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DAVID H. SOUTER:

THE DEFINITION OF JUDGING

An analysis of
President George Bush's nomination of

DAVID H. SOUTER

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

by

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EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

DAVID H. SOUTER: THE DEFINITION OF JUDGING

On July 23, 1990, President George Bush exercised his power under Article II, Section 2[1] of the United States Constitution and formally nominated U.S. Circuit Judge David H. Souter to be an associate justice of the Supreme Court of the United States.

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

JUDGE SOUTER'S RESUME

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

After just two years of legal practice, David Souter entered public service. He served as Assistant Attorney General from 1968 to 1971, Deputy Attorney General under then-Attorney General Warren Rudman until 1976, and Attorney General until 1978. Moving to the judicial branch, he served as an associate justice of the New Hampshire Superior Court for five years and, by appointment of then-Governor John Sununu, an associate justice of the New Hampshire Supreme Court from 1983 to 1990. President Bush nominated Justice Souter to be a judge on the U.S. Court of Appeals for the First Circuit in February 1990.[3] The American Bar Association rated him "well qualified" for this post and the U.S. Senate unanimously consented to his appointment. He began service on May 25, 1990.[4]

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

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

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

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

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

SOURCES OF INFORMATION

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

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

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

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

[5] 410 U.S. 113 (1973).

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

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

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

* "Abortion opponents attacked Souter for serving on the boards of two New Hampshire medical facilities where abortions are performed."[8]

* The Manchester *Union Leader* reported that, while state attorney general, Souter opposed a bill which included provisions repealing the state's strict anti-abortion law. He stated: "Quite apart from the fact that I don't think unlimited abortions ought to be allowed, if the state of New Hampshire left the situation as it is now, I presume we would become the abortion mill of the United States."[9] The article pointed out that Souter was representing Meldrim Thomson, New Hampshire's strongly pro-life governor, and that his remarks did not necessarily reflect his own views.

* In 1981, a pro-abortion member of the New Hampshire House of Representatives requested an opinion from the Superior Court about a pending bill requiring parental consent for abortions on minors but authorizing a "judicial bypass" of the parents' wishes. Justice Souter wrote a letter on behalf of the court to the relevant committee chairman recommending that the legislature "not authorize the exercise of judicial choice by justices of the Superior Court to determine whether an abortion should be performed upon a pregnant, immature minor whose parents do not consent to that course of action."

    * The letter expressed no opinion about parental consent: "The judges do not believe it is appropriate for the court to take a position on the basic question addressed by the bill, whether parental consent should be required before an abortion may be performed upon an unmarried minor."

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[7] 462 U.S. 416 (1983).

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

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

* The letter addressed only the "judicial bypass" provision, allowing a judge to authorize an abortion for an immature minor which would be in her "best interests."

* The letter objected to the judicial bypass provision because it required making "fundamental moral decisions about the interests of other people without any standards to guide the individual judge." The individual judge's "predilections" rather than articulated "rules and stated norms" would result in judges engaging in inappropriate "acts of unfettered personal choice."

* The letter objected to the judicial bypass provision because of the "necessarily moral character" of the decision judges would have to make and the "resulting disparity of responses." In sum, "a principled and consistent application of the quoted provision would be impossible."

* One journalist concluded: "While the 1981 letter may have been useful to abortion-rights supporters [in defeating the proposed legislation], it also reflected a view of the role of judges that is in line with the philosophy espoused by Bush and his predecessor, Ronald Reagan."[10] The bottom line is that this letter said nothing about *Roe v. Wade*, nothing about parental consent, and nothing about abortion.

* A state regulation prohibited the use of Medicaid funds to pay for elective abortions. A U.S. district court permanently enjoined this regulation and the state appealed. The brief on the merits, dated March 10, 1976, was filed with the U.S. Court of Appeals for the First Circuit under Attorney General Souter's name by the brief's author, Assistant Attorney General Richard Wiebusch. The following statement appears on page 41 of the brief: "Plaintiffs cannot in good faith dispute that thousands of New Hampshire citizens possess a very strongly held and deep-seated moral belief that abortion is the killing of unborn children." Wiebusch also wrote and filed, under Souter's name, a separate memorandum supporting the state's motion for suspension of the injunction pending appeal. The following statement appears on page 6: "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." Wiebusch has told reporters that Souter had "nothing to do with this brief. This wasn't his language. He didn't preapprove it....I didn't even talk with him about the case until after we lost it."[11]

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

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

* In *Smith v. Cote*,[12] Justice Souter joined an opinion in which the New Hampshire Supreme Court[13] recognized for the first time a cause of action for "wrongful birth."[14] The court stated that the U.S. Supreme Court's decision in *Roe v. Wade* "is controlling"[15] and felt the issue before it was "whether, given the existence of the right of choice recognized in *Roe*, our common law should allow the development of a duty to exercise care in providing information that bears on that choice."[16] Justice Souter concurred specially to address a significant issue not specifically raised by the questions of law transferred by the superior court. He raised the hypothetical of the pro-life physician and wrote that "I do not understand the court to hold...that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure."[17] Clearly, whatever one's evaluation of the court's legal analysis concerning the relevance of *Roe*, the court assumed that decision's relevance without any comment as to its validity.

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

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

[13] Chief Justice King did not participate in this decision.

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

[15] *Smith*, 513 A.2d at 346.

[16] *Id.* at 344.

[17] *Id.* at 355.

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

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

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

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

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

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

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

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

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

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

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

> *I want to speak explicitly on something which I think about and which the counsel for the defendant quite rightly said I should think about, and that is the purposes of sentencing.*
>
> *To start off with, one of them is the perception in the world around us that the defendant has been justly dealt with in relation to what he did. There should be a proportion observed in sentencing, and trivial cases should not be dealt with with severity. And flagrant cases should not be dealt with leniently.*
>
> *Secondly, one considers the effect usually referred to as the reformative effect likely on the defendant from the sentence....I don't believe that very many sentences on many--very many--criminals are likely to have much reformative effect after the first offense....[I]f the defendant does not receive a heavy sentence, one may reasonably guarantee that it's not going to have any reformative effect.*
>
> *[The t]hird consideration is deterrence....And [the] fourth consideration is public protection. I don't know whether this defendant's alcoholism is ever going to be controlled. But I think the circumstances justify trying to protect the public from the effects of that alcoholism for about as long as it is possible.*[23]

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

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

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

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

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

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

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

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

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

[26] 540 A.2d 1212 (N.H. 1988).

[27] *Id.* at 1217.

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

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

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

[28] 508 A.2d 1059 (N.H. 1986).

[29] *Id.* at 1062.

[30] 562 A.2d 185 (1989).

[31] *Id.* at 186.

[32] 547 A.2d 260 (N.H. 1988).

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

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

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

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

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

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[35] *Panto*, 547 A.2d at 264.

[36] *Id.* at 269.

[37] 486 A.2d 283 (N.H. 1984).

[38] *Id.* at 286.

[39] *Id.*

[40] *Id.* at 288.

[41] *Id.*

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

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

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

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

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[42] 549 A.2d 1210 (N.H. 1988).

[43] *Id.* at 1211.

[44] *Id.* at 1212.

[45] 480 A.2d 160 (N.H. 1984).

[46] *Id.* at 161.

[47] 533 A.2d 32 (1987).

[48] *Id.* at 33.

[49] 469 A.2d 1365 (N.H. 1983).

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

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

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

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

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

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[51] *Id.*

[52] 480 A.2d 123 (N.H. 1984).

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

[54] *Duchesnaye*, 469 A.2d at 124.

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

[56] 498 A.2d 348 (N.H. 1985).

[57] *Id.* at 350.

it failed to substantiate statements in the letter and later published an apology. Justice Souter concluded that it was error for the trial court to find that the letter must necessarily be read as "a non-actionable expression of opinion."[58] He also found that the officer's status as a "public official" for purposes of a libel action[59] must be left to the jury.[60]

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

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[58] *Id.* at 352.

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

[60] *Id.* at 353.

[61] 549 A.2d 1187 (N.H. 1988).

[62] *Id.* at 1198.

[63] 118 N.H. 356 (1978).

[64] *Keeton*, 549 A.2d at 1199.

E. First Amendment - Freedom of Association. In *In re Chapman*,[65] the court held that active opposition by the Board of Governors of the State Bar Association[66] to tort reform legislation was not within the mandate of the Association's constitution.[67] "Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate." The court viewed this mandate narrowly to include "those matters which are related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession."[68] Justice Souter joined Justice Brock's opinion, but concurred specially. He wrote that when "the compulsory organization uses dues or fees to finance political or ideological activities that are not reasonably related to the responsibilities that justify the compulsion to join, it infringes on the first amendment rights of members who dissent from the organization's positions."[69] This suggests that Justice Souter's view of what must justify using compulsory dues and fees for activities unrelated to the central mission of a compulsory organization may have been more relaxed than the majority.

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

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

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[65] 509 A.2d 753 (N.H. 1986).

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

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

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

[69] *Id.* at 761-62 (emphasis added).

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

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

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

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

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

[73] *Id.* at 1262.

[74] *Id.* at 1264.

[75] *Id.* at 1266.

[76] 499 A.2d 977 (N.H. 1985).

[77] *Id.* at 984.

[78] *Id.* at 985.

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

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

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

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

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[79] *Id.*

[80] 536 A.2d 1236 (N.H. 1987).

[81] 447 U.S. 231 (1980).

[82] *Coppola*, 536 A.2d at 1239.

[83] *Id.*

[84] 480 A.2d 854 (N.H. 1984).

[85] Justice Douglas did not participate in this case.

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

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

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

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[86] *Elbert*, 480 A.2d at 859.

[87] 533 A.2d 358 (N.H. 1987).

[88] Justice Batchelder did not participate in this case.

[89] *Lewis*, 533 A.2d at 360.

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

[91] *Lewis*, 533 A.2d at 361.

[92] *Id.* at 363.

[93] *Id.* at 364.

[94] 561 A.2d 504 (N.H. 1989).

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

H. Fifth Amendment - Self Incrimination. In a rare split decision, Justice Souter demonstrated his willingness to depart from his colleagues when he felt the law required it. In *State v. Cormier*,[96] the court, by a 3-2 vote, affirmed a conviction for operating a motor vehicle while under the influence of intoxicating liquor. The defendant claimed that evidence she refused to submit to a chemical blood-alcohol test[97] violated her right against self-incrimination under the state constitution.[98] Justice Souter first held the constitutional protection applied only to "evidence by a defendant that is of testimonial character"[99] and does not apply to "physical evidence such as a sample of defendant's blood...or to demonstrations provided by the performance of field sobriety tests."[100] The refusal in the present case was "an act of choice to suppress physical evidence" and, therefore, non-testimonial.[101] Justice Souter also held that, whether testimonial or not, the evidence in question had not been "compelled."[102]

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

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

[96] 499 A.2d 986 (N.H. 1985).

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

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

[99] *Cormier*, 499 A.2d at 987.

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

[101] *Id.*

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

[103] 536 A.2d 1242 (N.H. 1987).

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

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

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

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

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[104] *Id.* at 1246.

[105] 561 A.2d 1075 (N.H. 1989).

[106] *Id.* at 1077.

[107] *Id.* at 1078.

[108] 513 A.2d 325 (N.H. 1986).

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

[110] *Goding*, 513 A.2d at 331.

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

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

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

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[111] 523 A.2d 82 (N.H. 1986).

[112] *Id.* at 85.

[113] *Id.*

[114] *Id.* at 86.

[115] *Id.* at 87.

[116] 561 A.2d 1063 (N.H. 1989).

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

[118] *In re "K,"* 561 A.2d at 1065.

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

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

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

* Under the due process clause of the federal or state constitution, there exists no liberty or property interest in adoption or becoming a foster parent "and thus no entitlement thereto." No procedural due process protections are therefore

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[119] *Id.* at 1066.

[120] *Id.*

[121] *Id.* at 1067.

[122] 530 A.2d 21 (N.H. 1987).

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

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

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

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

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

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

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

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[126] *Id.* at 26.

[127] 563 A.2d 435 (N.H. 1989).

[128] Justice Johnson did not participate in this case.

[129] *Grondin*, 563 A.2d at 436.

[130] 545 A.2d 726 (N.H. 1988).

[131] *Id.* at 728.

[132] 117 N.H.927 (1977).

[133] *Sanborn*, 545 A.2d at 733.

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

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

JUDGE SOUTER'S JUDICIAL PHILOSOPHY

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

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

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

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[134] *Id.* at 735.

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

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

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

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

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

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

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

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

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

[138] *Id.* at 1066.

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

[140] 563 A.2d 435 (N.H. 1989).

[141] *Id.* at 436.

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

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

APPROPRIATE LINES OF QUESTIONING

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

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

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

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

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

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

A Department of Justice study concludes:

> *What distinguished the Bork, and to a lesser extent the Kennedy confirmation proceedings, therefore, was the equating of criticism of the judicial reasoning of a case with criticism of its substantive results, the confusion of political opinion with judicial philosophy, the use of statistical track records as evidence of judicial philosophy, and the attempts to obtain preconfirmation commitments on certain issues from the nominees. The assumption underlying much of this approach was that judicial philosophy and political philosophy are essentially identical, and that a nominee's political views will direct or even determine his judicial decisions. Indeed, the proceedings suggested not only that the judicial decisionmaking process is political, but that it ought to be.*
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> *To the extent such thinking has become prevalent in the Senate, the courts, academia, and in society generally, it threatens to compromise the independence of the Judicial Branch, and thus to undermine the legitimacy of its authority. Because an independent, apolitical judiciary is a vital part of our constitutional system, this in turn has implications for the structure and workings of our entire democratic system of government.*[143]

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

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

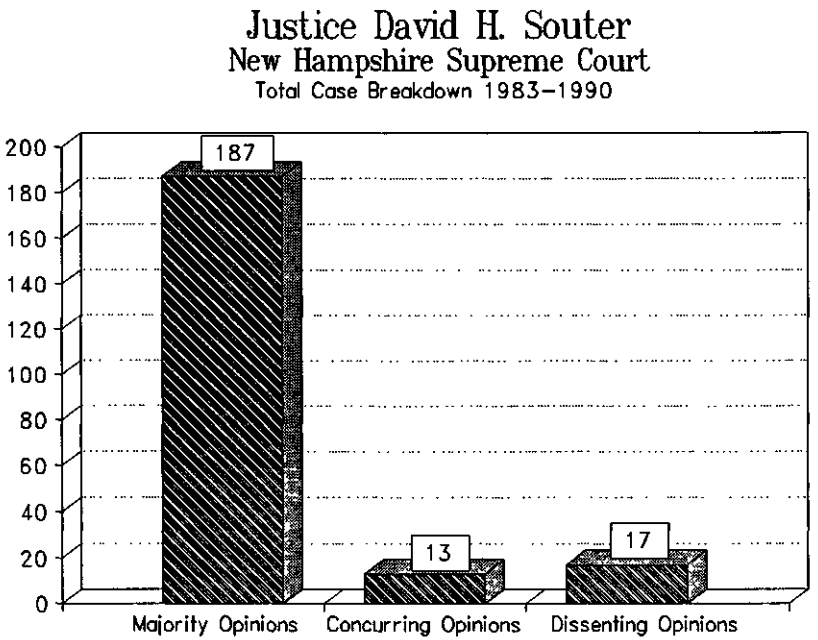
[144] Margolick, "Souter Hearings Won't Be Useful for Predictions, One Justice Says," New York *Times*, August 8, 1990, at A14.

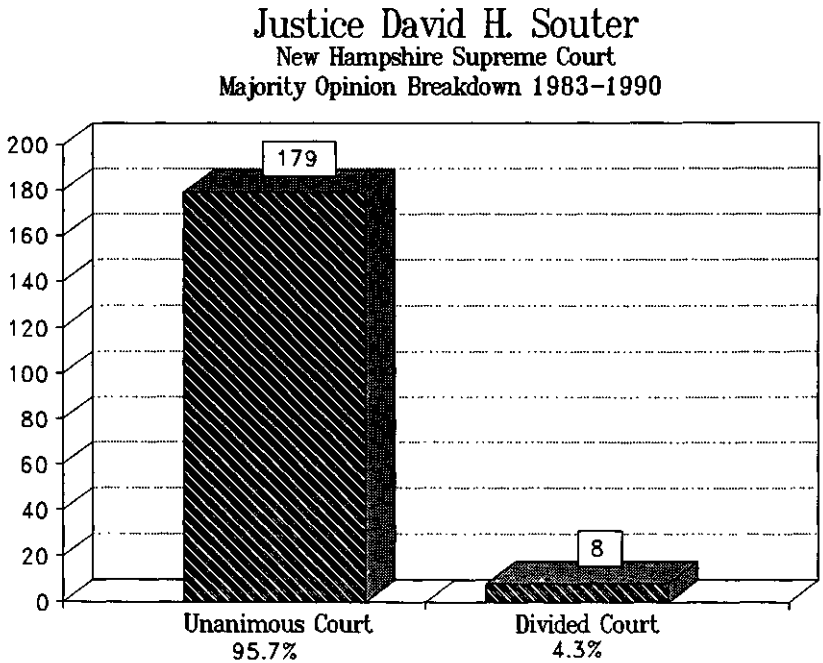
Those who condemn efforts to regulate the appellate jurisdiction of the Supreme Court as "political tampering" but who call for application of a political "balance" approach to filling vacancies on the Court are disingenuous at best and lack any integrity at worst.

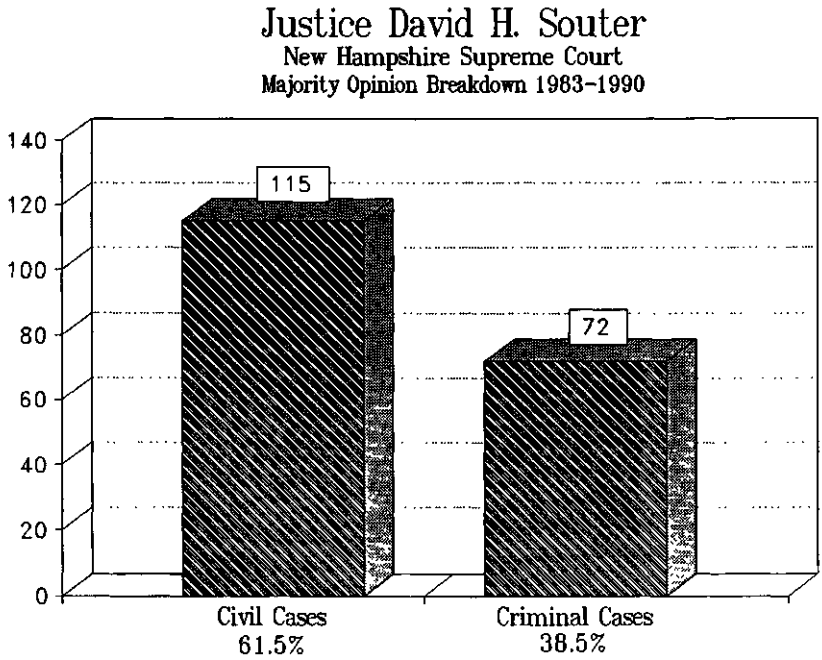
The Senate must exercise its role of advice and consent in a way that respects the unique nature and place of the judiciary in our constitutional framework. Questions that require a nominee to bias himself publicly on issues that may well come before him later as a judge essentially demand that he violate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

CONCLUSION

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


Justice David H. Souter
New Hampshire Supreme Court
Total Case Breakdown 1983–1990
200
180
160
140
120
100
80
60
40
20
0
187
13
17
Majority Opinions
Concurring Opinions
Dissenting Opinions

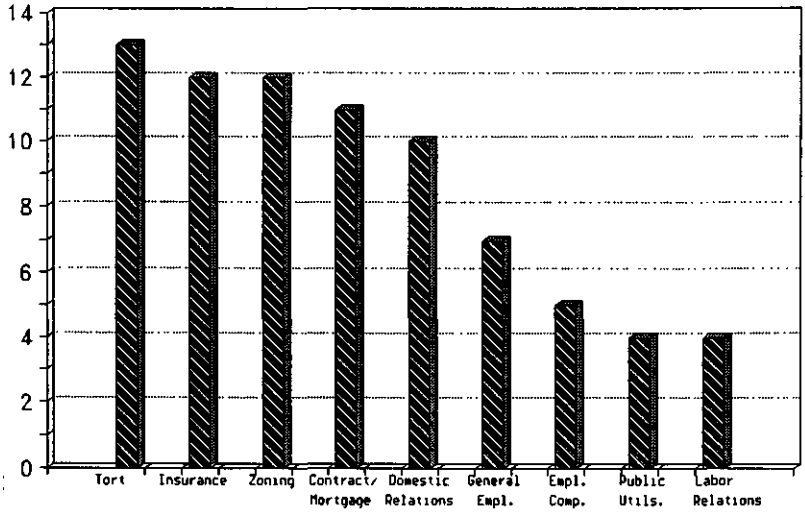

Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990
200
180
160
140
120
100
80
60
40
20
0
179
8
Unanimous Court
95.7%
Divided Court
4.3%


Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990
140
120
100
80
60
40
20
0
115
72
Civil Cases
61.5%
Criminal Cases
38.5%

Justice David H. Souter

New Hampshire Supreme Court

Civil Case Breakdown 1983-1990

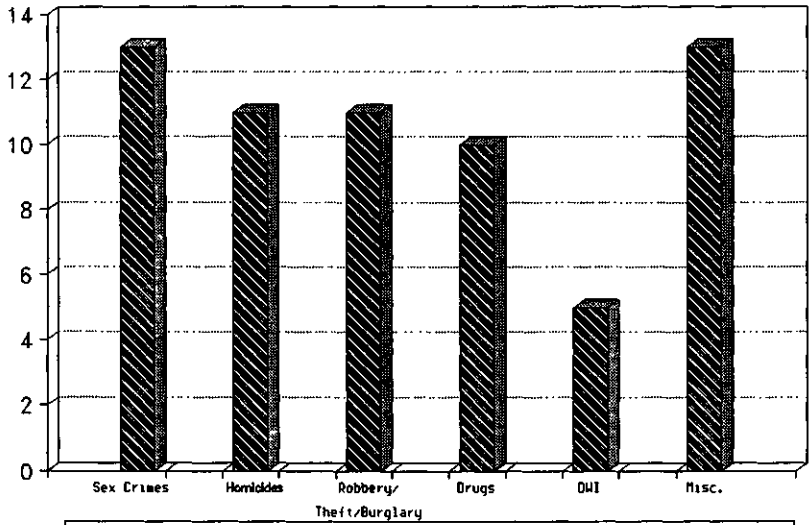


(NOTE: 30 civil cases which do not fall under the above categories, have been omitted.)

Justice David H. Souter

New Hampshire Supreme Court

Criminal Appeal Breakdown 1983-1990



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