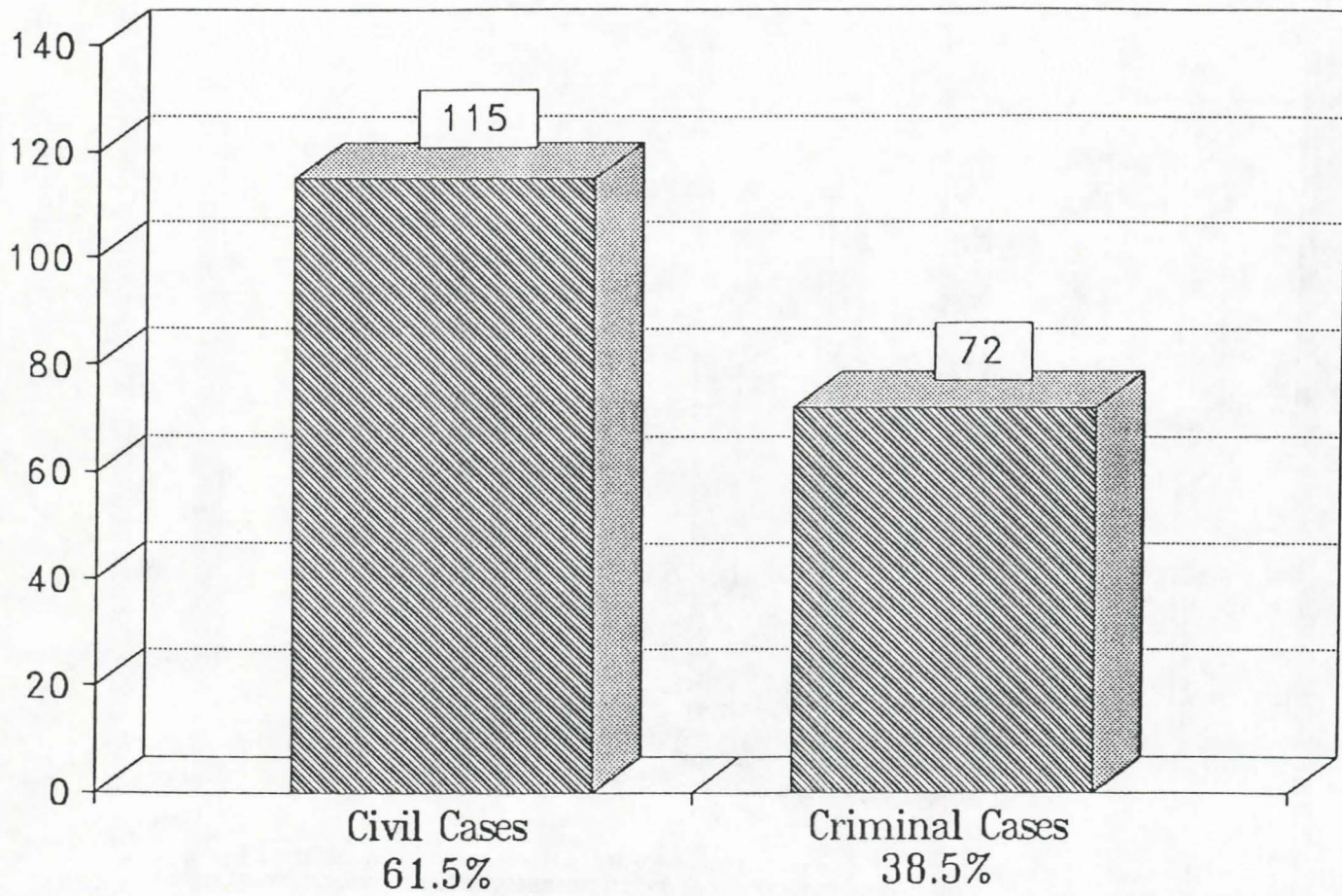
Justice David H. Souter
New Hampshire Supreme Court
Total Case Breakdown 1983-1990



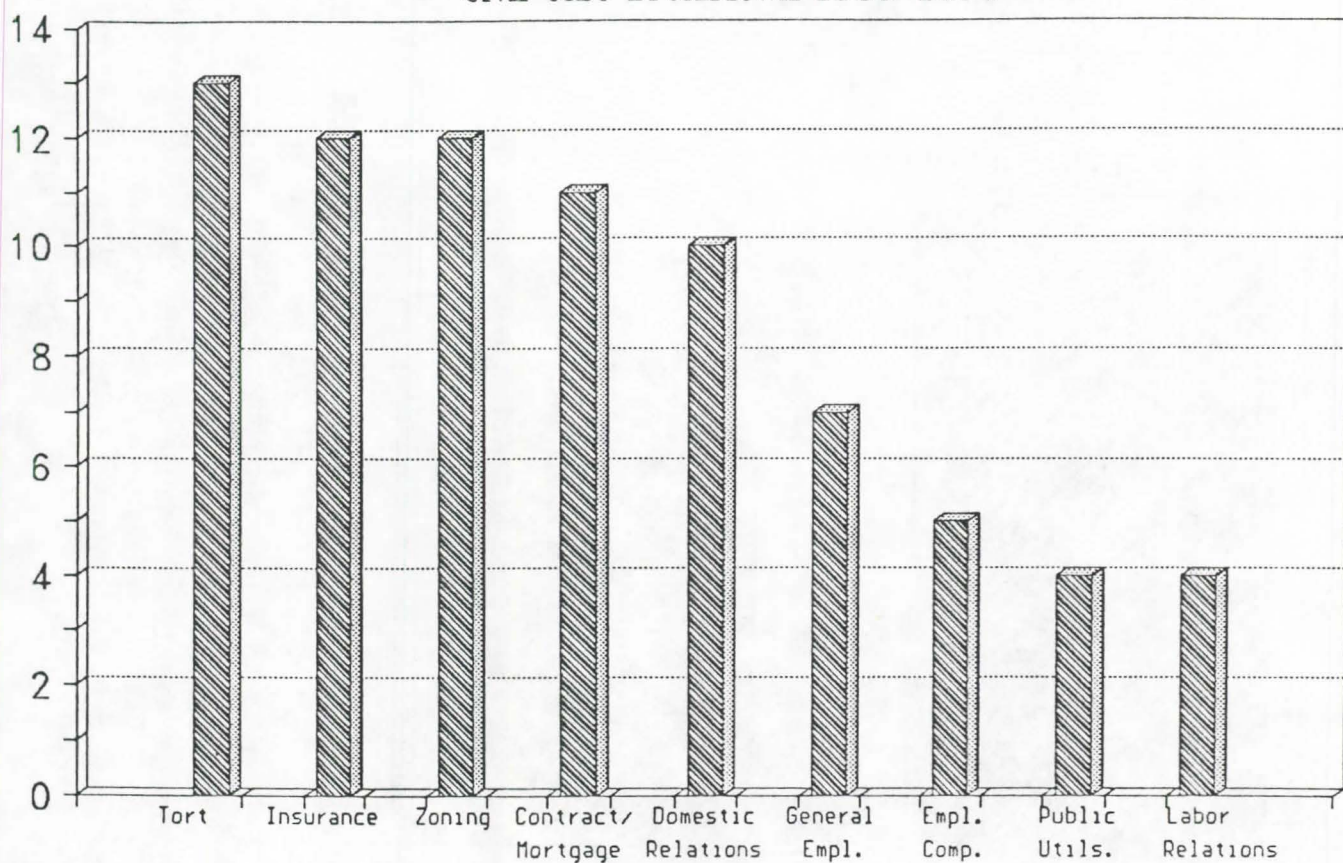
Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990



Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990

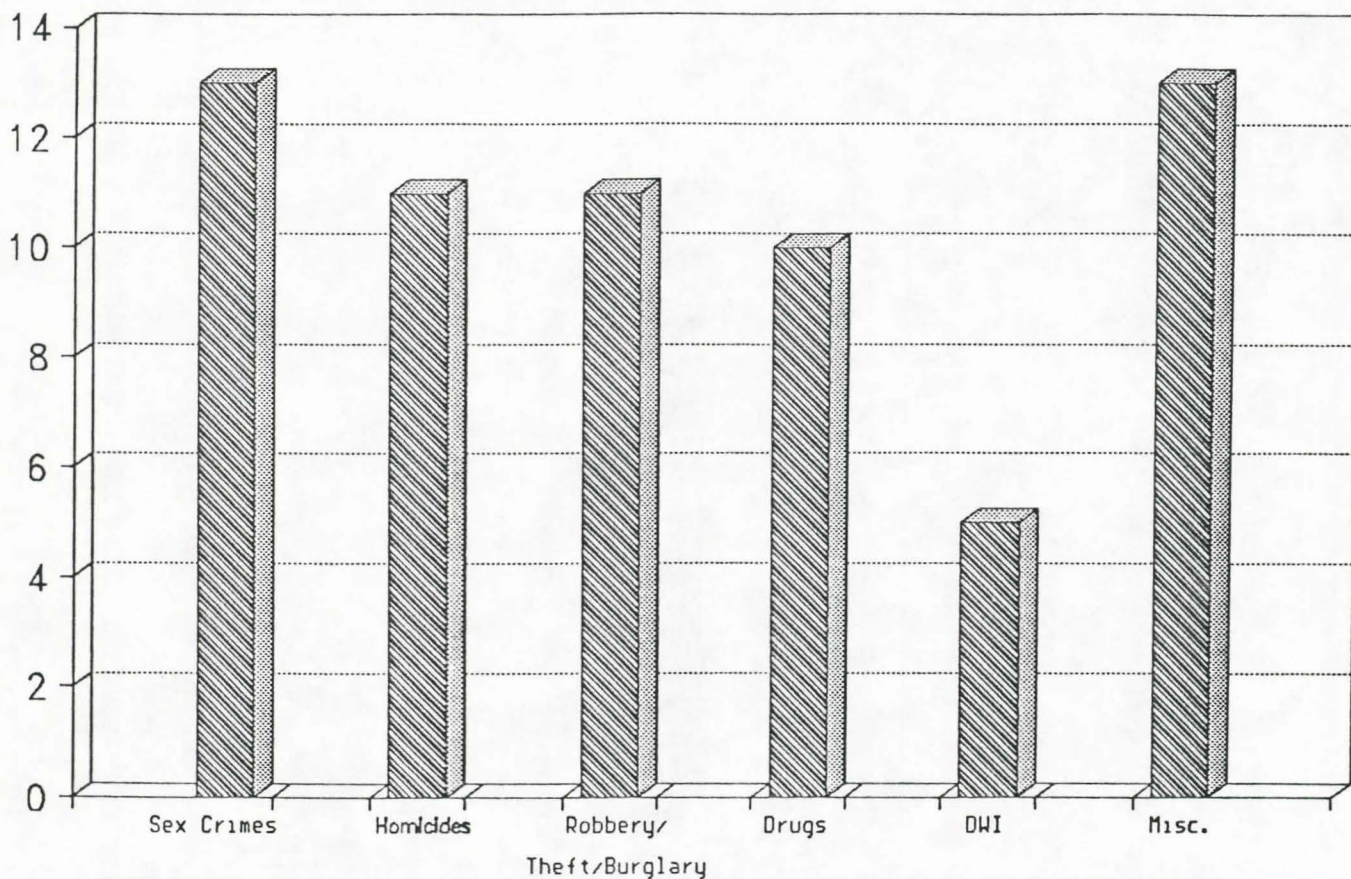


Justice David H. Souter
New Hampshire Supreme Court
Civil Case Breakdown 1983-1990



(NOTE: 30 civil cases which do not fall under the above categories, have been omitted.)

Justice David H. Souter
New Hampshire Supreme Court
Criminal Appeal Breakdown 1983-1990



Total criminal appeals = 63; Other criminal cases = 9; Total criminal cases = 72

JUSTICE DAVID H. SOUTER
New Hampshire Supreme Court
Majority Opinion Tabulation
1983-1990

CRIMINAL CASES

Offense	Cases	Convictions Affirmed	Reversed/Remanded
Automobile	1	1	
Drugs	10	10	
Homicide	11	10	1
(including attempt)			
Sex Crimes	13	11	2 ¹
Robbery/Theft/ Burglary	11	11	
DWI	5	5	
Receiving Stolen Property	3	2	1
Fugitive	1	1	
Assault	2	2	
Arson	2	2	
Forgery	2	2	
Leaving the Scene	1	1	
Attempted Escape	1	1	
	-----	-----	-----
	63 ²	59	4
		(93.7%)	(6.3%)

Miscellaneous Criminal Cases (parole, indigency, etc.) 9

TOTAL CRIMINAL CASES = 72

¹ Each of these decisions, *State v. Colbath*, 540 A.2d 1212 (N.H. 1988), and *State v. Baker*, 508 A.2d 1059 (N.H. 1986), is discussed in the Coalitions for America analysis, *David H. Souter: The Definition of Judging*.

² Twelve of these decisions are discussed in *David H. Souter: The Definition of Judging*.

CIVIL CASES

Category	Cases
Landlord/Tenant	1
Tort	13
Contract/Mortgage	11
Public Utilities	4
Probate	2
Insurance	12
Employment	7
Zoning	12
Domestic Relations (divorce, parental rights)	10
Trade Regulation	1
Habeas	1
Taxation	5
Labor Relations	4
Unemployment Comp.	7
Education	1
Eminent Domain	2
Civil Rights	1
Attorney Discipline	1
Libel	2
Involuntary Civil Commitment	3
Miscellaneous	15

TOTAL CIVIL CASES = 115³

³ Ten of these cases are discussed in *David H. Souter: The Definition of Judging*.

David Souter
~~Franklin~~
Gregory

MEMORANDUM

To: 721 Group & Allies
From: Thomas L. Jipping, J.D.
Re: Souter Nomination/"Red Flag" Decisions
Date: July 24, 1990

Needless to say, the Souter nomination is something of a "thud" for conservatives. Bush picked someone not on our "short list" who looks somewhat conservative but is a relative unknown. Analyses of this nomination will flourish in the days ahead. Here is a brief memo on the two New Hampshire Supreme Court decisions in which Justice Souter participated that our allies have flagged. Copies of the decisions are attached.

Opinion of the Justices
129 N.H. 290 (May 5, 1987)

In this case, the Supreme Court of New Hampshire, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of House Bill 70. That bill would prohibit homosexuals from adopting, being foster parents, or running day care centers, creating an irrebuttable presumption that they are unfit for these activities. Four justices, including Souter, joined this opinion.

The majority concluded that the proposed statute, as applied to adoption and foster care, would not violate equal protection, procedural or substantive due process, privacy, association, or other rights. The majority concluded that the proposed statute would violate the equal protection clause as applied to operating child care agencies and, therefore, did not evaluate that provision for any other constitutional defects.

I. Federal Equal Protection. The court concluded that homosexuals are not a suspect class requiring heightened scrutiny, do not qualify for "middle tier" scrutiny, and do not have a fundamental right to engage in sodomy. "There is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute." The proper test is whether the legislation is rationally related to a legitimate governmental purpose.

The court generally accepted "the assertion that the provision of appropriate role models is a legitimate governmental purpose." The court concluded: "It is our opinion that the exclusion of homosexuals, as narrowly defined by your resolution, from foster parentage and adoption can be found to be rationally related to the bill's purpose...to provide appropriate role models for children, but we are unable to conclude that such an exclusion vis-a-vis operators of all types of child care agencies is so related."

According to the court, "the source of sexual orientation...is thought to be a combination of genetic and environmental influences." The "role model theory" that persons in the position of parents serve as role models after whom children pattern themselves "most likely holds true in the parent-child or other familial context. We are not satisfied, however, that it would hold true outside such a context....Thus, we are unable to accept the role model theory as providing a rational basis on which to exclude homosexuals as a class from operating all of the types of facilities defined [in state law]."

II. State Equal Protection. Same analysis and conclusion.

III. Federal or State Due Process. The court concluded that there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."

IV. Right to Privacy. The court, following the U.S. Supreme Court's decision in *Bowers v. Hardwick* (1986), concluded that H.B.70 would not violate "any substantive right to privacy under either the State or Federal Constitution."

V. Freedom of Association. "Likewise, there is no infringement upon any right of freedom of association under either the Federal or State Constitution."

The court's decision with respect to adoption and foster care is certainly correct. It rejected the underpinnings of the homosexual agenda, that homosexuals have specific legal "rights" to engage in certain activities. The court's decision that the "role model" theory could not justify the exclusion from homosexuals from operating child care agencies is arguably defensible on strictly legal grounds but arguably indefensible on strictly policy grounds. This decision, and Souter's joining it, is essentially a correct one and should not, by itself, raise any serious concerns. A Justice Brennan or a Justice Marshall might well have joined the single dissenter in this case who thought every restriction on homosexuals in this bill was unconstitutional.

Smith v. Cote
513 A.2d 341 (1986)

In this medical malpractice case, a woman brought a "wrongful birth" claim against her physician for failing to discover the mother's rubella and advise her of the risk of potential birth defects if she became pregnant. She claimed this deprived her of information that would have led her to have an abortion.

The court held that a wrongful birth cause of action may be maintained in New Hampshire, extending its previous recognition of a "wrongful conception" cause of action arising from a negligently performed sterilization. The increased ability to predict and detect fetal abnormalities and the U.S. Supreme Court's decision in *Roe v. Wade* are two factors explaining widespread judicial acceptance of wrongful birth actions.

The plaintiff also brought a "wrongful life" claim, supposedly on behalf of her daughter born with congenital rubella syndrome. Using standard tort principles, the court concluded that "[i]n order to recognize Heather's wrongful life action, we must determine that the fetal Heather had an interest in avoiding her own birth, that it would have been better for *Heather* if she had not been born." The court refused to recognize this claim because of "compelling policy reasons."

Justice Souter joined the majority opinion but wrote a separate opinion to address the issue of "whether, or how, a physician with conscientious scruples against abortion, and the testing and counselling that may inform an abortion decision, can discharge his professional obligation without engaging in procedures that his religious or moral principles condemn. To say nothing about this issue could lead to misunderstanding." He concluded: "It does not follow, however, and I do not understand the court to hold, that a physician can discharge the obligation of due care in such circumstances only by personally ordering such tests and rendering such advice. The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."

The court's recognition of a wrongful birth cause of action is distressing though it is consistent with the pattern across the country. The birth of a child should never be considered a legal wrong warranting compensation for emotional distress and the costs of raising that child. Justice Souter joining the majority indicates he may be a "prudential" conservative in the sense of feeling bound by precedent. Nonetheless, he could legitimately have dissented, distinguishing the court's "wrongful conception" precedent. The obvious question is whether he might feel so bound by precedent that he would resist overruling truly bad precedents. His separate opinion is encouraging and indicates his careful attention to avoiding announcing rules broader than necessary to decide the particular case before the court. That makes him a "prudential" conservative as well. A Justice Brennan, Marshall, or Blackmun might well have said that keeping the abortion option available and attractive means that physicians' right of conscience must give way.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From David McIntosh to Bill Kristol et al Re: Nomination of Judge Souter (1 pp.)	08/06/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Liberman, Lee S.
Subseries: David H. Souter Files
WHORM Cat.:
File Location: Folder One: David H. Souter - Analysis 1]

Open on Expiration of PRA
(Document Follows)

By NED(NLGB) on 12/12/2007

Date Closed: 5/7/1998
FOIA/SYS Case #: 1998-0206-F[1]
Re-review Case #:
P-2/P-5 Review Case #:

OA/ID Number: 45254-004

MR Case #:
MR Disposition:
Disposition Date:

Appeal Case #:
Appeal Disposition:
Disposition Date:

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information



OFFICE OF THE VICE PRESIDENT

WASHINGTON

August 6, 1990

*David Souter
analysis*

MEMORANDUM FOR BILL KRISTOL
LEE LIBERMAN ✓
FRED NELSON

FROM: DAVID McINTOSH *David*

SUBJECT: Nomination of Judge Souter

For your information, attached are materials supporting the nomination of Judge Souter that were sent out by Paul Weyrich's group, Coalitions for America.

Since we don't have any White House equivalent, maybe we should direct our friends to Weyrich's organization.

ACTION MEMORANDUM

To: Judicial Nomination Allies
From: Thomas L. Jipping, J.D. 
Legal Affairs Analyst, Coalitions for America
Re: Nomination of David H. Souter
Date: July 30, 1990

As you know, on July 23 President Bush nominated U.S. Circuit Judge David H. Souter to replace retired Supreme Court Associate Justice William J. Brennan, Jr. Souter was not on among those individuals most often recommended for appointment. It is clear that President Bush tried to strike a balance between conservatism and consentability.

The Left is trying to find valid reasons openly to oppose Souter; they have been unable to do so. Alternatively, the left is trying to split and diminish conservative support; they should not be allowed to do so.

Coalitions for America has nearly completed our own independent analysis of Souter's record. It will be available soon. We have found no reason to oppose him and are finding many reasons to support him. It is important now to begin conservative grassroots support. It is, however, equally important to show the right kind of support.

The appropriate stance to take is a step removed from the individual and focuses on the criteria for a good Justice. President Bush used the same phrase half a dozen times at the press conference announcing Souter's nomination and we should continue using it: America needs a Justice who will interpret the Constitution and not legislate from the bench. Our message should be that it appears David Souter is this kind of Justice. This not only shows positive, yet slightly cautious, support for this nominee, it also puts us all on record about what we expect the next one to be.

Find a few items attached:

1. Generic talking points stressing themes, priorities, criteria. Use them, repeat them, emphasize them. Do not get caught up in the litmus test game, semantic bantering about stray sentences, or reactions to individual concurring opinions. Stress these general points and say that we are increasingly confident that Souter will be the kind of Justice that President Bush said he was nominating.

2. A preliminary Senate target list for letters, calls, etc. This is developed from raw data on nearly a dozen past roll call votes on judicial nominations and supplemented with some intuition and intelligence gathering. Its form does assume that things are/will become polarized. If they do not, the balance will shift toward the "favorable" category.

3. A short memorandum on two "red flag" decisions which conservatives have been discussing. Neither raises any serious cause for concern. Neither does the "advisory letter" printed in today's Washington Post. That letter - which expresses no opinion about abortion, no opinion about parental involvement, and no opinion about Roe v. Wade - reflects a narrow, restrained view of the proper role and function of judges. We support that view.

4. A short biography.

RECOMMENDED IMMEDIATE ACTION

You need to write and call Senators, especially those on the Judiciary Committee, to support the nomination. In doing so, stress the themes, oppose the litmus test, and create high expectations.

You need also (this is an opportunity we have missed in the past) make your voice heard to the Senators as they are home in their states during the August recess, roughly August 10 through Labor Day.

**PLEASE SEND US COPIES OF ANY LETTERS,
REPORTS OF ANY CONTACTS, CALLS, OR
OTHER ACTION YOU ARE ABLE TO DO !!
THIS IS ESSENTIAL TO KEEP TRACK OF THE TROOPS.**

Coalitions for America -- 721 Group

Talking Points for Letters to the Editor, Letters to Senators

(feel free to use as your own)

Presidential Mandate

The Constitution specifically defines two powers in the judicial selection process -- nomination and appointment -- both of which belong to the President. The Senate's role in the judicial selection process is, as a unanimous Supreme Court articulated earlier this year, strictly "limited to advise and consent." When the President submits a superbly qualified conservative nominee to the Senate, the Senate should consent to the nomination. The duty is to the Constitution -- not to a single issue litmus test.

Judicial Review -- Not Judicial Legislation

President Bush said that judges should "not legislate from the bench, but faithfully interpret the Constitution." He wants a strict constructionist who will adhere to the full text of the Constitution, not supplant his or her own view, however seemingly noble, over the actual text of the Constitution.

What the Law Is, Not what It "Ought" to Be

The country needs a Justice who will state what the law is, not what he or she thinks it ought to be. The power of judicial review which the Great Chief Justice John Marshall articulated is the power to interpret existing laws, not create new ones. Judicial review is not a veto power. The Framers of the Constitution mandated that the legislature -- not the court -- make policy. The framers explicitly rejected a proposal to make the judiciary a part of the Council of Revision.

Fidelity to a Written Constitution

Only when a law clearly and unmistakably conflicts with a constitutional provision or premise does the Constitution warrant judges to nullify the law. The province of the judiciary is law-not politics. Chief Justice John Marshall warned us to "never forget that it is a Constitution we are expounding." Jefferson voiced this same sentiment that judges were not to "make the Constitution a blank piece of paper" by taking the Constitution's name in vain to protect their own pet causes and issues. As John Marshall summed it up: "the peculiar circumstances of the moment may render a decision more or less wise, but it cannot make it more or less constitutional." The sole and only question in each and every case is whether the law comports with the text of the Constitution, and only those law which clearly conflict with the actual Constitution are unconstitutional. In a trial, we ask that

the jury be honest, impartial, and free from bias. Can't we ask at least -- as the Constitution dictates -- that the same be true for our judges?

"Laws Not Men"

We often hear our nation described as one governed by law not men. No one is above the law -- and that includes Justices. America needs a Justice who will not be above the Constitution but bound by duty to its actual text. Justices should not be blurred by emotions -- the duty is to the law. As Aristotle has said -- "law is reason, free from passion."

We want a Justice who will follow the law, not his or her own emotions. Former Justice William Brennan let his emotions override the Constitution's clear text -- in particular, with the death penalty. The Constitution clearly anticipates in four instances that the death penalty is a constitutionally permissible. Yet, Brennan let his personal notion of justice thwart not only the mandate of the legislature, but also the Constitution. The Constitution does not bar the death penalty if legislatures enact statutes which conform to due process. America needs judges who will faithfully follow the Constitution -- not their own personal visions of justice. Justices cannot pick and choose which parts of the Constitution to interpret -- they must interpret all of the Constitution.

America needs a Justice who will not rewrite the Constitution according to his or her predilections and prejudices. America needs a Justice who will interpret the actual Constitution and all of its text -- and not selectively disregard certain provisions which he or she dislikes. The duty is to the law, the duty is to the Constitution.

The Constitution -- Not Interpretations

America needs a Justice who will fight to defend the Constitution -- not *Roe v. Wade*. When precedent conflicts with the Constitution, the Constitution must win. To quote Justice Felix Frankfurter -- "the ultimate touchstone of the Constitution is the Constitution, not what we have said about it." In other words, the ultimate duty is to the Constitution -- not to precedents which are not ultimately based in the actual words of the Constitution.

Justice is Not One-Sided

As Justice Louis Brandeis has avowed: "Justice is due to the accuser as well as the accused." We often speak of CRIMINAL JUSTICE; yet, the liberals have an extremely myopic view -- seeing only the criminal. It is about time that we have a Justice who will put "justice" back into criminal justice. The very first sentence of the Constitution -- the very first mandate -- is to "establish

Justice." Justice demands "justice" for the victim in addition to the deserved punishment of the criminal.

Presumption of Innocence

The two-fold aim of "justice" is that "the guilty will not escape nor innocent suffer." America needs a Justice who will not let the "guilty escape" due to a mere technicality. In addition, we want a Justice who will not make the innocent suffer in the name of affirmative action. The presumption of innocence should not be used by Justices merely when it is convenient -- it is a permanent rule. Two wrongs do not make a (constitutional?) right. In the recent FCC case, a five Justice majority stated that it was o.k for the government to discriminate against whites -- that it was benign discrimination. As Justice Sandra Day O'Connor retorted in dissent, "'benign racial classification' is a contradiction in terms." Equal protection of the laws extend to ALL citizens, regardless of color. America needs a Justice who will protect the rights of ALL Americans. The Constitution clearly states that the rule is NO DISCRIMINATION -- PERIOD!

Unenumerated Rights

As the Ninth Amendment states, the Bill of Rights is not an exhaustive list of the rights retained by the people. But these rights are to be conferred by a legislature, not invented by the judiciary.

We the People -- Government by the People, Not the Judiciary

In America, the legitimacy of government rests ultimately with the people. In America, the people rule, not nine lawyers -- their duty is to guard rights which are actually in the Constitution, not those concocted out of thin air.

Right to Vote in a Democratic Republic

The most precious American right -- the right to vote -- will not be tossed aside. In our America--the people's right to choose -- the right to vote -- will be taken seriously. In our America, "We the people" -- not the judges -- will rule.

-- David Baloga, Patrick McGuigan

MEMORANDUM

To: 721 Group & Allies
From: Thomas L. Jipping, J.D. 
Re: Souter Nomination/"Red Flag" Decisions
Date: July 24, 1990

Needless to say, the Souter nomination is something of a "thud" for conservatives. Bush picked someone not on our "short list" who looks somewhat conservative but is a relative unknown. Analyses of this nomination will flourish in the days ahead. Here is a brief memo on the two New Hampshire Supreme Court decisions in which Justice Souter participated that our allies have flagged. Copies of the decisions are attached.

Opinion of the Justices 129 N.H. 290 (May 5, 1987)

In this case, the Supreme Court of New Hampshire, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of House Bill 70. That bill would prohibit homosexuals from adopting, being foster parents, or running day care centers, creating an irrebuttable presumption that they are unfit for these activities. Four justices, including Souter, joined this opinion.

The majority concluded that the proposed statute, as applied to adoption and foster care, would not violate equal protection, procedural or substantive due process, privacy, association, or other rights. The majority concluded that the proposed statute would violate the equal protection clause as applied to operating child care agencies and, therefore, did not evaluate that provision for any other constitutional defects.

I. Federal Equal Protection. The court concluded that homosexuals are not a suspect class requiring heightened scrutiny, do not qualify for "middle tier" scrutiny, and do not have a fundamental right to engage in sodomy. "There is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute." The proper test is whether the legislation is rationally related to a legitimate governmental purpose.

The court generally accepted "the assertion that the provision of appropriate role models is a legitimate governmental purpose." The court concluded: "It is our opinion that the exclusion of homosexuals, as narrowly defined by your resolution, from foster parentage and adoption can be found to be rationally related to the bill's purpose...to provide appropriate role models for children, but we are unable to conclude that such an exclusion vis-a-vis operators of all types of child care agencies is so related."

According to the court, "the source of sexual orientation...is thought to be a combination of genetic and environmental influences." The "role model theory" that persons in the position of parents serve as role models after whom children pattern themselves "most likely holds true in the parent-child or other familial context. We are not satisfied, however, that it would hold true outside such a context....Thus, we are unable to accept the role model theory as providing a rational basis on which to exclude homosexuals as a class from operating all of the types of facilities defined [in state law]."

II. State Equal Protection. Same analysis and conclusion.

III. Federal or State Due Process. The court concluded that there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."

IV. Right to Privacy. The court, following the U.S. Supreme Court's decision in *Bowers v. Hardwick* (1986), concluded that H.B.70 would not violate "any substantive right to privacy under either the State or Federal Constitution."

V. Freedom of Association. "Likewise, there is no infringement upon any right of freedom of association under either the Federal or State Constitution."

The court's decision with respect to adoption and foster care is certainly correct. It rejected the underpinnings of the homosexual agenda, that homosexuals have specific legal "rights" to engage in certain activities. The court's decision that the "role model" theory could not justify the exclusion from homosexuals from operating child care agencies is arguably defensible on strictly legal grounds but arguably indefensible on strictly policy grounds. This decision, and Souter's joining it, is essentially a correct one and should not, by itself, raise any serious concerns. A Justice Brennan or a Justice Marshall might well have joined the single dissenter in this case who thought every restriction on homosexuals in this bill was unconstitutional.

Smith v. Cote
513 A.2d 341 (1986)

In this medical malpractice case, a woman brought a "wrongful birth" claim against her physician for failing to discover the mother's rubella and advise her of the risk of potential birth defects if she became pregnant. She claimed this deprived her of information that would have led her to have an abortion.

The court held that a wrongful birth cause of action may be maintained in New Hampshire, extending its previous recognition of a "wrongful conception" cause of action arising from a negligently performed sterilization. The increased ability to predict and detect fetal abnormalities and the U.S. Supreme Court's decision in *Roe v. Wade* are two factors explaining widespread judicial acceptance of wrongful birth actions.

The plaintiff also brought a "wrongful life" claim, supposedly on behalf of her daughter born with congenital rubella syndrome. Using standard tort principles, the court concluded that "[i]n order to recognize Heather's wrongful life action, we must determine that the fetal Heather had an interest in avoiding her own birth, that it would have been better for *Heather* if she had not been born." The court refused to recognize this claim because of "compelling policy reasons."

Justice Souter joined the majority opinion but wrote a separate opinion to address the issue of "whether, or how, a physician with conscientious scruples against abortion, and the testing and counselling that may inform an abortion decision, can discharge his professional obligation without engaging in procedures that his religious or moral principles condemn. To say nothing about this issue could lead to misunderstanding." He concluded: "It does not follow, however, and I do not understand the court to hold, that a physician can discharge the obligation of due care in such circumstances only by personally ordering such tests and rendering such advice. The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."

The court's recognition of a wrongful birth cause of action is distressing though it is consistent with the pattern across the country. The birth of a child should never be considered a legal wrong warranting compensation for emotional distress and the costs of raising that child. Justice Souter joining the majority indicates he may be a "prudential" conservative in the sense of feeling bound by precedent. Nonetheless, he could legitimately have dissented, distinguishing the court's "wrongful conception" precedent. The obvious question is whether he might feel so bound by precedent that he would resist overruling truly bad precedents. His separate opinion is encouraging and indicates his careful attention to avoiding announcing rules broader than necessary to decide the particular case before the court. That makes him a "prudential" conservative as well. A Justice Brennan, Marshall, or Blackmun might well have said that keeping the abortion option available and attractive means that physicians' right of conscience must give way.

The American Bench (1987)

SOUTER, David Hackett (*Associate Justice, New Hampshire Supreme Court*) Appointed by governor to term beginning 1983. Born Melrose Massachusetts Sept 17, 1939 to Joseph Alexander and Helen Adams Hackett Souter. Episcopalian. Educated at Harvard University B.A. 1961 LL.B. 1966 and Oxford University, England 1961-63. Rhodes Scholar. Member Phi Beta Kappa. Admitted to practice New Hampshire. In legal practice Concord 1966-68. Associate Justice, New Hampshire Superior Court 1978-83.

Assistant Attorney General 1968-71. Deputy Attorney General 1971-76 and Attorney General 1976-78 New Hampshire. Member New Hampshire and American Bar Associations. Republican. Trustee Concord Hospital 1973-85 (President Board of Trustees 1978-84). Board of Overseers Dartmouth Medical School since 1981. Member New Hampshire Historical Society (Trustee 1976-85. Vice President 1980-85).

Office: Supreme Court Building, Noble Drive. Concord 03301.

Telephone: (603) 271-3660.

Who's Who in American Law 1990-91 (1989)

SOUTER, DAVID HACKETT, state supreme court justice: b. Melrose, Mass., Sept. 17, 1939; s. Joseph Alexander and Helen Adams (Hackett) S. BA. Harvard U., 1961, LL.B. 1966; Rhodes scholar, Oxford U., 1961-63. MA. 1969. Bar: N.H. Assoc. firm Orr & Reno, Concord, 1966-68; asst. atty. gen. N.H. 1968-71, dep. atty. gen., 1971-76, atty. gen., 1976-78; assoc. justice Superior Ct. N.H., 1978-83, N.H. Supreme Ct., 1983—. Trustee Concord Hosp., 1973-85, pres. bd. trustees, 1978-84; bd. overseers Dartmouth Med. Sch., 1981-87. Mem. Am. Bar Assn., N.H. Bar Assn., N.H. Hist. Soc. (v.p. 1980-85, trustee 1976-85), Phi Beta Kappa, Republican, Episcopalian. Judicial administration. Home: 34 Gillev Hill Rd Weare NH 03231 Office: Supreme Ct Noble Dr Concord NH 03301

DRAFT AS OF 7-25-90

phone numbers (202-224-****)

Senate Judiciary Committee

Biden	(D-DE)	5042	Thurmond	(R-SC)	5972
Kennedy	(D-MA)	2417	Hatch	(R-UT)	5251
Metzenbaum	(D-OH)	2315	Simpson	(R-WY)	3424
DeConcini	(D-AZ)	3464	Grassley	(R-IA)	0473
Leahy	(D-VT)	4242	Specter	(R-PA)	4254
Heflin	(D-AL)	3419	Humphrey	(R-NH)	1353
Simon	(D-IL)	2152			

(special priority committee targets in **BOLD**)

SOLID IN FAVOR		LEANING IN FAVOR		LEANING AGAINST *		SOLIDLY AGAINST *	
Armstrong	(R-CO) 5941	Exon	(D-NE) 5922	Bingaman	(D-NM) 5521	Adams	(D-WA) 2621
Bond	(R-MO) 5721	Boren	(D-OK) 4721	Dixon	(D-IL) 2854	Akaka	(D-HA) 6361
Boschwitz	(R-MN) 5641	Breaux	(D-LA) 4623	Graham	(D-FL) 3041	Biden	(D-DE) 5042
Cochran	(R-MS) 5054	DeConcini	(D-AZ) 4521	Nunn	(D-GA) 3521	Bradley	(D-NJ) 3224
D'Amato	(R-NY) 6542	Ford	(D-KY) 4343	Pell	(D-RI) 4642	Bumpers	(D-AR) 4843
Danforth	(R-MO) 6154	Heflin	(D-AL) 3419	Sanford	(D-NC) 3154	Burdick	(D-ND) 2551
Dole	(R-KS) 6521	Johnston	(D-LA) 5824	Chafee	(R-RI) 2921	Conrad	(D-ND) 2043
Domenici	(R-NM) 6621	Shelby	(D-AL) 5744	Jeffords	(R-VT) 5141	Cranston	(D-CA) 3553
Durenberger	(R-MN) 3244	Specter	(R-PA) 4254	Warner	(R-VA) 2023	Daschle	(D-SD) 2321
Heinz	(R-PA) 6324	Cohen	(R-ME) 2523	Reid	(D-NV) 3542	Dodd	(D-CT) 2823
Garn	(R-UT) 5444	Wilson	(R-CA) 3841	Bryan	(D-NV) 6244	Fowler	(D-GA) 3643
Gramm	(R-TX) 2934	Packwood	(R-OR) 5244	Pryor	(D-AR) 2353	Glenn	(D-OH) 3353
Grassley	(R-IA) 3744	Shelby	(D-AL) 5744	Robb	(D-VA) 4024	Harkin	(D-IA) 3254
Hatch	(R-UT) 5251			Bentsen	(D-TX) 5922	Inouye	(D-HA) 3934
Hollings	(D-SC) 6121					Kennedy	(D-MA) 4543
Kassebaum	(R-KS) 4774					Kerry	(D-MA) 2742
Helms	(R-NC) 6342					Kohl	(D-WI) 5653
Humphrey	(R-NH) 2841					Lautenberg	(D-NJ) 4744
Kasten	(R-WI) 5323					Levin	(D-MI) 6221
Lugar	(R-IN) 4844					Metzenbaum	(D-OH) 2315
McCain	(R-AZ) 2235					Mikulski	(D-MD) 4654
McClure	(R-ID) 2752					Mitchell	(D-ME) 5344
McConnell	(R-KY) 2541					Moynihan	(D-NY) 4451
Murkowski	(R-AK) 6665					Byrd	(D-WV) 5244
Nickles	(R-OK) 5754					Riegle	(D-MI) 4822
Pressler	(R-SD) 5842					Rockefeller	(D-WV) 6472
Roth	(R-DE) 2441					Sarbanes	(D-MD) 4524
Rudman	(R-NH) 3324					Simon	(D-IL) 2152
Simpson	(R-WY) 3424					Wirth	(D-CO) 5852
Stevens	(R-AK) 3004					Baucus	(D-MT) 2651
Symms	(R-ID) 5623					Leahy	(D-VT) 4242
Burns	(R-MT) 2644					Sasser	(D-TN) 3344
Coats	(R-IN) 5623					Gore	(D-TN) 4944
Lott	(R-MS) 6253						
Mack	(R-FL) 5274						
Wallop	(R-WY) 6441						
Thurmond	(R-SC) 1300						
Hatfield	(R-OR) 3753						
Gorton	(R-WA) 3441						

BUCK-PAC

Leiberman (D-CT) 4041

* Assuming events become polarized

Mailing address for all Senators:
 The Honorable _____
 U.S. Senate
 Washington, D.C. 20510

MEMORANDUM

To: 721 Group & Allies
From: Thomas L. Jipping, J.D. 
Re: Souter Nomination/"Red Flag" Decisions
Date: July 24, 1990

Needless to say, the Souter nomination is something of a "thud" for conservatives. Bush picked someone not on our "short list" who looks somewhat conservative but is a relative unknown. Analyses of this nomination will flourish in the days ahead. Here is a brief memo on the two New Hampshire Supreme Court decisions in which Justice Souter participated that our allies have flagged. Copies of the decisions are attached.

Opinion of the Justices 129 N.H. 290 (May 5, 1987)

In this case, the Supreme Court of New Hampshire, at the request of the state House of Representatives, rendered an advisory opinion on the constitutionality of House Bill 70. That bill would prohibit homosexuals from adopting, being foster parents, or running day care centers, creating an irrebuttable presumption that they are unfit for these activities. Four justices, including Souter, joined this opinion.

The majority concluded that the proposed statute, as applied to adoption and foster care, would not violate equal protection, procedural or substantive due process, privacy, association, or other rights. The majority concluded that the proposed statute would violate the equal protection clause as applied to operating child care agencies and, therefore, did not evaluate that provision for any other constitutional defects.

I. Federal Equal Protection. The court concluded that homosexuals are not a suspect class requiring heightened scrutiny, do not qualify for "middle tier" scrutiny, and do not have a fundamental right to engage in sodomy. "There is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute." The proper test is whether the legislation is rationally related to a legitimate governmental purpose.

The court generally accepted "the assertion that the provision of appropriate role models is a legitimate governmental purpose." The court concluded: "It is our opinion that the exclusion of homosexuals, as narrowly defined by your resolution, from foster parentage and adoption can be found to be rationally related to the bill's purpose...to provide appropriate role models for children, but we are unable to conclude that such an exclusion vis-a-vis operators of all types of child care agencies is so related."

According to the court, "the source of sexual orientation...is thought to be a combination of genetic and environmental influences." The "role model theory" that persons in the position of parents serve as role models after whom children pattern themselves "most likely holds true in the parent-child or other familial context. We are not satisfied, however, that it would hold true outside such a context....Thus, we are unable to accept the role model theory as providing a rational basis on which to exclude homosexuals as a class from operating all of the types of facilities defined [in state law]."

II. State Equal Protection. Same analysis and conclusion.

III. Federal or State Due Process. The court concluded that there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore required. No issue of substantive due process is raised because the bill furthers "the government's legitimate objective of providing adopted and foster children with appropriate parental role models."

IV. Right to Privacy. The court, following the U.S. Supreme Court's decision in *Bowers v. Hardwick* (1986), concluded that H.B.70 would not violate "any substantive right to privacy under either the State or Federal Constitution."

V. Freedom of Association. "Likewise, there is no infringement upon any right of freedom of association under either the Federal or State Constitution."

The court's decision with respect to adoption and foster care is certainly correct. It rejected the underpinnings of the homosexual agenda, that homosexuals have specific legal "rights" to engage in certain activities. The court's decision that the "role model" theory could not justify the exclusion from homosexuals from operating child care agencies is arguably defensible on strictly legal grounds but arguably indefensible on strictly policy grounds. This decision, and Souter's joining it, is essentially a correct one and should not, by itself, raise any serious concerns. A Justice Brennan or a Justice Marshall might well have joined the single dissenter in this case who thought every restriction on homosexuals in this bill was unconstitutional.

Smith v. Cote
513 A.2d 341 (1986)

In this medical malpractice case, a woman brought a "wrongful birth" claim against her physician for failing to discover the mother's rubella and advise her of the risk of potential birth defects if she became pregnant. She claimed this deprived her of information that would have led her to have an abortion.

The court held that a wrongful birth cause of action may be maintained in New Hampshire, extending its previous recognition of a "wrongful conception" cause of action arising from a negligently performed sterilization. The increased ability to predict and detect fetal abnormalities and the U.S. Supreme Court's decision in *Roe v. Wade* are two factors explaining widespread judicial acceptance of wrongful birth actions.

The plaintiff also brought a "wrongful life" claim, supposedly on behalf of her daughter born with congenital rubella syndrome. Using standard tort principles, the court concluded that "[i]n order to recognize Heather's wrongful life action, we must determine that the fetal Heather had an interest in avoiding her own birth, that it would have been better for *Heather* if she had not been born." The court refused to recognize this claim because of "compelling policy reasons."

Justice Souter joined the majority opinion but wrote a separate opinion to address the issue of "whether, or how, a physician with conscientious scruples against abortion, and the testing and counselling that may inform an abortion decision, can discharge his professional obligation without engaging in procedures that his religious or moral principles condemn. To say nothing about this issue could lead to misunderstanding." He concluded: "It does not follow, however, and I do not understand the court to hold, that a physician can discharge the obligation of due care in such circumstances only by personally ordering such tests and rendering such advice. The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."

The court's recognition of a wrongful birth cause of action is distressing though it is consistent with the pattern across the country. The birth of a child should never be considered a legal wrong warranting compensation for emotional distress and the costs of raising that child. Justice Souter joining the majority indicates he may be a "prudential" conservative in the sense of feeling bound by precedent. Nonetheless, he could legitimately have dissented, distinguishing the court's "wrongful conception" precedent. The obvious question is whether he might feel so bound by precedent that he would resist overruling truly bad precedents. His separate opinion is encouraging and indicates his careful attention to avoiding announcing rules broader than necessary to decide the particular case before the court. That makes him a "prudential" conservative as well. A Justice Brennan, Marshall, or Blackmun might well have said that keeping the abortion option available and attractive means that physicians' right of conscience must give way.

The American Bench (1987)

SOUTER, David Hackett (*Associate Justice, New Hampshire Supreme Court*) Appointed by governor to term beginning 1983. Born Melrose Massachusetts Sept 17, 1939 to Joseph Alexander and Helen Adams Hackett Souter. Episcopalian. Educated at Harvard University B.A. 1961 LL.B. 1966 and Oxford University, England 1961-63. Rhodes Scholar. Member Phi Beta Kappa. Admitted to practice New Hampshire. In legal practice Concord 1966-68. Associate Justice, New Hampshire Superior Court 1978-83.

Assistant Attorney General 1968-71. Deputy Attorney General 1971-76 and Attorney General 1976-78 New Hampshire. Member New Hampshire and American Bar Associations. Republican. Trustee Concord Hospital 1973-85 (President Board of Trustees 1978-84). Board of Overseers Dartmouth Medical School since 1981. Member New Hampshire Historical Society (Trustee 1976-85. Vice President 1980-85).

Office: Supreme Court Building, Noble Drive, Concord 03301.

Telephone: (603) 271-3660.

Who's Who in American Law 1990-91 (1989)

SOUTER, DAVID HACKETT, state supreme court justice; b. Melrose, Mass., Sept. 17, 1939; s. Joseph Alexander and Helen Adams (Hackett) S. BA, Harvard U., 1961, LLB, 1966; Rhodes scholar, Oxford U., 1961-63, MA, 1969. Bar: N.H., Assoc. firm Orr & Reno, Concord, 1966-68; asst. atty. gen. N.H. 1968-71, dep. atty. gen., 1971-76, atty. gen., 1976-78; assoc. justice Superior Ct. N.H., 1978-83, N.H. Supreme Ct., 1983—. Trustee Concord Hosp., 1973-85, pres. bd. trustees, 1978-84; bd. overseers Dartmouth Med. Sch., 1981-87. Mem. Am. Bar Assn., N.H. Bar Assn., N.H. Hist. Soc. (v.p. 1980-85, trustee 1976-85), Phi Beta Kappa, Republican, Episcopalian. Judicial administration. Home: 24 Cillev Hill Rd Weare NH 03281 Office: Supreme Ct Noble Dr Concord NH 03301



Douglas Johnson
analyst

FOR IMMEDIATE RELEASE:
Saturday, July 21, 1990

FOR FURTHER INFORMATION:
Douglas Johnson, Legislative Director
(202) 626-8820, (301) 502-1170
Nancy Myers, Communications Director
(202) 626-8825, (202) 544-8116

**NATIONAL RIGHT TO LIFE COMMITTEE EXPRESSES CONFIDENCE
IN BUSH'S STATED INTENT TO APPOINT CONSTRUCTIONIST JUSTICE**

Commenting on the retirement of Supreme Court Justice William Brennan, National Right to Life Committee (NRLC) spokesman Douglas Johnson said: "We trust that President Bush will nominate, as he said yesterday, 'somebody who will be on there [the Supreme Court] not to legislate from the bench, but to faithfully interpret the Constitution.'"

The President's statement echoed the position he took during his election campaign.

Johnson commented: "Roe v. Wade was judicial legislation at its most extreme. Any jurist who meets the President's criteria of faithfulness to the real Constitution could not vote to reaffirm Roe v. Wade."

In Roe, Brennan and six other justices manufactured a "fundamental right" to abortion, which was applied in subsequent cases to invalidate virtually any direct restrictions on abortion, even during the final three months of pregnancy. However, beginning with the 1989 Webster decision, there have been only four votes on the Supreme Court to treat abortion as a "fundamental right." In Webster, four justices (Rehnquist, White, Kennedy, and Scalia) wanted to overturn Roe, explicitly or in effect, while Justice O'Connor has continued to review abortion restrictions under her "undue burden" analysis-- a standard considerably less stringent than the extreme approach of the four pro-Roe justices (Brennan, Blackmun, Marshall, and Stevens). "Brennan's replacement by a judicial constructionist would continue the trend towards abandonment of a tragic constitutional error," Johnson said. "As a result, legislators should be free to adopt stronger legal protections for unborn babies."

NRLC is the nation's major pro-life organization, representing about 3,000 local chapters.

#####



national RIGHT TO LIFE committee, inc.

Suite 402 4th Street N.W.
Washington D.C. 20044-2700 (202) 626-8800

David Souter -
R-9/90

NATIONAL RIGHT TO LIFE STATEMENT ON CERTAIN ISSUES RELATING TO THE SOUTER NOMINATION

July 26, 1990

FOR FURTHER INFORMATION: Douglas Johnson, Legislative Director
(202) 626-8820, (301) 502-1170

As we said on the day the President announced his selection, July 23, as far as we know, Judge Souter has not expressed a judgment on Roe v. Wade. His overall approach appears to be that of judicial restraint and adherence to the text of the Constitution. We feel comfortable with that approach, since Roe v. Wade has no basis in the text of the Constitution.

Judge Souter joined in one opinion recognizing a limited cause of action for "wrongful birth" in New Hampshire. The court held that it was compelled by Roe v. Wade to so rule. While we believe the case should have been decided the other way, it reveals nothing regarding Judge Souter's views on whether Roe v. Wade is a correct interpretation of the Constitution.

The letter written in 1981 by Judge Souter-- on behalf of the entire committee of Superior Court judges-- to a state legislator, expressing opposition to enactment of a law permitting state judges to either authorize or deny authorization for an abortion to be performed without parental consent on a minor, reveals nothing regarding Judge Souter's views on Roe v. Wade-- or for that matter, his views regarding abortion or the legality of abortion.

Souter once sat on the boards of Concord Hospital (1972-85) and of Dartmouth Hitchcock Medical School (1981-87). Reportedly, abortions were performed at both institutions, but Souter's role in these pro-abortion policies remains unclear.

It still appears that Judge Souter is an advocate of judicial restraint, and we continue to believe that Roe v. Wade cannot survive scrutiny by judicial constructionists.

#####