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Court's Balance May Shift on Some Divisive Issues

Another Conservative Voice Could Be Critical in Areas Such as Civil Rights, State Authority

By Ruth Marcus
Washington Post Staff Writer

Five years ago, when liberal members of the Supreme Court managed to scrape together a five-justice majority to overrule a 1976 case limiting the federal government's power over states, Chief Justice William H. Rehnquist issued a dissent—and a prediction.

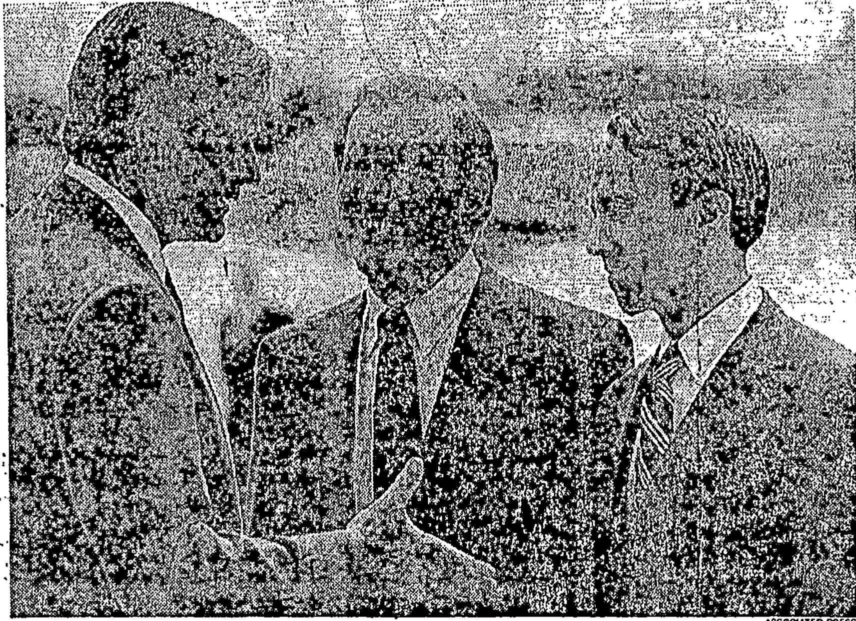
Some day, said Rehnquist, the author of the jettisoned decision, his view of federalism would prevail. "I am confident," he said, that his position will "in time again command the support of a majority of this Court."

With the retirement of Justice William J. Brennan Jr., that time may have arrived.

The dispute over an arcane though important question of the scope of congressional authority over the states underscores the broad potential impact of Brennan's departure and the tenuous hold of some key liberal victories.

NEWS ANALYSIS

Most public debate since Brennan's surprise announcement has focused on the future of abortion rights. Without Brennan, it is clear, the 1973 *Roe v. Wade* decision—in which seven justices agreed that there is a fundamental constitutional right to abortion—now has just three firm supporters on the court: its author, Justice Harry A. Blackmun, and Justices Thurgood Marshall and John Paul Stevens.



ASSOCIATED PRESS
President Bush reaches to shake hands with Souter as Sen. Warren B. Rudman (R-N.H.) looks on Friday.

But the resignation of the court's foremost liberal has far larger implications for the future of constitutional law and the role of the court in some of the most divisive social issues of the day.

Brennan's absence, combined with the likely confirmation of federal appeals court Judge David H. Souter, nominated last week by President Bush to replace him, strengthens the court's fragile conservative majority. It is likely to tilt the balance of power in conservatives' favor in cases involving civil rights, separation of church and state, the role of the federal courts, and the power of states versus the federal government.

While conservatives already have the upper hand in such areas as capital punishment and the rights of criminal defendants, the addition of another conservative voice could mark an end to the already rare instances in which liberals are able to cobble together a majority in such cases, and a further erosion of already weakened precedents in the criminal law area.

"All the chips are in the middle of the table," said Charles J. Cooper, an assistant attorney general in the Reagan administration and architect of much of its legal philosophy. "We may well be on the precipice in which the court will stablilize and become predictably conservative in the same way that the Warren court was predictably liberal," Cooper said.

"There are a large number of cases in many important areas where a switch of one vote could have severe consequences. . . . The doctrines are at risk," said Norman Dorsen, president of the American Civil Liberties Union.

The shift, when it comes, will be the culmination of a process that began with the appointment of now-retired Chief Justice Warren E. Burger in 1969.

With Souter, Republicans will have made nine consecutive appointments to the high court (although two of those picks, Richard M. Nixon's selection of Blackmun and Gerald R. Ford's selection of Stevens, have turned out to be disappointments to conservatives.) The last justice to be named by a Democratic president was Marshall, in 1967.

The new court may not manifest itself dramatically overnight. It takes time for some issues to percolate up through the lower courts to the Supreme Court. The court's respect for precedent—even decisions with which a majority may now disagree—may put a brake on wholesale change.

And the justices are not likely to disturb some of the Warren court's landmark rulings, now entrenched in the law and society—cases like the Miranda decision, the one-man, one-vote ruling, or the decision excluding prayer from public schools.

"I think there will be a sense on the part of a substantial number of the conservative justices about preserving the court's capital and not going so fast that it impairs the court's prestige as an institution," said University of Chicago Law School dean Geoffrey Stone, a former Brennan clerk.

But whether Souter turns out to be an outspoken, aggressive advocate for change in the manner of Justice Antonin Scalia or a swing voter and force for narrowly written rulings in the mode of Justice Sandra Day O'Connor, the likelihood appears high of an eventual—and perhaps a speedy—transformation in some of the most controversial areas within the court's purview.

An examination of the dwindling number of 5 to 4 rulings during Brennan's final years on the bench offers a road map of the areas of likely change. During the last term, for example, he voted with the majority in a dozen 5 to 4 decisions.

A few of those rulings, like the decision striking down the federal flag desecration statute, did not break down along ideological lines. Two of the court's most conservative members, Scalia and Justice Anthony M. Kennedy, provided the margin of victory in the flag case, and how Souter would vote if confronted with such a statute cannot be predicted.

But others—expanding Congress's power to enact affirmative action programs; allowing federal judges to order local school boards to raise property taxes to pay for desegregation plans; or striking down most political patronage in hiring and promotion—appear unlikely to survive on a court without Brennan.

Justice Byron R. White provided the margin of victory in each of those cases. "If we assume for a moment that Souter will be more like Rehnquist than like White, then White becomes irrelevant in terms of the transition of this court to a more reliably conservative court," Cooper said.

The impact of the change could be felt as early as the term beginning Oct. 1, when the court hears its first school desegregation dispute in more than a decade. The case involves Oklahoma City's attempts to dismantle its court-ordered busing plan and could determine the duties of school boards throughout the country to maintain desegregated schools.

The court also will decide a sex-discrimination case involving whether companies can exclude fertile women from certain jobs in order to protect their fetuses, and it will consider whether punitive damages can be so large as to violate due process.

And, in a case that could offer the first glimpse of Souter's view on both abortion and free speech, the court will review Reagan administration regulations that prohibit federally funded family planning clinics from providing any information about abortion, although it is unlikely that the court in that case will confront *Roe* head-on.

In the longer run, however, the abortion decision is clearly in jeopardy. With Souter apparently hostile to the idea of affirmative action, as indicated in a 1976 speech, the court is also likely to cut back on congressional power to enact affirmative action programs (following on its 1989 decision restricting state and local power), and perhaps to limit the ability of employers to adopt voluntary racial preference programs as well.

With the addition of Souter, the court could go further in what Dorsen and other civil libertarians view as the dismantling of the wall between church and state, allowing more government aid to religious groups and parochial schools or perhaps upholding a moment of silence in public schools.

In the criminal law area, some of the few liberal victories in the past several years are candidates for overruling—for example, the decisions excluding "victim impact" statements from consideration in death penalty cases.

And it is likely to continue what Brennan and his fellow liberals have asserted is the "evisceration" of Fourth Amendment protections against unreasonable search and seizure.

Some areas, like protections for freedom of speech, at least outside the area of pornography, may be relatively unaffected. "The First Amendment freedom of speech is the most likely to continue," said Harvard Law School professor Kathleen Sullivan, a liberal. "There's almost a sacral attitude toward freedom of speech, even among the conservatives."

Rapid change, however, would not be unprecedented. "Once the New Deal formed its liberal juggernaut, it overturned 26 cases in four years," noted conservative legal scholar Bruce Fein. "They had to rewrite volumes on the commerce clause, economic liberties, states' rights in that short a period. . . . So what's the institutional restraint?"

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SOUTER

THE WHITE HOUSE

WASHINGTON

AUGUST 8, 1990

MEMORANDUM FOR DAVID DEMAREST
FRED MCCLURE
CHRISS WINSTON
BOBBIE KILBERG

FROM: DEB AMEND

RE: JUDGE SOUTER UPDATE

1. Attached please find: Editorial highlights with specific articles attached. Our public affairs office is keeping the clipping file and will update as necessary and appropriate.

2. Attached also find: A draft OP/ED for Griffin Bell. Please note, it's an open memo to the members of the Senate Judiciary Committee laying out how they should consider the hearings ahead. I think it's an innovative approach. It was written by Dan Casey at Justice. It was not staffed, please let's chat if you have any changes, comments, questions, etc.

Here's an update:

letters to the papers all the Senators read

1. Letters to the Boston papers from the New Hampshire crew of Souter supporters: They have their marching orders but I don't have any results yet. However, they are enthusiastic and we only asked them to help two days ago.

2. Political's "A" list of folks around the country who will sign OP/EDs, etc., is due Friday, per the discussion at our last meeting.

distribute speech insert to GOP candidates

3. Current Material -- we don't have much, which is part of the problem. Talking points on "law and order" were finally done today. Communications will distribute to all of our target groups, per the discussion at our last meeting.

4. Future Material -- Solving the problem, Justice has one more OP/ED cooking: The generic piece on Judicial activisism which we should have on Friday. Chriss Winston has assigned Ed McNally to the Souter beat next week, (Ed's a former Justice Department lawyer) to help with the preparation of the rest of the material we need to distribute to surrogates, which should put us in pretty good shape.

5. Target states -- the quest for key surrogates in key states continues.

MEMO TO: Senate Judiciary Committee

When you arrive back in Washington in September to consider the nomination of Judge David Souter you will have had the benefit of five weeks of constituent "input" in the matter. It is doubtful that the loudest voices heard have been counselling thoughtful, judicious inquiry. Single-issue advocates have pleaded, protested and importuned to enlist you in their cause. Their assignment to you: find out from nominee Souter how he will vote on their issue. After all, their's is the most important issue - an issue of fundamental right(s). What's wrong with expecting answers to a few simple questions? What does the nominee have to hide? It will be easy to give in to the temptation. To promise to get specific answers. Don't.

During the next few weeks listen to the quiet voices. Put aside the temporal swirl of politics and political advantage and reflect on the very essence of American government. Separation of powers, checks and balances, rule of law, an independent judiciary. There are no organized interest groups rating you on your devotion to these fundamental precepts. No one greets you at a town meeting chanting slogans from the Federalist Papers. Yet it is precisely in defense of these principles that you must shut out and defy the loud voices.

Since the Founding, the Senate's advise and consent role has been construed both narrowly and broadly, usually depending upon the prevailing political balance between the legislative and executive branches. But the appointing power has and always will be vested in the President, and, as such the Senate's role has historically been limited to rejecting only the most politically unacceptable of nominees. But it is not the Senate's ability to confirm or reject a nominee that threatens today.

At stake is the common belief in and the acceptance of the existence of an independent judiciary. Does that strike you as overly dramatic? Consider: What is left of the Rule of Law, if the public no longer perceives that judges are willing to put aside their personal likes and dislikes? Yet that is precisely the message sent by a Senate inquisition into a nominee's personal and political views. What happens when the public believes that political "correctness" and not neutral law is being applied by judges who have been forced to run a Senate gauntlet of single-issue litmus tests? What is "independent" about a judiciary composed of men and women who have cleared the gauntlet only by pre-judging a wide range of politically-sensitive issues? Where then are the "open minds" upon which the impartial consideration of a case rests?

1) These are not questions pondered by the loud voices, no matter how sincere. These are the questions long ago answered by the Founding Fathers when they crafted a government of laws - not men. Indeed, Alexander Hamilton, writing as Publius in Federalist No. 78, warned against a judiciary made dependent on the whims of legislative caprice and even went so far as to say "there is no liberty, if the power of judging be not separated from the legislative and executive power." An independent judiciary are among the permanent things that you must preserve and protect to assure liberty. Before you return to the Nation's capital, listen to the quiet voices that speak across the centuries.

or

2) These are not questions pondered by the loud voices, no matter how sincere. These are the questions long ago answered by the Founding Fathers when they crafted a government of laws - not men. These are the permanent things you must preserve and protect. Before you return to the Nation's capital, listen to the quiet voices that speak across the centuries.

EDITORIAL SUPPORT OF PRESIDENT BUSH'S NOMINATION OF JUDGE DAVID SOUTER TO THE SUPREME COURT

"Judge Souter sounds like the kind of judge most people admire. Maybe that's why I think he will pass muster when he faces the Senate in September."

Godfrey Sperling, Christian Science Monitor, August 7, 1990

"All court cases, including those that come before the Supreme Court, involve real events. The wisdom and knowledge judges obtain from the face-to-face encounters with those [they] judge are essential components of the art of judging. It is wrong to minimize Judge Souter's experience."

Judge Robert S. Brandt, The New York Times, August 7, 1990

"The key to the court's critical constitutional role lies in the mystery of its future actions. If the justices appear to have committed their votes to the president, who appoints them, or to the Senate, which confirms them, we will no longer trust them as our ultimate authority on the Constitution's meaning."

Lloyd N. Cutler, The Washington Post, August 2, 1990

"For too long, Congress has written vague laws and relied on the court to fill in the blanks and do the heavy lifting Congress disdains. If judge Souter helps bring that trend to an end, the nation will have taken an important step toward restoring accountability in government."

The Detroit News, July 29, 1990

"His stock in trade appears to be his innate brilliance - a characteristic that has impressed everyone with whom he has dealt as a lawyer and jurist."

The Cincinnati Enquirer, July 29, 1990

"Despite the grumbles from the political extremes, President Bush's appointment of Judge David H. Souter to the Supreme Court has every indication of being a superb choice - both substantively and politically.

What the country should care about is that the New Hampshire jurist - by the unanimous testimony of those who know him - brings a powerful, superbly trained legal intellect, disciplined work habits and genuine independence of judgment to the issues before the high court."

David S. Broder, The Washington Post, July 27, 1990

"On the evidence to date, there is every reason to believe that Judge Souter is a brilliant judge, a 'strict constructionist', and a solid sound judicial conservative."

William Rusher, The Washington Times, July 27, 1990

"With the appointment of Judge Souter - according to early reports a man of high intellect and integrity, but one who is not a 'political animal' - Bush is saying to the nation, let's stop thinking of the court as the spoils of a partisan war."

Christian Science Monitor, July 26, 1990

"Those who know him praise him highly - 'an absolutely spectacular reputation,' said former New Hampshire Democratic Party Chairman J. Joseph Grandmaison.

Mr. Bush has chosen astutely.... All that Judge Souter comes with is his basic credentials, and they are excellent."

The Hartford Courant, July 25, 1990

"...Justice Souter is an unknown quantity to many. However, his career appears to indicate competence, intelligence and personal achievement."

The Dallas Morning News, July 24, 1990

CHRISTIAN SCIENCE MONITOR
8/7/90

Will Souter Make It?

WHY are the results of the last presidential election being largely overlooked in the scrutiny of the president's nominee to the Supreme Court?

Where is the memory of the Democrats who said that they must defeat George Bush because, if elected, he would have the opportunity to turn the high court in the conservative direction?

They lost. Bush won. And that's what's happening, even though the president has picked a conservative whose ideology isn't showing in order to avoid a rancorous battle in the Senate.

Indeed, if there was any passion in the Democrats' fight for the presidency, it was on this Supreme Court opportunity issue. They knew they were on the verge of losing control of the Supreme Court's direction well into the next century. But this possibility obviously didn't scare the voters – where a conservative trend has been apparent since Ronald Reagan became president.

Obviously, Judge Souter isn't a Judge Bork. His manner is quiet. He won't take on his critics on the Judiciary Committee. And he probably will be confirmed without much inflammatory grilling – although he will be pressed hard on his views about the right of privacy.

But the real story is that the judiciary, along with the Executive Branch, now is in the hands of the Republicans.

Certainly, Supreme Court justices are independent of politics – and sometimes show this independence. The best example is William J. Brennan Jr. – an Eisenhower appointee. Ike also put Earl Warren on the Court. Both moved in liberal directions that caused Eisenhower to regret these appointments.

So Souter as an associate justice might surprise Bush and please the Democrats. I can imagine Souter refusing to overthrow Roe v. Wade – deciding to stand by *stare decisis* (decided matters). *He might even find himself joining another conservative, Justice Sandra Day O'Connor, in taking such a position.*

But who says abortion is a conservative versus liberal issue – although many people frame it that way? It is arguable that the imposition of government into the lives of individuals is something that conservatives have been resisting for years.

There is nothing evil about a president appointing a justice who he thinks will see the world the way he does. This has been going on for a long time. I recall when Franklin D. Roosevelt even tried to increase the size of the court and thus get people in sympathy with his New Deal approach on that judicial body.

He failed in packing the court. But his supporters saw nothing wrong in a president seeking to get high-court approval for measures that were taking the nation in a socialistic direction.

What would be wrong is if a president named an incompetent – or someone whose experience was insufficient. No one could say that Judge Souter is lacking in these categories.

I became convinced that the Souter nomination would win out when I read Washington Post columnist Judy Mann's interview with a woman who had been young Souter's girlfriend when he was a law student at Harvard. Ellanor Stengel Fink, his friend, was a student at nearby Wheaton College.

Today, Ms. Fink, a Democrat and a mother of three children, is chairman of the board of elections of the town of Somerset – on the edge of Washington, D.C. Her husband is a lawyer. Of Souter, with whom she has not spoken in 20 years, she has, according to Mann, "extremely positive recollections."

"What's characteristic of him [Souter]," Fink told Mann, "is he's fair-minded. He wants to know and listen to everybody and to reach a fair position based upon the law. The one thing you can say is he will be fair and he will listen to all sides and he will tell you how it is."

Fink continued, "He is very much an individualist, with strong feelings about the rights of individuals to control their lives, but I think he also has strong feelings about an individual's duty to the community. He feels very strongly about the country in a very quiet, unassuming sort of way."

Judge Souter sounds like the kind of judge most people admire. Maybe that's why I think he will pass muster when he faces the Senate in September.

NEW YORK TIMES
8/7/90

State Court Service

To the Editor:

Ann F. Lewis's thoughtful article on David Souter and the coming confirmation process (Op-Ed, July 25) refers to Judge Souter's "relative lack of experience" and mentions his "brief record." Judge Souter served 12 years as a state trial court judge and state Supreme Court justice before moving to the Federal system.

Ms. Lewis probably means that Judge Souter has had limited involvement with that handful of highly visible issues that excite those at the extremes of the political spectrum. Most of the cases that define the fundamental relationships in our society — husband and wife, parent and child, employer and employee, buyer and seller, the state and its citizens — are not decided by the Supreme Court or

Supreme Court from a state court.

All court cases, including those that come before the Supreme Court, involve real events. The wisdom and knowledge judges obtain from the face-to-face encounters with those we judge are essential components of the art of judging. It is wrong to minimize Judge Souter's experience.

Ann Lewis may have raised some legitimate concerns about Judge Souter's selection, but that Judge Souter's years of service are as a state court judge is not one of them.

ROBERT S. BRANDT
Judge, Chancery Court, Tennessee
Nashville, July 26, 1990

WASHINGTON POST
8/2/90

Lloyd N. Cutler

In Justices, Mystery Is Essential . . .

When the president was choosing his nominee to replace Supreme Court Justice William Brennan, I hope his advisers reminded him of what happened when President Abraham Lincoln faced a similar choice. The tale is also worth the Senate's attention.

Lincoln had a Supreme Court vacancy to fill at a time when the court was about to hear the Legal Tender Cases. These cases involved the constitutionality of the Civil War statute authorizing the Treasury to issue paper money and making it "legal tender" for the payment of existing as well as future obligations. The cases were of enormous importance to the solvency of the government, and the argument was likely to turn on the vote of the new chief justice Lincoln was about to nominate.

Lincoln wrote to a friend: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known." He then selected his secretary of the Treasury, Salmon P. Chase, who had drafted the Legal Tender bill and had urged Congress to enact it. Chase was duly confirmed, but he confounded everyone by casting the decisive vote and writing the court's opinion holding the Legal Tender Act unconstitutional.

There are two morals to the story. The first is fairly obvious. While the president and the Senate both have the duty to consider a candidate's political and legal philosophy, they press this prerogative too far, as Lincoln recognized, if they ask how he or she would decide a particular issue such as whether to overrule *Roe v. Wade*.

The second moral is that thanks to the "good behavior" clause of the Constitution entitling a justice once appointed to serve for life, presidents and senators who try to make certain of how a nominee will vote are often disappointed. Lincoln is not the only president who made a wrong choice. Theodore Roosevelt was openly bitter that his nominee Oliver Wendell Holmes wrote opinions restricting the sweep of Roosevelt's antitrust legislation. Dwight Eisenhower, when asked if he had made any mistakes as president, replied: "Yes, two, and they [Earl Warren and William Brennan] are both sitting on the Supreme Court." As Holmes, Warren and Brennan prove, presidents sometimes choose more wisely than they intend.

Moreover, justices usually serve more than a decade, and some, like Justices Holmes and Brennan, for more than three decades. No president or senator can predict what the important constitutional issues will be a decade or two ahead, and no nominee could reliably say now how he or she would resolve those issues. In selecting a Supreme Court justice, no president or senator with a sense of history would limit the focus to today's headline cases.

There is a further and even more important point. As Prof. Charles Black has noted, the court is the great legitimator of our government, the final arbiter of whether or not the executive and legislative branches have exceeded or abused their limited powers. To perform that vital function, the court must be, and must appear to be, as independent of the president and of Congress as humanly possible. While the president must appoint and the Senate must confirm or reject each nominee, it is vital to the integrity of the process that neither they nor the rest of us insist on knowing in advance how a new justice is going to vote in a particular case.

BY ELEANOR MILL

The key to the court's critical constitutional role lies in the mystery of its future actions. If the justices appear to have committed their votes to the president, who appoints them, or to the Senate, which confirms them, we will no longer trust them as our ultimate authority on the Constitution's meaning.

The writer, a Washington lawyer, was White House counsel to president Jimmy Carter.

DETROIT NEWS
7/29/90

The Right Questions for Souter

All Washington is abuzz over just what kind of questions are likely to be asked of Supreme Court nominee David Souter at his confirmation hearings in September. Many liberals want to find out how he feels about abortion without really asking quite so bluntly. Some conservatives, wary of a betrayal by a "moderate" President Bush, are just as eager to have an answer to the abortion question.

What seems to be missing from this debate is the substantive issue of whether the Supreme Court should be involved at all in deciding delicate questions of social policy. The real question for Judge Souter is not what he thinks about abortion, affirmative action, school busing and the like, but his philosophy of the role of the court and the law in American society.

It's no accident that as the court has arrogated to itself more and more power during the last 25 years, Supreme Court appointments have become more and more controversial. Virtually every appointment since President Lyndon Johnson tried to elevate his old political crony Abe Fortas to the chief justiceship in 1968 (an effort torpedoed by Michigan Republican Sen. Robert Griffin) has resulted in a political battle. The climax was the successful and still-incredible campaign to smear Judge Robert Bork in 1987.

One would hope that the extremists who destroyed Mr. Bork would have learned that, though they won the battle, they lost the war. Whatever his views on issues, Judge Bork had a strong respect for established court precedents. The man who eventually got the nod, Justice Anthony Kennedy, is more in the mold of Justice Antonin Scalia, who believes in overturning liberal precedents where possible.

Lessons have certainly been learned on the White House side. A major problem with Judge Bork turned out to be his "paper trail," numerous books and articles written over a long academic and legal career containing many statements that could be misconstrued or taken out of context. Judge Souter, in contrast, has said and written virtually nothing over the years. It is indeed a sad day for the republic when a president feels he has no choice but to nominate someone whose views are so hard to divine.

From what has been revealed so far, however, Judge Souter appears to be a man who has a limited view of the role of judges. As a New Hampshire Supreme Court justice, he opposed legislation that would have allowed judges to decide when minors could have abortions without the consent of their parents. He did not believe a legislature could simply grant judges such power.

This is as it should be. Unelected, unaccountable judges ought not be in the position of making moral or policy judgments that affect many lives directly, such as whether or not school children should be bused or local taxes raised. Questions of morality and policy are for our elected representatives to decide.

So it is appropriate to ask Judge Souter about his philosophy of judging. Will he rule based on the law, and not his personal view of right, wrong, good, bad or indifferent? For too long, Congress has written vague laws and relied on the court to fill in the blanks and do the heavy lifting Congress disdains. If Judge Souter helps bring that trend to and end, the nation will have taken an important step toward restoring accountability in government.

CINCINNATI ENQUIRER
7/29/90

Supreme Court

Souter faces a long journey on his way to confirmation

Senators, columnists, public-policy researchers and special-interest advocates will be working night and day for the next five or six weeks to learn everything they can about David Hackett Souter, whom President Bush seeks to elevate to the Supreme Court. What they discover in their inquiries will determine not simply whether the nomination is confirmed or rejected, but also the tone in which the Senate's hearings are conducted.

Judge Bork

Whether by coincidence or carefully formulated strategy, the president's choice to succeed retiring Justice William J. Brennan has been a part of the federal judiciary only a few months. His judicial experience stems from his work in New Hampshire, where he had no occasion to grapple revealingly with the contentious issues that are the Supreme Court's regular fare. By the same token, he has made few speeches and written few scholarly articles.

His stock in trade appears to be his innate brilliance — a characteristic that has impressed everyone with whom he has dealt as a lawyer and jurist.

That clearly won't be enough to satisfy the Senate or its Judiciary Committee. Even if they find no skeletons in Judge Souter's closet, senators will do their best to persuade him to judge hypothetical cases to provide some insight into any predispositions. If they fail that, they are likely to accuse him of deviousness and unresponsiveness.

In making his choice, President Bush could not have been unaware of the Senate's treatment of Judge Robert Bork, whom President Reagan wanted on the Supreme Court. Unlike Judge Souter, Judge Bork had written dozens of decisions as an appellate judge (none of them, significantly, reversed by the Supreme Court); he had made scores of speeches and written dozens of articles. Every word became grist for his opponents' mills.

The deciding issue was not that Judge Bork was inadequate in terms of intellect or experience, but that he was, if anything, overqualified.

Columnist Charles Krauthammer perhaps put it most succinctly: "If Bork is rejected, it will ultimately be because his opponents fear letting such an intellect loose on the court. ... To deny Bork's constitutional view one seat out of nine is to claim that it has no place at the highest level of American judicial discourse. And that is a confession of both judicial narrow-mindedness and intellectual fear."

The Bork experience should forearm Judge Souter and his supporters.

WASHINGTON POST
7/27/90

David S. Broder

The Next Three Court Nominees

Despite the grumbles from the political extremes, President Bush's appointment of Judge David H. Souter to the Supreme Court has every indication of being a superb choice—both substantively and politically.

What the country should care about is that the New Hampshire jurist—by the unanimous testimony of those who know him—brings a powerful, superbly trained legal intellect, disciplined work habits and genuine independence of judgment to the issues before the high court.

The political finesse of Bush's first Supreme Court appointment is underlined by the array of attractive options now open to him for those who may follow Souter. After naming an easily confirmable conservative who shares his own New England, Yankee, WASP heritage to replace

Bush can play ethnic and ideological politics with subsequent Supreme Court choices.

Associate Justice William J. Brennan, Bush has put himself into a position where he can play tough but rewarding ethnic and ideological politics with subsequent Supreme Court choices.

The tip-off to the long-term strategy came in the eagerness with which White House officials aided reporters in learning the identities of those who they said were highest on the list of also-rans. They were, in the White House's publicized order of preference, Circuit Court Judges Edith H. Jones, a Texan and a woman; Clarence Thomas, a black; and Laurence H. Silberman, a Jew—all clearly in the conservative camp.

A Democratic political consultant who looked at the list remarked, "They've got perfect positioning if they want to pick our coalition apart." What he meant was that if Bush gets the opportunity to make additional Supreme Court appointments before 1992, he can force the Democrats either to acquiesce in moving the high court much farther to the right or to pay an exceptionally high political price by challenging nominees from important constituencies.

Talking about the politics of the court appointments in such bald terms may seem offensive, especially when Bush just has acknowledged a president's overriding obligation to give the greatest weight to the quality of the nominee for the high tribunal. But it would be fatuous to pretend that the political environment was not part of this choice. Bush did not want—and could not afford—a Robert Bork-like confrontation with the Democratic Senate at this moment.

The most important reason is that so much now hangs on the success of his budget summit with Congress. Bush has paid a significant political price, by abandoning his "no-new-taxes" pledge in order to keep the Democrats negotiating. He needs to get a return on that investment—a credible deficit-reduction agreement that will allow the Federal Reserve to cut interest rates and help revive a faltering economy.

The urgency of that agreement is underlined by the new Washington Post-ABC News poll's finding that nearly three out of five Americans think the economy is worsening, and more disapprove than approve Bush's leadership on economic issues. Collapse of the budget talks would damage Bush politically and quite possibly tip the economy into recession.

The negotiations are arduous already, and the venom of an ideological battle over a Supreme Court nomination would inevitably poison the chances of the budget summit accomplishing its objective.

The second reason Bush did not want a pitched battle now over a clearly ideological appointee is the imminence of the midterm elections. Republican chances of making gains in the Senate depend heavily on states such as Illinois and Rhode Island, where Republican women challengers are supporters of abortion rights, and Iowa, where the Democratic incumbent is trying to turn the election into a single-issue referendum on his challenger's anti-abortion views.

The last thing Bush wanted to do was to send up a Supreme Court nominee who would provoke a lengthy confirmation fight centered on the abortion issue.

None of these considerations would apply in 1991, should the opportunity for other appointments arise. Bush might well find it useful then to nail down his conservative base by making a more ideological court appointment, just as he courted the religious right in pre-election 1987 with a series of speeches and gestures.

A pitched battle in the Senate in 1991 would be a win-win proposition for Bush: Even if the liberals defeated his nominee, he would have made his point and could come back with a less controversial conservative.

That is why the three names are so intriguing. If Sandra Day O'Connor were to retire, Democrats opposing Judge Jones would find themselves opposing a female and a southerner on a court that has had only one woman and no one from Dixie in recent years.

If Thurgood Marshall were the retiree, how would Democrats feel about blocking Judge Thomas and making the court all-white again? And if Silberman were the choice, how many Democrats would be eager to oppose the first Jew on the court since Abe Fortas?

You can see why White House political operatives like the setup.

7/27/90

WILLIAM RUSHER

Ahead for Souter

President Bush's nomination of Judge David Souter to replace retiring Justice William Brennan makes conservative control of the Supreme Court almost inevitable at last.

It has been nearly a quarter of a century since the American people tired of liberalism. But as Robert Whitaker noted, the Supreme Court is traditionally "the last bastion of dying establishments." The liberals, thanks in large part to Justice Brennan, have managed to continue imposing many of their views on a reluctant nation, by discovering them hidden in previously unsuspected clauses of the Constitution. With any luck, that sort of nonsense is about to end.

But it probably won't end without a fight. In the battle over Judge Robert Bork's nomination by President Reagan, Sens. Edward Kennedy, Howard Metzenbaum and Joseph Biden dragged the once-dignified process of senatorial advice and consent squarely into the political pit, and there it will fester until higher-quality men and women are elected to the U.S. Senate.

Even if those experienced mudgunners were disposed to let Judge Souter take his seat without undue delay, the screaming battalions of the abortion activists and their liberal allies wouldn't let them. They have learned, or think they have learned, that a court nominee, no matter how well-qualified, can be defeated if subjected to enough high-octane billingsgate. They have already decided to block Judge Souter, and they can probably induce the Senate's liberals to resist his confirmation.

On the evidence to date, there is every reason to believe that Judge Souter is a brilliant judge (he was, for one thing, a Rhodes scholar), a "strict constructionist," and a solid, sound judicial conservative.

That is quite enough to rouse the venom of the Senate liberals. As the first nominee over the parapet, he will very probably be treated to the worst down-and-dirty trashing that the fertile minds of Messrs. Kennedy, Metzenbaum, Biden and their leftist staffs can devise.

It may turn out (as it did in the case of Chief Justice William Rehnquist) that he was a poll-watcher for Barry Goldwater in 1964 and got into a quarrel with a black Democrat. He may have been seen spitting on the sidewalk outside an Equal Rights Amendment rally. Somebody may be found who will testify, truthfully or otherwise, that he once saw the judge, as an undergraduate at Harvard, smoking a marijuana cigarette.

With that much stimulus, Democrats who know better, like Howell Heflin of Alabama, will probably sell out again to their black constituencies. Such near-beer Republicans as Arlen Specter of Pennsylvania will once more follow their supple consciences down the well-worn path of liberalism. Across the land, liberal megaphones like Norman Lear's People for the American Way will indulge (again) in techniques that even Messrs. Kennedy and Metzenbaum can't bring themselves to use.

I don't envy Judge Souter his forthcoming ordeal, or predict his confirmation. Sheer political dishonesty has its victories, no less renowned than war's. This is, however, a game that President Bush is bound to win in the long run — just as President Reagan won the last one by ultimately nominating Justice Anthony Kennedy, who has proved if anything slightly more conservative than Judge Bork might have been.

> *It is enough to rouse the venom of the Senate liberals. As the first nominee, he will probably be treated to the worst trashing that the fertile minds of Messrs. Kennedy, Metzenbaum and Biden can devise.*

For when the smoke has blown away, if Judge Souter has been rejected, Mr. Bush will send the Senate another name. And it is in the nature of such Grand Guignol theater as Kennedy & Co. specialize in that it can't be repeated right away. The second nominee, if only he or she is closemouthed, competent and quietly conservative, will sail through an exhausted Senate and onto the court.

Conservatives, then, should prepare for battle: first, in support of Judge Souter. And this time let's make it a brawl that Mr. Kennedy will remember less fondly than the last.

William A. Rusher, a senior fellow of the Claremont Institute, is a nationally syndicated columnist.

make this a plus. one voice on the court w/ open mind

CHRISTIAN SCIENCE MONITOR
7/26/90

Respect for the Court

IN nominating Judge David Souter to the Supreme Court seat vacated by Justice William Brennan, President Bush appears to have had several objectives. First, he selected a judge who has virtually no record on abortion, the most polarizing issue confronting the Supreme Court and the nation today. The selection of a professed pro-life jurist not only would have met with fierce resistance from pro-choice advocates, but it would have caused abortion to dominate the confirmation hearings to the near exclusion of other matters.

A related but broader point: The president picked a man who, unlike Reagan nominee Robert Bork, doesn't have a long "paper trail" of strongly articulated views on contentious issues. Clearly Mr. Bush wants to avoid another bitter and prolonged confirmation battle. Avoiding such a battle increases the likelihood that the high court will be at full strength for its October term. Also, such a partisan fight could have unpredictable consequences for the November elections.

More important than these short-term considerations, however, the president seems to be signaling a desire to calm the politicized atmosphere that has enveloped the Supreme Court in recent years. With the appointment of Judge Souter – according to early reports a man of high intellect and integrity, but one who is not a "political animal" – Bush is saying to the nation, let's stop thinking of the court as the spoils in a partisan war, and to the justices themselves, you are not champions of political causes.

It is a sign of Bush's respect for the court that he doesn't want to perpetuate President Reagan's practice of nominating people with an agenda. Mr. Reagan seemed mindful only of the Supreme Court's power – power he wanted in "reliable" hands. He had little feel or regard for the court's supra-political role as a mediator of clashing interests in a highly complex modern society, and as a sensitive buffer between government and the individual. Bush is more attuned to the court's function in these respects.

Some commentators say that at stake in the choice of Brennan's successor is the "soul" of the court. Brennan himself probably doesn't agree. On several recent occasions he has stated his confidence in the durability and ultimate fairness of American institutions. Those institutions, not individuals, he says, are the safeguards of Americans' liberties.

Justice Brennan enlarged the Supreme Court, but also was enlarged by it. That capacity to be elevated by the institution – combining intellectual force with open-mindedness, confidence with humility – is one of the chief qualities the Senate should look for when it examines Souter.

THE HARTFORD COURANT
7/25/90

Getting to know Judge Souter

There is, or should be, more to a U.S. Supreme Court appointment than the nominee's thoughts on the issue of a pregnant woman's freedom of choice.

But in the first day after President Bush's introduction of Judge David H. Souter, national attention is fixed on abortion and little else. Will Mr. Bush's choice of a successor to Justice William J. Brennan Jr. vote to reverse the court's 1973 Roe vs. Wade decision?

The question is important, of course, but it should be only one of many. Above all, the Senate must decide if Judge Souter is qualified intellectually and temperamentally to sit on the highest bench. Supreme Court appointments must not be made on the basis of a single issue. A president who listens to only one special interest is a president destined for disappointment.

Mr. Bush obviously should be expected to choose a justice with whom he feels philosophically compatible. But compatibility should be general, rather than specific, and the president recognized that principle when he asserted that Judge Souter wasn't given a litmus test.

To believe that Mr. Bush and his subordinates haven't the foggiest idea about the nominee's philosophical direction would be naive. Judge Souter's two primary boosters — White House Chief of Staff John H. Sununu and U.S. Sen. Warren B. Rudman of New Hampshire — are scarcely liberal.

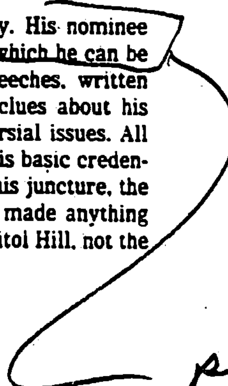
The 50-year-old nominee's paper credentials are impeccable: graduate of Harvard Law School, Rhodes Scholar, attorney general of New Hampshire, state Supreme Court justice for a dozen years and, for the past two months, a federal appeals court judge in Boston. Those who know him praise him highly — "an absolutely spectacular reputation," said former New Hampshire Democratic Party Chairman J. Joseph Grandmaison.

But much of the nation doesn't know him at all, and the Democratic-dominated Senate no doubt will try to remedy that during the confirmation process. The challenge will be to probe without treating the occasion as an opportunity to embarrass the administration or extract "campaign" promises from the Supreme Court nominee.

Confirming a lifetime judicial appointment requires more than cross-checking the nominee's resume, however. A president should have wide latitude in choosing members of his administration. Even in nominating the leaders for a different branch of government, a president deserves the benefit of doubt. But the Constitution doesn't require confirmation as a formality. Senators, Republicans and Democrats, aren't elected to act as rubber stamps.

The confirmers must tread carefully in learning more about Judge Souter and at the same time eschewing litmus-test questions. What should be of utmost concern is the nominee's temperament, knowledge of the law, general intellect, sense of fairness, compassion and fidelity to constitutional principles.

Mr. Bush has chosen astutely. His nominee has no judicial "fingerprints" by which he can be prejudged. He has given few speeches, written even fewer articles and left no clues about his position on the array of controversial issues. All that Judge Souter comes with is his basic credentials, and they are excellent. At this juncture, the burden of proving that Mr. Bush made anything but a solid nomination lies on Capitol Hill, not the White House.



historic case... where everyone thought issue X — was but it turned out to be Y??

presumed innocent

A COMMON SENSE, LAW AND ORDER JUDGE

- Judge Souter is a tough, anti-crime judge. Having served as New Hampshire's Attorney General -- the state's chief law enforcement official -- and as a hands-on trial court judge, he has a practical understanding of the problems that face prosecutors and police, and takes a common-sense approach to questions of criminal law and procedure.

- In society's battle against drug traffickers, he has upheld the constitutional use of "pen registers," a highly effective law enforcement tool that's enabled police to track down drug kingpins by identifying the phone numbers of those who supply street-level drug dealers. (State v. Valenzuela, 536 A.2d 1252 (N.H. 1987)).

- Protecting the lives and safety of citizens who act to assist the police, he has shielded the names of police informants from disclosures that could destroy sensitive criminal investigations. (State v. Svoleantopoulos, 543 A.2d 410 (N.H. 1988); State v. Cote, 493 A.2d 1252 (N.H. 1985)).

- Early on, Judge Souter took a common sense, constitutional stand to protect our citizens from what the President has called "one of the most deadly scourges ever to strike modern times" -- drunk driving. He has approved the careful use of properly conducted police roadblocks to apprehend drunk drivers, upholding a police department's judgment that roadblocks are an effective means of law enforcement. In particular, Judge Souter has observed that the public interest in protecting life, health, and property on the highway is great, and is clearly "served by detecting impairment caused by intoxicants before the impairment manifests itself in the sort of behavior that would justify an individual stop." (State v. Koppel, 499 A.2d 977 (N.H. 1985) (Souter, J., dissenting) (emphasis added)).

- Demonstrating the kind of common sense for which the people of New Hampshire are known, he has rejected arguments that drunk driving convictions must only be based on "high-tech" blood, urine, or breath samples. He observed that the people's representatives in the legislature had not imposed any such requirement, and that there is nothing unfair in proving a drunk driving charge with evidence gathered through traditional methods of observation and investigation. (State v. Alcorn, 484 A.2d 1176 (N.H. 1984)).

- Judge Souter has resisted the arguments of those who would tip the scales of justice further in favor of criminal wrongdoers. He has been reluctant to impose new, judge-made requirements that would be tougher on police than they would be on criminals. For example, Judge Souter has declined to expand the already-strict requirements of the _Miranda_ decision (_State_ v. _Jones_, 484 A.2d 1070 (N.H. 1984)), and has rejected arguments that would have prevented a jury from hearing certain relevant evidence against a criminal defendant. (_State_ v. _Brown_, 517 A.2d 831 (N.H. 1986); _State_ v. _Cormier_, 499 A.2d 986 (N.H. 1985) (state privilege against self-incrimination)).

- Judge Souter's views in the criminal law area are influenced both by his considerable experience as a public law enforcement officer and his deep understanding of the community's interest in combatting crime. He has consistently demonstrated a strong willingness to defer to the decisions of legislators, prosecutors and police so long as those decisions do not infringe on the constitutional rights of criminal defendants.

July 24, 1990

David H. Souter

Judge David Souter was born on September 17, 1939 in Melrose, Massachusetts to Joseph and Helen Souter. His family moved to a farm in Weare, New Hampshire when he was 11, and he has lived there since. After attending the public schools in Concord, New Hampshire he went on to Harvard College, working summers as a truck driver. He graduated from Harvard in 1961 magna cum laude and was a member of Phi Beta Kappa.

On the strength of his well rounded record at Harvard, Souter was chosen a Rhodes Scholar and studied at Magdalen College, Oxford University from 1961 to 1963. Returning to Harvard, he earned his law degree in 1966 and entered into the private practice of law with the Concord, New Hampshire firm of Orr and Reno.

Judge Souter's career as a public servant began in 1968 with his appointment as an Assistant Attorney General for the State of New Hampshire.

After Judge Souter had served for three years in the office's Criminal Division, he was appointed Deputy Attorney General under then-Attorney General Warren Rudman. In 1976, eight years after entering the office, Souter rose to become New Hampshire's Attorney General, charged with final responsibility for the legal affairs of the State. As the State's top law enforcement officer, Souter was known as a firm advocate of law and order who urged tough penalties for those who threaten society.

Judge Souter's outstanding performance as Attorney General led to his appointment to the Superior Court of New Hampshire in 1978. He served as a state trial court judge for five years until 1983, when again he was promoted -- this time to a post on the State's highest Court, the Supreme Court of New Hampshire.

As a state Supreme Court Justice, Souter quickly gained an excellent reputation for his precise and lucid written opinions and for his fidelity to the rule of law.

On April 30, 1990, President Bush appointed Souter to the United States Court of Appeals for the First Circuit.

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Judge Souter is a scholar of the law in particular and a lover of books in general; he is a student of the history of the State through whose mountains he hikes for recreation, and served as a Trustee and Vice President of the New Hampshire Historical Society. He has made further contributions to his community even apart from his service on the bench. His service on legal and judicial committees is too lengthy to describe in full, but has included membership on 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 (of which

he was Vice Chair). He was also involved in the successful effort to make St. Andrews Episcopal Church, of which he is a parishioner, accessible to those with disabilities.

* * * * *

Justice Souter described his general approach to judging in the Senate Judiciary Committee Questionnaire he submitted upon his nomination to the U.S. Court of Appeals for the First Circuit. As he put it:

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

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COMMENTS ON THE SUPREME COURT NOMINATION OF JUDGE DAVID SOUTER

"I believe I'm recommending an individual with a strong, incisive, independent devotion to interpreting the Constitution. He's a quiet man of enormous intellectual strength. A tough trial court judge with a great legal mind and an impartial quality that will serve the Court well."

--- President Bush on his decision to nominate Judge David Souter to the Supreme Court to the Philadelphia GOP on July 24, 1990

The Administration on Judge Souter:

- **Governor John Sununu said that he, Attorney General Thornburgh, C. Boyden Gray** were all "struck by the crispness, the logic, the flow and the structure" of Judge Souter's opinions. (New York Times 7/25/90)

- On ABC-TV's "Good Morning America," **Attorney General Thornburgh** said, "I don't think it will be a hard sell at all, when you look at the man's (Judge Souter) record, experience, integrity and ability to deal with tough questions of law."

The Congress on Judge Souter:

- **Rep. Newt Gingrich** (R-GA) said of the Souter nomination, "It seems to meet all of the President's philosophical commitments.... At the same time, it doesn't allow the President's ideological opponents very much automatic opportunity to fight with him." He then added, "The people I know from New Hampshire who have known him say that he is a very solid person." (New York Times 7/26/90)

- "It's a good one... he has chosen someone for his legal qualifications, not his ideological ones," remarked **Sen. Patrick Leahy** (D-VT), a member of the Senate Judiciary Committee, on the selection of Souter by President Bush. (Boston Globe 7/25/90)

- "From what I have read, my impression is positive," said **Sen. Sam Nunn** (D-GA) of Souter. (New York Times 7/26/90)

Associates from New Hampshire on Judge Souter:

- "I know him as a scholarly, bright and articulate exponent of his judicial philosophy," remarks **Judge Brock** who served with Judge Souter on the New Hampshire Supreme Court. (Washington Times 7/25/90)

- "He's fiercely independent in his legal reasoning and he'll get there on his own. He has no constituency," remarked **John Broderick**, president of the New Hampshire Bar Association, on Souter's decisions while on the bench. (Washington Times 7/25/90)

- "A man of industry, integrity and great intellectual ability," said **Martin Gross**, a Democrat and former mayor in New Hampshire. (Dallas Morning News 7/24/90)

- "...he has taken an approach in his style and his demeanor and his judicial conduct that is conservative.... People who admire brilliance will be very impressed with this man.... He has tremendous respect in the legal community as an attorney general and as a judge as well," remarks **Rep. Thomas Gage**, Chairman of the New Hampshire House Judiciary Committee in his dealings with Judge Souter. (Washington Times 7/25/90)

- During his tenure as New Hampshire's Attorney General, Judge Souter hired **Richard McNamara** as a prosecuting attorney. When asked about Souter he remarked that, "(Souter) inculcated in young prosecutors a sense of fairness." (Washington Times 7/25/90)

Others on Judge Souter:

- In his 7/27/90 syndicated column, **David Broder** remarked, "What the country should care about is that the New Hampshire jurist - by the unanimous testimony of those who know him - brings a powerful, superbly trained legal intellect, disciplined work habits and genuine independence of judgment to the issues before the high court," when discussing the Souter nomination to the Supreme Court. (Washington Post 7/27/90)

- Said **L. Gordon Crovitz**, in an editorial for the Wall Street Journal (7/25/90), wrote "his willingness to ask whether all issues are necessarily legal issues could help nudge the court back to its more modest practice of avoiding essentially political cases."

- "He's always wanted to be a defender of America and American values. That's why he went into law," said **Dr. Melvin Levine**, a Rhodes Scholar at Oxford University with Judge Souter. (New York Times 7/25/90)

- **Anthony Lewis**, in his column, wrote: "Judge Souter is described as a conservative. But indications are that he comes to this great appointment with no ideological agenda: no list of legal wrongs he is determined to right." (New York Times 7/27/90)

- **Gov. Gerald L. Baliles**, former Virginia governor, who worked with Souter when they were deputy attorney generals found him "without a trace of ideology."(Washington Post 7/26/90)

THE NEW YORK TIMES
7/25/90

Sununu Tells How and Why He Pushed Souter for Court

By R. W. APPLE Jr.

Special to The New York Times

WASHINGTON, July 24 — John H. Sununu, the White House chief of staff, said today that he had assured President Bush that David H. Souter would uphold conservative values on the Supreme Court. He also said he had given "strong personal support" to Judge Souter at a key moment in the President's decision-making.

As Governor of New Hampshire, Mr. Sununu named Judge Souter an Associate Justice of its Supreme Court.

"I was looking for someone who would be a strict constructionist, consistent with basic conservative attitudes, and that's what I got," the chief of staff said in an interview. "I was able to tell the President that I was sure he would do the same thing when he encountered Federal questions.

"What he says and does is what he is. No pretense, no surprises.

Their Kind of Man?

The chief of staff's comments were designed to advance the overall White House strategy of seeking to convince conservatives that Judge Souter was their kind of man, who could be trusted to vote "right" on the big issues, without getting him involved in fierce debates about abortion or flag burning or other contentious specifics.

In being unusually candid about the details in the selection process, Mr. Sununu was carrying out his role as Mr. Bush's primary liaison to the right wing of the Republican Party and to the ideological groups that support Mr. Bush but are nervous about the commitment to their issues.

Mr. Sununu said that neither he nor the President asked the 50-year-old jurist any questions about abortion, the most politically explosive issue facing the Supreme Court, or about Roe v. Wade, the Court's basic decision on abortion rights, which has been under attack by anti-abortion groups. Another White House official said Mr. Bush had crossed several questions off a list prepared for his meeting with Judge Souter by his counsel, C. Boyden Gray, because they seemed too specific.

Judge Souter, named only recently to the United States Court of Appeals for the First Circuit, in Boston, has no record of public statements on the issue.

"We think it's wrong for us to apply a litmus test on a single issue in selecting a nominee," Mr. Sununu said. "We think it's wrong for the Senate to do so in confirmation proceedings. That's a principle we're going to try to stress in the weeks ahead."

Reading Between the Lines

Mr. Sununu said that President Bush had had two candidates under consideration when he retired to his office on Monday with a yellow legal pad to make his decision — the two he had just spoken with, Judge Souter and Judge Edith H. Jones, 41, who sits on the Court of Appeals for the Fifth Circuit, in Houston.

"Reading between the lines, and that's all it is," the chief of staff said, "maybe we're talking about a sequence here. Maybe she is the choice the next time that we have a vacancy on the Court. There are no sure things, and times and conditions can change, but the President was impressed."

Mr. Sununu said that he had "intervened with strong personal support" for Judge Souter only on Monday morning, and that even then he had made positive comments about the two other candidates still in the running at the time, identified by another Bush aide as Judge Jones and Judge Laurence H. Silberman, 54, who is on the Court of Appeals for the District of Columbia Circuit.

The list, the chief of staff reported, had been cut from a dozen names early Saturday morning to four or five by Sunday evening. Only Judge Souter and Judge Jones met with the President.

It was Attorney General Dick Thornburgh and Mr Gray, Mr. Bush's counsel, who "brought David's name out of the pack" of 20 or more names with which the Administration began 18 months ago, Mr. Sununu said. "I stayed out until almost the end."

Rudman Wields Influence

But it was Senator Warren E. Rudman, the influential New Hampshire Republican, who first brought Mr. Souter's name to the attention of officials in Washington in 1986 and 1987.

Reacting a bit testily to reports describing Judge Souter as a protégé or an ideological twin of Mr. Sununu, Mr. Rudman declared: "John Sununu didn't know David Souter — though he of course knew of him, in a small state like New Hampshire — when the vacancy on the state court came up. I pushed him for that, I told Ronald Reagan about him. I pushed him for the Circuit Court job and I urged Bush to choose him this time. He's not Sununu's man."

The chief of staff largely confirmed that account, but said he came to know and respect Judge Souter later, not socially but professionally. Asked whether he considered the jurist as one of those who worked to create a mood of ideological conservatism in New Hampshire — like Mr. Sununu himself,

Message to conservatives: You'll like him.

former late Gov. Meldrim Thomson or the late newspaper publisher William Loeb — Mr. Sununu replied: "David was philosophically comfortable with it, but temperamentally not suited to public battle. He was content to make his contribution in a judicial sense."

'A Little Problem' Recalled

On one occasion, Mr. Sununu added, the judge "created a little problem for me" in an opinion "so tight and so ironclad and leak-proof" that the structure of the state's meal taxes had to be thoroughly redesigned.

"The man loves the law to the point of keeping himself completely out of the public eye," he said. "He loves being a judge, reading and doing private things, not showing off by talking and writing about being a judge."

"There's a feeling that this is a guy who wants to be a Supreme Court Justice and wants to dedicate his life to it," said an aide briefing reporters about the reasons for Mr. Bush's choice. "He's not a political guy. On a personal basis, the President was impressed by the fact that he's a humble man, quiet and studious."

Mr. Sununu said that Mr. Gray and Mr. Thornburgh had been struck by "the crispness, the logic, the flow and the structure" of Judge Souter's opinions. But if he is thoroughly at home with the written word, Judge Souter apparently has no gift whatever for chitchat or small talk.

What did Judge Souter have to say at his meetings with Mr. Sununu Monday?

"Not very much," the chief of staff answered. "As usual."

THE WASHINGTON POST
7/25/90

Bush Opens Drive For Court Nominee

Confirmation Hearings Set for September

By David S. Broder
and Helen Dewar
Washington Post Staff Writers

The White House launched the confirmation drive for President Bush's first Supreme Court nominee yesterday against a virtually invisible opposition and amid signs that David H. Souter will resist efforts to pin down his views on abortion.

Souter, the little-known, 50-year-old New Hampshire jurist named by Bush Monday to replace retiring Justice William J. Brennan Jr., continued to draw approving comments across the political spectrum.

"I think there's a positive feeling," said Sen. Patrick J. Leahy (D-Vt.), a member of the Judiciary Committee, which will hold confirmation hearings in September.

President Bush told a GOP fund-raising luncheon in Philadelphia "there should be no litmus test in the process of confirmation," reiterating his statement that he had applied no such standard himself on abortion or any issue.

White House press secretary Marlin Fitzwater said Bush is moving quickly on the nomination because "we saw that some of the special interests—on abortion, civil rights—were going to try to cook up a stew that this nomination would get dumped into."

Sen. Warren B. Rudman (R-N.H.), a close friend of the nominee, said the former New Hampshire Supreme Court justice had made it clear to administration officials that "if they had any litmus tests to apply, he was not interested" in the appointment he received from Bush earlier this year to the 1st U.S. Circuit Court of Appeals in Boston or in being elevated to the Supreme Court.

"He will take that same stance with senators," Rudman said. "He has far too much respect for the independence and integrity of the judiciary to allow that to happen."

Bush made the same point, arguing that the court needed justices with "independent minds . . . above the flames of political passion."

The first Judiciary Committee member to indicate publicly an intent to press Souter on the abortion issue was Sen. Charles E. Grassley (R-Iowa), a strong opponent of

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abortion. "I don't have to be circumspect," he said, "but he may."

Grassley added that "at this point, it looks like it [confirmation] will go very smoothly," a judgment that was echoed at the liberal end of the political spectrum by another Judiciary Committee member, Sen. Howard M. Metzenbaum (D-Ohio).

"The waters are quiet," Metzenbaum said. "He's got a clean slate so far. But that doesn't mean something won't come up tomorrow morning."

Liberal interest groups said last night that their first look at Souter's judicial record had yielded no ammunition for a fight against him. Initial review of the more than 200 opinions Souter wrote during his seven years on the state supreme court reflected a jurist who focused more often on the mundane and technical issues of a state court than on sweeping constitutional questions.

Administration officials expressed confidence that Bush had found what he wanted—a conservative judge with no written opinions, especially on abortion issues, that would fuel ideological conflict on the eve of the midterm election.

"I don't think it will be a hard sell at all, when you look at the man's record, experience, integrity and ability to deal with tough questions of law," Attorney General Dick Thornburgh said on ABC-TV's "Good Morning America."

Souter began preparing for the confirmation process by meeting with White House officials and Kenneth Duberstein, former White House chief of staff in the Reagan administration, who will shepherd him through the hearings.

Rudman, who hired Souter as a young lawyer when Rudman was

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>
> —Sen. Howard M. Metzenbaum, Judiciary Committee member

New Hampshire attorney general, said he would escort the nominee personally to meetings with Senate leaders today and with Judiciary Committee members tomorrow. "I know him better than anyone else," he said, "and I'm going to do the honors myself."

At a brief photo session yesterday afternoon in Rudman's office, Souter confessed that "I really was in some state of shock" when he stood at Bush's side for the announcement Monday. "I was astonished." But White House officials said Souter was a strong contender from the beginning, having impressed Thornburgh and others with his intellectual qualities when he was being interviewed for the circuit court.

Barring a surprise discovery about Souter, most senators who ventured a judgment yesterday said he should be easily confirmed. Rather than question his qualifications, they fell to debating the propriety of asking him about abortion and other sensitive issues.

Sen. Alan K. Simpson (R-Wyo.) said, "I think it would be appalling to spend too much time, if any at all, on abortion," when the hearings begin.

But Sen. Dennis DeConcini (D-Ariz.), another Judiciary Committee member, said, "He doesn't look contentious to me . . . but it's unrealistic to think he will not be asked about abortion, flag burning, the line-item veto and a lot of other issues. But I don't expect him to give us any clear-cut answers."

One of the few negative notes was sounded by Sen. Orrin G. Hatch (R-Utah) who said he would have preferred if Souter, a lifelong bachelor, were a family man. But Hatch quickly backed away from the statement. "It came out wrong," Hatch said. "I did not mean that as criticism."

Staff writer Dan Balz, traveling with President Bush, contributed to this report.

Souter Meets With Leaders of Senate In Session of Humor and Good Will

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, July 25 — Judge David H. Souter, President Bush's choice for the Supreme Court, visited the Senate's Democratic and Republican leaders today in a relaxed atmosphere that reflected the absence of active opposition to his nomination so far.

With Senator George J. Mitchell, the majority leader, Judge Souter exchanged reminiscences about a senior Federal judge from the Senator's home state of Maine.

Judge Souter told Mr. Mitchell that he admired the judge, Frank M. Coffin, and had once received a letter from him. "I would frame it," Judge Souter said, "but that would be ostentatious."

A Straight Line for Dole

Probably inadvertently, the nominee fed a straight line to the Republican leader, Senator Robert Dole of Kansas, about New Hampshire, which is Judge Souter's home state and the place where Senator Dole's Presidential campaign ran aground two years ago.

"Are you going to be sorry to leave New Hampshire?" someone asked Judge Souter as the meeting with Senator Dole was about to begin.

"I don't know that anyone wants to leave New Hampshire," the judge replied.

"I did," Mr. Dole said.

The two brief sessions, in elegant offices at opposite ends of a corridor behind the Senate chamber, began with photo opportunities, as consecutive waves of photographers were admitted to record the event. Judge Souter appeared at ease, almost amused as he parried the shouted questions with a politician's ease. He had shed the stunned expression he wore when he stood beside President Bush two days ago for the announcement of his nomination, which Mr. Bush officially sent to the Senate this morning.

The nominee, no longer stunned, appears at ease in the Senate.

Wit and Parry

How did it feel to be plucked from obscurity, he was asked.

"I must say, I never thought of myself as that obscure," Judge Souter replied.

Asked to recount his feelings upon being nominated, he answered: "The best news I have is that the blood is circulating to the brain well enough now so that I'm beginning to have some feelings."

Judge Souter, who sits on the United States Court of Appeals for the First Circuit, in Boston, is to meet Thursday morning with Senator Joseph R. Biden Jr., the Delaware Democrat who heads the Senate Judiciary Committee. The committee's confirmation hearing will be held in September.

Senate Democrats have been largely silent about the nomination. Neither the Democrats nor the liberal interest groups that organized the successful fight against Judge Robert H. Bork's nomination to the Supreme Court three years ago have yet arrived at an approach to this nomination. Judge Souter's views about the issues that concern these groups the most, like abortion, are not known.

One Democratic aide to the Judiciary Committee was asked today how he was spending his time. "Reading," the aide replied.

Letter About Abortion

The scrutiny of Judge Souter's record goes beyond his more than 200 written opinions as an Associate Justice of the New Hampshire Supreme Court, extending to his actions as the state's Attorney General and even to letters he wrote on official business.

The National Abortion Rights Action League, which has expressed concern over the lack of knowledge about Judge Souter's views on abortion, found in its New Hampshire affiliate's files a letter that he wrote to a committee of the State Legislature in 1981. Judge Souter, then a judge on the state's trial court, the Superior Court, was expressing the views of a committee of judges on a bill to require teen-agers to get their parents' consent before having an abortion.

His letter said that the judges had decided to take no position on the question of parental consent but that they did oppose a provision in the bill to give teen-agers the alternative of seeking permission from a Superior Court judge.

Writing on behalf of his fellow judges, Judge Souter said the provision would force the judges to engage in "acts of unfettered personal choice." He said "a principled and consistent application of the quoted provision would be impossible" because judges would respond to the teen-agers' requests on the basis of their own views about abortion, or at least their views about their ability to make choices about abortion for another person.

Judge Souter's letter said: "Much criticism of the role of the judiciary in this country has characterized judicial activity in the application of constitutional standards as no more than the imposition of individual judges' views in the guise of applying constitutional terms of great generality. The provision that I have quoted from the present bill would force the Superior Court to engage in just such acts of unfettered personal choice."

The parental consent bill did not pass the Legislature.

A Pitch From Bush

Dawn Johnsen, legal director of the abortion rights group, said she found Judge Souter's letter "disturbing" because it indicated that he might vote on the Supreme Court to uphold parental consent laws that did not give teen-agers the option of seeking approval from a judge. The Supreme Court has not ruled on whether a "judicial bypass" is constitutionally required for all such legislation.

But Ms. Johnsen said the letter did not appear to indicate Judge Souter's view on the constitutionality of other restrictions on abortion.

The White House today was also polishing its strategy for the confirmation process. Kenneth M. Duberstein and Tom C. Korologos, two White House aides from previous Republican administrations who are now in the public relations business, have been asked to work with Judge Souter in preparation for the hearing.

'I must say, I never thought of myself as that obscure.'

At a White House meeting this morning with Congressional leaders, President Bush urged support of the nomination.

Leaving the meeting, Senator Sam Nunn, Democrat of Georgia, said the President had "made a pitch" for Judge Souter. "From what I've read, my impression is positive," the Senator said.

Representative Newt Gingrich, a Georgia Republican who is a spokesman for conservatives in the House, said as he left the same meeting that the nomination was a "surprise" and "sort of a George Bush-like choice."

"It seems to meet all of the President's philosophical commitments," Mr. Gingrich said. "At the same time, it doesn't allow the President's ideological opponents very much automatic opportunity to fight with him."

Mr. Gingrich added, "The people I know well from New Hampshire who have known him say that he is a very solid person."

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THE BOSTON GLOBE
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Souter confirmation strategy mapped

By John W. Mashek
and Stephen Kurkjian
GLOBE STAFF

WASHINGTON – Judge David H. Souter, President Bush's nominee to the Supreme Court, met with White House officials yesterday to map out his Senate confirmation strategy, while Bush urged the Senate to avoid letting a single issue dominate the hearings.

As Senate investigators began scrutinizing Souter's record, both personal and judicial, political strategists said that by moving rapidly to nominate Souter, Bush had succeeded in shifting much of the enormous attention concerning the nominee's position on abortion to his significant qualifications as a jurist.

Souter appeared relaxed when he posed for photographers at the White House. "The blood is circulating a little bit better than it was yesterday afternoon at five o'clock," he

said. "I didn't think it was going to happen. I was astonished."

Souter was selected from a list of potential nominees that numbered 18 last Saturday, that was trimmed to four over the weekend and that was reduced to two on Monday: Souter and Judge Edith H. Jones, 41, of the 5th US Circuit Court of Appeals in Houston, sources said. Bush interviewed Jones and Souter on Monday afternoon before deciding on Souter, they said.

Hearings on his nomination in the Senate Judiciary Committee are expected to start in early September. The White House and the Senate leadership want the vacancy left by retiring Justice William J. Brennan Jr. filled when the new court term starts on the first Monday in October.

Speaking on a political fund-raising trip in Philadelphia, Bush alluded to the divisive abortion debate as he urged the Senate to avoid letting a single issue dominate the confirmation proceedings.

"In my nomination . . . there was no single issue, no litmus test or standard dominating my decision to nominate," Bush said. "I will add there should be no litmus test in the process of confirmation."

He promoted Souter as a judge "true to the life and spirit of the Constitution, a priority that I'm confident will also guide the Congress in the confirmation process."

Advantageous background

The relative lack of definition in Souter's judicial background is working in his favor, as various interest groups and some members of the Senate struggle to find any nuggets of controversy in his record in New Hampshire and on the federal bench.

Liberals and conservatives are in the same predicament, because so little is known about the 50-year-old Souter, a close friend of Sen. Warren B. Rudman, Republican of New Hampshire.

"It is an unclear nomination in the sense of where he is going, and that really does help him in this situation in the Senate," said Sen. Paul Simon, an Illinois Democrat who is a liberal member of the Judiciary Committee. "I think the president was aware of that."

By deciding to announce Souter's nomination less than three days after receiving official notification that Brennan was resigning, Bush was able to cut off the pressure from both sides of the abortion issue to nominate a person who reflected their views.

"The longer the president took, the more his decision would be framed as by the abortion issue," said a White House adviser who asked not be to be identified. "He felt the quicker it was done the more people would concentrate on the person's qualifications, rather than anything else."

We hope the Senate will agree," McClure added.

The nominee's lobbyist

The White House confirmed that Kenneth Duberstein, a former chief of staff and congressional liaison in the Reagan administration, will help lobby Capitol Hill for Souter on an unpaid basis. Duberstein, a Washington lobbyist, is likely to help

Democrats on the Judiciary Committee over how hard Souter should be pressed to detail his position on abortion, which he has not directly ruled on during his 12 years on the New Hampshire Superior and Supreme courts.

Some senators believe that because Souter has taken no public position on abortion, questions should be limited to his positions on the

Souter on the limits of questioning during the hearings.

Asked how Souter would respond to heated questioning by Democrats on the abortion issue, one Bush adviser said: "I doubt very much if you'll see anything very deep on any issue, such as that, that is before the court."

However, according to sources, there is a potential split among the

broader issue, such as whether the Constitution sets out the right to privacy.

To concentrate on one issue, even one as emotional as abortion, would "relegate the historic confirmation process to single-issue politics," Leahy said.

However, other Democrats on the committee appear to feel that abortion is a significant enough issue legally and politically to center the debate over Souter's qualifications to sit on the court.

Politics and history

Some staff members are already researching the number of past confirmation battles that hinged on a single issue, including the Senate's rejection of George Washington's elevation of Justice John Rutledge to chief justice in 1795 because of Rutledge's opposition to a treaty with England.

Doug Bailey, a Republican political consultant, said that abortion is such an explosive, political issue that senators might legitimately be able to press Souter to define his position, without being viewed as abusing the confirmation process.

"Two years from now, if Souter is on the bench and overrules Roe v. Wade, there are going to be a lot of prochoice people out there asking their senators why they weren't tougher in questioning this guy," Bailey said.

In the 19th century, Supreme Court nominees were routinely rejected for a broad range of political reasons. But in this century, the trend has been to allow the president to nominate to the court a person who shares his judicial philosophy.

The most recent exception to that trend, the Senate's rejection of Reagan's nomination of Robert H. Bork, was fueled by Bork's lengthy writings and opinions on a range of controversial topics before the court.

Following a faint trail

There is only a faint paper trail in Souter's case, a fact that worries conservatives as well as liberals. "Most conservatives today have nervous smiles," said Richard A. Viguerie, chairman of the United Conservatives of America. "We think we can be happy, but we're a little apprehensive. We don't know a lot about Judge Souter."

Until the confirmation hearings begin, Souter is likely to stay out of the public eye and withhold all comment on matters before the court, administration sources said.

He is not expected to return to his home in Weare, N.H., until the weekend. Today, Souter will begin a tour of Capitol Hill to meet with Senate leaders, followed by members of the Judiciary Committee.

Metzenbaum's score card

Sen. Howard M. Metzenbaum, an Ohio Democrat and a Simon colleague on the Judiciary Committee who is likely to be the toughest questioner, told reporters: "At this point it's no hits, no runs, no errors. It may not be a good thing in a justice, but it's a good thing in sending up a nominee to be confirmed."

Sen. Patrick J. Leahy of Vermont, a liberal Democrat on the Judiciary Committee and a fierce critic of many of President Reagan's judicial nominations, was similarly positive. "It's a good one," Leahy said of Bush's decision. "He could have sent up a symbol that would pander to the far right of his party, but instead he has chosen someone for his legal qualifications, not his ideological ones."

At the White House, Souter met with Frederick McClure, Bush's congressional liaison chief, to discuss the confirmation strategy. McClure said the meeting was routine, a normal practice associated with new nominees. "He's a well qualified guy.

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White Mountains echoing pride and praise for Souter

By Alan McConagha
THE WASHINGTON TIMES

CONCORD, N.H. — New Hampshire, a state with an abiding faith in tradition, elaborated its version of a Horatio Alger epic yesterday with the story of Judge David H. Souter.

As reporters flocked here to learn more about the surprise nominee to the Supreme Court, his friends revealed that he is a jurist with an abiding faith in tradition.

He is also popular. The retiring, scholarly, 50-year-old federal appeals judge was hailed as the "Abraham Lincoln of New Hampshire" by Concord High School Principal Charles Foley.

According to the enthusiatic Mr. Foley, if Judge Souter ran for public office "he'd be a shoo-in — and people would be running to get into the pictures with him. He's that respected."

Chief Justice David A. Brock of the New Hampshire Supreme Court said he was "extremely pleased" and shared in the state's pride at Judge Souter's selection for the high court.

"I know him as a scholarly, bright and articulate exponent of his judicial philosophy," said Judge Brock, who served for several years with Judge Souter on the state Supreme Court.

Judge Souter is "a big-league ball player who's finally getting to go to the big league," said John Broderick, president of the New Hampshire Bar Association.

Former state Attorney General Steve Merrill, now a Manchester lawyer, added, "The New Hampshire bar is delighted that one of the best and brightest in New England, if not the whole country, was chosen."

But it was also apparent in these interviews that Judge Souter's views on such sensitive issues as abortion are as little known in his hometown as they are among Washington advocacy groups.

The Concord Monitor, in an admiring editorial, noted that the nominee respects legal precedent: "Souter is no Robert Bork," the newspaper said. "It's far from certain whether, for example, he would vote to overturn Roe vs. Wade."

The newspaper was referring to the 1973 landmark Supreme Court decision that legalized abortion and to retired Judge Robert Bork, whose nomination to the high court by President Reagan failed to win confirmation.

James Duggan, a professor at Franklin Pierce Law Center, said Judge Souter in the past closely analyzed the text of the New Hampshire Constitution in arriving at his decisions.

But Judge Souter's respect for legal precedent might make him reluctant to overturn earlier rulings, said Mr. Duggan. He thought it was an "open question" whether Judge Souter would vote against Roe vs Wade.

One government official who requested anonymity told the Associated Press that Judge Souter follows the values and philosophy of "the Great Dissenter," conservative Supreme Court Justice Oliver Wendell Holmes, another stickler for precedent. The official said he took that to mean Judge Souter would be reluctant to overturn a previous decision such as Roe vs. Wade.

Judge Souter was born in Melrose, Mass., and moved at age 11 to the nearby community of Weare. A bachelor, he continues to live quietly in the austere farmhouse in which he was raised.

He went to school in Concord, and his high school yearbook describes him as "very hard working and studious and in constant demand."

WASHINGTON TIMES
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Colleagues find Souter non-political on bench

By Dawn M. Weyrich
THE WASHINGTON TIMES

David Souter's short career on the federal bench makes it hard to predict how he will tip the balance of the Supreme Court, but colleagues call the nominee a "judge's judge" who consistently refused to let politics encroach on the outcome of his decisions.

Judge Souter was appointed to the New Hampshire Superior Court in 1978 by conservative Gov. Meldrim Thomson Jr. and elevated to the state's Supreme Court five years later by another conservative, Gov. John Sununu, now White House chief of staff.

"If I were a conservative, I'd say that was a fairly good sign," said John Broderick, president of the New Hampshire Bar Association and counsel for the state's Democratic Party. "But to connect those dots to say he will carry out some conservative agenda on the court is to miss the man."

Colleagues from New Hampshire's clannish legal community insist that Judge Souter has no political agenda. But they agree that he is an adamant opponent of "judicial activism" — legislating from the bench.

"Judge Souter might not have voted for a specific piece of legislation had he been in the legislature," said former state Attorney General Stephen Merrill, who has argued cases before the nominee. "If it appeared in front of him as bad law, he would criticize it for being bad law, but he would not strike it down if it were constitutional."

Some Senate Judiciary Committee members have said they plan to quiz Judge Souter about his philosophy on abortion, and some interest groups insist the nomination will turn on that single question. The one case in which he dealt with that issue, however, does not reveal his position on Roe vs. Wade, the 1973 Supreme Court ruling that recognized a fundamental abortion right.

But because Judge Souter is a "strict constructionist" — one who interprets the Constitution by the framers' intent — some speculate he might vote to overturn the decision.

"If the chance were to come before him and it involved what he believed to be a correct interpretation of the Constitution, the answer would have to be yes, he would overturn Roe," said Mr. Thomson, the former governor.

But other colleagues insist that Judge Souter has high respect for prior decisions and might be loath to take such an extreme step.

"He sees the law in an evolutionary mode, not a revolutionary mode," Mr. Broderick said. "He won't give the electric shock treatment to any precedent."

Mr. Merrill agreed: "If people think Souter is going to be easy to predict on these very troubling legal issues, they're wrong."

Mr. Broderick said Judge Souter's opinions are likely to surprise those who attempt to label him a true conservative.

"He will not cast his lot with the conservatives on the court merely because they're conservatives," he said. "He's fiercely independent in his legal reasoning and he'll get there on his own. He has no constituency."

Bush reveals high court nominee

Views differ on label for federal jurist

By Steve McGonigle
Washington Bureau of The Dallas Morning News

WASHINGTON — President Bush described U.S. Appellate Judge David Souter as conservative Monday but likened his intellect and background to that of William Brennan, the liberal Supreme Court justice whom Judge Souter may succeed.

A lawyer in Judge Souter's home state of New Hampshire offered another comparison. He invoked the image of former Justice Lewis Powell, a moderate who was often a key swing vote on issues such as abortion and civil rights.

Time will tell which, if either, portrayal fits Judge Souter.

His name and legal opinions are not well-known outside the Northeast, where he served as a state trial and appellate judge for 12 years.

Mr. Brennan, who resigned Friday because of ill health, was a New Jersey Supreme Court justice when President Dwight Eisenhower tapped him for the high court in 1956. Mr. Brennan went on to become the court's leading liberal and a source of frustration to five Republican presidents.

President Bush named Judge Souter to the 1st U.S. Circuit Court of Appeals in Boston in April, and he was confirmed unanimously by the Senate. However, several senators acknowledged Monday that the evaluation process was not as thorough as the one Judge Souter now will undergo.

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Judge Souter's close friend, Sen. Warren Rudman, R-N.H., said the nominee "cannot be categorized as having an ideology in any way, shape or form, and a reading of his opinions would quickly indicate that."

Cass Sunstein, a law professor at the University of Chicago, said a computer study of legal journals shows that Judge Souter has not written a decision on abortion, the issue that some interest groups deem crucial.

What is clearly evident about Judge Souter, the president and the judge's friends say, is that his intelligence and legal skills are exceptional.

Mr. Souter, 50, is a magna cum laude graduate of Harvard College and also received his law degree from Harvard University Law School. Before starting his legal studies, he was a Rhodes Scholar at Oxford University in England.

Accolades for his knowledge come in shades of brilliance.

The president called his nominee "a remarkable judge of keen intellect and the highest ability, one whose scholarly commitment to the law and whose wealth of experience mark him of the first rank."

Mr. Bush said he decided to nominate Judge Souter after meeting and talking with him Monday for the first time. They did not discuss abortion or any other legal issue, the president insisted to reporters.

Tom Rath, a former New Hampshire attorney general, said he told his wife after being interviewed by Judge Souter for a job in the attorney general's office in 1972 that he "ought to be on the United States Supreme Court."

"He just had an intellect and an approach to the law that struck you as special," said Mr. Rath, who described himself as a close friend.

Martin Gross, a Concord, N.H., lawyer, called his longtime colleague "a man of integrity and unquestioned legal ability."

"He doesn't enter cases with any predetermined views. He believes that a judge should decide cases based on what's argued," Mr Gross said.

James Duggan, head of New Hampshire's public defender program, said that Judge Souter tends to view the law in strict, literal terms.

"He interprets rights as they are written and interprets the powers of government as they are written," Mr. Duggan said.

Although Judge Souter once participated in an abortion-related decision while on the New Hampshire Supreme Court, Mr. Duggan said he could not predict how Judge Souter would vote on abortion while on the Supreme Court.

The 1986 decision — in which Judge Souter wrote a concurring opinion — ruled that the parents of a child born with multiple birth defects could sue a doctor because he did not counsel them about abortion. basis of Roe vs. Wade, the New Hampshire court noted that the Supreme Court had found that a woman "has a constitutionally secured right to terminate a pregnancy."

Judge Souter, in his concurrence, wondered what the ruling's impact would be on doctors who oppose abortion but were bound to advise patients about it.

"I think he would have dissented from Roe vs. Wade, but whether he would be prepared to overrule it now after the court has built on it and decided a lot of cases on it, is a different question," Mr. Duggan said.

Mr. Souter, whom friends say is a Republican, has been appointed to four legal and judicial jobs by two Republican governors and Mr. Bush. But he is not viewed by intimates as actively political himself.

Mr. Gross, a Democrat, sought to dispel the notion that Judge Souter is a political appointee, although he is close to Mr. Rudman and was appointed to the state Supreme Court by John Sununu, the former New Hampshire governor now serving as Mr. Bush's chief of staff.

"This is a man who has not had a political tie in his life," Mr. Gross said. "Each time he was named, we all breathed a sigh of relief."

Mr. Rath called Judge Souter "apolitical."

Mr. Rudman said his longtime friend and former chief deputy when he was New Hampshire's attorney general most likes reading and mountain-climbing.

"Dave and I rarely discuss politics because he doesn't know much about politics," Mr. Rudman said. "We talk about other things."

The senator said he did not know Judge Souter's view of the 1973 Roe decision, which ruled that women had a constitutional right to privacy in making the decision to terminate a pregnancy in its early stages.

Paul Rothstein, a Georgetown University law professor who attended Oxford University with Judge Souter in the early 1960s, praised him as a "very, very sound lawyer with a lot of judicial experience."

"Based on legal skills, this man is a first-rate lawyer and will make a first-rate judge," Mr Rothstein said.

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Souter endorsed the death penalty

By Jerry Seper
THE WASHINGTON TIMES

CONCORD, N.H. — Supreme Court nominee David H. Souter, who has avoided public comment on controversial issues since his appointment a dozen years ago as a judge, had well-known positions when he served as a state prosecutor, records show.

In fact, during his tenure as New Hampshire's attorney general between 1976 and 1978, Mr. Souter endorsed the death penalty and took a firm stand against civil disobedience.

His death penalty stand came during an April 1977 appearance before the state House Judiciary Committee in New Hampshire when, as attorney general, Mr. Souter testified that he favored the death penalty in some cases of first-degree murder, the records show.

"For a certain, limited class of crime, I do not believe life imprisonment is sufficient penalty," Mr. Souter told committee members.

Mr. Souter, who had served as deputy attorney general from 1971 to his appointment as attorney general in 1976, testified that capital punishment as a deterrent "has a lot more subtle effect" than life imprisonment or other long-term incarceration.

Mr. Souter, who was appointed to the New Hampshire Superior Court in 1978, told the committee that statistics had proved that the death penalty served as a deterrent to murder.

His views on civil disobedience surfaced in June 1977, when he testified before the state Senate Finance Committee that anti-nuclear protesters at the Seabrook nuclear plant had made a "farce" of the criminal justice system, according to the records.

As attorney general, Mr. Souter told the committee he planned to strictly enforce civil disobedience laws and vowed to vigorously prosecute those who violated them.

Mr. Souter prosecuted the cases against the demonstrators himself.

"It was unusual," said Al Casassa, who served as the Hampton District Court judge for eight years. "I think it was the only time in my period in court that he or any attorney general came down there."

"He was extremely thorough," remembers Mr. Casassa, now a lawyer in private practice.

When questioned by Finance Committee members on why many of those arrested during the Seabrook demonstrations had been detained in nearby armories rather than being booked and released, Mr. Souter testified that the demonstrators had expected to be locked up.

"They thought the state of New Hampshire was not going to do a damn thing with them," Mr. Souter said. "They got a good deal more than they bargained for."

Other positions Mr. Souter took when he served as attorney general included opposition to the construction of Seabrook over thermal discharges and opposition to gambling.

"He would devote so much thought to what the state of New Hampshire should do," said Richard McNamara, whom Mr. Souter hired as a prosecutor straight out of law school. "He inculcated in young prosecutors a sense of fairness."

Rep. Thomas Gage, who chairs the state House Judiciary Committee, said his dealings with Mr. Souter led him to think of him as a conservative "with a little C."

"I think conservative is a good word for him in that he has taken an approach in his style and his demeanor and his judicial conduct that is conservative," he said. "He strikes one as a very gray pin-striped sort of a guy.

"People who admire brilliance will be very impressed with this man," he said. "He has tremendous respect in the legal community as an attorney general and as a judge as well."

• *Jay Mallin in Washington contributed to this report.*

The Next Three Court Nominees

David S. Broder

Despite the grumbles from the political extremes, President Bush's appointment of Judge David H. Souter to the Supreme Court has every indication of being a superb choice—both substantively and politically.

What the country should care about is that the New Hampshire jurist—by the unanimous testimony of those who know him—brings a powerful, superbly trained legal intellect, disciplined work habits and genuine independence of judgment to the issues before the high court.

The political finesse of Bush's first Supreme Court appointment is underlined by the array of attractive options now open to him for those who may follow Souter. After naming an easily confirmable conservative who shares his own New England, Yankee, WASP heritage to replace Associate Justice William J. Brennan, Bush has put himself into a position where he can play tough but rewarding ethnic and ideological politics with subsequent Supreme Court choices.

Bush can play ethnic and ideological politics with subsequent Supreme Court choices.

The tip-off to the long-term strategy came in the eagerness with which White House officials aided reporters in learning the identities of those who they said were highest on the list of also-rans. They were, in the White House's publicized order of preference, Circuit Court Judges Edith H. Jones, a Texan and a woman; Clarence Thomas, a black; and Laurence H. Silberman, a Jew—all clearly in the conservative camp.

A Democratic political consultant who looked at the list remarked, "They've got perfect positioning if they want to pick our coalition apart." What he meant was that if Bush gets the opportunity to make additional Supreme Court appointments before 1992, he can force the Democrats either to acquiesce in moving the high court much farther to the right or to pay an exceptionally high political price by challenging nominees from important constituencies.

Talking about the politics of the court appointments in such bald terms may seem offensive, especially when Bush just has acknowledged a president's overriding obligation to give the greatest weight to the quality of the nominee for the high tribunal. But it would be fatuous to pretend that the political environment was not part of this choice. Bush did not want—and could not afford—a Robert Bork-like confrontation with the Democratic Senate at this moment.

The most important reason is that so much now hangs on the success of his budget summit with Congress. Bush has paid a significant political price by abandoning his "no-new-taxes" pledge in order to keep the Democrats negotiating. He needs to get a return on that investment—a credible deficit-reduction agreement that will allow the Federal Reserve to cut interest rates and help revive a faltering economy.

The urgency of that agreement is underlined by the new Washington Post-ABC News poll's finding that nearly three out of five Americans think the economy is worsening, and more disapprove than approve Bush's leadership on economic issues. Collapse of the budget talks would damage Bush politically and quite possibly tip the economy into recession.

The negotiations are arduous already, and the venom of an ideological battle over a Supreme Court nomination would inevitably poison the chances of the budget summit accomplishing its objective.

The second reason Bush did not want a pitched battle now over a clearly ideological appointee is the imminence of the midterm elections. Republican chances of making gains in the Senate depend heavily on states such as Illinois and Rhode Island, where Republican women challengers are supporters of abortion rights, and Iowa, where the Democratic incumbent is trying to turn the election into a single-issue referendum on his challenger's anti-abortion views.

The last thing Bush wanted to do was to send up a Supreme Court nominee who would provoke a lengthy confirmation fight centered on the abortion issue.

None of these considerations would apply in 1991, should the opportunity for other appointments arise. Bush might well find it useful then to nail down his conservative base by making a more ideological court appointment, just as he courted the religious right in pre-election 1987 with a series of speeches and gestures.

A pitched battle in the Senate in 1991 would be a win-win proposition for Bush: Even if the liberals defeated his nominee, he would have made his point and could come back with a less controversial conservative.

That is why the three names are so intriguing. If Sandra Day O'Connor were to retire, Democrats opposing Judge Jones would find themselves opposing a female and a southerner on a court that has had only one woman and no one from Dixie in recent years.

If Thurgood Marshall were the retiree, how would Democrats feel about blocking Judge Thomas and making the court all-white again? And if Silberman were the choice, how many Democrats would be eager to oppose the first Jew on the court since Abe Fortas?

You can see why White House political operatives like the setup.

THE WALL STREET JOURNAL
7/25/90

David Souter, Bush's UnBorkable Nominee

Rule of Law

By L. Gordon Crovitz

With mystery nominee David Souter, conservatives get a high-stakes test of the judicial philosophy that what counts is not who wins and who loses in cases but how the judges play the game. His empty file on the hot button legal issues should make no difference to anyone so long as he passes the litmus test of reasoning by law and not by politics.

A review of Judge Souter's New Hampshire court opinions suggests he is a practitioner of classic judicial restraint. He does not legislate from the bench or make up new parts of the Constitution. Indeed, several of his cases feature what might be called a Thrifty Yankee view of the Constitution: Use it sparingly.

Judge Souter's supporters cite one case in particular to show the importance of *how* a judge reaches his decision. *New Hampshire v. Valenzuela* (1987) was a run-of-the-mill appeal by drug dealers caught with 65 pounds of cocaine, almost a ton of marijuana and weapons. The defendants tried to invoke the exclusionary rule to suppress the evidence.

The police had used what's called a pen register to record the telephone numbers dialed by one of the drug dealers. To the defendants' argument that this was an unreasonable search, Judge Souter did not wade in to make new search-and-seizure law. Instead, he ruled that unlike a wiretap attaching this device to a subscriber's telephone line was not a search at all.

He dismissed the view that "any effort to gather evidence should be treated as a search." Otherwise, he reasoned, the police would also have to get a warrant before they could use information given to an agent or informer. Judge Souter thus gave the Constitution the frugal reading it often deserves but rarely gets from judges more eager to add their footprints to the head of a jurisprudential pin.

Civil libertarians and separation-of-powers cognoscenti will also be cheered by this opinion. Judge Souter chastised a magistrate in the case who had advised the police that evidence would be suppressed if they denied one of the arrested defendants his request to make a phone call. Judge Souter wrote that "legal advice to police officers ought to come from city or county attorneys or from the attorney general's office, not from judges." Giving advice places neutrality at risk, with potentially appalling consequences." He warned that "all of us in the judiciary should take care to avoid occasions for any more litigation about judicial detachment."

Judge Souter also criticized judges for adopting multipronged balancing tests as a hidden way of creating new legal rules. The straightforward question in *City of Dover v. Imperial Casualty & Indemnity* (1990) was whether the city was immune from liability when a woman slipped on a public sidewalk. Somehow this tort case led to a majority opinion on the wrinkles of the Constitution's equal protection clause. In his dissent, Judge Souter warned that the court's "middle-tier equal protection scrutiny . . . and accompanying questions as yet unanswered will provide fodder for a good many opinions."

Judge Souter's dissent in *New Hampshire v. Ballou* (1984) is strict constructionism at work. The state extended the period of new committals to mental hospitals for criminal defendants who plead guilty by reason of insanity. Recommittals would last five years instead of two years. The defendant claimed this violated the prohibition against ex post facto laws for the punishment of criminal offenses.

But Judge Souter noted that the insanity plea is not an admission of a crime. Instead, the purpose of the plea is to avoid criminal liability. "A statute regulating commitments of dangerous defendants following findings of insanity does not deal with criminal offenses and, by definition, could not do so," he wrote. Therefore, the ex post facto clause does not apply.

These cases help explain why—proprieties aside—the Bush administration does not need to ask potential nominees their views on substantive issues. Put it this way: If you have to ask a nominee his views after analyzing his opinions, you probably shouldn't nominate him. It is highly unlikely that a judge who will parse the ex post facto prohibition to distinguish between criminal defendants and the criminally insane would then fail to take seriously other statutes or the Constitution.

David Souter

It's worth noting that litmus-test questions on substantive issues were put to judicial candidates during the Carter administration. This makes sense. It is obviously important to know the policy views of an activist judge whose legal methodology could well be determined by the result to be reached.

President Bush may well have found an unBorkable nominee. Judge Souter has apparently never written a law-review article or given a memorable speech. The liberal lobbyists will have a hard time making much of his opinions likeliest to attract their attention. He has written on abortion, but in a medical malpractice case and only to say that doctors don't have to perform abortions themselves when they advise patients that there may be a birth defect. In another case, he was part of a court that ruled New Hampshire could prohibit homosexuals from adopting children, but also said the state could not exclude them from working in day-care centers.

So if a fight develops against Judge Souter, it probably won't be the smear and misrepresentation campaign that worked so well against Robert Bork. The lobbyists instead might have to debate the role of judges. We already hear liberal voices testing the waters by dismissing the distinction between judges interpreting the law and legislating from the bench as nothing but a "cliche."

Anyone tempted to push this notion might think twice. For one thing, it is a problem for liberals to dismiss the existence of judicial activism even as they erect monuments to its champion, William Brennan. Justice Brennan had to ignore whole tracts of the Constitution to find a prohibition on the death penalty.

If liberal Senators defeat a judicial nominee because he believes too strongly in judicial restraint, they legitimize activist judging at their peril. After all, most federal judges were appointed by President Reagan or Bush. No one has seen a right-wing activist judge in many decades, but a new breed is possible to imagine. Such a judge might ignore the 16th Amendment in order to invalidate income taxes or dismiss the Clean Air Act as patently irrational and refuse to hold defendants liable.

More likely, Judge Souter will become Justice Souter in time for the next term of the Supreme Court. His close analysis of statutes and the Constitution will put him in the conservative camp of justices. His willingness to ask whether all issues are necessarily legal issues could help nudge the court back to its more modest practice of avoiding essentially political cases. It is a tribute to the influence of Justice Brennan that even his replacement by David Souter would mean only that the new conservative intellectual jurisprudence will be off to a healthy infancy.

Ascetic at Home but Vigorous on Bench

By DAVID MARGOLICK

Special to The New York Times

New York Times 7/25/90

WEARE, N.H., July 24 — Whenever lawyers assess a candidate for the United States Supreme Court, they generally make comparisons to known judicial quantities. That is how the lawyers of New Hampshire are describing Judge David H. Souter, whom they have followed from private practice in Concord to the State Attorney General's office to the state and Federal bench.

Some see in Judge Souter the quirkiness of Justice John Paul Stevens. Others see the intellectual rigor of Justice Antonin Scalia, or the pragmatic conservatism of Justice Lewis F. Powell Jr. And almost everyone reaches all the way back to the 1930's for a Justice of Judge Souter's ascetic style and monastic personal life: Benjamin N. Cardozo.

The one Justice to whom he is never compared here, either in temperament or judicial philosophy, is the one he would replace: William J. Brennan Jr.

Cottage Cheese and an Apple

In this green and pleasant state, where lawyers number just 3,500 and State Supreme Court justices just five rather than the usual seven or nine, even someone as reclusive as Judge Souter cannot remain a remote Olympian figure.

Lawyers here can tell you what kind of cars he drives (and drives and drives): cheap subcompacts, most recently a 1987 Volkswagen Golf. They can tell you what he undeviatingly eats for lunch every day (cottage cheese and an apple); what he wears (his black judge's robe was said to add color to his attire), and how and where he lives (alone, in a weatherbeaten farmhouse in this southern New Hampshire town nine miles from the Supreme Court where he sat for seven years).

They know he is intermittently and selectively gregarious, a good storyteller who displays a dry New England wit to those who really get to know him. He is said to do a splendid imitation of former Gov. Meldrim Thomson Jr., who named him Attorney General, and to tell great tales about Senator Warren Rudman, the New Hampshire Republican who is his long-term political mentor and sponsor.

Outside the courtroom, they say, he can cast aside judicial rigor for a measure of personal warmth. Each Sunday he walks the same elderly woman home from St. Andrew's Episcopal Church in Hopkinton, where he is a vestryman, and each Sunday he visits his mother at a Concord nursing home each Sunday. He offered money to help rebuild a friend's barn after it burned down.

Neighbors like Martha Knox and Nellie Perrigo, as well as college classmates from his days at Harvard 30 years ago, describe him as courteous, loyal, unaffected and upright.

"He isn't stuck up, doesn't put on any airs and is very down to earth," said Howard Ineson, who lives a mile up Sugar Hill Road from the judge and has known him and his family for 40 years. "They're going to have to work very hard to find any blemishes."

On the New Hampshire Supreme Court, where unanimity is commonplace and whose spectrum runs less from liberal to conservative than from humanistic to hyper-logical, lawyers here say Judge Souter is at the far edge of the latter.

If there are any qualms at all about Judge Souter, it is a quiet concern over his circumscribed way of life. As a young man he was briefly engaged to the daughter of a State Superior Court justice, but he never married, and even his admirers wonder whether his solitary style has limited his empathy or level of human understanding.

Almost no one here purports really to understand the small, buttoned-down figure who stood by awkwardly as President Bush nominated him to the nation's highest Court on Monday. Even by the laconic standards of this community, he is known for his reticence.

Few, including his fellow judges, have ever been inside his house, with its peeling paint, sagging porch, and lawn clogged with clover and Queen Anne's lace. Those who have say it is filled with books. By all accounts, he is much more interested in Tennyson than tennis, though he likes hiking in the White Mountains as much as either.

The Judge

Independence And Hard Work

But Judge Souter's reticence vanishes behind the bench. He is credited with bringing a new level of fire and vigor to the once-sleepy oral arguments that long characterized the court. He is also widely praised for his hard work, dedication, intellectual acuity and independence. "Souter does not carry this huge cargo of ideological precommitments that seems to have been a qualification for everyone who's been appointed to the Supreme Court for the last 10 years," said Martin L. Gross, a lawyer in Concord.

James E. Duggan, a professor at Franklin Pierce Law Center in Concord who has often argued before him, described Judge Souter as "very conservative, but with a streak of Yankee independence that makes him somewhat unpredictable."

"I'm disappointed that Brennan is leaving, but Bush could have done a lot worse," Mr. Duggan said. "Souter is not a blind right-wing law-and-order judge. On the other hand, he's not going to cut any breaks for criminal defendants."

Mr. Gross agreed. "David places a much stronger value on society's need to protect itself than most civil libertarians would like," he said. "What they'd better be rejoicing about is that they didn't get another right-wing nut. This is a guy who listens intently to what litigants have to say."

Bruce E. Friedman, director of the civil practice clinic at the Franklin Pierce Law Center in Concord, was less enthusiastic. "He's smart and diligent," Mr. Friedman said, but I don't think he will be a general in the war for a kinder, gentler America."

For the past day, New Hampshire residents have experienced a surge of pride as they did when two other New Hampshire natives, Alan Shepard and Christa McAuliffe, were selected for the space program. New Hampshire has not had a Supreme Court Justice it could call its own since Harlan Fiske Stone, in the 1940's. In Concord, WKXL radio's "Party Line" program, originally set aside for phone calls about big-band music, devoted today's show to Judge Souter, whom the moderator described as "squeakier than squeaky clean."

The Student

Formal, Reserved, Intensely Private

Judge Souter, an only child, moved here with his parents at the age of 11. His father, Joseph, was an official at the New Hampshire Savings Bank in Concord.

The younger Souter was a diligent student, whose only brush with juvenile delinquency, as one story has it, came when he was kicked out of the New Hampshire Historical Society for loitering after hours. At Concord High School where he was voted "most literary," "most sophisticated" and "most likely to succeed." The high school yearbook described him as "witty and in constant demand" and said he enjoyed "giving and attending scandalous parties."

Mr. Souter entered Harvard in 1957. From 1961 to 1963 he attended Oxford University on a Rhodes Scholarship, studying law and philosophy. He then moved to Harvard Law School, where he did well but did not make the Law Review.

When he graduated from Harvard College in 1961, several classmates came up with the perfect idea for a gift: a scrapbook filled with imaginary news stories about the blazing career everyone foresaw for him. In the book, someone pasted the headline "David Souter Nominated to the Supreme Court."

'Mr. Justice Souter'

It was a joke that said much about his classmates' affection for him, and about his single-mindedness. "All David ever wanted to be was a judge," said the Rev. John L. McCausland, an Episcopal minister who was one of his closest friends at Harvard College and Harvard Law School. He said Mr. Souter's friends used to call him "Mr. Justice Souter."

But just three weeks ago, when Mr. McCausland called Judge Souter to congratulate him on being confirmed to an appellate court seat in Boston and jokingly asked if this would just be a steppingstone to the Supreme Court, he said the judge replied: "No. There's no chance I'll be nominated, because I come from a politically insignificant state."

As an undergraduate, Mr. Souter was fascinated by Justice Oliver Wendell Holmes, and though he majored in philosophy, he wrote his senior honors thesis about Holmes's judicial positivism. Mr. McCausland recalled an evening meeting at Lowell House at which Mr. Souter read his thesis. "It was very technical and erudite," Mr. McCausland said, but what struck him was that it examined Holmes's belief that a judge should not act out of political persuasion, or ideology.

A Book of Common Prayer

Mr. Souter's father was a loan officer in a savings bank in Concord, N.H. The family didn't have a lot of money, Mr. McCausland said, and so David Souter went to Concord High School, not to a prep school.

Mr. Souter was deeply religious, Mr. McCausland and other longtime friends recalled. The Episcopal priest said he was amused by Judge Souter's preference for the 1928 Episcopal prayer book, rather than the updated 1970's book, which dropped the use of words like thee and thou.

David Eisenberg, another Harvard classmate who was a Rhodes scholar with Mr. Souter, recalled that Mr. Souter was one of the few Rhodes scholars who attended chapel and took communion.

Professor Eisenberg, who teaches molecular biology at the University of California at Los Angeles, recalled Mr. Souter as somewhat reclusive and bookish. "At every break, the rest of us would take off for the continent, to get away from the English cold and to explore," he said. "But David always just stayed at Oxford."

Like other friends, Mr. Eisenberg described Judge Souter as "an excellent conversationalist, great fun to have dinner with, but formal, reserved and intensely private."

He added, "I think he is rather an old-fashioned kind of person, with strong values and principles."

Other old friends used similar terms. Dr. Melvin Levine, another former Rhodes scholar, said Mr. Souter, his close friend at Oxford, was "in the 18th-century mold." He has "magnificent handwriting that looks like calligraphy," and is courtly and unfailingly polite, said Dr. Levine, who is now a professor of pediatrics at the University of North Carolina Medical School in Chapel Hill.

At Oxford, Mr. Souter was very patriotic, deeply offended at anti-American remarks, Dr. Levine said, adding: "He's always wanted to be a defender of America and American values. That's why he went into law."

Influence of an Aunt

Mr. Souter was profoundly influenced by an aunt, Harriet Bartlett, who was a pioneer in medical social work. "She had a combination of being politically and socially conservative, but she fulfilled liberal causes," Dr. Levine said.

Dr. Levine said he thought Mr. Souter had modeled himself on her, and added that she might be the source of his interest in medicine and hospitals: for 13 years he served as a trustee of Concord Hospital in New Hampshire, 6 of them as president.

Mr. Souter's old friends took a turn at guessing what kind of Supreme Court Justice he might be. Mr. McCausland, who was a lawyer in Chicago before he became a minister, predicted that his friend would be "very conservative as a Justice, but my feeling is he is the kind of conservative who can fool the people who appointed him."

"He's extraordinarily honorable and thoughtful and intelligent," Mr. McCausland added. "He would be technically conservative, but not ideologically conservative, not like a Scalia.

"He might well continue to be a swing vote. He is not a crusader for any cause."

Dr. Levine also said he thought Judge Souter might prove to be a surprise on the Court. "I've always believed he is more liberal than he allows in public," he said. "He is very conservative, but part of that is preserving an image of old American values. On the humanistic side, he is very compassionate."

The Legal Mind

Conservative, But What Else?

After law school, Mr. Souter returned to Concord, a move that surprised some who had expected him to settle in a more distant and exotic place. He joined the Concord law firm Orr & Reno, where he spent two unhappy years. In 1971 he became a Deputy State Attorney General.

He remained in that office for the next 12 years, much of it under Mr. Rudman's tutelage. "They were the two sides of a perfect public person: Warren Rudman was gregarious and great on his feet, and David Souter more thoughtful, careful," said Charles Leahy of Concord, a friend of Judge Souter's. "It was a chemical, intellectual and emotional match."

In 1976 Governor Thomson named Mr. Souter Attorney General, and during his two-year stint he took several controversial stands, often at Mr. Thomson's behest. He urged, for instance, that demonstrators arrested at the Seabrook nuclear power plant be given more than suspended sentences. He also argued, unsuccessfully, that it was constitutionally permissible to fly the American flag at half staff on Good Friday and that New Hampshire could force residents to use "Live Free or Die" license plates on their cars.

Mr. Thomson named him to the Superior Court in 1978. Five years later his successor, Gov. John H. Sununu, elevated him to the Supreme Court to replace Maurice Bois, who had retired. "I think when I'm old and gray, people will say 'This is one of the greatest things you did as Governor,'" Mr. Sununu said at Judge Souter's swearing-in ceremony.

Over the next seven years, he became known for writing forceful but increasingly long and complex opinions. "He has a tendency to disclose compulsively every twist and turn in his reasoning," Mr. Gross said. It is an odd fate for someone who, as Attorney General, handed out copies of Strunk and White's manual on English usage to lawyers working for him.

THE NEW YORK TIMES, FRIDAY, JULY 27, 1990

ABROAD AT HOME
Anthony Lewis

Models For a Justice

BOSTON

Senator Warren Rudman of New Hampshire was asked the other day whether Judge David Souter especially admired any past members of the Supreme Court. Senator Rudman said he thought the Souter favorites were Justices Oliver Wendell Holmes Jr and John Marshall Harlan the younger.

If that is so — and as a close friend Senator Rudman should know — it is an extremely interesting answer. It does not tell what everyone in Washington is panting to know: how Judge Souter would vote on this issue or that as a member of the Court. But it gives intriguing insight into how he may see the job.

Justice Holmes, who served from 1902 to 1932, generally believed in judicial deference to legislative choices. When the Court tried to stop economic reforms, for example when it held restrictions on child labor unconstitutional, he wrote eloquent dissents. He thought that democracy meant that majorities must usually have their way — but not when it came to freedom of speech.

"If there is any principle of the Constitution that more imperatively calls for attachment than any other," Holmes wrote in 1929, "it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

He was dissenting there from a decision that denied American citizenship to a woman because she was a pacifist and said she would not bear arms to defend the Constitution. A later Court overruled the decision and came to Holmes's view of free speech.

Justice Harlan served from 1955 to 1971. For many of us who knew the Court in that period, he is a model of what a Supreme Court justice should be. That is not because he reached results that always pleased us — far from it — but because of his craftsmanship and the way he committed himself to deciding cases.

Harlan and Holmes may shape Judge Souter's approach.

He had no agenda. He did not go into a case with certainty about how it should come out. He struggled to be disinterested. That did not mean unconcerned; he cared deeply. It meant that he tried genuinely to understand both sides of the argument.

He was respectful of the past. He believed in *stare decisis*, the principle that precedent should ordinarily be followed, and he accepted rules, once established, from which he had earlier dissented. But his mind was open to fresh applications of the Constitution to meet new threats.

When the Supreme Court first considered a Connecticut law against the use of contraceptives, in 1961, Justice Harlan saw the law as a violation of the liberty guaranteed by the 14th Amendment. The state, he said, was intruding on "the most intimate details of the marital relation with the full power of the criminal law."

Justice Harlan had been a Wall Street lawyer, and he was a thorough gentleman. But he had the rare empathic ability to see issues from the viewpoint of others with different backgrounds and different premises.

In 1971, during the Vietnam War, the Court considered the case of a young man convicted of disturbing the peace when he wore a sweatshirt bearing an obscenity against the draft. Justice Harlan would no doubt have been outraged, personally, at such behavior. But he wrote the opinion reversing the conviction.

"The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours," he said.

"It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

Judge Souter is described as a conservative. But indications are that he comes to this great appointment with no ideological agenda: no list of legal wrongs he is determined to right.

In Washington both conservatives and liberals seem discontented with that. They want to make him register his votes in advance: for a constitutional right to abortion or against, for affirmative action or against. I think that is a terrible idea.

Requiring a nominee to fill out a scorecard on particular issues would be contemptuous of the Court and of the judicial process. It would tell a judge that he must make up his mind before hearing the facts and arguments in a particular case. It would reduce the Supreme Court to sheer politics and wound an institution on which all of us ultimately depend for our freedom. □

THE WASHINGTON POST
7/26/90

MARY McGRORY

Nice Guy With Powerful Friends

The nouns about Judge David H. Souter are sparse: Yankee, bachelor, intellectual, Phi Beta Kappa, Rhodes scholar, mountain-climber, skinflint.

The adjectives are somewhat more promising: shy, brilliant, thoughtful, considerate, witty, pleasant, measured, courteous.

Hordes of reporters are climbing through the lovely hills of New Hampshire in search of the man.

Here, two questions hover. Who got him the job? And should he be required to tell his views on questions of the day?

The importunate White House Chief of Staff John H. Sununu is taking bows for the appointment and signaling to the right wing that they need have no fears.

On the other hand, Sen. Warren G. Rudman (R-N.H.) is saying, "He's *my* guy. Sununu being chief of staff of the White House helped make it happen, but I spotted Souter 20 years ago and I'm the one who promoted him."

The question of his sponsorship matters in the Senate. Most of the members assumed that Sununu was the driving force behind the choice, since Souter and Sununu are both from New Hampshire and the chief of staff has assumed control of so many aspects of White House activity.

Sununu is controversial on Capitol Hill. It is not just his militant conservatism that raise hackles; it is the suspicion that the co-presidency that was briefly floated at the 1976 GOP convention, when Gerald R. Ford considered picking Ronald Reagan, has come to pass. Sununu's fingerprints are on the levers from Moscow to Massachusetts.

Sen. Dale Bumpers (D-Ark.) spoke for just about everybody when he told the Arkansas Gazette last weekend that he thought Sununu "would probably get his way" in Bush's first Supreme Court pick.

But Rudman, a popular, pragmatic middle-of-the-road second-termer, says he proposed Souter long before Sununu ever thought of him. In 1987, he told Howard Baker, then the White House chief of staff, that Souter was Supreme Court caliber. Reagan chose Anthony M. Kennedy instead. In 1990, Souter, with a push from Rudman, was unanimously confirmed for the 1st Circuit Court of Appeals.

Last Sunday, when Souter was summoned to the White House, he called Rudman. The senator picked him up, drove him to the airport, gave him cash, gave him advice: "When you talk to Bush, give him those legal pyrotechnics of yours." Monday after Bush announced the choice, Rudman took the shocked nominee to the Senate Dining Room for supper and put him up in his Capitol Hill apartment.

Rudman has pushed Souter since 1977, when the 1968 Harvard law graduate came to then-New Hampshire attorney general Rudman and dazzled the boss with his prose—"scintillating, magnetic, revealing." He made Souter his deputy. When Rudman moved on, then-Gov. Meldrin Thomson made Souter attorney general.

In 1983, Rudman told the newly elected governor, Sununu, that the only thing he wanted for his help was a seat on the Supreme Court for Souter.

Rudman is expected to shepherd Souter's nomination safely through—while Sununu continues to wink at the right and assure them that the justice-designate will not be a "judicial activist"—a term that means he won't hand down decisions that will upset Newt Gingrich (R-Ga.).

The administration is acting as if it would be unthinkable for anyone to ask Souter his views on burning social questions, such as abortion. The president, when asked if he had asked Souter how he felt about *Roe v Wade* said, in effect, of course not, you cur.

The president's men are hinting that it is unconstitutional to raise the issues with a man who could decide how they will be dealt with for the next 30 years. The usually uninhibited Howard M. Metzenbaum (D-Ohio), of the Judiciary Committee, said he thought it would be "inappropriate" to inquire.

Some people are saying that Bush pulled a fast one by naming a cipher with no written opinions. That is a minority view. Senators can, if they want to, hear raves about Souter from Democrats such as Paul McEachern, who was twice defeated for governor by Sununu and regards Souter as "an honorable man" who appears in court so prepared, other judges listen to his every word.

Gerald L. Baliles, a former Democratic governor of Virginia, also is a fan. He and Souter worked together as deputy attorney generals on Atlantic seaboard questions. Baliles found him to be "without a trace of ideology."

Even Renny Cushing, a veteran of the Clamshell Alliance who was arrested in Seabrook demonstrations and sent to jail at Souter's insistence, thinks well of him. The judge in the case suspended sentences but Souter, as the attorney general, dashed to court and begged for jail time for the protesters. Souter, says Cushing, is "basically a nice person."

F	C
212	100
32	0

180

$F = \frac{9}{5}C + 32$

$F - 32 =$

$18 = 10x$

$\frac{18}{10} = x$

$\frac{9}{5}$

$5\overline{)900}$ = 180

37 × 9 = 333; 333 ÷ 5 = 66.6

$F =$ 66.6 + 32 = 98.6

37

WHITE HOUSE DISCUSSION POINTS

SUPREME COURT NOMINATION OF JUDGE DAVID SOUTER

"Judge Souter, I believe with all my heart, will prove a most worthy member of the court. His tenure as an Associate Justice of the Supreme Court of the State of New Hampshire, as Attorney General of that state, and more recently, as a federal appeals judge, unquestionably demonstrates his ability, his integrity, and his dedication to public service. And he has a keen appreciation of the proper judicial role rooted in fundamental belief in separation of powers and the democratic principles underlying our great system of government."

--- President Bush nominating Judge Souter as an Associate Justice of the Supreme Court on July 24, 1990

* In nominating Judge Souter to the Supreme Court, the President selected a jurist of **extraordinary** ability with impeccable qualifications.

* Judge Souter is a man of unquestioned distinction and accomplishment. He is an outstanding judge, **fair**, equitable, and thoughtful.

* Judge Souter received the ABA's **highest** rating of "well qualified" before he was nominated for a judgeship on the court of appeals. He was unanimously confirmed for that position by the Senate in April, 1990.

* Judge Souter is a believer in judicial restraint, a **tough** trial court judge with a **great** legal mind who will interpret the Constitution not legislate from the bench.

* The President did not use any litmus test nor did any single issue dominate his decision to choose. There should be no litmus test in the process of confirmation.

* Judge David Souter was chosen because of his fidelity to the Constitution and the rule of law. These qualities, coupled with a nominee's education and experience, determine whether a nominee will be a good Justice of the Supreme Court.

For additional information, please contact the Office of Public Affairs at 202-456-2483.