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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.

**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:

- o **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)
- o 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:

- o **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)
- o "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)
- o "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:

- o "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)
- o "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)
- o "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)
- o "...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)
- o 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:

- o 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)
- o 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."
- o "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)

- o **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)
- o **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)

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 senior judge 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 Co-

lumbia 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 10 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 so much 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 iron-clad 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 chat 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."

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 fundraising 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 Martin 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

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

—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 aston-

ished." 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 Bala, traveling with President Bush, contributed to this report.

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

By LINDA GREENHOUSE

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 led 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 of-

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

fices 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.

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 1991. Judge Souter, then a judge on the state's trial court and 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

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

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.

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."

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

Souter confirmation strategy mapped

By John W. Mashok
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 bloom 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 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 1796 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 wary 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,"

WASHINGTON TIMES
7/25/90

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 enthusiastic 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
7/25/90

Colleagues find Souter non-political on bench

By Dawn M. Wevrich
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 clanish 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 mem-

bers 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 ac-

Please see COLLEAGUES on Page 11A.

knowledgeed Monday that the evaluation process was not as thorough as the one Judge Souter now will undergo.

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.

DALLAS MORNING NEWS

7/24/90

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 grumblings 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 fizzle 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 easy confirmable conservative who shares his own New England, Yankee, WASP heritage to replace

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.

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

David Souter, Bush's UnBorkable Nominee

With mystery nominee David Souter, voters will 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 title as a 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

Rule of Law

By L. Gordon Crovitz

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 charged 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 waste 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 informant. 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 commitments to mental hospitals for criminal defendants who plead guilty by reason of insanity. Recidivists 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.

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.



David Souter

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 common-

place 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.

ABRCAD AT HOME

Anthony Lewis

Models For a Justice

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 1855 to 1877. For many of us who knew the

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's 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. □

Harlan and Holmes may shape Judge Souter's approach.

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.

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.

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-term, 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. Meldrim 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 McClellan, 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."