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Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files

OA/ID Number: 29171
Folder ID Number: 29171-007

Folder Title:
Souter (Judge David) (1990)

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national RIGHT TO LIFE committee, inc.

FOR IMMEDIATE RELEASE:
Monday, July 23, 1990

FOR FURTHER INFORMATION:
Douglas Johnson, Legislative Director
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Nancy Myers, Communications Director
(202) 626-8825

STATEMENT BY NATIONAL RIGHT TO LIFE COMMITTEE
ON THE NOMINATION OF JUDGE DAVID SOUTER TO THE U.S. SUPREME COURT

WASHINGTON-- The National Right to Life Committee (NRLC), the nation's major pro-life organization, today issued the following statement regarding President Bush's selection of Judge David Souter to fill the current vacancy on the U.S. Supreme Court.

"As far as we know, Judge Souter has not expressed a judgment on Roe v. Wade. We are pleased that President Bush says he is nominating a justice who will interpret the Constitution according to its text, and who will not legislate from the bench. Since Roe v. Wade has no basis in the Constitution, the appointment of such justices should continue the erosion of the tragic error of Roe v. Wade."

The National Right to Life Committee is the nation's major pro-life organization, representing some 3,000 local chapters.

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THE WHITE HOUSE

WASHINGTON

September 27, 1990

MEMORANDUM FOR FREDERICK D. MCCLURE
ASSISTANT TO THE PRESIDENT FOR
LEGISLATIVE AFFAIRS

FROM: DAVID M. CARNEY
SPECIAL ASSISTANT TO THE PRESIDENT AND
DIRECTOR, OFFICE OF POLITICAL AFFAIRS

SUBJECT: GOP SUPPORT FOR SOUTER

The following is a list, by region, of Republican Senators who are supporting the nomination of Judge David Souter.

Southwest

Senator Wilson - will support
Senator McCain - will support
Senator Domenici - will support
Senator Hatch - will support
Senator Kassebaum - will support
Senator Dole - will support

Northwest

Senator Armstrong - will support
Senator Boschwitz - will support
Senator Burns - will support
Senator Durenberger - will support
Senator Gorton - will support
Senator Hatfield - will support
Senator McClure - will support
Senator Murkowski - will support
Senator Packwood - will support
Senator Simpson - will support
Senator Stevens - undecided, will not focus on it until vote
Senator Symms - will support
Senator Wallop - will support
Senator Pressler - will support
Senator Garn - will support

South

Senator Mack - will support
Senator McConnell - will support
Senator Cochran - will support

Senator Lott - will support
Senator Helms - will support
Senator Thurmond - will support
Senator Warner - will support, has made statement

Great Lakes/Midwest

Senator Kasten - will support
Senator Bond - will support
Senator Danforth - will support
Senator Coats - will support
Senator Lugar - will support
Senator Gramm - will support
Senator Grassley - will support, has made statement
Senator Nickles - will support

Northeast

Senator Specter - will support
Senator Heinz - will support
Senator Jeffords - will support, probably announce 9/27
Senator Chafee - will support
Senator Humphrey - will support
Senator Rudman - will support
Senator D'Amato - will support
Senator Roth - will support
Senator Cohen - will support

cc: Governor Sununu
Ed Rogers
Rob Portman
Boyd Hollingsworth

WARREN B. RUDMAN
NEW HAMPSHIRE

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United States Senate

WASHINGTON, DC 20510

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July 22, 1989

The Honorable George Bush
President
The White House
Washington D.C. 20500

Dear Mr. President:

I write this letter to recommend that you nominate the Honorable David H. Souter, Judge of the First Circuit Court of Appeals, to the United States Supreme Court.

David Souter has, through his exceptionally distinguished career, demonstrated that he possesses the brilliant legal intellect, judicial temperament, and conservative legal philosophy that would make him an outstanding addition to our nation's highest court. He graduated Phi Beta Kappa from Harvard University, was a Rhodes Scholar with honors, and graduated from Harvard Law School. After serving in private practice, he was appointed an Assistant Attorney General for New Hampshire. He was subsequently promoted to Deputy Attorney General, and became Attorney General in 1976. His record as a prosecutor and the State's highest law enforcement officer was exemplary.

He then served on the Superior Court of New Hampshire, and subsequently on the State Supreme Court. He so distinguished himself during those years that your decision to appoint him to the First Circuit was supported by the entire legal community in New Hampshire.

A review of Judge Souter's opinions while on the New Hampshire Supreme Court display his brilliant understanding of legal principles. For example, in State v. Cormier, he wrote that the State constitutional guarantee against compelled self-incrimination does not preclude the evidentiary use of the defendant's refusal to provide a breath or blood sample in a drunk driving case because the defendant was not compelled to provide such a sample in the first place. In State v. Campbell, Judge Souter found that a defendant had no constitutional right to the use of public funds for access to a psychiatrist whose testimony would be offered to impeach the credibility of a witness at trial, since the most the defendant probably could have obtained was an inadmissible opinion on a subject that was fully developed on the evidence before the jury.

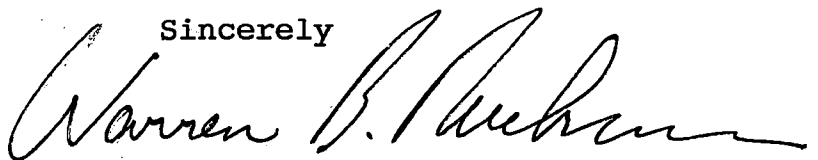
The Honorable George Bush
Page 2
July 22, 1990

Justice Souter's strength is not limited to criminal law, as demonstrated in Vermont Mut. Ins. Co. v. Malcolm. In that case, he wrote that a trial court erred in ruling that an insured's acts of sexual assault were an "occurrence" for the purpose of personal liability coverage under a home owner's insurance policy, since it is clear that the causes of injuries inflicted were not accidental.

Perhaps more compelling are his dissents. For instance, in In re Estate of Dionne, Judge Souter demonstrated admirable judicial restraint when he refused to side with the majority's decision to strike down as unconstitutional a statute requiring the payment of fees to judges of probate courts for special sessions on the grounds that such a method of compensation smacked of the purchase of justice. While he made his distaste for the practice clear, he argued that the merits of the statutory policy were not subject to judicial review because the system passed constitutional muster. And, in State v. Koppel, Judge Souter stood alone in finding that the use of roadblocks to detect drunk driving violations was constitutional because the criteria governing the conduct of the police during the stops were not "unreasonable". It is worth noting that U.S. Supreme Court used similar reasoning to find such roadblocks constitutional during one of the landmark cases of its most recent term, Michigan Department of State Police v. Sitz.

I believe that David Souter is one of, if not the most, talented judges in the United States today. He made an enormously favorable impression during his appearance before the Senate Judiciary Committee this year. He does not believe in judicial activism, having a full understanding of our system of government and the proper role of judges in it. His intellect, temperament, and classic conservative philosophy would make him an outstanding addition to the Supreme Court. I can think of no one more deserving of such an honor.

Sincerely

A handwritten signature in dark ink, reading "Warren B. Rudman". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Warren B. Rudman
United States Senate

SUPREME COURT NOMINEE DAVID SOUTER

Getting a fix on the 'Stealth Judge'

Does he oppose 'Roe'?
Trust Bush, Sununu

PRESIDENT Bush's nomination of Judge David Souter for Associate Justice of the Supreme Court must be seen in light of the President's and Chief of Staff John Sununu's often-stated position on the most contentious issue facing the country: abortion.

Although the President said that abortion was not the central issue in his selection of Judge Souter, he seemed to telegraph his faith that Souter will fulfill his personal expectations when he referred to the judge's commitment to "interpreting the Constitution, not making law." The President also said that he believes that "the proper judicial role is rooted in the fundamental belief of the separation of powers." Phrases like that are manna to conservatives.

The President can say that he

Those favoring Judge Souter should spell out what the cultural wars of the last 30 years have been about. Most Americans are ignorant of the history of the Constitution and of how liberal Justices have departed from it. How about asking Ronald Reagan for help?

does not anticipate a battle, but a battle there will be. Kate Michelman, who heads the National Abortion Rights Action League, dispatched 500,000 fund-raising letters to supporters within hours after Justice William Brennan announced his retirement. Eleanor Smeal of the Fund for a Feminist Majority said that the nominee's position on abortion will be the litmus test for her organization.

If Judge Souter does not have a "paper trail" on the abortion issue, and he appears not to have much of

CAL THOMAS

one), suspicious senators and activists will try to create one by focusing on whether he believes that there is a Constitutional right to privacy.

But President Bush does have a considerable "paper trail" on the abortion issue. The President is on record as coming to his pro-life convictions by moral persuasion. In my interviews with Bush and his chief of staff, there has been no equivocation about the President's position on abortion.

On June 26, 1986, then-Vice President Bush characterized his pro-life position as "firm" and "definitive." "Like many other Americans," he told me, "I have come to see this issue as a very important moral question."

In July 1988, just before his party's Presidential nomination, Bush told me: "It would be fair to say that I am one who wants to see the repeal of *Roe vs. Wade*."

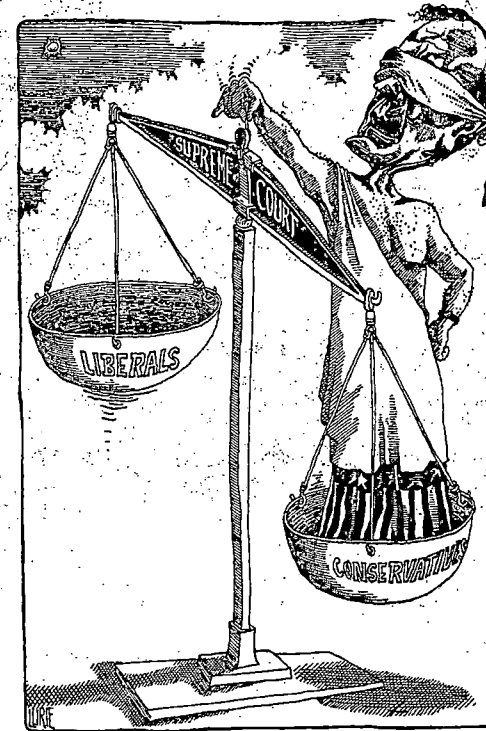
Judicial attack on abortion

Before becoming chief of staff, Sununu said during a December 1988 interview with me: "I think that on social issues, George Bush has evolved — and he ought to be given credit for that. I'm a strong believer that people who come to [the pro-life] position the hard way — by evolution — are sometimes the strongest supporters." Sununu also promised that Bush would handle the abortion issue through the judicial process rather than through Congress.

In a November 1989 interview, I again asked Sununu about abortion. He said: "This is not an Administration that is going to wet its finger to decide which way the wind is blowing on issues that are based on principle and values."

So the President, if he is true to his principles, must believe that Souter will be a pro-life judge. Of almost equal importance is the type of battle that Bush will fight to ensure his nominee's confirmation. It must not be the conscientious-objector approach taken by the Reagan Administration, which led to the defeat of Robert Bork's candidacy.

The Reagan Administration



thought that it could finesse Bork around liberal Senate opposition by lying low. It badly misperceived the intensity of the opposition. This time, the Bush people had better be ready.

Key to the liberal anti-Bork crusade was the enormous amount of unchallenged disinformation that was pumped into the media by pro-abortion special-interest groups and senators such as Edward Kennedy. Bork's positions were consistently misrepresented. Direct-mail campaigns and political commercials, like those produced by People for the American Way that featured the voice of actor Gregory Peck, built on this campaign of lies and distortions to make it appear that Bork wanted to return to the days of slavery and limit women's role in society to the kitchen and bedroom.

What the Bush Administration needs to do with Judge Souter is to establish the machinery that will answer every lie, correct every misrepresentation, and provide spokespersons, position papers, and exact

quotations from Judge Souter's cases that will counter any disinformation campaign. This will require coordination with conservative groups, who should produce their own commercials and demand equal time on the networks to answer every liberal charge.

Those favoring Judge Souter also should spell out in some forum what the cultural wars of the last 30 years have been about. Most Americans are ignorant of the history of the Constitution and of how liberal Justices have departed from it to make laws of their own. A careful explanation by someone with strong communications skills would be of enormous value. How about asking Ronald Reagan for help?

If President Bush holds to his principled convictions and answers any call to arms by the Left with a strike force of truth and history, he will win the most important battle of his Presidency and will return the nation to its roots perhaps for decades to come.

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Is he another 'Bork'?
Not by a long shot

SANDY GRADY

DAVID who? Souter, as in neuter. At 5 p.m. Monday, he stood in the television lights, a small, dour man wearing a rep-stripped tie, heavy 5 o'clock shadow, and a gravedigger's solemnity.

And that's all anybody — seemingly including the President of the United States — knew about the nominee to the Supreme Court.

If there were such an outfit as Judges Anonymous, David Souter would be a charter member. He's a man with no rap sheet or fingerprints. George Bush's Mystery Guest.

As I watched Bush spring Souter on the world, flashing through this observer's brain were the words: "Dan Quayle II." Not since Bush uncrated Quayle as running mate has there been such befuddled astonishment.

But unlike Quayle — not merely because he's a Harvard Phi Beta Kappa and Rhodes Scholar — Bush's Invisible Judge is a smart choice politically.

Bush hates confrontations. David Souter is such a neutral, taciturn cipher that he'll probably slide through the Senate without the damaging firefight that Ronald Reagan lit with prickly Judge Robert Bork.

I suspect that that was the winning sales pitch on Souter: "He's no Bork."

The pall of ignorance

That's why the Invisible Judge had Washington gasping like a leaky bellows. In the Imperial City, where reporters, lobbyists, and senators — especially senators — pride themselves on inside dope, the pall of ignorance was comical.

"A blank slate," shrugged Sen. Howard Metzenbaum, D-Ohio, Judiciary Committee member.

"So unremarkable that I remember nothing about him," said Sen. Charles Grassley, R-Iowa, of Souter's April committee appearance.

Oh, sure, Bush heaped praise on his Invisible Judge with a trowel: "High intellect" and "scholarly" and "experienced." A half-dozen times, Bush recited the meaningless mantra: "He'll interpret the law, not make law."

How did Bush know? He'd met Souter for 45 minutes, read his resume, and listened to John Sununu, Currier who called: Souter a

"Sununu Special," noted the chief of staff's smug, cat-who-ate-the-canary smile.

You can imagine Sununu, who hoisted Souter up the judicial ladder in New Hampshire, laying a spiel on Bush: "Mr. President, have I got the Supreme Court nominee for you! Guy's a bachelor, lives on a farm, takes care of his mother. Never made a speech. Never written a book. No paper trail. And [broad wink] he thinks just like us."

Ah, but what about the "Big A" word?

Bush, who swore that he didn't grill Souter on abortion, flared with exasperation at reporters: "I didn't use the litmus test approach. . . . Look, you can stop trying [to ask about Souter's abortion views] because it would be unfair to Judge Souter."

'Right' means right

That's why Souter's anonymity makes him a savvy political choice for Bush. He's the Stealth Judge, untrackable on radar.

Bush knew if he picked a Right-wing ideologue — a sure vote to tumble *Roe vs. Wade* — the abortion furor would stall the Senate, hurt Republicans in the 1990-92 elections, and sap Bush's popularity.

In truth, Souter is as unpredictable as other rookie Supremes. (Remember, Ike said that Justice William Brennan, the liberal hero who just retired, was "one of my greatest mistakes.") A man who knows Souter, Georgetown law professor Paul Rothstein, admitted, "He could be a Trojan horse; he [Bush] may not know what's inside him."

All we really know of Souter is that he's an enigmatic grind; the Triumph of the Nerds. I like what his ex-law partner, Ron Snow, said: "Dave probably sleeps in a brown suit. A black robe would improve his color pattern."

Souter seems fireproof against an abortion storm. That's clever politics. Sure, he's no William Brennan. But he's no Robert Bork, either.

David Souter is the most mysterious jurist since Judge Crater vanished. But Bush could have done far worse.

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WHITE HOUSE DISCUSSION POINTS

SUPREME COURT NOMINATION OF JUDGE DAVID SOUTER

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

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

- * In nominating Judge Souter to the Supreme Court, the President selected **extraordinary competence and excellence**.
- * Judge Souter is a man of unquestioned distinction and accomplishment. He is an outstanding jurist, **fair**, equitable, and thoughtful.
- * Judge Souter received the ABA's **highest** rating of "very qualified" when he was being considered for a judgeship on the court of appeals.
- * Judge Souter is a strict constructionist, a **tough** trial court judge with a **great** legal mind and will interpret the Constitution not legislate from the bench.
- * The President did not use any litmus test - no single issue - in choosing Judge Souter because it is not appropriate in the selection process of a Supreme Court Justice.
- * Judge David Souter was chosen because he is true to the life and spirit of the Constitution, a guide that Congress should also use during the confirmation process.

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

WHITE HOUSE DISCUSSION POINTS

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Letter	From Gordon Humphrey to John Sununu Re: Recommendation for U.S. Court of Appeals vacancy (2 pp.)	7/24/90	(b)(6)	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Souter (Judge David) (1990)

Date Closed:	12/13/2004	OA/ID Number:	29171-007
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

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

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

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

PRM. Removed as a personal record misfile.

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

(b)(1) National security classified information [(b)(1) of the FOIA]
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(b)(9) Release would disclose geological or geophysical information

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01b. Letter	From Gordon Humphrey to John Sununu Re: Recommendation for U.S. Court of Appeals vacancy (1 pp.)	n.d.	(b)(6)	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Souter (Judge David) (1990)

Date Closed:	12/13/2004	OA/ID Number:	29171-007
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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01c. List	From Gordon Humphrey to John Sununu Judges of the Federal Circuit 1988-1990 (1 pp.)	n.d.	P2 , P 6	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Souter (Judge David) (1990)

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 12/12/07

Date Closed:	12/13/2004	OA/ID Number:	29171-007
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 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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**JUDGES OF THE FEDERAL CIRCUIT
1988 - 1990**

DAVID BRYAN SENTELLE - DISTRICT OF COLUMBIA CIRCUIT, APPOINTED 9-11-87, FORMER U.S. DISTRICT JUDGE, 47 YEARS OLD

CLARENCE THOMAS - DISTRICT OF COLUMBIA CIRCUIT, APPOINTED 4-30-90, FORMER CHAIRMAN, U.S. EEOC, 42 YEARS OLD

CONRAD K. CYR - FIRST CIRCUIT, APPOINTED 11-20-89, FORMER U.S. DISTRICT JUDGE, 59 YEARS OLD

DAVID H. SOUTER - FIRST CIRCUIT, APPOINTED 4-27-90, FORMER ASSOCIATE JUSTICE SUPREME COURT OF NEW HAMPSHIRE, 50 YEARS OLD

JOHN M. WALKER, JR. - SECOND CIRCUIT, APPOINTED 11-21-89, FORMER U.S. DISTRICT JUDGE, 49 YEARS OLD

RICHARD LOWELL NYGAARD - THIRD CIRCUIT, APPOINTED 10-17-88, FORMER JUDGE, COURT COMMON PLEAS OF PA (6TH DISTRICT) - 50 YEARS OLD

JOHN M. DUHE, JR. - FIFTH CIRCUIT, APPOINTED 10-17-88, FORMER U.S. DISTRICT JUDGE, 57 YEARS OLD

RHESA H. BARKSDALE - FIFTH CIRCUIT, APPOINTED 3-12-90, FORMERLY WITH MISSISSIPPI LAW FIRM, 46 YEARS OLD

STEPHEN S. TROTT - NINTH CIRCUIT, APPOINTED 3-25-88, FORMER ASSOC. ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, 50 YEARS OLD

FERDINAND F. FERNANDEZ - NINTH CIRCUIT, APPOINTED 5-22-89, FORMER U.S. DISTRICT JUDGE, 51 YEARS OLD

PAMELA ANN RYMER - NINTH CIRCUIT, APPOINTED 5-22-89, FORMER U.S. DISTRICT JUDGE, 49 YEARS OLD

WADE BRORBY - TENTH CIRCUIT, APPOINTED 2-17-88, FORMERLY WITH WYOMING LAW FIRM, 56 YEARS OLD

DAVID M. EBEL - TENTH CIRCUIT, APPOINTED 4-20-88, FORMERLY WITH COLORADO LAW FIRM AND ADJUNCT PROFESSOR, UNIV DENVER LAW SCHOOL, 50 YEARS OLD

EMMETT RIPLEY COX - ELEVENTH CIRCUIT, APPOINTED 4-25-88, FORMER U.S. DISTRICT JUDGE, 55 YEARS OLD

involved first-rate *public servant, person* *know of*
Yesterday I selected the best candidate I could find for the Supreme Court of the United States. Judge Souter is a ~~distinguished~~ jurist, a ~~man of~~ of distinction and accomplishment, and a fair man. There was no litmus test, no politics--I selected the person I believed would do the best job of interpreting our Constitution and our laws.

in 4 I ~~am heartened~~ upon Congress am heartened by the initial reactions of many in Congress--that they wish to evaluate Judge Souter on the merits, as they did a few months ago when he was unanimously confirmed; that they want to avoid rancorous partisanship or the pressures of special interest groups who would insist on a judge who toes their party line. I am distressed that some special interest groups fail to appreciate the difference between judging and legislating, and think it appropriate to seek from a judge a commitment to a particular policy outcome. But I am confident that in a climate of civil discourse and ~~want to work with Congress to~~ *and* ~~mark~~ preserve a climate of civil discourse ~~and~~ non-partisan consideration appropriate to the advise and consent process, and I am confident that Congress ~~will~~ will tender its consent to this outstanding jurist and fine man.

MEMORANDUM

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

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

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

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

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

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

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

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

II. State Equal Protection. Same analysis and conclusion.

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

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

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

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

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

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

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

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

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

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

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From Frederick D. McClure to John Sununu Re: Confirmation Strategy for Supreme Court Nominee (3 pp.)	7/23/90	P/2, P/5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Souter (Judge David) (1990)

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 12/12/07

Date Closed:	12/13/2004	OA/ID Number:	29171-007
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

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

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

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

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

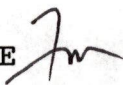
PRM. Removed as a personal record misfile.

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

THE WHITE HOUSE
WASHINGTON

July 23, 1990

MEMORANDUM FOR JOHN H. SUNUNU

FROM: FREDERICK D. McCLURE 

SUBJECT: Confirmation Strategy for Supreme Court Nominee

Below is the strategy I have tentatively designed for the purpose of securing confirmation of the President's Supreme Court Associate Justice nominee. Pending the selection of the nominee, it is difficult to know what, if any, problems we may encounter in the Senate. However, should problems arise, having an appropriate mechanism to deal with them already in place will be extremely useful.

I. **Legislative Affairs and Press Office Briefing**

Immediately **following** the selection, it is important for Marlin Fitzwater, Boyd Hollingsworth and me to confer with the nominee regarding (1) press statements, (2) Congressional courtesy visits, and (3) hearing preparation. Hearing preparation, i.e., background materials, will be prepared by a designated individual from the Department of Justice, in conjunction with Counsel's Office.

II. **Outside Advisory Group**

I plan to ask former White House legislative affairs officials to serve as an informal advisory group. The purpose will be to assist in designing day-to-day strategy, gathering Senate intelligence, and providing direct contact with Senators as the confirmation process goes forward. In addition, these individuals, plus others, will be asked to participate in "Murder Board" preparations. This group would meet at least once a week.

Members

Fred McClure

Will Ball, former Assistant to the President

Tom Korologos, former Deputy Assistant to the President
(Senate)

Pam Turner, former Deputy Assistant to the President
 (Senate)
 Nancy Kennedy, former Special Assistant to the President
 (Senate) and currently Assistant Secretary of
 Education for Legislative Affairs
 Boyd Hollingsworth
 Press Office representative
 Department of Justice representative

On an "as needed" basis, Boyd and I will be in contact with well-placed Democrat lobbyists who have significant ties with Democrat members of the Judiciary Committee.

III. Internal Working Group

The purpose of this group is to coordinate White House activities, and, in particular, to deal with any public relations or political problems that might arise during the confirmation process. The group will meet for initial strategy sessions, then on an "as needed" basis.

Members

Fred McClure
 Boyd Hollingsworth
 Press Office representative
 White House Legal Counsel's representative
 Dave Demarest
 Bobbie Kilberg
 Deb Amend
 Office of Political Affairs representative
 Department of Justice representative

IV. Miscellaneous

It will be necessary for the nominee to designate at least one "contact" person. This individual is needed for coordination of courtesy call appointments and hearing schedules, which appointments will be scheduled through the Office of Legislative Affairs (Senate). A member of the Senate Legislative Affairs team (Boyd Hollingsworth where possible) will accompany the nominee on all Hill visits.

During the August recess, the "murder boards" will begin so that when the confirmation hearings commence the nominee will be prepared. August being a slow news month, we can expect a number of issues being raised during the recess.

My office will have initial discussions early this week with the Staff Director and Minority Staff Director of the Judiciary Committee concerning the hearing schedule. We will make clear that our objective is to move the confirmation process forward as quickly as possible.

MEMO

To: Pat McGuigan
Fr: Jeffery D. Troutt
Re: Smith v. Cote
Dt: July 24, 1990

=====

You asked for my analysis of the Smith v. Cote 513 A.2d 341 (N.H. 1986) case may say about Judge Sauter's jurisprudence in the area of the sanctity of human life. My answer is that Smith v. Cote says nothing about Sauter's jurisprudence in the abortion area, and that it would be a mistake to assume that it does.

In 1979, Linda Smith became pregnant. At some point in the early stages of her pregnancy, she became ill. The physicians treating her may have misdiagnosed her condition, believing it to be a reaction to antibiotics. Four months later, during the second trimester of pregnancy, they suggested, and she underwent a rubella titre test which suggested she had been exposed to rubella.

Smith carried the child to term. The child was born with multiple birth defects.

Smith sued in her own name, and in the name of the child, alleging that she contracted rubella early in her pregnancy, and that the defendants failed to test for and discover her exposure to the disease in a timely manner. She contended that if she knew she was exposed to the disease and informed of the high possibility of birth defects which resulted from the disease, she would have obtained an abortion.

Smith brought two causes of action which are relevant for our discussion¹ -- wrongful birth and wrongful life. Neither of these causes of action were recognized in New Hampshire. The Hillsborough County Superior Court referred the questions as to whether these causes of action are recognized, and if so, what is the measure of damages, to the Supreme Court of New Hampshire for interlocutory review.

The court, in an opinion written by Justice Batchelder, held

¹ She brought an additional cause of action under the parental bystander doctrine for emotional injury resulting from the impact of seeing the child's birth defects before and after birth. The court rejected her argument, and refused to hold the defendants liable.

that New Hampshire law recognizes a wrongful birth tort², but does not recognize a wrongful life tort.³

In recognizing a wrongful birth tort, the court noted that two development, one scientific and one legal, affected their ruling. First, modern science has progressed to the point that it is possible to predict and diagnose fetal defects.

Second, the United States Supreme Court held in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), established a constitutional right for a woman to have an abortion. The court gave no opinion concerning the correctness of Roe, but rather stated that although abortion is a controversial issue, the Supreme Court has consistently held that abortion is a constitutional right, and that those opinions are binding.

To briefly summarize the court's reasoning from this point, the court held that the advances in medical knowledge imposed a duty upon physicians to inform pregnant women of the risk imposed by an increased possibility of birth defects. So informed, the woman may then decide whether or not to have an abortion. The court stated, "[g]iven the decision in Roe v. Wade, we recognize that the 'due care' standard [citation omitted], may have required the defendants to ensure that Linda had an opportunity to make an informed decision regarding the procreative options available to her." Cote, at 513 A.2d 346. (emphasis added.)⁴

The court was careful to note, however, that:

² A wrongful birth claim is brought by parents of a severely deformed child against a physician who negligently fails to inform them in a timely manner that there is an increased possibility of birth defects, thereby precluding the possibility of their deciding not to have a child (whether through abortion or conventional methods of family planning).

³ A wrongful life claim is brought on behalf of a child. The child claims that the physician negligently failed to inform the parents of an increased possibility of birth defects, and prevented the parents from deciding not to have the child (by abortion or conventional family planning). The distinction between wrongful birth and wrongful life is that the wrongful birth tort is based on the damage to parents in having to raise a child they could have chosen not to have. Wrongful life, on the other hand, is based on the proposition that the child was damaged by virtue of the fact that it was born in a deformed condition, and infers that the child would have been better off had it not been born.

⁴ Note that the citation which was omitted refers to RSA 508:13 in the New Hampshire statutes, which I presume defines the "due care" standard. The wording of the statute was not available to me at the time I wrote this, and could have an effect upon the underlying analysis.

[n]otwithstanding the disparate views within society on the controversial practice of abortion, we are bound by the law that protects a woman's right to choose to terminate her pregnancy. Our holding today neither encourages or discourages this practice, [citation omitted], nor does it rest upon a judgment that, in some absolute sense, Heather Smith should never have been born.

The court held that the damages to be imposed where a wrongful birth cause of action is established is not the total cost of caring for the child, but the additional costs of medical treatment, education, etc., imposed upon the parent as a result of the birth defects.

The court rejected a wrongful birth cause of action on the grounds that it necessitated making a decision that the child's life was not worth living. While wrongful life is a tort committed against the parents who are burdened with caring for a child born with birth defects, wrongful life presupposes that the child was harmed by the fact that it was born.

The court gave three public policy reasons which militated against providing for a wrongful life claim.

1. Courts should not decide whether or not any person's life is worthwhile;
2. Recognizing such a claim would harm the interests of handicapped persons.
3. Tort law and the judicial process are too limited to make definitive adjudications which, "necessarily hinge[] upon subjective and intensely personal notions as to the intangible value of life." Cote, at 513 N.H. 341. The results of such tort actions would necessarily, therefore, be disparate and unpredictable.

The court noted that there may be instances where, because the parents are not available to file suit, a child may not be able recover expenses incurred where a physician failed to warn its parents of the increased risk of birth defects. The court said:

In the future recovery of an impaired child's necessary medical expenses may well depend on whether the child's parents are available to assert a claim for wrongful birth. [citation omitted.] But this cost is the price of our paramount regard for the value of human life, and of our adherence to fundamental principles of justice. We will not recognize a right not to be born, and we will not permit a person to recover damages from one who has done him no harm. Cote, at 513 A.2d 355.

Then-Justice Souter filed a concurring opinion, which focused

upon the duty imposed upon a physician who is opposed to abortion. Souter wrote:

[T]he court holds that a sphere of medical practice necessarily permitted under Roe v. Wade, [citation omitted], is not exempt from standards of reasonable medical competence. Consequently we hold that the plaintiff alleges a violation of the physician's duty when she claims, in the circumstances of the case, that prevailing standards of medical practice called for testing and advice, which the defendants failed to provide.

* * *

The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure. The defensive significance, for example, of timely disclosure of professional limits based upon religious or moral scruples, combined with timely referral to other physicians who are not so constrained, is a question open for consideration in any case in which it may be raised. Cote, at 513 A.2d 341.

The Cote case seems to be a logical and defensible extension of tort law under new circumstances, i.e., improved medical technology and the Roe decision. If there is a constitutional right to abortion, if that decision belongs to the woman alone, and if physicians are bound by the standard of due care to inform their patients of the risks associated with their medical condition, then physicians have a duty to inform pregnant women about developments which may impact their decision whether or not to continue a pregnancy, including, when necessary, diagnosing and warning them of developments in their pregnancy which may lead the woman to decide to have an abortion. I don't see how an honest reading of the law would support any other conclusion.

While I believe that Roe is illegitimate and indefensible, the court in this case was not in a position to challenge Roe. The justices' opinion of Roe was entirely irrelevant. If a lower court judge, faced with a similar case, failed to recognize the existence of Roe, he would be rightly labeled incompetent.

It should be noted that the majority opinion neither applauds nor condemns Roe. However, each time the court alluded to the fact that it was bound by Roe, it said that it recognized the controversy of abortion. This seems to indicate that the majority was not entirely comfortable with the Roe decision. Nevertheless, this is merely an inference which may be drawn from the language of the opinion. There may be other reasons for inserting such language, such as out of courtesy to one or more justice, or to those who disagree with Roe, or out of the justices' desire to reach the case's holding without forfeiting the

opportunity to be reelected or reappointed (I do not know if Justices in New Hampshire have life tenure), or promoted to the Federal courts.

Nothing in this cases, therefore, definitively suggests that either the New Hampshire Supreme Court, or then-Justice Sauter, favored or disfavored Roe v. Wade.

It should be noted, however, then-Justice Souter showed sensitivity to the fact that there are physicians who are morally opposed to abortion, and who, because of this decision, may feel they have to choose between their values, and their profession. He suggested a way out of the decision for such physicians, by referring such a case to a colleague who has no such scruples.

Again, however, this says nothing about his opinion about Roe, and certainly does not suggest that he would vote to affirm or overrule Roe v. Wade. It does, however, show that he takes the views of people who are opposed to abortion seriously, rather than dismissing such people as yahoos, as some jurists may. It certainly exemplifies judicial temperament, and an admirable concern for people who may feel themselves in a moral conundrum because of the decision, but that is all it demonstrates.

Cote is an example of a state court wrestling with the implications of the Roe v. Wade decision. The court appeared to make a legitimate and sincere attempt to discover the law in the light of new scientific and legal developments, improved medical technology, and the Roe decision, balanced against the law's traditional reverence for the sanctity of human life. Nothing in the language of the decision indicates that the majority or concurring opinions were biased in any direction. While one may disagree with the holding, or with the Roe decision which underlies the case, there is nothing in Cote which indicates that the court was involved in anything other than the classic common law process of discovering the law. Anyone who reads more into this case commits a grave error.

July 22, 1990 11:40 a.m. To: John Sununu, Ed Rogers From: Pat McGuigan
The pages which follow are being faxed all over the country today and we will continue to work tomorrow. The whole group will meet Tuesday a.m. From Vienna, Weyrich offers this input: "If he/she is easy to confirm, it won't be good enough for our people. Don't think in terms of what's easy in the Senate, think in terms of what's right and what will energize our troops for November. Then, even if you lose, you win." My additional input is this: Even if we eventually get a 100-0 vote (as we did with Clarence Thomas), we will only get there after hard work. The liberals will try, as they did there, to block anyone good. However, if we work hard and smart we might be able to make it look easy by the time it's all over. I'm at my office for the next couple or three hours. I'll continue to work on this from home (703-998-8890). ~~It would be good to talk in the next few hours, tonight or tomorrow.~~ Of all the ideas I've given you previously, my own choice would be Edith Jones. From the desk of:

PATRICK B. MCGUIGAN

Chairman, 721 Group

Date _____

To:

From: Pat McGuigan, Tom Jipping

Re: Eventual floor vote on replacement for Justice William Brennan

As a "first cut" at a target list for action, what follows breaks down the voting percentages on roll call votes for judicial nominations. There have been no recent such votes, so this information is somewhat dated. It has the great advantage, however, of coming from real votes and not merely intuition. We would recommend figuring out what you can do to encourage support for any good judicial conservative nominee among all the Senators ranging from 90% to 20%.

Naturally, we will be working closely with you in the days ahead. The 721 Group will have its regular meeting Tuesday morning July 24 at 8:30 a.m. at the regular place. Hope to see you there.

Coalitions for America

721 2nd Street, N.E. • Capitol Hill • Washington, D.C. 20002
(202) 546-3003

SPECIAL EDUCATIONAL SUPPLEMENT

Senate Voting Performance On Judicial Nominations

Votes included in calculation:

1. Edwin Meese for Attorney General 2/23/85 approved 63-31
2. Alex Kozinski for 9th Circuit 11/11/85 approved 54-43
3. James Buckley for D.C. Circuit 12/17/85 approved 84-11
4. Sidney Fitzwater for N.D. Texas cloture 3/18/86 yes 64-33
5. Sidney Fitzwater for N.D. Texas 3/18/86 approved 52-42
6. Daniel Manion for 7th Circuit 6/26/86 approved 48-46
7. Daniel Manion for 7th Circuit reconsideration 7/23/86 no 49-49
8. William Rehnquist for Chief Justice cloture 9/17/86 yes 68-31
9. William Rehnquist for Chief Justice 9/17/86 approved 65-33
10. Robert Bork for Associate Justice 10/23/87 rejected 42-58

100%	90%	80%	70%	60%	50%	40%	30%	20%	10%	0%	(Only vote on Bork)
Stevens	Cohen	Kassabbaum	Heflin	Specter	Boren	Bumpers	Nunn	Exon	Cranston	Dodd	Shelby
Murkowski	Heinz	Packwood	DeConcini	Hollings	Peil	Pryor	Dixon	Bingaman	Biden	Riegle	Wirth
McCain	Chafee				Bentsen	Ford	Simon	Burdick	Inouye	Levin	Graham
Wilson	Warner					Johnston		Leahy	Harkin	Lautenberg	Fowler
Armstrong									Mitchell	Metzenbaum	Breaux
Roth									Sarbanes		Mikulski
McClure									Kennedy		Reid
Symms									Kerry		Sanford
Lugar									Baucus		Conrad
Grassley									Bradley		Daschle
Dole									Moynihan		Adams
McConnell									Glenn		
Durenberger									Sasser		
Boschwitz									Gore		
Cochran									Byrd		
Danforth									Rockefeller		
Bond (Bork only)											
Humphrey											
Rudman											
Domenici											
D'Amato											
Helms											
Nickles											
Hatfield											
Thurmond											
Pressler											
Gramm											
Garn											
Hatch											
Gorton (not vote on Bork)											
Kasten											
Wallop											
Simpson											

No votes to date:

Lieberman	Mack
Akaka	Kerrey
Burns	Bryan
Coats	Jeffords
Loiz	Robb

Table based on statistics gathered by the American Conservative Union

United States Senate
Judicial Nominations Voting Index

Description of Votes

- ① Vote on the nomination of Edwin Meese as Attorney General of the United States. February 23, 1985. Nomination *confirmed* 63-31.
- ② Vote on the nomination of Alex Kozinski to the Ninth Circuit Court. November 11, 1985. Nomination *confirmed* 54-43.
- ③ Vote on the nomination of James Buckley to the District of Columbia Circuit Court. December 17, 1985. Nomination *confirmed* 84-11.
- 4 Cloture vote on the Sidney Fitzwater nomination to the Northern District Court of Texas. March 18, 1986. Cloture *agreed to* 64-33.
- ⑤ Final vote on the nomination of Fitzwater. March 18, 1986. Nomination *confirmed* 52-42. (*Live pairs included as + and -*).
- ⑥ Vote on the nomination of Daniel Manion to the Seventh Circuit Court. June 26, 1986. Nomination *confirmed* 48-46. (*Live pairs included as + and -*).
- ⑦ Reconsideration of the Manion confirmation vote. July 23, 1986. Reconsideration *rejected* 49-49. (*Live pairs included as + and -*).
- 8 Cloture vote on the Justice William Rehnquist nomination to Chief Justice of the Supreme Court. September 17, 1986. Cloture *agreed to* 68-31.
- ⑧ Final vote on the nomination of Rehnquist. September 17, 1986. Nomination *confirmed* 65-33.
- ⑩ Vote on the nomination of Judge Robert H. Bork to the Supreme Court. October 23, 1987. Nomination *rejected* 42-58.

MAY-25-90 FRI 10:36 OPD

P. 03

	1	2	3	4	5	6	7	8	9	10	PSN	Votes
ALABAMA												
Heflin *	+	+	+	-	-	+	+	+	+	-	70	1 Meese
Shelby	0	0	0	0	0	0	0	0	0	-	0	Nomination
ALASKA												
STEVENSON *	?	+	+	+	+	+	+	+	+	+	100	2 Buckley
MURKOWSKI	+	+	?	+	+	+	+	+	+	+	100	Nomination
ARIZONA												
DeConcini	+	+	+	+	+	-	-	+	+	-	70	3 Kozinski
MCCAIN	0	0	0	0	0	0	0	0	0	+	100	Nomination
ARKANSAS												
Bumpers	-	-	+	?	?	-	-	+	+	-	38	4 Fitzwater
Pryor *	-	-	+	+	+	-	-	-	+	-	40	Cloture
CALIFORNIA												
Cranston	-	-	+	-	-	-	-	-	-	-	10	5 Fitzwater
WILSON	+	+	+	+	+	+	+	+	+	+	100	Nomination
COLORADO												
ARMSTRONG *	+	+	+	+	+	+	+	+	+	+	100	6 Manion
Wirth	0	0	0	0	0	0	0	0	0	-	0	Nomination
CONNECTICUT												
Dodd	-	-	-	-	-	-	-	-	-	-	0	7 Manion Re-
Lieberman	+0	0	0	0	0	0	0	0	0	0	NR	consideration
DELAWARE												
ROTH	+	+	+	+	+	+	+	+	+	+	100	8 Rehnquist
Biden *	-	-	+	-	-	-	-	-	-	-	10	Cloture
FLORIDA												
Graham	0	0	0	0	0	0	0	0	0	-	10	9 Rehnquist
MACK	+0	0	0	0	0	0	0	0	0	0	NR	Nomination
GEORGIA												
Nunn *	-	-	+	-	-	-	-	+	+	-	30	10 Bork
Fowler	0	0	0	0	0	0	0	0	0	-	0	Nomination

MAY-25-90 FRI 10:37 OPD

P. 04

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	PSN	Votes
HAWAII												
Inouye	+	-	-	?	?	-	-	-	-	-	13	
Akaka	+0	0	0	0	0	0	0	0	0	0	NR	
IDAHO												
MCCLURE *	+	+	+	+	?	+	+	+	+	+	100	
SYMMS	+	+	+	+	+	+	+	+	+	+	100	
ILLINOIS												
Dixon	-	+	+	-	-	-	-	-	+	-	30	
Simon *	-	-	+	+	+	-	-	-	-	-	30	
INDIANA												
LUGAR	+	+	+	+	+	+	+	+	+	+	100	
COATS *	+0	0	0	0	0	0	0	0	0	0	NR	
IOWA												
GRASSLEY	+	+	+	+	+	+	+	+	+	+	100	
Harkin *	-	-	+	-	-	-	+	-	-	-	10	
KANSAS												
DOLE	+	+	+	+	+	+	+	+	+	+	100	
KASSEBAUM *	+	+	+	+	+	-	-	+	+	+	80	
KENTUCKY												
Ford	+	-	+	-	-	-	-	+	+	-	40	
MCCONNELL *	+	+	+	+	+	+	+	+	+	+	100	
LOUISIANA												
Johnston *	+	-	+	+	-	-	-	-	+	-	40	
Breaux	0	0	0	0	0	0	0	0	0	-	0	
MAINE												
COHEN *	+	-	+	+	+	+	+	+	+	+	90	
Mitchell	-	-	+	-	-	-	-	-	-	-	10	
MARYLAND												
Sarbanes	-	-	+	-	-	-	-	-	-	-	10	
Mikulski	0	0	0	0	0	0	0	0	0	-	0	

MAY-25-90 FRI 10:37 OPD

P. 06

	1	2	3	4	5	6	7	8	9	10	PSN	Votes
NEW MEXICO												
DOMENICI *	+	+	+	+	+	+	+	+	+	+	100	
Bingaman	-	-	+	-	-	-	-	+	-	-	20	
NEW YORK												
Moynihan	-	-	+	-	-	-	-	-	-	-	10	
D'AMATO	+	+	+	+	+	+	+	+	+	+	100	
NORTH CAROLINA												
HELMS *	+	+	+	+	+	+	+	+	+	+	100	
Sanford	0	0	0	0	0	0	0	0	0	-	0	
NORTH DAKOTA												
Burdick	+	-	+	-	-	-	-	-	-	-	20	
Conrad	0	0	0	0	0	0	0	0	0	-	0	
OHIO												
Glenn	-	-	+	-	-	-	-	-	-	-	10	
Metzenbaum	-	-	-	-	-	-	-	-	-	-	0	
OKLAHOMA												
Boren *	+	-	?	+	-	-	-	+	+	+	56	
NICKLES	+	+	+	+	+	+	+	+	+	+	100	
OREGON												
HATFIELD *	+	+	+	+	+	+	+	+	+	+	100	
PACKWOOD	+	+	+	+	+	+	-	+	+	-	80	
PENNSYLVANIA												
HEINZ	+	?	+	+	-	+	+	+	+	+	89	
SPECTER	+	+	+	+	-	-	-	+	+	-	60	
RHODE ISLAND												
Pell *	+	-	+	+	+	-	-	+	-	-	50	
CHAFEE	+	+	+	+	+	+	+	+	+	-	90	
SOUTH CAROLINA												
THURMOND *	+	+	+	+	+	+	+	+	+	+	100	
Hollings	+	-	+	+	-	-	-	+	+	+	60	

F. D. T.

[illegible]

MAY-25-90 FRI 10:37 OPD

P. 04

	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<u>10</u>	PSN	Votes
HAWAII												
Inouye	+	-	-	?	?	-	-	-	-	-	13	
Akaka	+0	0	0	0	0	0	0	0	0	0	NR	
IDaho												
MCCLURE *	+	+	+	+	?	+	+	+	+	+	100	
SYMMS	+	+	+	+	+	+	+	+	+	+	100	
ILLINOIS												
Dixon	-	+	+	-	-	-	-	-	+	-	30	
Simon *	-	-	+	+	+	-	-	-	-	-	30	
INDIANA												
LUGAR	+	+	+	+	+	+	+	+	+	+	100	
COATS *	+0	0	0	0	0	0	0	0	0	0	NR	
IOWA												
GRASSLEY	+	+	+	+	+	+	+	+	+	+	100	
Harkin *	-	-	+	-	-	-	-	-	-	-	10	
KANSAS												
DOLE	+	+	+	+	+	+	+	+	+	+	100	
KASSEBAUM *	+	+	+	+	+	-	-	+	+	+	80	
KENTUCKY												
Ford	+	-	+	-	-	-	-	+	+	-	40	
MCCONNELL *	+	+	+	+	+	+	+	+	+	+	100	
LOUISIANA												
Johnston *	+	-	+	+	-	-	-	+	+	-	40	
Breaux	0	0	0	0	0	0	0	0	0	-	0	
MAINE												
COHEN *	+	-	+	+	+	+	+	+	+	+	90	
Mitchell	-	-	+	-	-	-	-	-	-	-	10	
MARYLAND												
Sarbanes	-	-	+	-	-	-	-	-	-	-	10	
Mikulski	0	0	0	0	0	0	0	0	0	-	0	

Coalitions for America

Paul M. Weyrich
National Chairman
Eric Licht
President
Library Court
Social Issues
Stanton
Defense & Foreign Policy
Kingston
Budget & Economic Policy
721 Group
Judicial & Legal Policy
Sienna Group
Catholic Coalition
The Omega Alliance
Young Activist Coalition
Resistance Support Alliance
Freedom Fighter Policy
Jewish/Conservative Alliance

Fax to: John SUNUNU
456-2397
721 Second Street
Capitol Hill
Washington, D.C. 20002
(202) 546-3003

July 26, 1990

To: Friends, Allies, Free Congress Personnel
From: Pat McGuigan
Re: Souter nomination, Your expressions of concern

Things such as the Washington Post story this morning, with its description of Judge Souter's expression of opposition to a judicial bypass procedure in a parental consent bill nine years ago, will (and should) naturally cause concern to those of us committed to the right to life. There are also indications that Souter did not object when, as a member of a Hospital Board of Directors in 1973, the hospital began to perform abortions.

and the rule of law.

These and other bits of information about the nominee must and will be checked out. Tom Jipping and our magnificent crew of summer interns are going through everything this guy has ever written to determine how strict constructionist, or judicially conservative, he really is. When he was nominated Monday night, many friends called or faxed material claiming Souter was "pro-gay rights" or "pro-abortion", but upon reading the actual decisions we found that (in the first case) that was completely inaccurate or that (in the second case) the actual decision was muddled.

The appropriate stance is to be cautiously supportive because we certainly support the kinds of nominees President Bush described in his remarks Monday evening. The question is whether or not Souter is that kind of nominee. He appears, based on Tom's reading so far, to be more consistently conservative than Sandra Day O'Connor, perhaps as conservative as Anthony Kennedy but by no means an Antonin Scalia. If that sounds nuanced, ambivalent and somewhat muddled, so be it. Careful consideration of his record combined with a determination to support the kind of jurisprudence the President described is our current position.

Tom's first round of intense reading and writing on this should be completed by some time next week. Between now and then, keep your powder dry while the full picture continues to emerge. I will forewarn you that the full picture is likely to be just about as mixed as the way we feel now -- perhaps slightly better, probably not worse.



Suite 402, 419 7th Street, N.W.
Washington, D.C. 20004—(202) 626-8800

NATIONAL RIGHT TO LIFE STATEMENT ON CERTAIN
ISSUES RELATING TO THE SOUTER NOMINATION

July 26, 1990

FOR FURTHER INFORMATION: Douglas Johnson, Legislative Director
(202) 626-8820, (301) 502-1170

As we said on the day the President announced his selection, July 23, as far as we know, Judge Souter has not expressed a judgment on Roe v. Wade. His overall approach appears to be that of judicial restraint and adherence to the text of the Constitution. We feel comfortable with that approach, since Roe v. Wade has no basis in the text of the Constitution.

Judge Souter joined in one opinion recognizing a limited cause of action for "wrongful birth" in New Hampshire. The court held that it was compelled by Roe v. Wade to so rule. While we believe the case should have been decided the other way, it reveals nothing regarding Judge Souter's views on whether Roe v. Wade is a correct interpretation of the Constitution.

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

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

It still appears that Judge Souter is an advocate of judicial restraint, and we continue to believe that Roe v. Wade cannot survive scrutiny by judicial constructionists.

#####

JUL 26 '90 18:58 FROM ANTHONY KANE - ASSOC.



American Life Lobby, Inc.

NATIONAL HEADQUARTERS, P.O. BOX 490, STAFFORD, VA 22554
703-659-4171 — METRO DC (703) 650-2510 — FAX (703) 659-2585

PRESS RELEASE...PRESS RELEASE...PRESS RELEASE...PRESS RELEASE...

FOR: IMMEDIATE RELEASE

CONTACT: ROBERT EVANGELISTO

JULY 26, 1990

(703) 659-4171

PRO-LIFERS DEMAND TO KNOW: IS SOUTER PRO-ABORTION?

Mrs. Judie Brown, president of American Life Lobby, today announced plans to petition pro-life Senator Charles Grassley (R-Iowa) to ask Supreme Court nominee David Souter "tough questions on the life issues."

Mrs. Brown stated: "Pro-abortionists demand to know where Judge Souter stands on their godless 'right' to kill preborn children. Well, so do we. There are events in Judge Souter's past that raise serious questions for pro-lifers.

"For example: While being a board member and overseer of two hospitals that performed abortions, did he ever do anything to stop the slaughter? If not, why? Also, in the case Smith v. Cote, why did he agree to extend tort principles to the birth of handicapped children, upholding so-called 'wrongful births'? This is very disturbing."

[MORE]

ALL...for God, for Life, for the Family, for the Nation

"But hearing them as lukewarm, and neither cold nor hot, I will begin to vomit thee out of my mouth" (Rev. 3:16)

JUL 26 '98 18:58 FROM ANTHONY KANE - ASSOC

Mrs. Brown concluded: "We will ask our 300,000 members to petition Senator Grassley and ask him to pose these questions to Judge Souter. With the lives of millions of innocent children hanging in the balance, pro-lifers must know. If we discover during the hearings that Judge Souter is pro-abortion, we expect President Bush to immediately rescind his nomination and find a pro-life replacement. As a pro-life President, elected by pro-life Americans, George Bush could do no less."

* * *

JUL 26 1990 18:58 FROM ANTHONY KANE - ASSOC

LOBBY PRODUCTION LETTERHEAD

cheshire area begins here

cheshire area ends here

DEAR JUDIE,

ENCLOSED IS MY SACRIFICIAL GIFT TO SUPPORT AMERICAN LIFE LOBBY'S CAMPAIGN TO GAIN A TRULY PRO-LIFE NOMINEE TO THE U.S. SUPREME COURT.

(RANGES, LO: 7, 15, 25, 50 OTHER) (HI: 25, 50, 100, 500, OTHER)
(PROSPECT: 25, 25, 50, 100 OTHER)

{FOR YOUR CONVENIENCE, YOU CAN USE: MASTERCARD ____ OR VISA ____}
CARD NUMBER: _____
EXPIRATION DATE: _____

BECAUSE AMERICAN LIFE LOBBY WORKS TO PASS PRO-LIFE LEGISLATION
YOUR GIFT IS NOT TAX-DEDUCTIBLE

PLEASE RETURN ENTIRE FORM TO:
AMERICAN LIFE LOBBY, P.O. BOX 490, STAFFORD, VA 22554

PETITION TO SENATOR CHARLES GRASSLEY

DEAR SENATOR GRASSLEY,

I RESPECTFULLY REQUEST THAT DURING THE FORTHCOMING HEARINGS ON THE NOMINATION OF JUDGE DAVID SOUTER YOU ASK HIM:

1. TO EXPLAIN WHY HE SIGNED ONTO SMITH V. COTE (July 9, 1986), A CASE THAT ENCOURAGED ABORTIONS IN CASES OF POSSIBLE BIRTH DEFECTS; AND

2. WHY HE NEVER CHALLENGED--IN EIGHT YEARS AS PRESIDENT OF THE BOARD OF CONCORD (N.H.) HOSPITAL--THE POLICY OF ALLOWING EVEN SECOND TRIMESTER ABORTIONS TO BE PERFORMED AT THE HOSPITAL;

3. WHY DID HE SIGN ON TO THE SMITH OPINION, WHICH WOULD ENCOURAGE ABORTION, WHEN HIS POSITION AS AN OVERSEER OF DARTMOUTH MEDICAL SCHOOL--AND THE DARTMOUTH HITCHCOCK HOSPITAL, WHICH PERFORMS ABORTIONS THROUGH THE END OF THE SECOND TRIMESTER--WOULD APPEAR TO CREATE A CLEAR CONFLICT OF INTEREST?

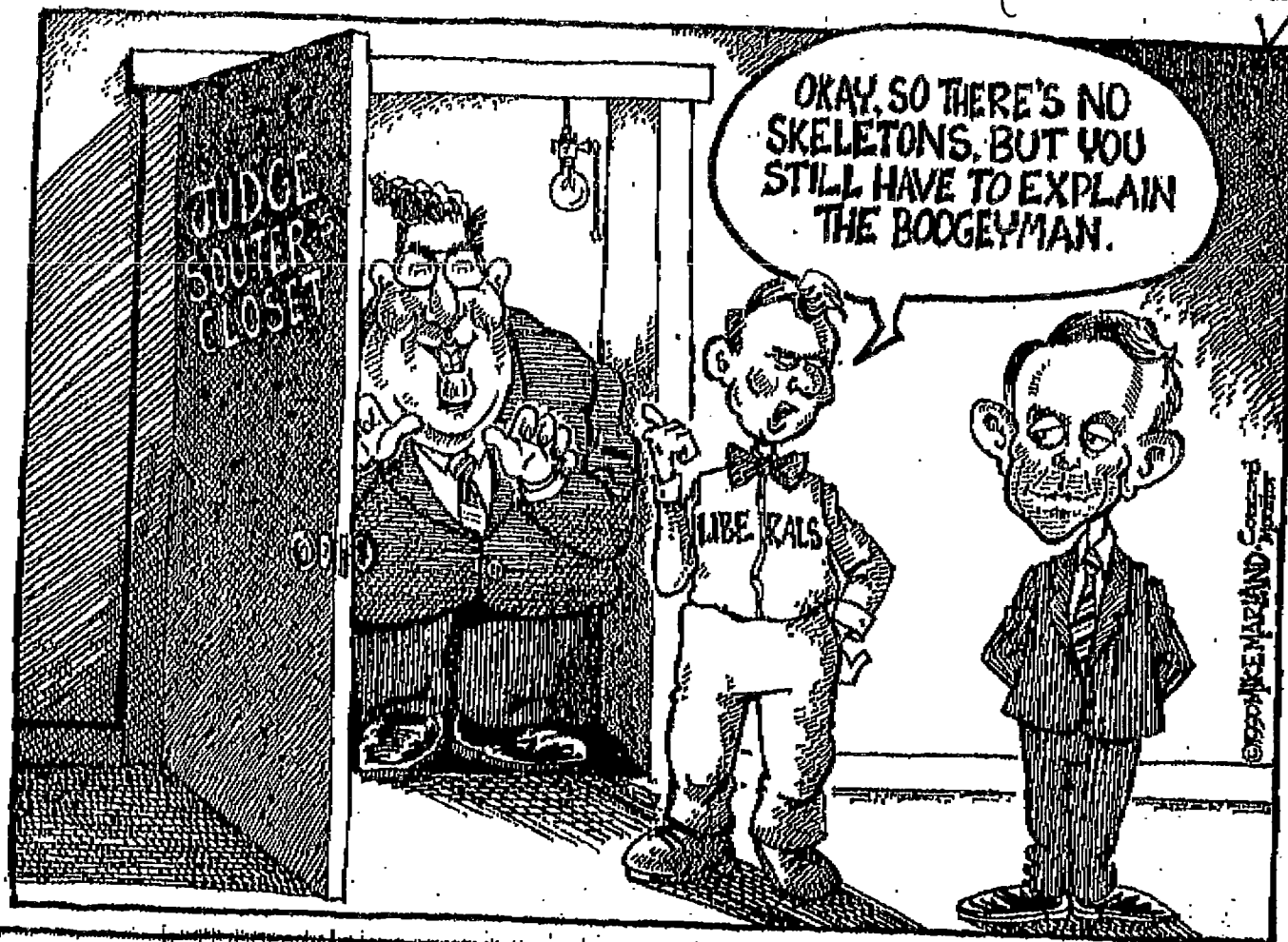
MORE THAN 27,000,000 INNOCENT PREBORN BABIES HAVE DIED IN THE UNITED STATES SINCE 1973. THE CITIZENS OF AMERICA WANT AND DESERVE A SUPREME COURT JUSTICE THAT IS DEDICATED TO THE RESTORATION OF LEGAL PROTECTION FOR ALL INNOCENT HUMAN LIFE.

I THANK YOU FOR YOUR EFFORTS TO RESTORE LEGAL PROTECTION FOR ALL INNOCENT HUMAN LIFE.

SIGNATURE(S) _____

from Rudman

CONCORD MONITOR Tuesday, July 31, 1990 B4



07/31/90

15:01

2202 224 3324

SEN. RUDMAN D.C.

002

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
HOWARD M. METZENBAUM, OHIO
DENNIS DECONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
HERBERT KOHL, WISCONSIN

STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE

RONALD A. KLAHN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
JEFFREY J. PECK, GENERAL COUNSEL
TERRY L. WOODFALL, MINORITY CHIEF COUNSEL
AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 27, 1990

FOR RELEASE: IMMEDIATELY

CONTACT: KEN DREXLER
202/224-8050
PAM MONTGOMERY
202/224-7731

BIDEN AND THURMOND ANNOUNCE SOUTER CONFIRMATION HEARINGS

Senator Joseph R. Biden, Jr. (D-Delaware), Chairman of the Senate Judiciary Committee, and Senator Strom Thurmond, the committee's Ranking Republican, today announced that the Judiciary Committee will commence hearings Thursday, September 13, on the nomination of David H. Souter to be Associate Justice of the United States Supreme Court.

The first day of hearings will begin at 10:00 AM in Room 216 of the Hart Senate Office Building.

r w PM-Souter-Abortion 1st Ld-Writethru 07-30 0314
^PM-Souter-Abortion, 1st Ld-Writethru, 0352<
^As Attorney General, Souter Opposed State Paying for Medicaid
Abortions<
^Eds: CORRECTS headline to remove reference to Souter calling
abortion ''killing''.<
^By JOHN KING=
^Associated Press Writer=

WASHINGTON (AP) - Supreme Court nominee David Souter, as New Hampshire's attorney general, opposed an order that the state pay for Medicaid abortions.

In its 1976 brief, the state referred to abortion as ''the killing of unborn children.''

The brief was filed during a federal court appeal of a case begun during the tenure of Souter's predecessor, Warren Rudman, and Souter did not personally argue the case. New Hampshire's attorney general is appointed by the governor and required by law to represent the governor's views in court. New Hampshire's governor at the time was arch-conservative Meldrim Thompson.

Souter's name was listed on the brief but it was signed by its author, Richard Wiesbusch, then an assistant attorney general.

Although nothing in the brief sheds any light on Souter's personal views on abortion, the case likely will provide Senate Judiciary Committee members eager to learn those views a vehicle to raise the issue.

''Clearly the Senate should ask Judge Souter to address himself to this document at his confirmation hearings,''' said Arthur J. Kropp, president of the liberal activist group People for the American Way, which today distributed copies of papers filed in the 1976 case.

New Hampshire was appealing to the 1st U.S. Circuit Court of Appeals a lower court injunction that it pay for elective abortions sought by Medicaid patients during the resolution of a larger case in which the state was seeking to prove it didn't have to pay.

New Hampshire's brief acknowledged the U.S. Supreme Court's 1973 Roe v. Wade decision legalizing abortion but argued that nothing in that landmark ruling required the state to use tax dollars to pay for abortions sought by Medicaid recipients for reasons other than to preserve a pregnant woman's life.

''Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant,''' the state's brief said.

AP-TV-07-30-90 1148EDT<+

*JHS -
He spoken to
Rudman + Souter
re: attached. I don't
think it causes any
problems. Jm*

JIPPING

Coalitions for America

721 Second Street, NE • Capitol Hill • Washington, DC 20002

**SUPREME COURT NOMINATION
DAVID H. SOUTER**

TALKING POINTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CRIMINAL CASES

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

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

TOTAL CRIMINAL CASES = 72

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

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

CIVIL CASES

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

TOTAL CIVIL CASES = 115³

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

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

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

THE PRECEDENT THING

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

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

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

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

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

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

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

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

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

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

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

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

⁵ 410 U.S. 113 (1973).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ 109 S.Ct. 3040 (1989).

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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

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

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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 2¹ of the United States Constitution and formally nominated U.S. Circuit Judge David H. Souter to be an associate justice of the Supreme Court of the United States.

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

JUDGE SOUTER'S RESUME

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

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

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

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

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

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

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

SOURCES OF INFORMATION

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

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

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

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

⁵ 410 U.S. 113 (1973).

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

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

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

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

⁷ 462 U.S. 416 (1983).

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

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

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

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

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

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

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

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

¹³ Chief Justice King did not participate in this decision.

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

¹⁵ *Smith*, 513 A.2d at 346.

¹⁶ *Id.* at 344.

¹⁷ *Id.* at 355.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁶ 540 A.2d 1212 (N.H. 1988).

²⁷ *Id.* at 1217.

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

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

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

²⁸ 508 A.2d 1059 (N.H. 1986).

²⁹ *Id.* at 1062.

³⁰ 562 A.2d 185 (1989).

³¹ *Id.* at 186.

³² 547 A.2d 260 (N.H. 1988).

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

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

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

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

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

³⁵ *Panto*, 547 A.2d at 264.

³⁶ *Id.* at 269.

³⁷ 486 A.2d 283 (N.H. 1984).

³⁸ *Id.* at 286.

³⁹ *Id.*

⁴⁰ *Id.* at 288.

⁴¹ *Id.*

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

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

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

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

⁴² 549 A.2d 1210 (N.H. 1988).

⁴³ *Id.* at 1211.

⁴⁴ *Id.* at 1212.

⁴⁵ 480 A.2d 160 (N.H. 1984).

⁴⁶ *Id.* at 161.

⁴⁷ 533 A.2d 32 (1987).

⁴⁸ *Id.* at 33.

⁴⁹ 469 A.2d 1365 (N.H. 1983).

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

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

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

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

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

⁵¹ *Id.*

⁵² 480 A.2d 123 (N.H. 1984).

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

⁵⁴ *Duchesnaye*, 469 A.2d at 124.

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

⁵⁶ 498 A.2d 348 (N.H. 1985).

⁵⁷ *Id.* at 350.

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

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

⁵⁸ *Id.* at 352.

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

⁶⁰ *Id.* at 353.

⁶¹ 549 A.2d 1187 (N.H. 1988).

⁶² *Id.* at 1198.

⁶³ 118 N.H. 356 (1978).

⁶⁴ *Keeton*, 549 A.2d at 1199.

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

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

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

⁶⁵ 509 A.2d 753 (N.H. 1986).

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

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

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

⁶⁹ *Id.* at 761-62 (emphasis added).

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

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

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

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

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

⁷³ *Id.* at 1262.

⁷⁴ *Id.* at 1264.

⁷⁵ *Id.* at 1266.

⁷⁶ 499 A.2d 977 (N.H. 1985).

⁷⁷ *Id.* at 984.

⁷⁸ *Id.* at 985.

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

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

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

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

⁷⁹ *Id.*

⁸⁰ 536 A.2d 1236 (N.H. 1987).

⁸¹ 447 U.S. 231 (1980).

⁸² *Coppola*, 536 A.2d at 1239.

⁸³ *Id.*

⁸⁴ 480 A.2d 854 (N.H. 1984).

⁸⁵ Justice Douglas did not participate in this case.

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

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

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

⁸⁶ *Elbert*, 480 A.2d at 859.

⁸⁷ 533 A.2d 358 (N.H. 1987).

⁸⁸ Justice Batchelder did not participate in this case.

⁸⁹ *Lewis*, 533 A.2d at 360.

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

⁹¹ *Lewis*, 533 A.2d at 361.

⁹² *Id.* at 363.

⁹³ *Id.* at 364.

⁹⁴ 561 A.2d 504 (N.H. 1989).

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

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

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

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

⁹⁶ 499 A.2d 986 (N.H. 1985).

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

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

⁹⁹ *Cormier*, 499 A.2d at 987.

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

¹⁰¹ *Id.*

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

¹⁰³ 536 A.2d 1242 (N.H. 1987).

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

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

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

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

¹⁰⁴ *Id.* at 1246.

¹⁰⁵ 561 A.2d 1075 (N.H. 1989).

¹⁰⁶ *Id.* at 1077.

¹⁰⁷ *Id.* at 1078.

¹⁰⁸ 513 A.2d 325 (N.H. 1986).

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

¹¹⁰ *Goding*, 513 A.2d at 331.

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

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

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

¹¹¹ 523 A.2d 82 (N.H. 1986).

¹¹² *Id.* at 85.

¹¹³ *Id.*

¹¹⁴ *Id.* at 86.

¹¹⁵ *Id.* at 87.

¹¹⁶ 561 A.2d 1063 (N.H. 1989).

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

¹¹⁸ *In re "K,"* 561 A.2d at 1065.

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

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

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

¹¹⁹ *Id.* at 1066.

¹²⁰ *Id.*

¹²¹ *Id.* at 1067.

¹²² 530 A.2d 21 (N.H. 1987).

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

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

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

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

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

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

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

¹²⁶ *Id.* at 26.

¹²⁷ 563 A.2d 435 (N.H. 1989).

¹²⁸ Justice Johnson did not participate in this case.

¹²⁹ *Grondin*, 563 A.2d at 436.

¹³⁰ 545 A.2d 726 (N.H. 1988).

¹³¹ *Id.* at 728.

¹³² 117 N.H.927 (1977).

¹³³ *Sanborn*, 545 A.2d at 733.

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

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

JUDGE SOUTER'S JUDICIAL PHILOSOPHY

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

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

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

¹³⁴ *Id.* at 735.

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

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

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

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

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

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

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

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

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

¹³⁸ *Id.* at 1066.

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

¹⁴⁰ 563 A.2d 435 (N.H. 1989).

¹⁴¹ *Id.* at 436.

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

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

APPROPRIATE LINES OF QUESTIONING

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

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

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

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

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

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

A Department of Justice study concludes:

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

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

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

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

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

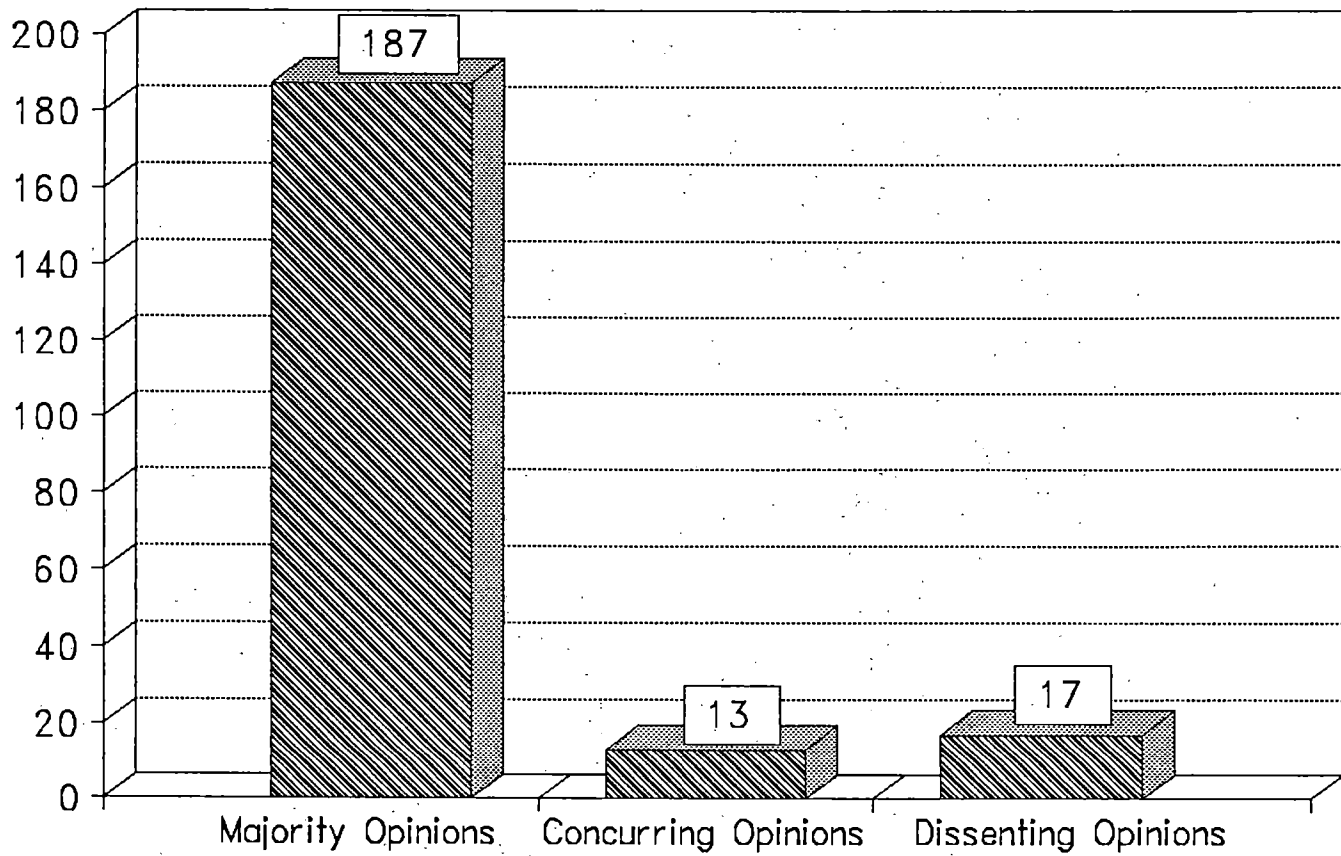
Those who condemn efforts to regulate the appellate jurisdiction of the Supreme Court as "political tampering" but who call for application of a political "balance" approach to filling vacancies on the Court are disingenuous at best and lack any integrity at worst.

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

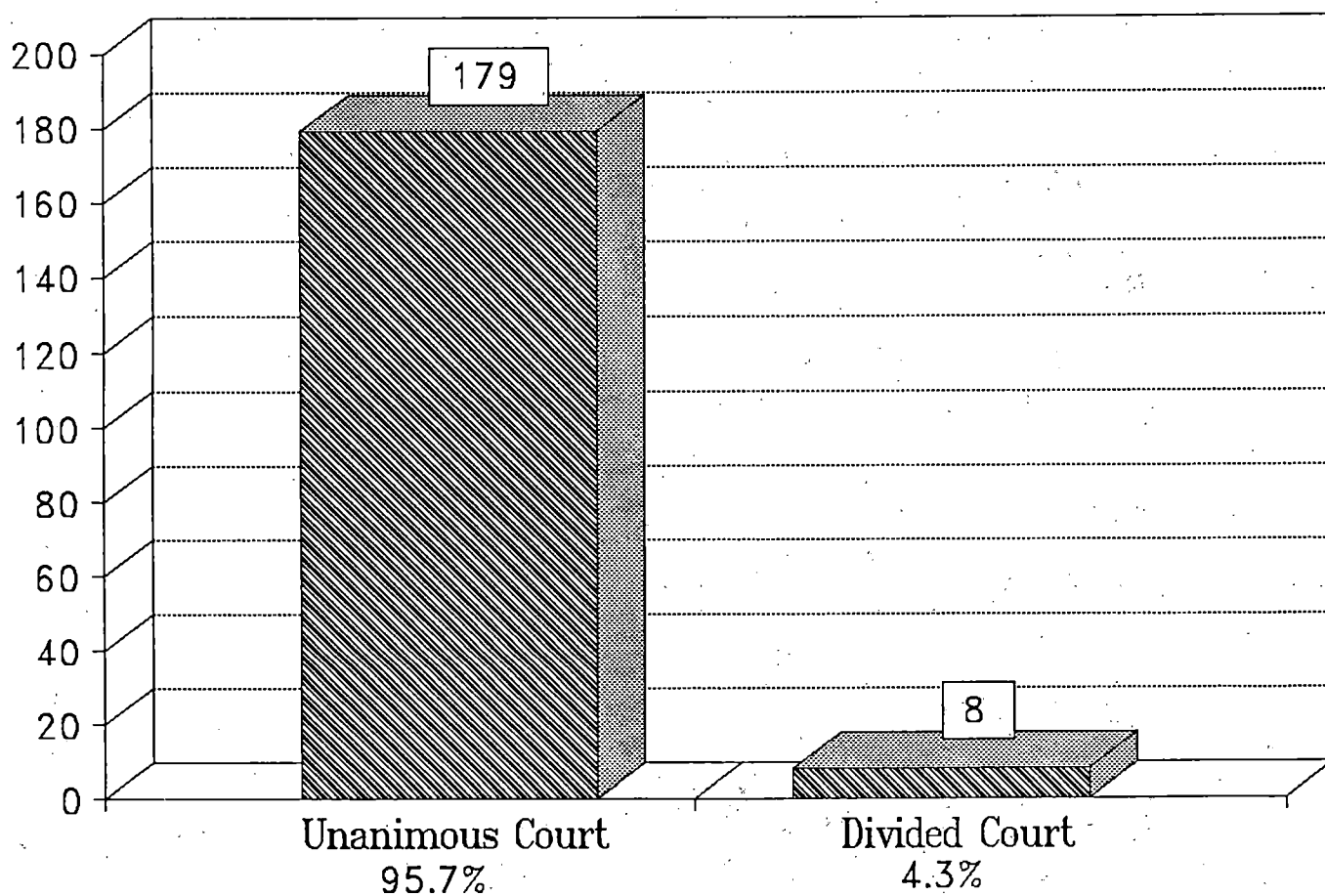
CONCLUSION

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

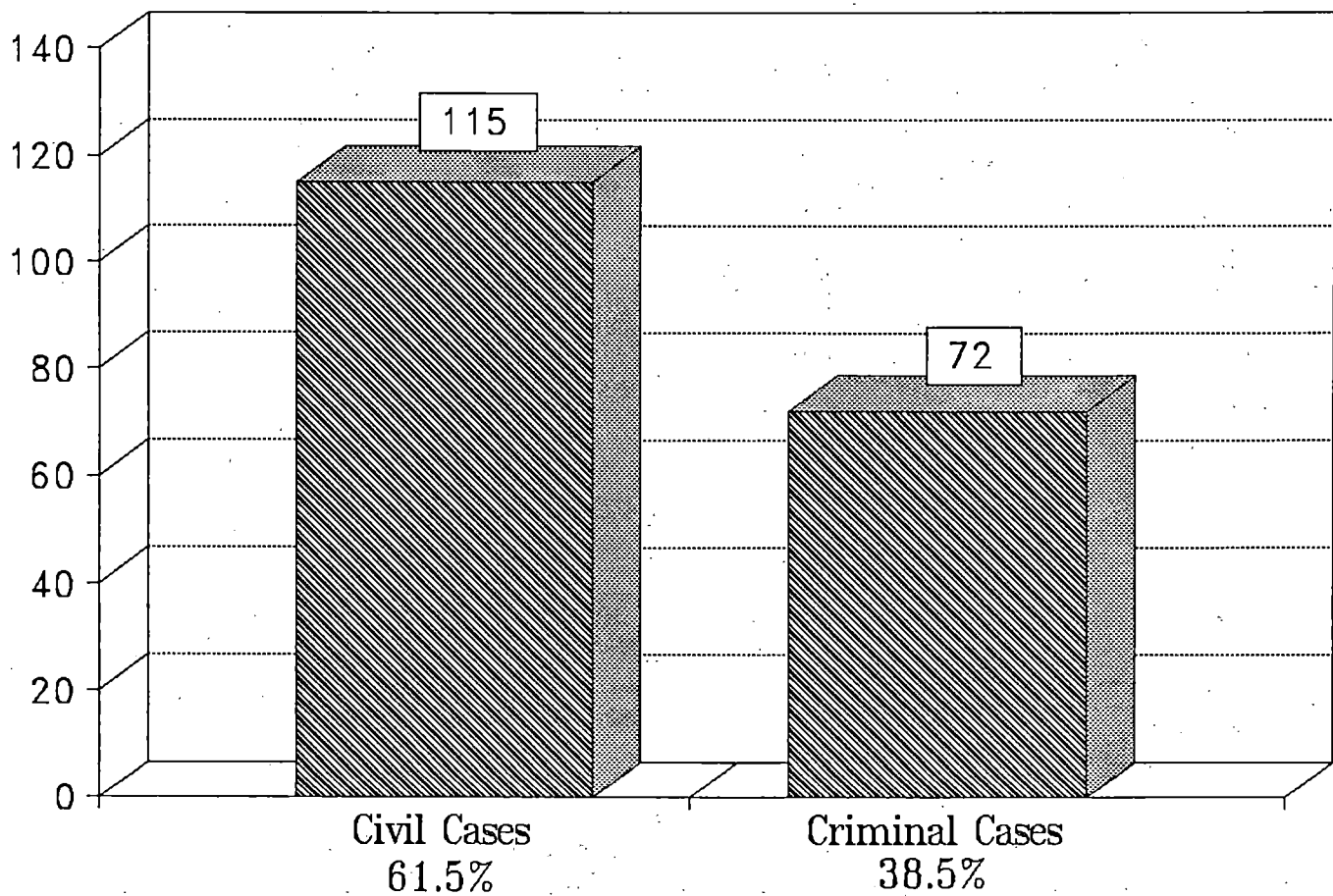
Justice David H. Souter
New Hampshire Supreme Court
Total Case Breakdown 1983-1990



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



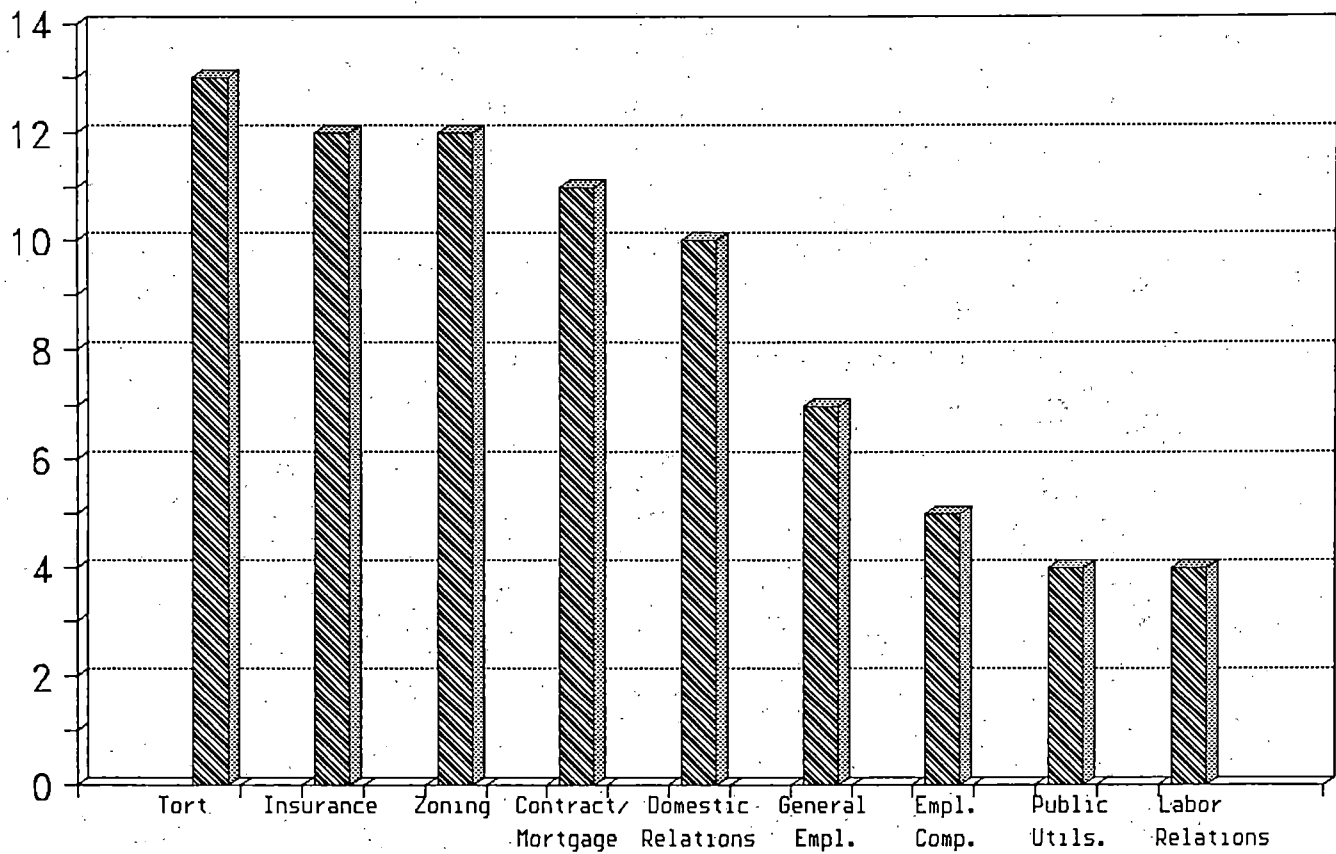
Justice David H. Souter
New Hampshire Supreme Court
Majority Opinion Breakdown 1983-1990



Justice David H. Souter

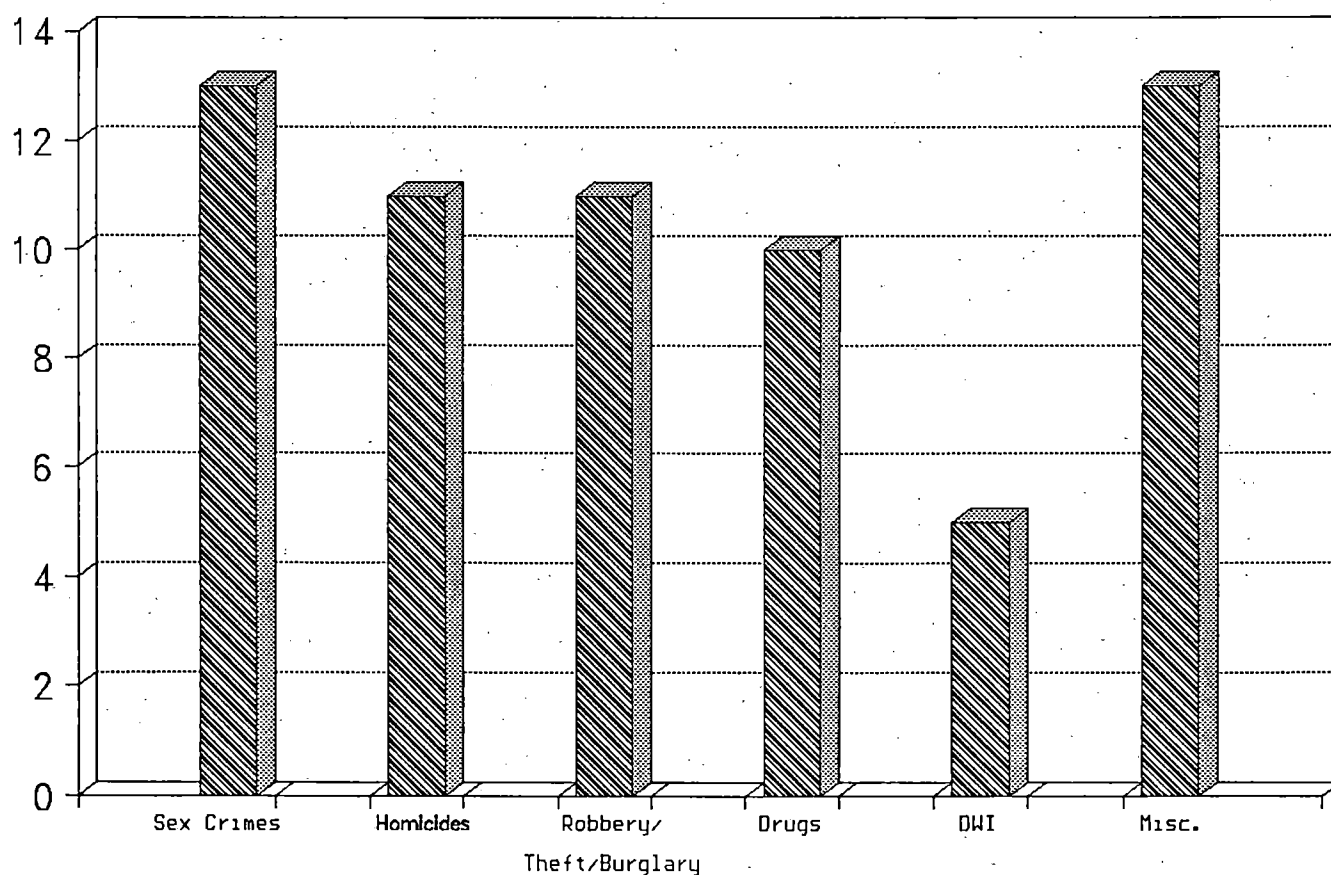
New Hampshire Supreme Court

Civil Case Breakdown 1983-1990



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

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



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

Clerk of Superior Court

MERRIMACK COUNTY

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JOHN M. SAFFORD, Commissioner
To Perform Duties of Clerk
HENRY DOWST, JR., Deputy Clerk
JAMES R. STARR, Deputy Clerk

163 North Main Street
Concord, New Hampshire 03301
Tel. 225-5501

May 13, 1981

The Hon. Roma H. Spaulding
Chairman of the House Committee on Health and Welfare
302 Legislative Office Building

Re: SB 194

Dear Madam Chairman:

I am writing as a member of the committee to speak for the Superior Court on proposed legislation that would affect the Court. The full Court met on May 7 and directed me to write to you to express the Court's position on SB 194, which you have scheduled for hearing on May 13.

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. The Court's concern is directed, rather, to that provision of the bill that would require a justice of the Superior Court to authorize the performance of an abortion upon such a minor when there is no parental consent, if the justice determines "that the performance of an abortion would be in ... [the] best interests" of a minor who is "not mature."

The members of the Court find two fundamental problems inherent in this provision. First, it would express a decision by society, speaking through the Legislature, to leave it to individual justices of this Court to make fundamental moral decisions about the interests of other people without any standards to guide the individual judge. Judges are professionally qualified to apply rules and stated norms, but the provision in question would enact no rule to be applied and would express no norm. In the place of a rule or a norm there would be left only the individual judge's principles and predilections. As carefully considered as these might be, they would still be those of only one individual, not those of society. Much criticism of the role of the judiciary in this country has characterized judicial activity in the application of constitutional standards as no more than the imposition of individual judges' views in the guise of

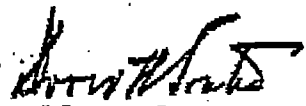
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applying constitutional terms of great generality. The provision that I have quoted from the present bill would force the Superior Court to engage in just such acts of unfettered personal choice.

The Court's second concern is with the necessarily moral character of such choice and the resulting disparity of responses to requests that judicial discretion be exercised. As you would expect, there are some judges who believe abortion under the circumstances contemplated by the bill is morally wrong, who could not in conscience issue an order requiring an abortion to be performed. There are others who believe that what may be thought to be in the "best interests" of the pregnant minor is itself just as necessarily a moral as a social question, upon which a judge may not morally speak for another human being, whatever may be that judge's own personal opinion about the morality of abortion. Judges in each such category would be obligated to indicate that they could not exercise their power in favor of authorizing abortions to be performed on immature pregnant minors. The inevitable result would be required shopping for judges who would entertain such cases. In other words, a principled and consistent application of the quoted provision would be impossible.

For these reasons I have been directed to request on behalf of the Court that any bill you may pass on this subject 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.

Yours respectfully,


David H. Souter, Justice
New Hampshire Superior Court

cc: The Sponsors
The Hon. Norman E. Champagne
The Hon. Laurier Leontagne
The Hon. Robert B. Monier
Members of the House Committee on Health and Welfare



THE SECRETARY OF THE TREASURY

John

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THE HONORABLE NICHOLAS F. BRADY
202-566-2533
DEPARTMENT OF THE TREASURY
15TH STREET AND PENNSYLVANIA AVENUE NW
WASHINGTON DC 20220+

DEAR NICK:

I STRONGLY RECOMMEND THAT PRESIDENT BUSH GIVE THE HIGHEST
POSSIBLE CONSIDERATION TO THE MAINSTREAM CONSERVATIVE, DAVID H.
SOUTER, JUSTICE FOR CIRCUIT COURT OF APPEALS, FOR HIS SUPREME
COURT NOMINEE.

I HAVE KNOWN JUSTICE SOUTER SINCE MY DAYS AT HARVARD LAW SCHOOL AND
CANNOT RECOMMEND HIS INTEGRITY, ABILITY, EXPERIENCE AND
INTELLIGENCE HIGHLY ENOUGH. HE WOULD BE A GREAT ADDITION TO THE
COURT AND TO THE COUNTRY.

BEST WISHES.

FINN M. W. CASPERSEN
CHAIRMAN OF THE BOARD
BENEFICIAL CORPORATION
100 BENEFICIAL CENTER
PEAPACK, NJ 07977

THE WHITE HOUSE

WASHINGTON

SEPTEMBER 18, 1990

MEMNORANDUM FOR GOVERNOR SUNUNU

THROUGH: DAVID DEMAREST 

FROM: DEB AMEND 

RE: EDITORIAL RESPONSE

Sir, Governor Kean wrote the attached OP/ED on Judge Souter which appeared in today's Philadelphia Inquirer.

The Philadelphia Inquirer

Tuesday, September 18, 1990

A man who knows tells how to choose judges

By **THOMAS H. KEAN**

The Senate Judiciary Committee's pointed questioning of Supreme Court nominee David H. Souter in an effort to ascertain his views on abortion took me back a few years.

In 1984, President Ronald Reagan sought my counsel in filling a federal district court vacancy in New Jersey. On my recommendation he nominated Joseph Rodriguez, a former New Jersey Bar Association president then serving as the state's public advocate.

Although I'm a lifelong Republican and Rodriguez was a Democrat, I believed not only that he was the best person for the job, but that the main qualification for federal judges is a strong belief in the U.S. Constitution.

Not everyone agreed. A storm erupted when a group of conservative senators — *Republican* senators — sent an eight-page list of questions to Rodriguez, seeking his views on subjects such as abortion, school prayer and gun control.

I condemned the tactic — and was quickly joined not only by the President, but also by the same Senate Democrats who are now posing just such questions to Judge Souter.

Back then, Democrats were angrily opposed to any "litmus test" for court nominees. Sen. Joseph Biden denounced the ideological questionnaire as "outrageous" and Sen. Howard Metzenbaum called it "offensive," "indefensible," and said it went "far beyond the bounds of propriety" in asking Rodriguez, among other questions, whether he agreed with Supreme Court decisions on abortion.

Metzenbaum concluded: "I do not think it is appropriate to require [Rodriguez] to meet some ideological test on school prayer, busing or abortion. This takes the Senate confirmation process down a road we should not go." The senator added that the Rodriguez nomination would long be remembered for ensuring that political litmus tests for judicial nominees were ended. The questions were eventually withdrawn, and no similar questionnaire was ever proposed.

But some people seem to be headed in that direction during these current hearings. The only thing that has changed is the people asking the questions. But it's just as wrong now as it was back then.

Neither the Senate nor the President is entitled to extract a commitment from a nominee on how he or she would rule in cases that might come before the court — and any attempt to obtain one threatens to compromise the independence of the American judiciary.

As Justice John Paul Stevens recently noted, the public "really wouldn't want a judge who would say in advance how he or she would vote on a particular issue, because there would be an appearance of impropriety . . . you would suspect that the position was being taken for the purpose of obtaining the office." He concluded, "That is not part of an independent judiciary."

Sen. Edward Kennedy said as much in 1981, when he insisted that Sandra Day O'Connor should not have to pass the litmus test of any single group. "Single-issue politics has no place in the solemn responsibility of the Senate to advise and consent to appointments to the Supreme Court or any other federal court," he said.

Abraham Lincoln was even more succinct. Before one nomination, he wrote: "We cannot ask a man what he will do; and if we should, and he should answer us, we should despise him for it."

As governor, I was responsible for appointing more than 250 judges in New Jersey, including two to the state Supreme Court where retiring Justice William Brennan first served. But although I support a woman's right to choose on the question of abortion, I never quizzed a single candidate about this divisive ideological question.

President Bush and I may disagree on the question of abortion. But we agree that the issue has no place as a single-issue litmus test in judicial selection.

I don't know where Judge Souter stands on abortion. But I am a firm supporter of his candidacy because of my continuing belief that the search for quality judges begins with a search for excellence. And there is no question of Judge Souter's excellence, both in academics and in experience. He has earned superb credentials from some of the world's toughest schools — Phi Beta Kappa at Harvard, a Rhodes Scholarship at Oxford and a Harvard law degree.

Equally impressive is the experience he would bring to America's high court. Judge Souter has a distinguished record of 12 years on the bench — more experience than any of the current justices had at the time of their elevation.

With a decade in law enforcement capped by his service as New Hampshire's attorney general, Judge Souter would be the court's only career prosecutor. And besides Justice O'Connor, he would be the only one with hands-on judicial experience in trial court, where judges deal not

just with lofty academic theories, but with real people and real problems — and where the true impact of Supreme Court decisions is first seen.

When he was elevated to the U.S. Court of Appeals earlier this year, Judge Souter was deemed "well qualified" by the American Bar Association — the group's highest rating. The widespread agreement about Judge Souter's qualifications has been challenged only by a few dissenters who claim he lacks "federal" experience.

Nonsense. This objection would have also denied a seat on the bench to Justice Brennan, who (as Souter would) has served as the high court's only representative from our nation's 50 state supreme

courts. And it is completely at odds with our political traditions, which view state office as precisely the right preparation for holding office in the national government.

Earlier this year, Sen. Biden's judiciary committee, like the full Senate, unanimously approved Judge Souter's nomination to the U.S. Court of Appeals — and did it without a litmus test. That standard, the standard of judicial excellence and independence, is what ought to be applied when making a decision on his qualifications for the Supreme Court.

Thomas H. Kean is the former governor of New Jersey. He is currently serving as president of Drew University, Madison, N.J.

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Letter	From Pat McGuigan to John Sununu Re: Strategy for Souter Confirmation [FOIA RESTRICTIONS REDACTED] (5 pp.)	8/3/90	P/2 , P/5 , (b)(6)	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Souter (Judge David) (1990)

Open on Expiration of PRA
(Document Follows)
By JP (NLGB) on 12/12/07

Date Closed:	12/13/2004	OA/ID Number:	29171-007
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

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P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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(b)(9) Release would disclose geological or geophysical information

165718

READING

August 3, 1990

To: John Sununu, Ed Rogers (faxed, then mailed)
From: Pat McGuigan cc: Tom Jipping, Paul Weyrich, Eric Licht
Re: "Swan Song" memo re Souter confirmation

In our last meeting, you asked for specific input on what you guys should be doing to confirm this good nominee. Taking you at your word, and assuming you weren't BSing me, I have given this considerable thought. Some of what follows also has implications for what we should be doing on the outside -- but your nominee will fail if we aren't both playing aggressively to win. These are not necessarily in order of importance.

1. Make visible Bush pro-Souter pitches during August recess. This will clearly contrast Bush's commitment to Souter with Reagan's indifference to Bork, and score modest points with conservatives. (I, for one, can promise positive editorials next month in at least one newspaper, contrasting August 1987 with August 1990 in terms of White House actions for a Supreme Court nominee.)

Do not, under any circumstances, allow yourself to be lulled into an easy August. Make your political people work long outrageous hours -- and make them devote half their time to this. Everybody always thinks their particular hot button is the one issue the President should drop everything and work on. But there's a difference this time: This is one where with hard work you can actually accomplish something tangible by the end of September, something which will change the course of our country's history, for the better.

2. An easy way to make the Prez constantly visible on this: Adapt the idea I offered to Ed and to Lee Liberman some days back and apply it specifically to August. Bring in for lunches with Bush 8 or so regional reporters at a time. Let them ask you about anything, but make Souter the main pitch. A nice, engaging hour or so, the kind of thing Bush is good at. Do the same with regional editorial writers. In D.C. context, make a point as well of getting to know -- figure this out -- which newspapers have editorial writers based in D.C. My newspaper, for example, is one. Bob Haught is our guy [662-7543, in the National Press Building]. Other papers around the country have one guy or gal in their D.C. bureau whose job it is to write the daily national editorial. Get early pro-Souter editorials from as many of them as you can. Reward those who have already delivered by giving them the opportunity to write another one, with the hook of a direct Bush chat. After August, keep doing this until your man is confirmed. Bush should keep repeating his constitutional litany about the kinds of judges we want over and over and over, because it is right and because it will work.

Yes, Souter is a high road kind of guy. But he needs a plain old-fashioned aggressive (but not stupid) conservative strategy to get

confirmed.

3. Your constant theme should be that the only legitimate litmus test is the Constitution, and constitutional judging.

4. Encourage Chuck Douglas to whip up "home town" sentiment for Souter in New Hampshire. There are a half dozen Democrat Senators who will be trekking through the snows of your good state in the coming years -- and they should be sensitized (hopefully through media accounts of the home state pride in Souter) so that they are reluctant to look in any way as if they are out to "get" Souter. This should be particularly appropriate in the cases of Bentsen and Nunn, who must rely on the existence of the fabled moderate/conservative Democrat primary voter.

5. The hometown sentiment idea could also be used to play off local N.H. pols against one another. Three of the Democrat members of the Senate Judiciary Committee have at one time or another built presidential campaign teams in your state. The past leaders of these campaigns should be put in the position of "out-Southering" each other in praise of the nominee -- the idea is to make this a modest story outside the region: can't you see the headline? "Biden, Simon and Kennedy Chairmen Agree -- 'Souter's Our Kind of Guy'."

6. Get pro-Specter Republicans in Pennsylvania (e.g. Elsie Hillman) to send the (friendly, of course) message to Specter that he will have a full-scale internecine war on his hand if he screws with Souter. Specter is already looking over his (right) shoulder at '92. I can't imagine that he thinks he can give potential primary opponents any more ammunition. Exhibit A for Arlen, who probably doesn't need a reminder: Look at how close pro-abortion Hafer came to being beaten by the good pro-life housewife, Peg Luksik.

7. Get the law enforcement types working on DeConcini and Heflin. Now. Yesterday. (Simple to do this, get Don Baldwin of the National Law Enforcement Council [223-5598] energized and on your team. If Prez won't do this personally right now, deploy the AG right now for something visible, concrete and worthy of press coverage (at a time the pressies really don't have much else to write about in terms of this nomination). Highly recommend you work with Baldwin, as he knows who is pro-gun, who is anti-gun, who is obnoxious about it, who might grandstand and undercut the pro-Souter effort, who will act as a team player and so forth.

8. Related to #7 is a point I mentioned to Ed in brief conversation days ago. Don't let Biden bury your cops, your pro-Souter nominees, at the end of the day, after 6 p.m. In my opinion, during the Bork hearings that was the one news day we should have "won" in terms of coverage and spin, but instead lost abysmally. There's no comfort from the fact that I predicted it (along with Casey) days before the hearings even began. Biden manipulated the schedule and our side was screwed. The cops should testify early, the statements should be ready well in advance, your team should

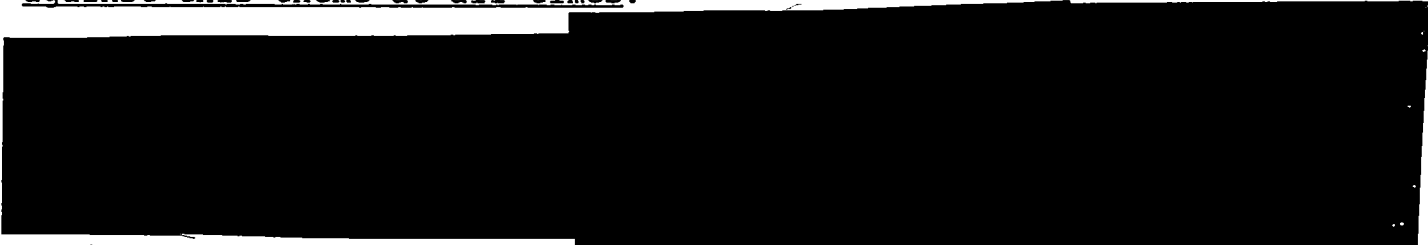
be ready to roll with awesome spin doctoring. Monitor the news coverage and get the advance stuff, as well, to your best multi-issue spokesmen to play up the cop angle. This is a winner.

9. The anti-Souter sentiment the pro-aborts and their allies are trying to generate should be dismissed (in press background spins) as fundraising posturing. The only issue out there raising money for the Left (in the mail) is abortion. That's the principle reason it has been their overwhelming focus in these early stages. This can tend to undermine the credibility of the anti-Souter pro-aborts -- at least on the margin -- particularly if the fundraising potential gets mentioned in anti-Souter stories.

10. Please don't think you can buy any good will on Souter's behalf with the civil rights Establishment by caving in and signing the so-called Civil Rights bill. You have almost all of your Republican caucus in both houses on the right side of that issue, which is separate from this nomination.

11. Keep emphasizing what a nice guy Souter is (he is). Compassionate, kind, etc. If the Left tries to gin up some serious opposition they will try to tie the various strands together under the theme that this guy just can't possibly understand or care about the average guy. There have already been a couple of op-eds to this effect. The President himself should be inoculating against this theme at all times.

(b)(6)



13. Stop Bobbi Kilberg and her crew from trying to send stupid winks and nudges to the Left. Everyone in town knows she's the pro-abortion advocate in the White House. To have her and her people trying to reassure the pro-aborts that Souter will be sensitive to "women's rights" is stupid, stupid, stupid. It looks like pandering, and it is. It looks politically naive and it is (who really believes Souter sent good vibes out to a lib like Kilberg?). If this continues, it will just further piss off our people, who are beginning to come around on the subject of Souter himself -- but who are quite unhappy at the way and the reason Doug Wead went down.

14. Go through the Bork material and find the lists of law deans and professors who opposed Bork. Get a shill to recruit them to sign onto a letter outlining the proper scope of inquiry for the Senate Judiciary Committee -- i.e. have them state it is improper effectively to ask a nominee how he would rule on a particular case or controversy. Get one of these idiots who wants to ingratiate himself with the Bush Administration to orchestrate it.

15. Find out if Senator McCain and Senator Heinz -- who were with us on Bork -- still have the names and addresses of the people who wrote to them in support of Bork. If such a list can be pulled together, it would make absolutely "prime pickins" for an outside pro-Souter letter writing campaign to DeConcini and Specter. If you want to win and sensitize those two for future needs, you will do something like this. (We don't have a way to get such a list and make it happen from the outside. If we had the list, we could go to town.)

16. Hurry up with the DOJ summary of Souter's opinions. Law enforcement groups could at least be mentioning Souter favorably in their newsletters if we give them a handle -- ditto for the gun groups and everyone else. This is crucial -- we are fast approaching deadlines for the typical conservative movement newsletter. Your lengthy pieces of pro-Souter stuff, from which they can pick what to emphasize, are needed ASAP.

For our part, Tom Jipping is working night and day on an analysis of the Souter record which will reassure our base without setting off coast to coast alarm bells. Coalitions for America hopes to be getting this around in the coming couple of weeks. Even better will be your own stuff which our community can rework to its constituencies (God, I'm even starting to write like a D.C. lobbyist).

17. Prepare a team of spinmasters to work the press during the hearings. This is the one area we -- and here I absolutely include myself and my team -- totally surrendered to the Left during the first few days of the Bork hearings. We didn't recognize how we were getting frozen out until the third or fourth day. Simply "being there" as the deadline pressed pressies closed on their stories would have helped. This time, let's do it right: Administration, Senators, outside conservative groups (with women such as Rebecca Hagelin of Concerned Women for America), Establishment types.

18. Force Souter to do murder boards with people who have some institutional memory about the way the Senate Judiciary Committee really works. Not merely PR hacks or legal eagles. You have some high ranking people at DOJ, for example, who are quite conservative who have not had big problems in front of the Committee (Bill Barr, Ken Starr). Get them in the loop. Deploy present and former Committee staffers to play the parts. Assume various scenarios, including absolutely brutal, vicious questioning (like the Leahy questions to Bork about why he earned lots of money during certain times).

19. Bring Dan Casey and Murray Dickman into your political operation to get the guy confirmed. I told you what I thought about Dan when we met. If you think I've got something to offer -- if your words to me were not just friendly smoozing -- you will take my counsel on this score. Casey is the best political mind I have known on this particular kind of politics (Weyrich is the

best on issues politics and candidate politics). Dickman is an ardent fan of Souter, and he brings to bear an understanding of Pennsylvania and therefore Specter. You'll have to start with the 6 GOPers in line on the merits of the nomination -- before you deploy any other resources -- if you expect to go get the requisite number of Democrats. As for the outside groups, stay in touch regularly with Tom Jipping (he is inheriting my direct line: 202-546-1173).

20. Remember: Everyone in this town who was alive in 1987 thinks he's an expert on what went wrong in the Bork nomination. 90% of the assessments are bullshit. Come to think of it, 90% of everything the pundits say is bullshit. Therefore, keep your bullshit detector on at all times. And, in August, read my damn book (again, I hope).

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

July 23, 1990

REMARKS BY THE PRESIDENT
IN ANNOUNCEMENT OF
SUPREME COURT NOMINEE
JUDGE DAVID H. SOUTER

The Briefing Room

5:04 P.M. EDT

THE PRESIDENT: My oath to the Constitution charges me to faithfully execute the Office of President and, to the best of my ability preserve, protect and defend the Constitution of the United States. Few duties are more important in discharging that obligation than my responsibility under Article II, Section 2 of our Constitution to select from among all possible choices one nominee to fill a vacancy on the Supreme Court of the United States.

The task of narrowing the selection to one highly qualified jurist, committed to the rule of law and faithful to the Constitution could never be easy. But I have found it enormously satisfying. My choice will serve the Court and the Constitution well.

I am most pleased to announce that I will nominate as Associate Justice of the United States Supreme Court a remarkable judge of keen intellect and the highest ability. One whose scholarly commitment to the law and whose wealth of experience mark him of first rank: Judge David Souter of the United States Court of Appeals for the First Circuit.

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

Let me pay tribute, too, to the Justice whose retirement from the Court created the vacancy: Justice William Brennan. His powerful intellect, his winning personality and, importantly, his commitment to civil discourse on emotional issues that, at times, tempt uncivil voices have made him one of the greatest figures of our age. No one can question his dedication to the nation and the energy that he has brought to his high office. His retirement is marked by the dignity and honor that characterized his 34 years of service on the bench. And I told him the other day when I talked to him of the respect that Mrs. Bush and I have for him for his wonderful service.

In choosing to nominate Judge Souter who, like Justice Brennan, is largely a product of the state court system, I have looked for the same dedication to public service and strength of intellect exemplified by Justice Brennan.

My selection process was not geared simply to any legal issue. It is not appropriate in choosing a Supreme Court Justice to use any litmus test. I want a Justice who will ably and fairly interpret the law across the range of issues the Court faces. Our country serves as a model for the world at a time of special significance. And I stress within the White House and to the

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Attorney General that our process could not be dominated by politics or special interests. And I believe that we've set a good example of selecting a fair arbiter of the law.

Judge Souter will bring to the Court a wealth of judicial experience on the Supreme Court of his state. And before that as a state trial court judge. Prior to his appointment to the state bench, he was Attorney General of the state of New Hampshire. Judge Souter is a graduate of the Harvard Law School, Phi Beta Kappa graduate of Harvard college. He was also a Rhodes scholar.

My respect for his outstanding record led me earlier this year to nominate him to his present position on the Court of Appeals. The Senate unanimously confirmed him to that position because of his exceptional qualities and his experience. His opinions reflect a keen intellect as well as wise balance between the theoretical and practical aspects of the law.

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

Judge Brennan's retirement took effect last Friday. The Court is now reduced to eight members. It is important to restore the bench to full strength by the first Monday in October when the Court begins its 1990 term. I look forward to presenting Judge Souter's nomination to the Senate as quickly as possible. And I look forward as well to a fair and expeditious confirmation process.

Helen.

Q Did you ask Judge Souter his views on abortion? Do you know what his views are? And affirmative action -- all of these things that have become so controversial, the major issues of the day.

THE PRESIDENT: No. And I had one meeting with Judge Souter. I was very impressed. But in my view, it would have been inappropriate to ask him his views on specific issues. This process has been going on, this selection process, not with any specific seat in mind, but just being prepared for a long, long time. Judge Souter was considered for the high Court back when Mr. Justice Kennedy was selected. And so there's a lot. And then, of course, his name was very much in the forefront when he was nominated and subsequently confirmed for the Appeals Court. So, I am familiar with him, with his general views, but I did not and would not, as I think I've said before when I talked about, not just here but at other times, the litmus test approach; I wouldn't go into that with him.

Q Sir, does that mean you do not care what he thinks on these issues?

THE PRESIDENT: It means that I have selected a person who will interpret the Constitution and in my view not legislate from the federal bench.

Q Mr. President, barely three days have passed since you learned of Justice Brennan's resignation. Why did you move so quickly on this appointment? And you also called the leaders of Congress and others over the weekend for their advice. When did you come to the choice of Justice Souter?

THE PRESIDENT: I came to the choice this afternoon. And I wanted -- I think I told the leaders that I talked to over the weekend that I wanted to move very fast. As I've said, this isn't precipitous in the sense that we just started looking for names last Saturday. I remember meeting with the Attorney General and Boyden Gray perhaps within the first month I was President -- at least the first two months. And I've had a couple of meetings with them, and they've been in discussion with each other for a long time on this. Just the prudence would dictate that one be prepared lest there be a

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vacancy. So we've been talking about who I might want to appoint for a long time.

Q Sir, if I could follow up, you're not certain in your own mind how Justice Souter will vote if Roe v. Wade becomes before the Court next term?

THE PRESIDENT: What I'm certain of is that he will interpret the Constitution and not legislate from the federal bench.

Q Mr. President, I believe Judge Souter is about 50 years old, as many of the candidates you've considered were younger than the current justices. What kind of lasting legacy do you want to leave on the Supreme Court? Do you expect this to be a long-term shifting of the center of balance for the Court?

THE PRESIDENT: I'm not looking -- he's in good health. I was looking over there to see how he's looking at 50 -- (laughter) -- but he seems to be in very vigorous health and I would expect he'd serve a long term on the bench, and I -- but Ann, I haven't -- I'm not viewing this as some personal Bush imprint on the Court. I've pledged to get -- to seek out excellence and I've pledged to look for somebody who would interpret the Constitution, and I am satisfied I have found the very best in that regard.

Q Do you expect the Court would shift to the right, philosophically?

THE PRESIDENT: I haven't put it in terms of shifting left or right. I read a great deal of speculation about all that, but all I'm saying is that we've got a nominee here who is extraordinarily intelligent, has a record, has been confirmed by the Senate, and who has satisfied inquiry at the state and federal level as to his objectivity and as to his judicial philosophy. I'm satisfied as to all those counts.

Q Mr. President, as you know, the whole issue of abortion has, over this choice, is major in all of this. Do you know if the Judge has written on this issue? Does he have a record on this issue that either side can point to, to make it an even bigger issue, or is it unknown and, therefore, more difficult to get at?

THE PRESIDENT: In the first place, I think it would be inappropriate, although I'll let him make up his own mind, for Justice Souter -- (laughter) -- to make any comments on any specific issue. Out of respect for the Senate, I would urge that he not do that. Any specific questions on specific issues should be addressed in an orderly confirmation process by the Senate. But beyond that, Lesley, you know, I think what I said earlier responds to your question.

Q You said you hadn't asked him, but I wonder if he has a record if it's in print or if he's made --

THE PRESIDENT: Well, I don't know about that. I didn't consider that, as I thought I had made clear.

Q Mr. President, if you've concluded that it's inappropriate to ask about a specific case like Roe v. Wade, do you also therefore consider it to be inappropriate for the Senate committee that'll do the confirmation to ask about a specific case like that?

THE PRESIDENT: I would let the Senate do whatever they want. They're a separate and an independent body of our government, and there are certain precedents for how they approach these issues. But listen, I've got enough problems down here without trying to tell the Senate how to conduct its confirmation hearings.

I've been handed a protocol note. Marlin Fitzwater, who is not known for his protocol -- (laughter) -- he says it would be most appropriate to let Judge Souter respond at this juncture. So

with your permission, we'll proceed.

David?

JUDGE SOUTER: Thank you, Mr. President. I'm really not sure how to do that. If it were possible for me to express to you the realization that I have of the honor which the President has just done me, I would try and I would keep you here as long tonight as I had to do to get it out. But I could not express that realization and I'm not going to try to do the impossible.

Beyond that, I hope you will understand that I think -- I must defer any further comments of mine until I am before the Senate and in the confirmation process.

Q Mr. President, conservatives recently have expressed some disappointment with what they call "the flip-flop" on no-new-tax pledge, your position on China, Lithuania, and the like. (Laughter.) And since Governor Sununu is recognized as the champion of conservatives in the White House, is his connection -- is the Judge's connection to Governor Sununu -- is this meant as an appeasement to the conservative right? Do you think it will appease them?

THE PRESIDENT: Sununu's got problems with his own credentials. I mean, he's not going to help on that. (Laughter.) And that's not what this is all about. This matter, as I've indicated, was -- there was almost a certain recusal on the part of Governor Sununu on this. Clearly, he knows Judge Souter, he has great respect for Judge Souter. But this process, as I'm sure Boyden Gray and Dick Thornburgh will tell you, came up through a system, excellence, came to the top, and so there is no politics of this nature in this kind of an appointment.

If I was looking to shore up one factor or another, there would be plenty of more visible ways to do it. Here, we are talking about excellence, judicial excellence, and the highest degree of qualification based on excellence to be on the Court.

Q Mr. President, earlier today, Marlin Fitzwater said that whomever you chose as your candidate, your nominee would reflect your general philosophy of government. Is it still your philosophy that Roe v. Wade, the abortion law, should be overturned?

THE PRESIDENT: Look -- you all can keep trying all day long to get me to comment on abortion in relation to this nomination. And please keep -- stop trying, because I'm not going to respond in that vein. It would be unfair to Judge Souter, it would be untrue, because I haven't looked at the nomination in that manner. And so I simply cannot, and -- you get another question, though, instead.

Q Well, my other question would simply be let's not respond in the connection of Judge Souter. How about just your own personal philosophy?

THE PRESIDENT: I haven't changed my views.

Q Mr. President, I'm still not totally certain by why you you feel it was inappropriate to ask the Judge's views on issues.

THE PRESIDENT: Because I understand that's the customary way of doing it. And that more important are the broad concepts of excellence -- is the man qualified, does he share a broad view that what he ought to do on the bench is interpret the Constitution and not legislate. And so that's all I need. And when you see the background of this man, I'm confident that the Senate will share my views. You're looking for fairness. You're looking for equity. I wrote down a bunch of words to help me make the determination. And I wish I had them because they're all along those lines -- experience. And I did say that I'd like somebody that will interpret the Constitution, not legislate.

Q But to even be sure of that, sir, does that mean

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that you've at least studied some of his rulings?

THE PRESIDENT: There's been a great deal of work done, in the Justice Department at several levels, in our General Counsel's shop on all that kind of thing. But, again, it would be inappropriate to go into those cases that he may have ruled on when he was on the state court or on the federal bench. And I would simply leave that to the Senate. But, yes, there has been a thorough study of Judge Souter's tremendously impressive record.

Q Mr. President, given the reality of getting a person confirmed to the Supreme Court these days, are you braced for a big battle?

THE PRESIDENT: I'm not going into this nomination or thrusting Judge Souter into the nomination expecting a highly contentious battle. The man was confirmed by the Senate unanimously, and after testimony. So I'm not suggesting there has to be or should be. I remember calmer days when there weren't. So I would not anticipate a contentious battle. I would anticipate thorough questioning. I would anticipate each senator having enough information to make up his or her mind based on the record, on responses to questions. But, no, I'm not -- we're not bracing for some horrendous fight with the United States Senate. And given his record, I would expect that the chances of that are minimal.

Q Do you think a President these days has to do more of a selling job than in the past?

THE PRESIDENT: I don't know, Maureen. I don't think so. If the record speaks for itself, if I had selected somebody out of the political arena that had never been on the bench and never had any experience but was in my view well qualified, there might well have been more intervention on my part. I'm prepared to do whatever is appropriate in not only defending but advocating this confirmation. But I don't believe there's going to be a lot of personal involvement necessary because I think his record and his standing will speak for itself.

Q Mr. President, I'm going to make one more try. You say it's inappropriate to ask. But you also admit there is a lot of background paperwork on someone. Judge Souter was appointed to the New Hampshire court by Governor Sununu whose feelings on abortion are well-known. Your feelings on abortion are well-known. Why should we not believe that that is a factor in your selection -- even in making a list?

THE PRESIDENT: Because I've told you it's not and because you ought to listen to the testimony on the Hill and then you can make up your mind better when you've seen the evidence. And I expect people will be raising this question. I've seen a lot of speculation over the last 48 hours, or whatever it was, since Justice Brennan retired. But I'm telling you -- you asked me what my view was, and I've told you how I approached this matter. And that's all I can do.

Q Mr. President, you said a moment ago that there are Senate precedents on how questioning happens in the Judiciary Committee. In fact, there are two very contrasting precedents. There was the Bork precedent where the nominee answered all sorts of questions, and there was the Justice O'Connor-Justice Kennedy precedent, in which the nominee declined to answer a lot of specific questions about how the nominee felt. Do you have any preference about how your nominee handles these questions?

THE PRESIDENT: No, but I have confidence my nominee will handle it properly. Look, the man is a Judge on an Appeals Court. He knows how to treat with this. And the Senate is a free Senate, and they know how to treat with it. So that -- I'm not going to get into that. I think it's inappropriate for a President to do that kind of thing.

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Q If I could follow up. Do you think it's appropriate for a nominee to answer specific questions about how he might rule on cases?

THE PRESIDENT: I would leave that to the nominee, and let the Senate make the final determination.

Q Were there one or two aspects of the judge's background -- his qualifications that particularly brought him to the top of the list?

THE PRESIDENT: Being bright -- extraordinarily bright. And then a record for fairness -- extraordinarily fair.

Q Surely -- who were bright and fair, though.

THE PRESIDENT: Well, I've made my judgment based -- you've asked me what I decided it on, and these are some of the qualifications that I think are essential. Plus I gave you the underpinning, which I want somebody that is not going to be a legislator sitting on the Supreme Court.

Q Did you meet Judge Souter before you made this decision within the last couple of days?

THE PRESIDENT: Yes. Just within the last couple of days.

Q Is this the first time you had seen him?

THE PRESIDENT: First time I had met him. And who knows? The amount of time I've spent in New Hampshire, I might well have seen him. (Laughter.) We've been, as I have indicated, been talking to our Attorney General and Boyden Gray on resumes or on records for a long, long time. The man is very highly regarded. I just had a short visit with Judge Souter today, and obviously was quite impressed.

Q You had already decided at that point?

THE PRESIDENT: No, I had not decided. And that's the truth, as is everything else I've said here.

Q In speaking to your advisors about resumes and records as you say, did you ask your advisors to produce only nominees who had no extensive written record on the abortion issue, that is, Trojan horse candidates who would not provoke a large debate over --

THE PRESIDENT: No.

Q Can you tell me how is it possible to make the selection without reviewing the Judge's record or a summary of his record that dealt with specific cases -- if not abortion, affirmative action, civil rights issues, free speech, a lot of the emotional issues that the country is very concerned about?

THE PRESIDENT: Most of his writings have been at the state level, and the -- I made the decision based on the criteria that I gave you.

Q So you're telling us that you have no idea what his judicial opinions are on abortion, affirmative action, civil rights, flag burning?

THE PRESIDENT: I'm telling you that you should stay tuned and let the testimony before the United States Senate determine whether he's confirmed or not, and that that will bring out all the questions that you are asking here. And the answers? That's up to the Judge to see how he should handle that as one who is going to have to deal with a lot of issues in the future.

Q Mr. President, has Governor Sununu, who is well-acquainted with the nominee, given you his reading on the Judge's views on controversial issues such as --

THE PRESIDENT: No.

One, two, three, and then I'm leaving.

Q Am I back far enough?

THE PRESIDENT: One, two, three, four -- you're in the middle.

Q Mr. President, I wonder if you can tell me, sir -- you extolled the Judge's virtues and pointed out more than once that he was unanimously confirmed by the Senate for his present position. Can you think of any reason, any possibility the Senate would not confirm the Judge for this post, other than ideological grounds?

THE PRESIDENT: No. I can think of none -- that would not confirm him. None. Period.

Q And would you object strenuously to a confirmation battle over ideological grounds?

THE PRESIDENT: Look, I have nothing to say about that. This is a separate body. I don't control the Senate. I would hope they would accept the -- when they've had a chance to ask questions and to have a chance to review his record would conclude, as I have, that he is standingly well qualified for the federal bench, a judgment that was given to him not too long ago by the ABA itself -- well-qualified, which I gather is the highest rating a judge can have.

Q You have said you're not interested in making a Bush imprint on the Court. But you may also --

THE PRESIDENT: I have to, I guess. But I'm not interested in having this known as a Bush Court or something of that nature.

Q Well, you may be called upon throughout your term to actually name one or two others. Do you have those in mind?

THE PRESIDENT: Yes.

Q And also, if by --

THE PRESIDENT: Yes, right there.

Q Who are they?

Q -- by having those names in mind of who you would appoint, are you doing the same thing like in foreign policy, saying that you want to choose a prudent man, or that the imprint would be something peculiar to you?

THE PRESIDENT: Look, I'll tell you how I look at this -- not in terms of some specific imprint, but I want it said when I'm about 90, 24 years from now, that I made a superb choice. And I think it will be so writ.

Q Mr. President, I'd like to ask you about the phrase you're using -- you're opposed to somebody who would legislate from the bench. You're on record as wanting Roe v. Wade overturned, you're on record as favoring a flag burning amendment to the Constitution. Aren't those sorts of issues tantamount to legislating from the bench as well?

THE PRESIDENT: You'd have to tell me the case and advise me as to how -- I don't think so. I don't think when called upon to answer a constitutional question that that has to be legislating from

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the bench.

Q You would not be upset if the Court overturned Roe v. Wade, or if the courts upheld the flag burning law?

THE PRESIDENT: No, and a lot of other things, too. I believe in the separation of powers, and I happen to think that there's been many, many things that trouble me. Encroachment of micromanagement by the United States Congress on the presidency -- but I haven't asked this able judge about those things. But I could cite -- you cite two -- you cite one that's been on everybody's lips ever since I -- since Justice Brennan retired. Listen, I never heard such coverage on the television. You might think the whole nomination had something to do with abortion. And it's far broader than that. I have too much respect for the Supreme Court than to look at one specific issue and one alone.

I've got time for one -- yes, Kathy.

Q Mr. President, there has been some speculation you might name an Hispanic this time and make history in doing so. You went a different route. What do you say to those who might be disappointed that didn't happen, and what is the likelihood you might name a Hispanic should another vacancy develop?

THE PRESIDENT: First, I say to whoever it is that inquires, I've made the best choice I possibly could make in terms of qualifications, ability, background and temperament to serve on this Court. And then I say, look, the great thing about this country is, you can achieve anything. There's a lot of time down the road in which I'm sure you'll see a different makeup on the Court. But I'm not going to deal in any one specific group vis-a-vis another one. That's what I would say.

I just would ask the American people to understand I looked at a wide array of names prior to my getting into it in as much depth as I have very recently. The Attorney General, his staff; Boyden Gray and his staff went through this process. It's a continuing -- it's a process that's been going on for sometime, and the excellence was just there at the top. And so I would not cite this as something discouraging for anybody that aspires to the Supreme Court or any group that would aspire to have representation on the Supreme Court.

Listen, I really do have to go.

Q What did you ask him when you interviewed him?

Q Did he win in the interviews?

THE PRESIDENT: He did very, very well.

Let me get one. I failed to --

Q Two or three of the candidates that were mentioned were from your home state, and there was talk that you perhaps would choose somebody from the South because you felt the South had been underrepresented since Justice Powell resigned. Wasn't anybody qualified in the South, or --

THE PRESIDENT: Plenty of people qualified, and you raise a good point, because there is nobody from what I would call the "Southeast Conference South," but the South excluding Texas that is on the bench now. And there's about a quarter of the people from there. So this is a consideration and was a consideration that was forcefully brought home to me by key members of Congress, and yet, I determined that Judge Souter, given the qualifications I've tried to extol here, the virtues, is the choice for the Supreme Court at this time. But, no, these calls are not easy. And Kathy asked about different ethnic groups. You asked about regional distribution. And I think one considers all these criteria. I think it's fair to say that New England, which is not represented on the bench now that

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Justice Brennan is retired, might look at it if I had gone with another nominee is, why were they excluded. So I can understand regionalism. But please believe me, as a proud Texan I tried to look at it in a national sense. And I think I've come up with the best nominee.

Jesse, I'm sorry to disappoint you.

Q A very quick follow-up if I could. Senator Simpson suggested that you follow the counsel of Mrs. Bush. Did you in any way on this decision?

THE PRESIDENT: How did he know? He doesn't even know who I nominated. How could he have said that?

Q He said that he hoped that that would be what you would do.

THE PRESIDENT: Oh, I see. Wonderful fellow, Al.
(Laughter.)

THE PRESS: Thank you.

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5:32 P.M. EDT