Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N.W. Suite 600 ■ Washington, D C 20009 ■ 202/332-3224

NAN ARON
Executive Director

FRANCES DUBROWSKI
Chair



**ALLIANCE FOR JUSTICE**

**STATEMENT IN OPPOSITION**

**TO THE SUPREME COURT NOMINATION OF**

**DAVID HACKETT SOUTER**

**September 21, 1990**

On September 6, the Alliance for Justice issued an analysis of Judge Souter's record, covering his tenure as state attorney general and supreme court Justice. The report concluded that Judge Souter's record, and the absence of any vigorous defense of individual rights during his entire legal career, pointed toward rejection. Accordingly, Judge Souter bore the burden of proving a commitment to the principles of equal justice. (A copy of the Alliance report is attached and submitted for the record.)

However, the Alliance withheld final judgment, anticipating that Judge Souter's testimony before the Senate Judiciary Committee would provide a clearer picture of his vision of the Constitution. In his seventeen hours at the witness table, Judge Souter failed to do so. He spoke volumes, but said little. Given numerous opportunities to explain his judicial philosophy, Judge Souter provided responses that only raised more troubling questions. Furthermore, he was neither forthcoming nor sufficiently specific in his answers. Judge Souter's testimony consisted of vague assurances, rather than a recognition of specific constitutional principles.

After carefully reviewing the hearing record, the Alliance is convinced that Judge Souter will not protect the rights of those suffering discrimination on the basis of race, gender, ethnicity, religion, sexual orientation or literacy. Furthermore, his responses concerning reproductive rights only intensify concerns that he would overturn relevant precedents. This statement covers the major reasons for rejecting this nominee.

Voting Rights. Voting is one of our basic rights under the Constitution. When asked about his defense of New Hampshire's literacy test to qualify voters, Judge Souter stated that, as assistant attorney general:

> "It seemed to me at the time that a state which was acting consistently with the Fourteenth Amendment -- and the State was -- had done no wrong."

(Hearing Transcript, Sept. 14, 1990, at 194.) In fact, one of the arguments in his brief was that voting by illiterate individuals "diluted the votes of people who read."

At the hearing, rather than retracting his statement, Judge Souter off-handedly characterized this assertion as merely "a mathematical statement." When asked to clarify, he repeated that it is "essentially a kind of statement of math." (Sept. 14, 1990, at 195.)

As an assistant attorney general, Judge Souter failed to understand that the right to vote is not dependent upon one's education level and that many citizens who are unable to read and write can still obtain information and formulate intelligent opinions through television and radio. Today, as a Supreme Court nominee, he continues to view the issue abstractly, ignoring the historic use of literacy tests to deny citizens the fundamental right to vote.

Civil Rights. In regard to New Hampshire's refusal to provide a racial breakdown of its state employees, as required by federal law, Judge Souter defended the state's action on the grounds that New Hampshire had no history of racial discrimination regarding its own employees. (Sept. 13, 1990, at 146.) Later, Judge Souter stated it even more broadly, that the "state of New Hampshire does not have racial problems." (Sept. 13, 1990, at 198.)

These statements show indifference to the existence of racial prejudice that is no less present in New Hampshire than it is anywhere else in the country. Numerous examples have been provided to the Committee. Moreover, his refusal to provide the statistical breakdown indicates a critical lack of understanding about the methods for detecting discrimination, namely, the collection of statistical data. It also suggests a potential hostility toward legislative attempts to overturn the Rehnquist Court majority decision in Wards Cove Packing Company, which imposed greater burdens of proof on Title VII plaintiffs bringing discrimination suits based on statistics.

Affirmative Action Speech. During the hearings, Judge Souter did not disavow his 1976 speech as attorney general in which he criticized affirmative action as "affirmative discrimination". He told the Committee:

> "...I hope that was not the exact quote because I don't believe that. The kind of discrimination that I was talking about in that speech was discrimination, as I described it and I recall being quoted in the paper about it, a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, having nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution."

(Sept. 14, 1990, at 111.) Several facts are apparent from this and later testimony. First, Judge Souter admits to having read the article covering his speech because he "recalled being quoted in the paper." He also attempts now to confine his criticism solely to racial quotas (though he painstakingly avoids using the phrase). However, during the last 14 years, he made no request for a retraction or clarification of the statement. David Souter made that speech as the state's chief lawyer and should have been aware of the seriousness and weight that his remarks carried.

Gender Discrimination. Several times during the hearings, Judge Souter criticized the "heightened" or "middle tier" scrutiny standard as "too loose" and as granting "an enormous amount of leeway to the discretion of the court". (September 13, at 156.) His statements mirror Justice Rehnquist's dissent in the landmark case of Craig v. Boren, 429 U.S. 190 (1976), that the heightened scrutiny standard is "diaphanous and elastic as to invite subjective judicial preferences." However, Judge Souter failed to note that this firmly established standard for reviewing sex-based classifications has been highly effective in battling discrimination against women.

When asked for examples demonstrating the "looseness" of the heightened scrutiny standard -- an alleged flaw that he repeatedly raised -- Judge Souter offered two cases, neither of which, however, involved the use of mid-level scrutiny for gender discrimination. (Sept. 17, 1990, at 55-57.) The first, Royster Guano Co. v. Virginia 253 U.S. 415 (1920), concerned an economic regulation, not a sex-based classification. The second, Reed v. Reed, 404 U.S. 71 (1971), although involving gender discrimination, was decided prior to Craig v. Boren, that is, before the establishment of the heightened scrutiny standard for gender cases and when the weaker, rational basis test was the law. His answer simply skirted the issue.

In light of several briefs and one judicial opinion in which Judge Souter called into question the heightened scrutiny standard, his comments about tightening the standard might give the hopeful impression that he believes sex discrimination deserves greater scrutiny than that provided by the current standard. However, noticeably absent in his testimony is a straightforward assurance that gender discrimination deserves at least heightened scrutiny. His exchange with Chairman Biden is illustrative:

> "The Chairman. So there should be a middle level to define it more clearly?"
>
> "Judge Souter. There has got to be something other than just threshold level scrutiny."

(Sept. 13, 1990, at 160.) Furthermore, Judge Souter shunned numerous opportunities to articulate a better approach to sex discrimination cases. (Sept. 13, 1990, at 160 and 217; Sept. 17, 1990, at 57.) Rather than providing a clearer picture of the principles he would use under the Equal Protection Clause of the Fourteenth Amendment, the nominee instead cast doubt on the security of the constitutional protections that have already been won for millions of women.

Right of Privacy. Throughout the hearings, Judge Souter treated all questions involving the right of privacy, and consequently, the right to choose abortion, as if it were a game of chess, rather than a discussion involving fundamental rights that could determine the course of women's lives. Judge Souter refused to acknowledge a fundamental right of privacy beyond that accorded to a married couple (Sept. 13, 1990, at 113.) He did acknowledge that "if we are going to have any core concept of marital privacy, [procreation] would certainly have to rank at its fundamental heart." (Sept. 13, 1990, at 116.) However, he refused to state whether the marital right to privacy includes the right to use contraception -- the holding 25 years ago in Griswold v. Connecticut, 381 U.S. 479 (1965) -- and to terminate a pregnancy within or outside of a marriage. (Sept. 13, 1990, at 112.)

Judge Souter's refusal to answer nearly all questions regarding the right of privacy, on the basis that the constitutional principles underlying Griswold and Roe are unsettled law, is inconsistent with his answers to other questions. For example, he discussed the Lemon v. Kurtzman test for reviewing Establishment Clause cases, which recently have been decided along 5-4 lines. Judge Souter also discussed with some degree of detail Justice O'Connor's views on applying the Lemon test. In addition, he even told the Committee how he would approach cases under the Free Exercise of Religion Clause, another area of close division among the Justices. Moreover, Judge Souter willingly discussed his moral views on the death penalty and sentencing for white collar crimes, but he refused to do so in regard to abortion. This double standard for answering questions and lack of candor is unacceptable and should be grounds for rejection.

The single instance Judge Souter could recall to show his "equality of empathy" on the abortion issue occurred 24 years ago. However, this account has no connection to his judicial philosophy. The experience does not allay concerns about his later actions as attorney general, when he adopted the inflammatory language of the anti-choice movement to oppose the repeal of New Hampshire's criminal abortion statute and government funding of abortions for indigent women. And, as a state judge, he empathized only with the dilemma of anti-choice judges and physicians who might be obligated to participate in a woman's decision to terminate her pregnancy.

Along the same lines, Judge Souter, when asked by Senator Leahy about "the practical consequences of overturning Roe v. Wade," turned the issue into an abstract question, replying that "the issue would become a matter for legislative judgment in every state" and the "issue of federalism would be a complicated issue." (Sept. 17, 1990, at 113.)

Seabrook. Senator Leahy questioned Judge Souter about the unusual action taken by the state government to raise money in May 1977 from the owner of Seabrook and others to finance the prosecution of protestors opposed to the nuclear power facility. Judge Souter acknowledged that these fundraising actions were improper, particularly the $74,000 contribution secured from the Seabrook owners.

However, Judge Souter's statements concerning his knowledge of the details in these solicitations remain murky. He claimed to know nothing about these activities until June 30, 1977, even though his deputy was informed about the fundraising appeals two months earlier. Given that the Manchester Union-Leader broke the story on May 15 and that the events surrounding the protestors at Seabrook and fundraising actions were highly visible in the press, Judge Souter's "lack of knowledge" is implausible.

Conclusion. Judge Souter's dodging of key constitutional principles is unacceptable from a nominee to the U.S. Supreme Court. While he acknowledged in his opening statement that his decisions will affect the lives of millions of people, he is unwilling to tell the American people where he stands on the issues. Judge Souter has failed to meet the burden of proving that he is forward-looking and that he has the open-mindedness needed so critically to bring balance to the Court. We urge the Committee to reject this nominee.

Consumers Union, National Wildlife Federation and Natural Resources Defense Council do not take positions on judicial nominations.

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# ALLIANCE FOR JUSTICE

## Report on United States Supreme Court Nominee

## David Hackett Souter

**September 6, 1990**

Prepared by
Nan Aron
George Kassouf
Carol Seifert
Elaine Metlin
Craig L. Wiener

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INTRODUCTION

The Alliance for Justice is a national association of civil rights, environmental, and consumer public interest law organizations. Its work includes promoting reform of the legal system to ensure equal access to the courts and encouraging the expansion of public interest representation. In addition, the Alliance works to preserve the integrity of the federal judiciary through the appointment of eminently qualified men and women who are committed to upholding the Constitution and the Bill of Rights.

This report analyzes Judge David Souter's opinions, writings and actions in light of his appointment to the U.S. Supreme Court, whose function is the vindication of individual and constitutional rights. The evaluation is a daunting one because the nominee's legal record is so sparse. As a New Hampshire Supreme Court Justice from 1983 until 1990, he wrote more than 200 opinions. Of these, only a few involve federal constitutional and statutory issues. The only other source of legal writings are the briefs he filed as Attorney General, a position he held from 1976 to 1978.

The underlying theme throughout David Souter's legal opinions and briefs is a constrained view of the role of the courts as the ultimate protectors of the disadvantaged and of unpopular minority groups against government coercion. During his tenure on the state Supreme Court, Judge Souter restrictively interpreted the New Hampshire Constitution, a document more protective of civil and individual rights than the federal Constitution. There is substantial reason to believe that he will limit federal constitutional guarantees in the same way.

In gathering information about David Souter's judicial philosophy, what is striking is an absence of any vigorous defense of individual rights or constitutional law. He has not, in any forum, spoken on any issue of law or philosophy. During the twenty-two years he spent as a public official, he neither gave speeches nor wrote legal articles. David Souter has failed to test his own thoughts on the great issues that he will undoubtedly face if he sits on the high court. For the U.S. Supreme Court and from David Souter, the country deserves more.

The Senate faces the responsibility of filling out the sketchy record on which David Souter can be judged. As an equal partner in the judicial appointment process, senators have the obligation to examine candidates on the full range of considerations on which the president has nominated them. Because of the closely divided U.S. Supreme Court, the Senate and the public need to understand where Judge Souter stands on the issues of privacy, civil rights, the role of the judiciary, as well as a range of other constitutional issues.

In recent years, the Senate has established the standard that a nominee's view of the Constitution and of the Supreme Court are key inquiries in the confirmation process. A president may choose someone who shares his views and values. However, he should not seek judges who show undue deference to majority rule over individual rights. Only after the Senate is fully satisfied that it has a substantial knowledge

of David Souter and is assured that he understands the role of the courts in affording citizens the full protection of the Constitution, can they assess the wisdom of this nomination and cast their vote knowledgeably.

It is incumbent on Judge Souter to meet the burden of proof that he is qualified for the post. If he answers senators' questions with vague assurances and generalities on key issues such as abortion and civil rights, then the Senate ought to be skeptical. If his answers leave the impression that Judge Souter would weaken civil and constitutional rights, the Senate should withhold consent.

JUDICIAL PHILOSOPHY

The judicial philosophy of Judge Souter raises critical questions about his theory of the role of the courts and his respect for the rights of individuals. His judicial opinions reveal a limited view of the judiciary's core function to protect individuals from overreaching by the state. In his Supreme Court questionnaire response on the role of the courts, Judge Souter is completely silent about safeguarding individual rights. Instead, he states that the "expansively phrased provisions of the Constitution must be read in light of its division of power among the branches of government and the constituents of the federal system." Thus, given an opportunity to expound upon the virtues of the Constitution, Judge Souter looks at the charter as merely a blueprint for power and omits any reference to the Bill of Rights.

Restrictive View of the State Constitution

Judge Souter has consistently refused to advance individual rights under the New Hampshire Constitution. Before his appointment to the New Hampshire Supreme Court, that court was developing a considerable body of law under the state Constitution, which often provided greater protections for individual than those secured under the federal constitution. This movement was reflected in State v. LaFrance, 471 A.2d 340 (1983), in which the court stated:

> "[O]ur voters and founding fathers intended to create a government which would be checked by a higher law. That higher law is our state constitution."
>
> . . . .
>
> "The courts have a duty to interpret constitutional provisions. This duty may result in decisions that run counter to the present desires of the voters or their elected representatives. This is so because the constitutions of our states and nation are intended to be restraining documents so that the exercise of power by the majority does not go unchecked. We do not have unqualified majority rule; we have majority rule with protection for minority and individual rights. Without this limitation we would have tyranny of the majority and we would lose our liberty."

To further the development of state constitutional law, in State v. Ball, 471 A.2d 347 (N.H. 1983), the court held that when claims of violations of the federal and state constitutions are presented, the court should address the state claims first before treating the federal issues. From 1983 to 1985, Judge Souter joined the court in broadly interpreting the state Constitution. However, he expressed reluctance to rely on the New Hampshire Constitution as an independent source of rights in his concurrence in State v. Kellenbeck, 474 A.2d 1388 (N.H. 1984): "I would concentrate on the development of State constitutional law in those cases when a State rule would be different from its federal counterpart and would affect the outcome."

Then, in 1985, Judge Souter began placing restrictions on Ball. In State v. Cimino, 493 A.2d 1197 (N.H. 1985), he warned litigants that they must clearly state independent grounds for a state claim if they are to be allowed to take advantage of Ball. By 1986, Judge Souter urged even greater limitations on Ball when he dissented from the court's consideration of a state constitutional claim on grounds that it was not "clearly" preserved for appeal. State v. Bradberry, 522 A.2d 1380 (N.H. 1986). He argued that the state issue had been inadequately presented, even though the claimant had specifically asked the trial court to rule on the issue and had raised it on appeal in the brief with citation to the specific constitutional provision. Subsequently, with a change in the court's membership due partly to then-Governor John Sununu's appointments, Judge Souter prevailed in blocking expansion of the state Constitution and in imposing stringent technical barriers on litigants seeking to press state constitutional claims. Overall, he has consistently refused to advance individual rights under the New Hampshire Constitution beyond those afforded under the federal Constitution.

Illustrative Cases

For example, given the opportunity to establish greater protections under the state constitutional guarantee of equal protection, Judge Souter declined. In State v. DeFlorio, 512 A.2d 1133 (N.H. 1986), a sixteen-year-old was convicted as an adult of misdemeanor traffic offenses -- driving without a license and operating a vehicle "in disobedience to a police officer" -- and sentenced to four consecutive weekends in the county jail, which lacked segregated facilities for juveniles. Because of his age, the county jail staff refused to admit him. On appeal, the county and the teenager argued that the statute requiring his being tried as an adult was unconstitutional on federal and state equal protection grounds. The defendant asserted that the court should apply "heightened scrutiny" to the statutory classification based on age, which requires the government to show that the age-based distinctions "serve important governmental objectives that are substantially related to achieving those objections." Craig v. Boren, 429 U.S. 190 (1976)

Judge Souter, writing for the court, rejected his argument and applied the less protective "rational basis test", which is used to review age-based discrimination under the federal equal protection clause. The rational basis test gives great deference to discrimination and requires only that the law be reasonable. By adopting this test as "the appropriate one to apply in assessing both the State and the federal claim," Judge Souter equated the two equal protection guarantees and completely ignored his statement in Kellenbeck that state constitutional standards should differ from their federal counterparts.

In cases involving criminal procedure, Judge Souter has shown an even greater willingness to defer to the state at the expense of individual rights. In State v. Koppel, 499 A.2d 977 (N.H. 1985), Judge Souter dissented from the majority holding that police roadblocks used to detect and arrest drunk drivers were unconstitutional under the New Hampshire Constitution, part 1, article 19, giving every citizen "a

right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions." Although similar to the federal Fourth Amendment, the New Hampshire court has recognized article 19 as providing "greater protection for individual rights." In his dissent, Judge Souter argued that the court was extending protections beyond prior cases and that the state's interest in roadblocks outweighed the "burden upon individual drivers." The Rehnquist Supreme Court has since adopted Judge Souter's views on the constitutionality of roadblocks. Michigan v. Sitz, 58 U.S.L.W. 4781 (1990).

However, Judge Souter's deference to police actions eventually prevailed. In writing for the majority in State v. Valenzuela, 536 A.2d 1252 (N.H. 1987), he held that the use of a pen register to record and disclose numbers dialed from an individual's telephone was not a "search" under article 19. Judge Souter was untroubled by the state police's foregoing use of a New Hampshire wiretapping law requiring judicial approval of telephonic intercepts, limited to a ten-day period, and instead asking federal agents to obtain a thirty-day period pen register authorization from federal court. The dissent noted that since the development of the case, the legislature had amended the wiretapping statute "to provide further protection for the citizens of this State in the maintenance of the 'proper balance between the State's duty to protect the public and the individual's right to privacy and free expression.'...[The legislature] has undertaken to preserve what it perceives as an expectation of privacy in an area where the plurality concludes that there is no such expectation."

Judge Souter also found no difficulty in weakening constitutional protections for individuals against retrospective or ex post facto laws. In State v. Ballou, 481 A.2d 260 (N.H. 1984), the defendant pled not guilty by reason of insanity and was subsequently committed to the state hospital. Under the law, his mental condition was due for reexamination in two years. However, during the intervening period, the legislature extended the validity of committal orders from two to five years, but also increased the state's burden of proof at recommittal hearings from mere preponderance of the evidence to that of proof beyond a reasonable doubt. The patient could seek review of his or her commitment prior to the expiration of the five-year period, but then the burden of proving sanity and non-dangerousness (by preponderance of the evidence) shifted to the patient. According to the majority in Ballou, the operation of the amendments so disadvantaged the patient, that they violated the state constitutional prohibition against retrospective laws "which changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed."

However, in dissent, Judge Souter concluded that this prohibition was completely inapplicable, stating that "[o]nly proof of dangerousness can justify commitment, and a commitment on grounds of dangerousness is not punishment" within the scope of the constitutional prohibition. He conspicuously omitted any discussion of the shifting burdens of proof.

Two years later, though, Judge Souter successfully narrowed the scope of the ex post facto prohibition. In State v. Heath, 523 A.2d 82

(N.H. 1986), the legislature had restricted the statutory right to take discovery depositions in cases involving child victims. Because the statutory amendments came after the date of the alleged offense, the defendant claimed that application of the restrictions to his case constituted an ex post facto law. The ex post facto prohibition includes any law which "alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the [offense]." Writing for the court, Judge Souter disagreed, stating that "the change in the law of entitlement to depositions does not fall within any of the ex post facto categories."

The extraordinarily heavy burden that Judge Souter demands of those seeking relief from the courts is vividly demonstrated in Appeal of Bosselait, 547 A.2d 682 (N.H. 1988), a case involving both constitutional and statutory issues. In Bosselait, two brothers, ages 76 and 79, shared a janitorial job, with each working four hours a day. When their employer laid them off, the brothers sought unemployment benefits but were rejected. The Department of Employment appeal tribunal noted that the benefits statute required applicants to be "available for and seeking permanent, full-time work." Although the Bosselaits complained that they suffered health problems precluding full-time employment and that the statute "is discriminating against old fellas...old people," the appeals tribunal rejected their claims.

Judge Souter dismissed the plaintiffs' claims of violations under the state and federal constitutional guarantees of equal protection, the federal Age Discrimination in Employment Act and the federal Rehabilitation Act. Despite the plaintiffs' statements before the appeals tribunal (where they appeared without counsel), he stated that "[n]ot one of these issues...has been both timely raised below and preserved for consideration on appeal." Although finding the record inadequate to preserve the issues, Judge Souter proceeded, in lengthy dicta, to discuss and reject each claim.

In the context of involuntary civil commitment, Judge Souter showed similar hostility to state constitutional claims. In In re Sanborn, 545 A.2d 726 (N.H. 1988), he refused to address a mentally retarded individual's claims under state constitutional law that evidence obtained through police questioning should be suppressed in his commitment hearing. Judge Souter stated that the patient's "pleadings and brief have not crossed the line dividing passing references to State issues from analysis calling for adjudication on independent state constitutional grounds."

Judge Souter's imposition of stringent technical barriers to raising state claims and his refusal to recognize claims under the New Hampshire Constitution have resulted in a backsliding of state constitutional law. His harshly restrictive, mechanistic approach to the state Constitution raises questions that bear directly on his views of the role of the courts and how he will interpret the federal Constitution and the Bill of Rights.

Doctrine of Original Intent

Another aspect of Judge Souter's judicial approach is his adherence to the "original intent" theory of constitutional interpretation. Endorsed by former Attorney General Edwin Meese, Judge Robert Bork, and Justice Antonin Scalia, the theory holds that a judge's role in interpreting ambiguous, open-ended constitutional language is simply to divine the intent of the framers through textual and historical analysis.

Judge Souter's most explicit application of the original intent doctrine can be found in In re Estate of Dionne, 518 A.2d 178 (N.H. 1986). In Dionne, the majority held that a state law requiring parties to pay a fee to the probate court for holding a hearing on days not set by statute was invalid under the state Constitution, part I, article 14, which provides that "[e]very subject of this state is entitled...to obtain rights and justice freely, without being obliged to purchase it..." According to the majority, compensating probate judges (who adjudicate wills and involuntary commitments) for special hearings "smacks of the purchase of justice." Although the arrangement had been in existence for almost one hundred years, the court stated that "[i]n an era of heightened sensitivity to appearances of impropriety, the spectacle of a citizen or attorney giving cash in one hand and receiving a judicial hearing and decision in the other is one that can no longer be tolerated."

Judge Souter dissented, urging obedience to the "court's 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.'" He stated that the "court's interpretive task is...to determine the meaning of the article 14 language as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text that took effect in June 1784." Judge Souter proceeded to trace the historical derivation of the constitutional provision from the Magna Carta of 1215 and recounted the statutory practice of compensating judges, dating back to American colonial days. He concluded by stating:

> "Since the adoption of that article [14] was not followed by any known challenge to the statutory provision for fees to compensate probate judges, the most reasonable inference is that the constitutionalists of that time did not understand the fee provision to be a forbidden obligation to purchase justice."

Judge Souter's heavy reliance on what the framers intended in the late 1700s reveals a fundamental and troubling aspect in his judicial philosophy. His dissent ignored what the majority recognized -- that standards of justice have evolved over the last two hundred years and that paying a fee to the judge (not the court clerk) to hear one's case raises questions about the judge's impartiality.

Furthermore, Judge Souter's failure to consider changing and modern circumstances is aptly illustrated by the very cases cited for support in his Dionne dissent. He cited an 1860 advisory opinion on proposed

legislation reducing the number of jurors from twelve to six, and claimed that the court had "confirmed the vitality of the [original intent] rule as recently as 1981," in another advisory opinion on nearly identical legislation. However, Judge Souter neglected to mention that the 1981 opinion was based not only on the 1860 opinion but also on empirical studies of the last twenty years using social science data on the use of six-person juries and the possibly greater risk of erroneous convictions.

In a recent interview with The Massachusetts Lawyer, Judge Souter failed to adequately explain this dissent in Dionne:

> "On constitutional matters, I am of the interpretivist school. We're not looking for the original application, we're looking for meaning here. That's a very different thing."

While the Dionne dissent alone is not conclusive proof that Judge Souter subscribes to the theory of original intent, he has said nothing to dispel this impression. Because original intent analysis can be used to roll back the progress of the last forty years in constitutional rights, Judge Souter's views must be fully explored.

ROLE OF ATTORNEY GENERAL

In addition to his opinions on the state Supreme Court, David Souter's briefs and actions as state attorney general, from 1976 to 1978, provide further insight in his legal views. These raise questions about whether he viewed his role as advocate for the public interest or as the lawyer for the governor who appointed him; whether and to what degree he adopted the legal positions he defended; and what his current view is of the arguments he advanced.

Institutional Independence

Several institutional checks guarantee the independence of the attorney general in New Hampshire. Because the attorney general's term of four years -- five years during David Souter's tenure -- extends beyond the governor's two-year term, he is not forced to adopt the governor's positions in order to maintain his appointment, and he is shielded to some degree from the political posturing that may occur with biennial gubernatorial elections. Second, under the laws of New Hampshire, the governor is provided his own legal counsel -- separate from the attorney general -- who serves at the governor's pleasure. RSA 4:12. And third, any attempt by the governor to remove the attorney general from office is appealable to the state Supreme Court. RSA 4:1.

In Opinion of the Justices, 259 A.2d 660 (N.H. 1969), the court noted that the attorney general "has sole responsibility of formulating his legal opinion." Furthermore, any order by the governor, under RSA 7:9, to the attorney general to represent the state's interest in any case must be "reasonable and practicable". Opinion of the Justices, 175 A.2d 396 (N.H. 1961).

Personal Independence and Standards

David Souter sought to establish his independence early in his tenure. In an interview prior to his January 1976 confirmation, he stated that not only is the attorney general the "chief law enforcement officer" and "civil law officer for state government", but he is also "counsel to the public". (Manchester Union-Leader, Dec. 28, 1975) Only a few weeks later, he declared:

> "At no time would I give testimony with which I disagree. And it would be irresponsible for the attorney general to support any state agency if he felt what they were doing was clearly wrong." (Concord Monitor, Jan. 7, 1976)

However, Attorney General Souter also stated that "he will represent an agency in an already-completed action, or in ongoing actions on which the law is open to interpretation." In a 1978 letter, shortly before he left office, Mr. Souter further described his standard:

> "My standard...has been simply this: this office will represent any governor in a proceeding brought against him in his official capacity whenever his action cannot reasonably be judged patently illegal or unconstitutional. If, as I

> believe, the Attorney General should act as a lawyer guided by generally applicable principles, I don't believe any other standard is possible. The alternatives seem to me to be an Attorney General who is a political rubber stamp or one who is a political spokesman for political opposition to the Governor. I find each such alternative unacceptable."

Letter to Robert A. Backus, Esq., March 30, 1978.

Conflicts with the Governor

Gambling Legislation

David Souter's first clashed openly with New Hampshire Governor Meldrim Thomson, who appointed him, in 1976, when he successfully blocked legislation permitting sports card betting and jai alai. He testified that "illicit operations would flourish" and "people who were not bettors before could have latent gambling interests stimulated to the point where they would eventually be giving money over to criminal operations." (Manchester Union-Leader, April 7, 1976)

The following year, when similar legislation was proposed to authorize casino gambling and slot machines, Mr. Souter again objected. He stated that it would invite organized crime to launder money in the state, and that it "is not really a call to increase our tourism" but instead an attempt to "exchange our present vacationers for a different sort of traveler." (Concord Monitor, Jan. 28, 1977) Governor Thomson supported the bills "wholeheartedly" and stated that he was "very much appalled" by the scare tactics used by the opponents. (Concord Monitor, April 7, 1977)

Seabrook Licensing

Governor Thomson and Attorney General Souter took opposite positions again on an issue that usually found them in complete agreement -- the Seabrook nuclear power plant. In July 1976, Mr. Souter filed legal objections to the federal government's licensing of the plant, claiming that the company had underestimated the number of people who would be affected by a nuclear accident, and that plant construction could not be conditioned on the Environmental Protection Agency's approval of the plant's cooling system.

Governor Thomson said that he "was deeply disturbed" by Mr. Souter's actions "especially since the law did not compel him to take such action." He further stated that the "Attorney General discussed with me his plan to make the appeal. The matter is entirely in his hands under the statutes and out of control of the governor." But the governor also stated that he might have his own legal counsel enter the case. (Manchester Union-Leader, July 18, 1976)

When criticized for objecting to the construction, Mr. Souter stated, "I see the attorney general's office as the counsel for the public, and it has been our job to make sure we worked within the rules as laid down by law." (Manchester Union-Leader, July 20, 1976) The

attorney general also stated that his appeal was not intended to halt or delay construction of the plant, but only to ensure its safety.

Despite these disagreements, David Souter supported the governor's positions on such issues as lowering the flag on state buildings on Good Friday to commemorate the death of Jesus Christ and refusing to comply with federal fair employment reporting regulations (New Hampshire was the only state in the Union to refuse). A former attorney of Mr. Souter's staff recalled that at his own farewell dinner, Mr. Souter publicly thanked the governor for never asking him to take a position that he thought was inappropriate.

Responsibility and Supervision

As a state official, David Souter held responsibility for any briefs or letters that went out under his name. In one of his early interviews as attorney general, David Souter stated his intention to keep his office small to maintain "a tightly-knit, tightly-run organization." One former staff member, Richard Wiebusch, a senior attorney who handled a case opposing Medicaid funding for abortions, recently told a reporter that Mr. Souter "had no time to look at most of the documents his staff wrote." (Concord Monitor, Aug. 8, 1990) However, several attorneys serving under Mr. Souter contradicted that statement, saying that the attorney general reviewed most documents filed under his name, such as opinion letters and briefs, though the degree of review varied according to individual. Regardless of the degree of his supervision, David Souter was constitutionally entrusted with carrying out and defending the legal positions of the state.

PRIVACY

David Souter's opinions, writings and public remarks in the area of privacy, coupled with his adherence to the doctrine of "original intent", raise serious questions over whether he will uphold this fundamental right.

The Right to Choose Abortion

Although Judge Souter grudgingly recognizes the Court's Roe v. Wade holding, his focus has never been on a woman exercising her constitutional right. Nor has he shown any measure of solicitude for the difficult decision she faces. Instead, as attorney general, David Souter has sought to block government funding for abortions and to retain restrictions on them. In addition, he has expressed sympathy for anti-choice doctors and judges who eschew any involvement in helping women exercise their right. Perhaps most significantly, in discussing abortion, David Souter has used the language of the anti-choice movement, including "abortion mill," "killing the unborn," and "the destruction of fetuses." The only known occasion in which he did not take a restrictive position is when the board of trustees of the Concord Hospital voted soon after Roe v. Wade to allow abortions to be performed at the hospital. Those present do not recall Judge Souter, a member of the board, commenting on the policy.

The Smith v. Cote Concurrence

As a state Supreme Court justice, David Souter concurred in a decision involving a woman's right to sue her doctor for failing to discuss the abortion option. In Smith v. Cote, 513 A.2d 341 (1986), a mother who had contracted measles during her pregnancy sued her doctor after the baby was born with birth defects. She asserted that the doctor was obligated to inform her of the possibility of birth defects and discuss with her the option to terminate the pregnancy. Recognizing a cause of action for wrongful birth, the New Hampshire Supreme Court held that doctors have a duty to test for birth defects, inform pregnant women of the results, and discuss the option of abortion.

In his concurrence, Judge Souter reached out to resolve an issue not before the court concerning the dilemma faced by doctors who are opposed to abortion and yet must discharge their professional obligation. He offered an alternative for such doctors, by allowing them to make timely referrals to other physicians "who are not so constrained." The majority believed it unnecessary to address the issue raised in Judge Souter's concurrence because it had not been briefed or argued in the court below.

Letter Lobbying Against Judicial Involvement

In 1981, Judge Souter expressed the same concern for anti-choice judges. As a superior court judge, David Souter wrote to a state legislator concerning proposed legislation that would have required either parental or judicial consent before an abortion could be performed on an unmarried minor. Speaking on behalf of the New

Hampshire Superior Court in his role as chair of the court's legislation committee, Judge Souter urged deletion of the judicial consent provision, because it left to judges a "fundamental moral decision about the interests of other people without any standards to guide the individual judges." Judge Souter raised the issue that some judges who "believe abortion...is morally wrong...could not in conscience issue an order requiring an abortion to be performed." He further wrote that he believed the legislation would result in "shopping for judges who would entertain such cases."

Contrary to David Souter's position, judges have a legal obligation -- just as doctors have a professional obligation -- to apply the law to issues regardless of their personal beliefs. Judges frequently make moral decisions, most visibly in death penalty cases. Judge Souter's empathy with anti-choice judges suggests not only a restrictive view on the role of the courts in protecting individual rights and applying constitutional standards, but also his strong distaste for abortion. In addition, though the letter was instrumental in preventing passage of the bill, Judge Souter took no position on whether young women should be required to obtain parental consent -- leaving open the question of whether he would vote with some of the U.S. Supreme Court Justices to permit states to require parental consent or notification without the opportunity for teenagers to obtain judicial relief.

Opposition to Repeal of Abortion Statute

As attorney general in 1977, David Souter successfully opposed the repeal of an 1848 law which applied criminal penalties for the performance of an abortion. To support his argument, David Souter evoked the symbol of New Hampshire becoming the abortion capital of the country. He is quoted as saying, "Quite apart from the fact that I don't think unlimited abortions ought to be allowed...I presume we would become the abortion mill of the United States." He further hypothesized, "Let's say somebody performed an abortion, which would now be legal in New Hampshire...in the eighth month. Let's assume you had a viable fetus. If that fetus died as a result of the abortion, that would not be murder or manslaughter. That would be no offense at all the way I read the statute."

Apparently, Mr. Souter was concerned that repeal would leave the state without any prohibition against abortions, when in fact the abortion statute was (and is) completely unenforceable under Roe. Moreover, Roe has always allowed state-imposed restrictions after viability, contrary to Mr. Souter's assertions. These gratuitous, inflammatory comments reveal a hostility to the fundamental right to choose.

Medicaid Funding of Abortion

Also, while David Souter was state attorney general, his office filed a brief opposing Medicaid funding of abortion for poor women. According to the brief, "it is equally clear that Congress did not enact Title XIX to aid in the destruction of fetuses." Moreover, the state was justified in prohibiting the funding of elective abortion except

when the life or health of the mother is in danger because "thousands of New Hampshire citizens possess the very strongly-held and deep-seated moral belief that abortion is the killing of unborn children." The state lost at the district court level, but an identical case before the U.S. Supreme Court approved the funding prohibition.

Rape Shield Cases

Similar to the rape shield laws enacted by forty-six states and the U.S. Congress, New Hampshire's statute is essentially a codification of the right to privacy for rape victims and is intended to encourage them to come forward to testify. The law provides that "[p]rior consensual sexual activity between the victim and any person other than the actor [defendant] shall not be admitted into evidence." Before Judge Souter's appointment to the state supreme court, in State v. Howard, 426 A.2d 457 (N.H. 1981), the court held that the rape shield law must yield to some degree to the defendant's constitutional right to cross-examination, and allow him an opportunity, out of the jury's presence, to show that the value of evidence of prior consensual sexual activity outweighs its prejudicial effect on the victim.

In State v. Colbath, 540 A.2d 1212 (N.H. 1988), Judge Souter reversed the trial court's exclusion of evidence of prior consensual sexual activity, stating that the rape shield law could not bar testimony of the rape victim "hanging all over everyone and making out with [the defendant] and a few others" in the hours preceding the incident. In this case, for example, "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." He further suggested that the victim may have alleged rape to "excuse her undignified predicament". The court concluded that the evidence related directly to the accused's defense of consent. However, on retrial, the defendant was convicted again. In State v. Baker, 508 A.2d 1059 (N.H. 1986), Judge Souter and the court reversed the conviction of a defendant for felonious sexual assault on the grounds that the defense counsel had not been given an opportunity to demonstrate that the rape shield law did not apply to testimony about the victim's prior consensual activity.

Judge Souter simply refused to recognize the importance of the rape shield law. Although the New Hampshire legislature clearly meant to ensure the victim's privacy rights, Judge Souter showed little deference to the lawmakers' intentions. In addition to ignoring the intent of the legislature, his approach echoes the harmful, stereotypical notions of "she asked for it" and "she made it up". Interestingly, his decision for the convicted rapist in Colbath is one of the few in his judicial career in which he ruled in favor of the defendant. In nearly all of his criminal cases, he upheld convictions and took a narrow view of constitutional protection for the accused.

Rights of Gays and Lesbians

In Opinion of the Justices, 530 A.2d 21 (1987), the Supreme Court rendered an advisory opinion on the constitutionality of state

legislation prohibiting gays from adopting children, becoming foster parents, and running day care centers. The court relied heavily on Bowers v. Hardwick, 106 S.Ct. 2841 (1986), which held that homosexuals do not have a federal constitutional right of privacy. Judge Souter and three other Justices accepted without any critical evaluation and despite contrary evidence presented, the legislative assumptions that "the provision of a healthy environment [for children] should exclude homosexuals...from participating in governmentally sanctioned programs of adoption, foster care, and day care" because "being a child in such programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce."

Applying the weakest scrutiny possible -- the rational basis test -- the court advised that the ban on adoption and foster parenting was constitutional. However, the court concluded that prohibiting gays from running day care centers was constitutionally infirm, on the basis that day care providers, unlike adoptive and foster parents, are not primary role models.

In a stinging dissent, Justice Batchelder rejected the use of sexual orientation as a factor in evaluating potential adoptive or foster parents. He writes, "[t]he State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to groups of citizens because of ancient prejudices against that group."

THE FIRST AMENDMENT

As reflected in the briefs filed as attorney general, David Souter views the protections of the First Amendment narrowly. In his positions on this subject, Mr. Souter has deferred to state action promoting the establishment of Christianity and interfering with the free exercise of religion, without requiring a compelling justification.

Separation of Church and State

Lowering the Flag on Good Friday

David Souter defended the state's ability to infringe upon First Amendment rights in his support for Governor Meldrim Thomson's order that flags on state buildings be flown at half-staff on Good Friday of 1978. The governor had ordered the flag-lowering to "memorialize the death of Christ on the first Good Friday" and called for meditation or prayer. Several clergymen filed suit, claiming that the order offended the First Amendment religion clauses.

Attorney General Souter supported the flag lowering, stating that it was "a religiously neutral symbol of respect for an individual" within the state's discretion. Lowering the flags, he claimed, had a secular purpose in that it recognized Good Friday as an occasion to commemorate the death of Jesus Christ. Failing to recognize the religious significance attached to Jesus Christ and inherent in the observance of Good Friday, Mr. Souter contended that the order did not advance or inhibit religion:

> "The lowering of the flag to commemorate the death of Christ no more establishes a religious position on the part of the State or promotes a religion than the lowering of a flag for the death of Hubert Humphrey promotes the cause of the Democratic Party in New Hampshire."

A federal judge issued a temporary restraining order, noting that the governor's order contained "all the seeds of divisiveness that the establishment provision was designed to prevent. It not only seeks to advance religion, but a particular religion." The First Circuit Court of Appeals reversed, but Justice William Brennan, as Justice for the First Circuit, issued a temporary stay on the appeals court decision, thus reinstating the district judge's order.

In this instance, Judge Souter was not simply acting at the behest of Meldrim Thomson, but on the belief that the flag order was lawful. In his own words, David Souter applied a straightforward standard "...in flag cases and any others....[that] this office will represent any governor in a proceeding brought against him in his official capacity whenever his action cannot reasonably be judged patently illegal or unconstitutional." It is reasonable to conclude that David Souter saw no constitutional problem with the flag order.

Displaying State Motto on License Plates

Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), two Jehovah's Witnesses challenged the constitutionality of a New Hampshire state law which required the display of the state motto, "Live Free or Die", on license plates. Objecting to the motto on religious grounds, Maynard covered over and cut out portions of the motto on his license plates and was convicted for violating state law. The case eventually reached the U.S. Supreme Court.

The attorney general's office, under David Souter, defended the constitutionality of the statute. He argued that important government interests were furthered by the establishment of an efficient motor vehicle registration system and promotion of tourism and state pride. The attorney general's office also argued that obscuring the motto bore "no relationship to the freedom of expression of the [Maynards]" and did not amount to symbolic speech worthy of First Amendment protection. Mr. Souter did not believe that the message conveyed by obscuring the state motto was sufficiently "particularized" to constitute symbolic speech. He characterized Maynard's conduct as "pure whimsy" without further explanation.

In an opinion by Chief Justice Warren Burger for a seven-member majority, the U.S. Supreme Court disagreed. While not passing on the "symbolic speech" issue, the Court found that the state could not compel an individual to display an ideological message on his private property for viewing by the public. The First Amendment, the Court held, protects the rights of individuals to refuse to foster an idea they find morally objectionable. Contrary to Mr. Souter's views, the Court also held that the state's interest was not sufficiently compelling to justify required display of the state motto on their license plates.

The Burger Court, unlike Mr. Souter, clearly found that the state interest in identifying passenger vehicles could have been achieved through less drastic means that did not impinge so broadly on First Amendment rights. Furthermore, the state's interest in promoting tourism and state pride through display of the motto did not outweigh an individual's right not to be forced to carry such messages.

Political Dissent

David Souter's involvement in the controversy surrounding the Seabrook nuclear power plant displays an unduly harsh treatment of political dissenters. As a state official representing the public interest, David Souter himself questioned the granting of the license to construct the power plant. However, Mr. Souter did not approve of civil disobedience regarding citizen opposition to the plant.

In 1976, Attorney General Souter questioned the safety precautions laid down by the Atomic Safety and Licensing Board before issuing the permit to the Seabrook plant. (Manchester Union-Leader, July 20, 1976) For raising these issues, Mr. Souter incurred the wrath of the Union-Leader, and "deeply disturbed" Governor Thomson, who claimed that his action would "comfort" opponents to the nuclear plant. (Associated

Press, July 19, 1976.) Later, however, Mr. Souter assured the governor that he did not care to be allied with either side. "[The Attorney General's] office never has, is not now and is not likely in the future to take a position adverse to the building of the plant as such. In particular, at this stage of the game, we're not trying to stop construction." (Manchester Union-Leader, December 1976)

Meanwhile, the Attorney General's office prosecuted ten of two hundred protesters involved in an August 1976 demonstration at the plant. For violating an injunction against entry at the plant site, the Attorney General's office successfully sought unusually severe sentences of six month's jail time (with three months suspended) for the demonstrators.

Less than one year later, in May 1977, the Clamshell Alliance, a New England-wide anti-nuclear group, organized a second demonstration, which was described as "the first large-scale show of civil disobedience in the nation in opposition to construction of a nuclear power plant." (Facts on File, May 28, 1977) More than 1,400 protesters were arrested and held in the National Guard Armory.

The trial court gave the first demonstrator on trial a suspended sentence of fifteen days at hard labor and an order to pay a $100 fine. Vehemently objecting, David Souter made an extraordinary, personal appearance in trial court and asked that the sentences not be suspended, "The imposition of a 15-day suspended sentence is for all practical purposes the imposition of nothing." Concord Monitor, May 6, 1977. He described the demonstration as "one of the most well-plannned acts of criminal activity" in the nation's history and stated that the police had overheard citizens band radio messages indicating that the demonstrators planned to reoccupy the construction site. Concord Monitor, May 7, 1977.

Mr. Souter then had to account for the financial costs for quashing the protest. The state Senate Finance Committee questioned the wisdom of his decision to incarcerate 1,400 demonstrators for almost two weeks at the cost of $50,000 per day. He defended his actions as necessary to preserve the integrity of the criminal justice system, and that the demonstrators had the attitude that "the state of New Hampshire is not going to do one damned thing to us." (Associated Press, June 3, 1977) Although admitting that incarceration was unusual for criminal trespass, Mr. Souter told the committee that he thought it necessary to clear away the protesters to avoid confrontation with the construction workers, who were scheduled to begin working the next day. The state also had to pay a National Guard bill of more than $500,000. (Associated Press, June 22, 1977)

With the responsibility for Seabrook prosecution costs squarely on his shoulders, David Souter faced the governor's Commission on Crime and Delinquency to request an additional $150,000 to defray the bill. When the Commission questioned his use of funds, Mr. Souter threatened to have the Commission disbanded if they did not appropriate the funds, according to one Commission member. The attorney general's office

accepted $74,000 from the power plant owners to defray the state's prosecution costs. (Manchester Union-Leader, May 15, 1977)

As the chief law enforcement officer in the state and with ultimate responsibility for all criminal prosecutions, David Souter shaped the course of the criminal proceedings in the Seabrook demonstration. The severity of the measures which he applied to the demonstrators reveals an intolerance of political dissent.

Gag Order on State Employees

An obtuse statement by David Souter in connection with one of Governor Thompson's controversial policies should give free speech advocates concern.

At Governor Meldrim Thomson's urging, the Executive Council adopted a resolution supporting nuclear power as the official state policy of New Hampshire. The resolution was in response to mounting criticism from legislators and state officials for the nuclear power plant that was to be built at Seabrook. Essentially, the resolution sought to prevent state employees from speaking against nuclear power in any official capacity. (New Hampshire Times, March 17, 1976)

"If someone wants to oppose the nuclear power plant, he has an easy way out. He can resign and then speak out against it," declared Governor Thomson. When critics charged the governor with imposing a gag rule, he quickly retreated, "State employees have always been free to speak out on any issue as private citizens....If any state employee were called before a regulatory board or court to give testimony on a subject with which he had special competence, he or she would be expected to respond regardless of the direction of the testimony." (Manchester Union-Leader, March 6, 1976)

Attorney General Souter's comment on the governor's resolution was noncommital: "No state employee, whose job it is to make sure that environmental protection safeguards are obeyed, should feel intimidated by the new policy." Mr. Souter failed to assure employees that their jobs would be protected if they openly disagreed with Thomson's policy. Looked at another way, his statement could be interpreted as trivializing the employees' free speech rights.

Public Right to Know

David Souter's narrow interpretation of the state's Right-to-Know law, when New Hampshire was coping with mounting criticism of the state prison, suggests a position which, at best, is vague and noncommittal. At worst, it is evidence of a belief that the state has the right to deny information to the public.

In July 1976, Governor Thomson announced that the Executive Council and the state prison board would be holding a "closed-door" session to discuss problems at the prison. Attorney General Souter defended the private meeting under an exception in the state's Right-to-Know Law permitting executive sessions if matters to be discussed "would be

likely to adversely affect the reputation of any person other than a member of the body itself." Mr. Souter promised reporters he would advise the governor to open the meeting if discussion drifted to criticizing Prison Warden Helgemoe's administration. (Concord Monitor, July 1, 1976)

The Concord Monitor criticized this attempt to evade the Right-to-Know law. According to the newspaper, Governor Thomson "already has so sullied Warden Helgemoe's reputation that little could be said in a public session to damage it further...The closing of the joint meeting was a sham, a cover-up and an evasion of the law. The public was denied its right to know the truth about the prison." (Concord Monitor, July 2, 1976)

Recognizing that the "reputation" exception could be used to exclude the public from almost any discussion, Attorney General Souter admitted that "it could be stretched so far as to swallow the law entirely." But then Mr. Souter declared that the Right-to-Know Law as a whole "stinks" because it is a piece of "vague and lousy legislative drafting."

Judicial Opinions

As a Justice on the New Hampshire Supreme Court, David Souter has written several opinions on freedom of expression, but they shed little light into his philosophy of the First Amendment. In State v. Hodgkiss, 565 A.2d 1059 (N.H. 1989), Judge Souter upheld a law banning the posting of signs on city property, but struck down another which prohibited encumbrances on sidewalks that prevented an individual from distributing literature and urging passers-by to vote for a candidate. In Petition of Chapman, 509 A.2d 753 (N.H. 1986), Judge Souter and the majority struck a compromise between the New Hampshire bar association and several member attorneys claiming that the association's lobbying against tort reform legislation violated their free speech rights. The court concluded that the bar association could lobby on legislative measures regarding the administration of justice, but not on proposed changes in substantive law, such as the creation or repeal of causes of action. In In re New Hampshire Disabilities Rights Center, 541 A.2d 208 (1988), Judge Souter invalidated a state law provision prohibiting non-profit corporations from providing services to non-indigent clients. He agreed that operation of the law violated an organization's rights of association and advocacy under the federal constitution.

Finally, as a trial judge on the New Hampshire Superior Court, in the 1981 case of State v. Siel, Judge Souter quashed subpoenas of two student reporters whose notes were sought by the defendant in a murder trial. Their newspaper article alluded to the victim's involvement in a local drug trafficking ring, which was a key factor at trial.

CIVIL RIGHTS

As attorney general, David Souter openly refused to comply with federal civil rights laws. He strongly attacked affirmative action and characterized attempts to implement programs to monitor discrimination as gratuitous and based on questionable intent. Furthermore, his narrow view of civil rights raises questions about whether he believes that the bedrock principles of the Forteenth Amendment include women as a protected class.

Affirmative Action

In a 1976 speech as attorney general, David Souter attacked federal affirmative action guidelines, calling them "affirmative discrimination." He said that the federal government should not be involved in establishing rules requiring employers to give preference to particular ethnic or racial groups. Mr. Souter said that such policies make people eligible for some service solely by virtue of ethnic background. He stated his belief that the protection of civil liberties should be accomplished through the restraint of power, as supported by "our Constitutional history". (The Manchester Union-Leader, May 31, 1976)

Mr. Souter used the same reasoning when, as attorney general, his office defended New Hampshire's refusal to report the racial composition of the state's workforce, as required by federal fair employment laws. In the state's brief before the U.S. Supreme Court, Mr. Souter challenged the constitutionality of the reporting requirement, calling it "superfluous" and "abusive." He claimed that the requirement "proceeds from the cynical assumption that the fairest employer cannot be trusted any more than the most biased. And, it ends in treating every employer as if he were a suspected bigot and lawbreaker." He stated the regulation was non-essential to the aims of Title VII and a intrusive and unnecessary exercise of governmental power. Brief for Appellant in United States v. New Hampshire, No. 76-1018 (1st Cir. filed Feb. 20, 1976).

Mr. Souter contended that requiring state employers to make racial and ethnic classifications was itself an illegal state action in violation of the equal protection clause. Such requirements were to be tolerated no more than racial quotas, which were impermissible in his view. Mr. Souter further argued that the reporting requirements would cause employers to think in terms of color, rather than merit, and thereby result in employers acting in terms of color. He assumed this result, even though the reporting was to be done on an aggregate, not an individual, basis. The First Circuit Court of Appeals rejected his arguments, United States v. New Hampshire, 539 F.2d 277 (1st Cir. 1976), and the Supreme Court denied his request for review.

State Literacy Test

The 1965 Voting Rights Act amendments are pivotal in this country's commitment to the protection of minority rights. In 1970, David Souter sought New Hampshire's exemption from adhering to them. In United States v. New Hampshire, Civ. No. 3191 (D. N.H. 1970), the Nixon Justice

Department filed an action, declaring that the amendments to the 1965 Voting Rights Act invalidated provisions in the New Hampshire constitution which prescribed a literacy test as a qualification to vote. As assistant attorney general, Mr. Souter defended the literacy test. He unsuccessfully argued that a suspension of the tests under the 1965 amendments exceeded Congress's authority, because the tests had been previously administered in compliance with federal law.

David Souter is obviously untroubled by the position he was asked to defend. Twenty years later, in his questionnaire to the Senate Judiciary Committee, he described this case as one of the ten most significant that he argued. However, given the opportunity to explain his position, he does not reflect on the substance of the case or on how the Voting Rights amendments have affected minority citizens. Instead, Mr. Souter could only recall the intellectual exchange of his oral argument.

Equal Protection

David Souter's views on the scope of equal protection regarding sex-based classifications are evidenced in a brief filed by the New Hampshire Attorney General's office in an appeal of a statutory rape case, Meloon v. Helgemoe, No. 77-1197 (D. N.H. April 27, 1977). Mr. Souter opposed a federal order holding that New Hampshire's statutory rape law was unconstitutional, because it punished only men who had sexual intercourse with underage females and not women who had intercourse with underage males. Mr. Souter disagreed in an extremely paternalistic manner.

He contended that any claim of sex discrimination was to be analyzed under the rational basis test, dismissing the "heightened scrutiny" standard for gender-based classifications that the U.S. Supreme Court had firmly adopted the year before in Craig v. Boren, 429 U.S. 71 (1976). The Craig test requires that a classification "must serve important government objectives and must be substantially related to the achievement of those objectives." Mr. Souter insisted that this language was merely an outgrowth of the rational basis test, contrary to mainstream legal thought concerning equal protection standards.

Sex Discrimination

Further evidence of Mr. Souter's restrictive interpretation of law is apparent in the civil rights case of King v. New Hampshire Department of Resources and Economic Development, 420 F.Supp. 1317 (D. N.H. 1976). The Attorney General's office under David Souter argued that the plaintiff had failed to prove that sex discrimination had occurred.

The female plaintiff had been refused summer employment with a beach meter patrol for three consecutive summers. In one job interview she was asked whether she could wield a sledgehammer, whether she had any construction industry experience, and whether she could "run someone in." Despite the fact that these duties admittedly constituted "less than one percent" of the duties of the job, the attorney general's office contended that such questions were job-related and did not

evidence any "discriminatory animus" toward the female applicant. Such questions, the office concluded, were not unlawful even if they resulted in a refusal to hire the plaintiff. The Second Circuit Court of Appeals rejected the argument and upheld the district court's findings that such questions evidenced a discriminatory state of mind on the part of the interviewer.

David Souter's office also contended that the plaintiff needed to show that the job was offered to male applicants with similar qualifications in order to make out a prima facie case of sex discrimination. However, the appeals court found that a prima facie case of sex discrimination was made and the burden was on the state to provide a legitimate nondiscriminatory reason for the employee's rejection.

Finally, the attorney general also contended that the district court had imposed an unreasonable burden on employers to check with every past employer reference of a female applicant. Such a requirement was described as "reverse discrimination", placing an onerous burden on small employers. The Court of Appeals disagreed, stating that an employer cannot use an isolated, negative reference as a pretext for not hiring an applicant, and such a negative reference was insufficient to overcome the showing of discriminatory animus has been made.

CONCLUSION

This report identifies the issues which require full exploration by the Senate Judiciary Committee. However, the Senate cannot be content with simple explanations of these issues. Mr. Souter's statements must be measured by the historic purpose served by the Supreme Court, which is to uphold the guarantees contained in the Bill of Rights.

The Alliance calls on the Senate to fill in the blanks and to show that Mr. Souter's appointment would serve the interest of the Court and of the country. The Senate must require that David Souter show an appreciation and recognition of the great strides made toward advancing social justice.

David Souter must assure the Senate and the public that he has an open mind, is forward- looking, and has a vision of the Constitution which respects individual rights. If he fails to meet this burden, the Senate should withhold its consent.