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**REPORT OF THE**

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**ON THE NOMINATION OF**

**DAVID SOUTER**

**TO BE AN ASSOCIATE JUSTICE OF THE**

**UNITED STATES SUPREME COURT**

**SUBMITTED TO THE**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**AUGUST 31, 1990**

This report on the nomination of Judge David Souter to the United States Supreme Court is submitted on behalf of the 25,000 members of the National Association of Criminal Defense Lawyers and its state and local affiliates. Among NACDL's principal missions is to guarantee that all persons accused of crime are afforded the fundamental rights contained in the Constitution and Bill of Rights.

The Supreme Court stands atop our system of government as the guardian of these rights. When a new nomination to the Court is made, NACDL is committed to undertaking a complete examination of the nominee's qualifications, including his or her substantive pronouncements on issues affecting the balance between the powers of the government and the rights of the governed--a balance which the nominee will be in a position to influence significantly for decades to come. This is the report of a special committee of the NACDL which was established to carry out this function.

The NACDL Committee fairly reflects both NACDL's membership and the seriousness of the task at hand. The Committee is comprised of a dean of a prominent law school, a former U.S. Attorney, a former state prosecutor, and well known trial attorneys, including an attorney from the State of New Hampshire.[1] Moreover, the Committee has not limited its inquiry to the cold record offered by the nominee's judicial opinions, but has inquired of its members and other attorneys who have observed the nominee as a state prosecutor, trial

[1] The Committee is chaired by Terrance Reed of Washington, D.C. and includes: Thomas Dillard and Charles Fels of Knoxville, Tennessee; Joseph Johnson of Topeka, Kansas; Mark Sisti of Chichester, New Hampshire; and Dean Gerald Uelmen of Santa Clara Law School.

attorneys who appeared before him found him willing to apply the law in an even-handed manner, including a willingness to suppress illegally obtained evidence in appropriate cases. As an appellate judge, he displayed integrity in taking the factual record presented to him, rather than resolving disputes based on assumptions or conclusions not borne out by the trial record. Thus, in cases where the facts clearly favor the defense, Judge Souter has ruled for the defense, an observation which is supported by the fact that every opinion he penned which reversed a conviction was unanimous.

Our examination of the nominee's judicial philosophy, however, has given us less to commend. His approach to resolving cases is conservative and methodical. While elevation to the Supreme Court would certainly give the nominee an opportunity to think on a broader level, his record leaves doubt as to whether he has the ability or interest in doing so.

Of the 82 opinions in criminal cases we examined, Judge Souter voted for positions asserted by the accused only nine times, and did so only when the Court spoke unanimously. Conversely, Judge Souter dissented three times from the Court's reversal of a conviction. Two of these dissenting opinions are illuminating in that both involve instances in which Judge Souter refused to recognize the greater protections identified by his colleagues under the state constitution than those available under the federal constitution. See State v. Koppel, 499 A.2d 977, 983 (1985); State v. Denney, 536 A.2d 1242, 1245 (1987). Of course, many of the 73 cases in which the nominee rejected defendant's position on appeal merely reflect the lack of merit of those positions, but they also offer insight into the nominee's view of the Constitution and the role it plays in protecting all citizens against the focused resources of the State.

Several of Judge Souter's opinions reveal that the nominee is capable of a healthy respect for the right to a jury trial and fair trial procedures, including the Sixth Amendment right to jury trial. For example, in State v. Jones, 484 A.2d 1070 (1984), Justice Souter wrote an opinion for a unanimous court which reversed a conviction because the trial judge responded to a jury question in such a way as to intrude upon the jury's fact-finding duties. In Richard v. MacAskill, 529 A.2d 898 (1987), Justice Souter reversed a conviction based upon a nolo contendere plea because the defendant had not knowingly and intelligently waived his right to a jury trial. Similarly, in State v. Hewitt, 517 A.2d 820 (1986), Justice Souter overturned a defendant's conviction because the trial court failed to obtain defendant's

personal consent, as opposed to that of his lawyer, before excusing a member of his deliberating jury. See also State v. Baker, 508 A.2d 1059 (1986) (reversing conviction for failure to hold evidentiary hearing, a "due process requirement which must be given higher priority than efficiency in the use of jurors' and witnesses' time").

Finally, in State v. Colbath, 540 A.2d 1212 (1988), Justice Souter reversed a rape conviction based upon a trial court's exclusion of evidence of provocative behavior by the complainant notwithstanding the provisions of New Hampshire's rape shield law. The Colbath opinion is particularly out of character, in that Judge Souter made a broad constitutional holding when he could have reached the same ruling on narrower statutory grounds. While the holdings of these cases are not remarkable, they do indicate that the nominee has the capacity to appreciate the importance of many rights which are essential to the preservation of the fundamental right to a fair trial. Moreover, these cases reinforce the conclusion of the attorneys who appeared before the judge as trial attorneys that the nominee was genuinely interested in providing litigants with a fair trial.

The practical reality of our criminal justice system, however, is that only a small minority of federal or state criminal cases ever go to trial. For most individuals accused of crime, contact with the criminal justice system is limited to police encounters or other common occurrences, such as bail determinations, that take place early in the criminal justice process. It is in this vitally important area that the nominee has not proven as sensitive to constitutional values as he has been in the area of trial rights.

Indicative of the nominee's perspective is his opinion in State v. Coppola, 536 A.2d 1236 (1987), in which he upheld the admission into evidence of a statement made by a suspect to police that: "I am not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. If you think I'm going to confess to you, you're crazy." This comment was immediately followed by the suspect's assertion of the right to see counsel before further questioning. Rather than recognizing this as a brusque assertion of the Fifth Amendment right not to incriminate oneself, Judge Souter held that this was admissible as evidence of the suspect's consciousness of guilt. On federal habeas corpus, the First Circuit Court of Appeals reversed, holding that, however boastful, the suspect's words adequately communicated that he was invoking his Fifth Amendment right to remain silent, and thus their

admission constituted reversible error. Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989).

Of course, like everyone else, Judge Souter is a product of his environment, and his opinion in Coppola may just reflect the fact that his life has been far removed from the daily realities that attend the lives of many of our citizens. Indeed, the nominee's distance from the mainstream of American life is not only a result of his intensive legal training, but also a matter of personal choice, as the nominee has acknowledged that he does not watch television, listen to the radio, nor generally does he read newspapers. June 1, 1977, Deposition of D. Souter, at 47, 107 in Wolff v. Thomson, Civil Action No. 77-143 (D. N.H.). Unlike the nominee, however, many citizens are not well versed in the subtleties of constitutional protections, and indeed, the Miranda opinion represents an effort by the Supreme Court to inform citizens of their rights before they unwittingly surrender them. We would expect from our judiciary a sensitivity to the fact that our constitution protects even those who lack respect for the law, and that an effort, however crude, to invoke the protections of our Constitution will be honored.

Similarly, in State v. Denney, 536 A.2d 1242 (1987), Justice Souter dissented from a majority opinion which reversed a defendant's Driving Under the Influence conviction because the police failed to warn the arrestee that his refusal to take a blood test could be used against him in court. Justice Souter dissented from the majority's holding that this was a violation of due process, and indicated that he would have held that the plain Miranda warning given that anything the arrestee said could be used against him was sufficient. Again, the nominee simply assumed that the average citizen would have the legal acumen to interpret police warnings about silence as applicable to police demands for blood.

We note that in his Denney dissent, Justice Souter makes a disturbing and confusing suggestion that the Miranda warnings must be so narrowly construed as to apply only to situations where the defendant has actually remained silent, as opposed to making some verbal utterance to the effect that he wishes to remain silent. He wrote that the warning given to the defendant that "if he made any statement, it could and would be used as evidence against him" was "certainly adequate to advise him that a statement of his refusal to take the [blood] test would be so used." 130 N.H. at 223. He seemed to suggest that if the defendant had remained silent instead of verbally declining to take the blood test, an entirely different

situation under Miranda would be presented and he would not now be arguing that the admissibility of the statement should be upheld:

> (Lest there be anything misleading about my own reliance on Miranda, however, I should add that I do not rule out the possibility of a conflict between a Miranda warning of the right to silence and the introduction of evidence that subsequent to the warning the defendant chose to remain silent as a means of refusing to submit to a blood test under the implied consent law . . . This problem is not, of course, before us and it has no bearing on either the majority's or the dissenters' views of how to resolve the issue that is before us . . .)

Id. at 224.

What is confusing is that he then goes on to point out that blood tests under implied consent laws are not covered under Miranda anyhow, raising the question of whether he would venture into this silence/verbal refusal distinction outside of the context of implied consent laws.

Our concern is heightened by reference back to the Coppola case, where he found the "if you think I'm going to confess to you, you're crazy" statement of the streetwise defendant to be admissible evidence of consciousness of guilt rather than an inadmissible invocation of the Fifth Amendment right to remain silent. Do uncooperative or defiant suspects get less Fifth Amendment protection than silent ones? Where would Judge Souter come down on other possible ways of refusing to make a statement to the police--less defiant statements such as "I'm absolutely not going to confess to you," or "I refuse to confess to you," or "I refuse to say anything"? Somewhere along this continuum, Judge Souter would surely find a valid invocation of the right to remain silent, but we are concerned that his rather wooden reading of the defendant's words, to the exclusion of their clear thrust and intent, bodes ill for the serious protection of rights which the Constitution affords equally to all citizens, whether articulate or not.

Likewise, in State v. Lewis, 533 A.2d 358 (N.H. 1987), Justice Souter rejected a Miranda violation claim by a defendant in what the nominee recognized was a "close case." In Lewis, a suspect was read Miranda warnings, after which he inquired of the police what the waiver language meant and whether he would be giving up his rights. The police responded by saying "Oh no-no-no-not at all--not at all." Despite this blatantly false response by the police, Justice Souter found that subsequent answers of the police officer adequately clarified what a waiver of rights meant. None of the officer's subsequent comments, however,

clarified that the officer had misspoke, at best, in telling the suspect that he would not be giving up his rights by talking further with the police about the crime. Similarly, in affirming a conviction despite a defendant's contention that he was too impaired by medications to understand Miranda warnings, Justice Souter described the warnings given as "Miranda litany" and a "Miranda protocol". State v. Derby, 561 A.2d 504 (N.H. 1989). Such opinions by Justice Souter evidence an extremely rigid and mechanical view of the Miranda ruling, and the fundamental Fifth and Sixth Amendment values it was designed to safeguard.

In at least one respect, the difference between the nominee and Justice Brennan, the Justice he would replace, could not be more glaring. Justice Brennan was a champion of state constitutional rights, especially in an era when federal constitutional rights were being narrowly construed. Contrary to the efforts of some of his colleagues, most notably then-Justice and now-Representative Charles Douglas, who construed the New Hampshire Constitution as providing a broader body of rights than the Federal Constitution, see e.g., State v. Ball, 471 A.2d 347 (1983), Judge Souter, while on the New Hampshire Supreme Court, has attempted to limit state constitutional rights to those rights available under the Federal Constitution.

For example, in State v. Koppel, 499 A.2d 977 (1985), a majority of the court, with Justice Souter dissenting, relied upon the search and seizure provisions of New Hampshire's Constitution to strike warrantless roadblocks. In State v. Bradberry, 522 A.2d 1380 (1986), Judge Souter wrote a concurring opinion in which he expansively interpreted prior precedent as holding that where a defendant had not expressly articulated a specific claim at trial that the State Constitution provides greater protection than the Federal Constitution, that no state constitutional claim could be considered. See also In re Sanborn, 545 A.2d 726 (N.H. 1988) (defendant's citation of inapposite state cases fails to raise state constitutional due process claim despite reference to due process under state constitution.) Thus, when the nominee was entrusted with interpretation of the New Hampshire Constitution he did not evidence any interest in broad application of state constitutional protections, but rather declined to join his fellow Justices when they chose to do so.

Because the nominee would be replacing Justice Brennan, the Committee also examined the criminal law opinions of the Supreme Court since the 1987 term to identify cases in which Justice Brennan's vote was a deciding vote in a Court divided by a 5-4 split. Justice Brennan's

vote was important in forming the majority on issues ranging from the death penalty to double jeopardy to flag burning. An index of these opinions is attached as appendix to this report. While it is impossible to predict whether the nominee would have voted in the same fashion as Justice Brennan, the nominee's record gives some reason for doubt.

In summary, we find that the nominee, though conservative in judicial philosophy, appears inclined to respect precedent, and disinclined to resort to "judicial activism"--either in the sense of leaping to broader constitutional issues where narrower statutory ones will suffice, or of selecting or massaging facts to reach preordained conclusions. In this, the nominee clearly falls within the mainstream of American jurisprudence.

We have reservations, however, about his willingness to extend existing constitutional protections to new situations where they would logically apply, and about his ability to resist governmental invitations to curtail such protections in appealingly "modest" increments. By this means, many cherished constitutional rights can suffer lingering death by a thousand wounds. In part, this may reflect a lack of successful separation, to date, from the prosecutive milieu in which his legal career developed. Or it may reflect a more troubling, innately narrow vision of the Constitution's role in our society. Whatever the reason, we are deeply concerned that the nominee has rarely displayed the courage to take constitutional positions independent of those urged by the State.

The picture that emerges from the nominee's jurisprudence is that he is driven by the force of logic, rather than by experiences of the human condition. His interpretation of constitutional rights tends to be crabbed, recognizing constitutional rights only where they are clearly established and carefully preserved by both citizens and their counsel. Moreover, his record is marked by a preference to halt any further extension of constitutional values.

Thus, his enforcement of trial-related rights, versus pre-trial rights, may well reflect a more general philosophical commitment to well established constitutional rights versus a lack of enthusiasm for more recently acknowledged constitutional rights, such as Miranda rights. This reluctance to embrace recently established constitutional rights may simply reflect a judicial preference for recognition of textually rooted constitutional rights, such as the right to a jury trial. Certain important constitutional rights, such as the right of privacy, fall within the category of recently recognized, non-textual rights secured only by general constitutional

guarantees of "due process" or the Ninth Amendment.

Nonetheless, the record demonstrates that the nominee endorses the principle of stare decisis--following settled precedent. For example, in State v. Meister, 480 A.2d 200 (N.H. 1984), Justice Souter filed a concurring opinion joining in the majority's reversal of a lower court's refusal to annul the defendant's conviction record. Justice Souter acknowledged that he disagreed with the majority's opinion, but that it was based on an earlier case, State v. Roger M, 424 A.2d 1139 (1981), in which his identical position as a trial judge had been reversed on appeal. Casting aside his "personal considerations" about the correctness of his position as a trial judge, Justice Souter observed that, "The consequences of what I believe was an unsound conclusion in that case are not serious enough to outweigh the value of stare decisis." Id. at 205.

In this instance, the nominee's commitment to stare decisis, then, was sufficiently strong to supercede his personal convictions. Nonetheless, the nominee also appears to recognize that when the consequences of an incorrect decision are serious enough, the value of stare decisis may be outweighed. Accordingly, while the nominee's record indicates a willingness to follow binding constitutional precedent, it also indicates he is very sparing in the recognition and enforcement of recently established constitutional rights. Especially when four current justices have recently concluded that stare decisis, while a "cornerstone of our legal system," nonetheless "has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes," Webster v. Reproductive Health Serv., 106 L.Ed.2d 410, 435 (1989), the nominee's commitment to stare decisis is a question that will have a dramatic impact on the vitality of many recently acknowledged constitutional rights.

In summary, we have found the nominee to be highly qualified by means of his intellectual abilities, his judicial temperament, his integrity, his experience, and his industry. We are troubled, however, by his lack of sensitivity to selected but important constitutional rights such as Miranda. We are also concerned that the nominee has not displayed much independence from the views espoused by the State. Nonetheless, based upon the personal experiences of counsel who have appeared before the nominee, we are reasonably confident that he is capable of becoming sensitized to the critical role that constitutional rights play in

everyday life in America. It is our fervent hope that the nominee would seize the opportunity that has been extended him to breathe life into the guiding constitutional principles of our times. Accordingly, we do not oppose the nomination of David Souter to the United States Supreme Court.

## APPENDIX

The following cases are United States Supreme Court decisions involving a 5-4 split with Brennan in the majority from October 1987 until June 27, 1990.

James v. Illinois, 110 S. Ct. 648 (1990) - The exclusionary rule forbids evidence obtained in violation of the Fourth Amendment from being used to impeach the testimony of a defense witness other than the defendant. Justice Brennan in writing for the majority stated that the balance of interest changes when tainted evidence is proposed to be used against witnesses other than the defendant. This is because the prospect of a perjury conviction is far more daunting to a witness than to a defendant who already faces conviction of a crime.

Idaho v. Wright, 110 S. Ct. 3139 (1990) - Any statements made by a suspected child victim of sex abuse to her treating pediatrician and offered for admission under the residual exception to the hearsay rule did not, when evaluated under the totality of the circumstances surrounding the making of the statements, have the particularized guarantees of trustworthiness that the Sixth Amendment confrontation clause requires for the admission of out-of-court statements for hearsay exceptions that are not firmly rooted. The existence of other evidence corroborating proper hearsay does not bear on whether the hearsay is sufficiently trustworthy to be admitted.

United States v. Eichman, 110 S. Ct. 2404 (1990) - The Flag Protection Act of 1989 which criminalizes the conduct of anyone who knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon the United States flag is a content based restriction on expressive conduct that violates the First Amendment as applied to the acts of flag burning in protest of government policies and the passage of the Flag Protection Act itself.

Grady v. Corbin, 110 S. Ct. 2084 (1990) - The Fifth Amendment's double jeopardy clause bars subsequent criminal prosecution in order to establish an essential element of an offense charged when the prosection will prove conduct that constitutes a defense for which a defendant has already been prosecuted. Here the defendant was arrested for causing a fatal traffic accident. He pled guilty to two traffic offenses which included drunk driving and failure to keep right of way. Several months later he was indicted on charges of manslaughter. The bill of particulars stated that the prosecution intended to prove that the defendant drove while drunk and failed to keep right of way. The Court, basing its decision on Illinois v. Vitale, 447 U.S. 410 (1980), stated that the test is what conduct the State will prove, not what evidence they will use.

South Carolina v. Demetrius Gathers, 109 S. Ct. 1110 (1989) - For purposes of imposing the death penalty, the defendant's punishment must be tailored to his personal responsibility and moral guilt. It is improper for the prosecutor to comment concerning the victim's personal characteristics, as is allowing the jury to rely on this information in imposing the death sentence because of factors about which the defendant was unaware and were irrelevant to the decision to kill. Here, in the prosecutor's closing arguments, he read to the jury at length from a religious tract the victim was carrying and commented on the personal qualities that the prosecutor inferred from the victim's possession of the religious tract and his voter registration card. The Court held that where there was no evidence that the respondent read either the tract or the voter card, the content of the papers the victim was carrying were purely fortuitous and could not provide any information relevant to respondent's moral culpability notwithstanding that the papers had been admitted in evidence for other purposes.

Mallard v. U.S. District Court for the Southern District of Iowa, 109 S. Ct. 1814 (1989) - In this case, an attorney who had recently been admitted to practice before the District Court, was appointed to represent indigent inmates in their suit against prison officials in a 1983 action. After the magistrate denied the attorney's request to withdraw, he appealed stating that forcing him to represent indigent inmates in an action requiring trial skills he did not possess would compel him to violate his ethical obligations and would exceed the Court's authority under 28 U.S.C. 1915(d). In a 5-4 decision, consisting of an unusual split, Justice Brennan wrote the majority opinion and was joined by Rehnquist, White, Scalia and Kennedy. The Court held that 1915(d) does not authorize the federal court to require an unwilling attorney to represent an indigent litigant in a civil case. As the operative term is request, the Court differentiated between 1915(c) which states that "officers of the Court shall use and serve all process and perform all duties in such cases" and 1915(d). The word "shall" rendered section (c) compulsory, while 1915(d) states that "the Court may request an attorney to represent an indigent litigant."

Mills v. Maryland, 108 S. Ct. 1860 (1988) - The petitioner was a Maryland prison inmate who challenged the death sentence he received for the killing of his cell mate as being unconstitutionally mandatory under Maryland law. He claimed that the statute required imposition of the death sentence if the jury unanimously found an aggravating circumstance but could not agree unanimously as to the existence of any particular mitigating circumstance. The Court held that in a capital case, the sentence may not be precluded from considering any relevant factors as mitigating circumstances. If the petitioner's assertion was correct, and the jury believed they were unable to consider any mitigating circumstances unless they unanimously agreed on the existence of a single mitigating factor, then the case must be remanded for resentencing.

Houston v. Lack, 108 S. Ct. 1008 (1988) - A prisoner's delivery to prison authorities for forwarding to a Federal District Court of a Notice of Appeal in a case in which the prisoner is acting pro se amounts to the filing of the notice within the meaning of Federal Rule of Appellate Procedure 4(a)(1) which sets a 30 day time limit for the filing of such a notice with the clerk of the court.

Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) - The Eighth Amendment's prohibition of cruel and unusual punishment forbids a capital defendant who is less than 16 years of age at the time of the offense from being sentenced to death under statutes that do not set a minimum age in which the commission of a capital crime can make the defendant subject to the death penalty.