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TESTIMONY OF CHRISTOPHER F.D. RYDER
ON BEHALF OF SUPREME COURT WATCH
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON THE NOMINATION OF DAVID H. SOUTER
TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES

September 18, 1990

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Mr. Chairman, Members of the Committee:

My name is Chris Ryder. I am an attorney in private practice at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison in New York City and appear before you today on behalf of Supreme Court Watch, a project of The Nation Institute. Supreme Court Watch is dedicated to research on and public education about the decisions and trends of the Supreme Court. For many years, Supreme Court Watch has analyzed and reported on the judicial records of Supreme Court nominees, with particular attention to their dedication to the protection of civil rights and civil liberties. Beginning in 1981, a representative of the project has appeared before this Committee or submitted written testimony in connection with the nominations of Sandra Day O'Connor, Antonin Scalia, Robert H. Bork and Anthony M. Kennedy.

We are deeply grateful for the opportunity to testify before you today as you discharge your constitutional duty of advice and consent. The Senate's decision on this nominee is likely to have a profound effect on the course this country will follow well into the next century. Your decision is a matter of the utmost importance to the American people.

Our review of Judge Souter's written and oral record and of comprehensive reports prepared by other organizations leaves us with questions and concerns in the areas of due process and equal protection, Fourth, Fifth and Sixth Amendment

protections, reproductive choice, separation of church and state, and discrimination on the basis of race, gender, age and sexual preference. Indeed, we are troubled that Judge Souter's record reflects a relatively narrow and technical regard for the law with respect to civil liberties.

Although by his record and testimony Judge Souter appears well-equipped to handle the complex, technical legal issues that confront a Supreme Court Justice, we remain concerned that he has demonstrated no clear commitment to upholding and ensuring the civil rights and civil liberties of all Americans. Consequently, Supreme Court Watch believes that the Senate should decline to confirm his nomination.

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Judge Souter's Record and Testimony[1]

Supreme Court Watch is troubled by several of Judge Souter's opinions in the criminal procedure area. Although he has testified about his concern for the victims of crime, neither his judicial record nor his testimony reflects a full appreciation for the necessary distinction between effective law enforcement -- a police function -- and upholding the constitutional guarantees implicated in criminal law jurisprudence.

For example, in *Opinion of the Justices*,[2] Judge Souter dissented from a New Hampshire Supreme Court majority rejecting a proposed law that would have allowed the state to dispose of blood alcohol evidence without giving the suspect an opportunity to

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[1]A copy of our preliminary report on Judge Souter's record, made public shortly after his nomination, is attached as Annex A to this testimony. We note that this report is not comprehensive and does not include analysis of his testimony before this Committee.

[2]557 A.2d 1355 (N.H. 1989).

test the evidence independently. Unlike the majority, Judge Souter found no due process interest in preserving this evidence for possible later challenge.

Further, Judge Souter's views on the writ of habeas corpus -- a writ of profound importance to our Founding Fathers -- will only serve to restrict its usefulness. Judge Souter's view of the current doctrine of federal collateral relief is that reviewing federal courts should not charge state courts retroactively with law which "was not there to follow at the time" of the state court's judgments. Judge Souter fails to appreciate that the same Constitutional rights, although identified only in later decisions, were in full force and effect at the time of the state judgments.

In *State* v. *Colbath*,[3] on the other hand, Judge Souter granted an accused rapist a new trial because he considered that evidence of the victim's previous sexual conduct should have been admissible where consent was a defense. Judge Souter's approach in this case limited the protection afforded by New Hampshire's "rape shield" law. In what may at best be described as insensitivity, Judge Souter suggested that the victim might have alleged rape as a way to excuse "her undignified predicament."

Judge Souter's due process and equal protection analysis also raises concerns about his sensitivity and commitment to furthering civil rights and liberties. In *Appeal of Albert & Edward Bosselait*[4] Judge Souter wrote the majority opinion denying a claim for unemployment compensation by two elderly workers who had shared a full-time janitorial position for 22 years. Applying the minimal level of scrutiny to the state unemployment

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[3]540 A.2d 1212 (N.H. 1988).

[4]547 A.2d 682 (N.H. 1988).

compensation statute, Judge Souter appeared to disregard the exceptional and emotionally compelling facts of this case in holding that the state could rationally conclude that it should reserve its funds solely for those seeking full-time employment. Moreover, Judge Souter's testimony last week did not allay any of our concerns regarding his position in that case.

In another area, Judge Souter joined an advisory opinion[5] upholding a rigid exclusion of gay and lesbian persons from adopting children or becoming foster parents under any circumstances. This opinion failed both to recognize that homosexuals should be protected from discrimination and to follow the lead of numerous states in rejecting the use of sexual orientation as an absolute factor in evaluating potential adoptive or foster parents.

Perhaps as attorney general and state court judge, David Souter has not had sufficient opportunity to demonstrate his commitment to extending the Constitution's guarantees to each and every person in this nation -- rich or poor -- regardless of race, gender, age and sexual preference. However, in discussing last week New Hampshire law that previously made literacy a condition of the right to vote, we are not comforted by his characterization of the resulting disenfranchisement of countless illiterate Americans as nothing more than "a mathematical statement."[6]

Moreover, in his testimony, Judge Souter affirmed that at the time he took these actions on literacy as Attorney General, he personally agreed with them, although he then

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[5]*Opinion of the Justices*, 530 A.2d 21 (N.H. 1987).

[6]*Nomination Hearings*, Friday, September 14, 1990 (response to Sen. Kennedy's questioning).

indicated he now disagrees with those positions. We fear, as should this Committee and the Senate as a whole, the consequences of entrusting the precious guarantees of the Constitution to a man with too circumscribed a vision of the democratic process. Indeed, in light of the need for the Civil Rights Act of 1990 specifically overruling certain recent Supreme Court holdings, Congress should be particularly sensitive to this nominee's constitutional vision.

Judge Souter's Failure to Respond to Questioning

Where, as here, the candidate's judicial record is silent or causes concern on important matters of federal constitutional jurisprudence, the candidate's testimony is of paramount importance. Judge Souter has not been as forthcoming as necessary. He has demonstrated wavering forthrightness in his inconsistent choice of subject matters about which to testify.

In one of Judge Souter's concurring opinions,[7] he went out of his way to express concern for hypothetical physicians' personal feelings in performing abortions. However, Judge Souter has absolutely refused to express concern about the real and present legal challenge to established Supreme Court precedent guaranteeing a woman's constitutional right to choose. We are troubled by Judge Souter's refusal to respond to questioning remotely relating to the constitutional principles underlying the right to choose and the President's right to wage a war not declared by Congress, while he does not appear to be similarly constrained with respect to equally vital and troubled areas such as

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[7] *Smith v. Cote*, 513 A.2d 341 (N.H. 1986).

separation of church and state.[8]

Judge Souter was forthcoming in his discussion of a number of current matters of constitutional adjudication, but refused to countenance any discussion of certain others. For example, Judge Souter was willing to discuss the *Lemon* v. *Kurtzman* test and Justice O'Connor's views on how to apply that test to recent cases before the Supreme Court. He expressed his approval of the result reached in one such case, affirmed the principles underlying that decision and specifically agreed with Justice O'Connor's concurrence.[9] Judge Souter gave this testimony despite his acknowledgement that a motion for rehearing in that case is pending before the Court. This is inconsistent with his refusal to discuss the constitutionality of President Truman's intervention in the Korean Conflict or the principles underlying *Roe* v. *Wade*.

Moreover, Judge Souter declined to discuss his personal view of the morality of abortion. In contrast, Justice O'Connor disclosed to this Committee her personal view of abortion and assured the Committee it would not play any role in her legal analysis. However, Judge Souter has stated some of his personal views on such issues as the morality of the death penalty. In sum, it is difficult to reconcile his apparent willingness

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[8]The Senate is well within the bounds of propriety to inquire into a candidate's views on even the most recent constitutional precedents and principles; only the solicitation of a commitment to vote a certain way on a particular pending case could raise a concern of prejudice or a requirement for recusal. If the Senate is unable to gain an understanding of the nominee's views in the area under inquiry, then it cannot effectively discharge its duty of advice and consent and cannot assent to the nomination.

Our views on the advice and consent process in the context of this nomination are attached as Annex B to this testimony.

[9]*Nomination Hearings*, Friday, September 14, 1990 (response to questioning by Senators Leahy and Specter).

to discuss certain cases, constitutional principles and personal viewpoints, but not others.

* * * * *

Judge Souter's record as Attorney General and as Justice on the New Hampshire Supreme Court raises numerous concerns regarding his commitment to the protection of civil rights and civil liberties. His testimony before this Committee has not sufficiently allayed these concerns. At a time when major Constitutional issues hang in the balance, Supreme Court Watch cannot, on the available record, support this nominee.

ANNEX A

JUDGE DAVID H. SOUTER, WHERE DOES HE STAND?

A Preliminary Review of his Judicial Record

President Bush's nominee for the Supreme Court, David H. Souter, has been called a "mystery man" and a "blank slate." It is likely that he was chosen precisely because he has not written or spoken out on the most controversial issues before the Court.

With this preliminary report, we hope to fill in some of the blanks. As New Hampshire's Attorney General and as then-Governor John Sununu's choice for the State Supreme Court – where he served from 1983-1990 and wrote 221 opinions – Judge Souter does have a record.

Supreme Court Watch examined Judge Souter's New Hampshire Supreme Court record in the following areas:

- **Abortion**
- **Criminal Procedure**
- **Due Process and Equal Protection**
- **Freedom of the Press**
- **Freedom of Speech**

Judge Souter's role as Attorney General in prosecuting protesters of the Seabrook nuclear power plant and in supporting the Governor's proclamation to fly flags on public buildings at half mast on Good Friday is also examined.

Supreme Court Watch raises a number of concerns about the prospect of Judge Souter sitting on the Supreme Court. He is described by his supporters as a "strict constructionist," a well-known euphemism for a deeply conservative jurist. His decisions generally support this conclusion and indicate that he very narrowly construes constitutional protections of individual rights.

"TO DESERVE A SEAT ON THE SUPREME COURT, JUDGE SOUTER MUST BE ABLE TO DEMONSTRATE TO THE SENATE AND THE AMERICAN PEOPLE A LIFELONG COMMITMENT TO EQUAL JUSTICE AND THE BILL OF RIGHTS."

There is also grave concern about what we don't know. Most major Supreme Court decisions last term were decided by a 5-4 vote. Before Judge Souter is given a life term on the Supreme Court and the chance to tip the balance of power on the current Court, the American people have the right to know Judge Souter's view of the Constitution, the function of the Supreme Court in protecting fundamental constitutional rights, and where he stands on vital constitutional questions central to American life.

The President and supporters of Judge Souter are staking out a position which suggests that the Senate does not have the right to question the nominee about these and other specific issues. We disagree.

The Senate has co-equal constitutional responsibility with the President to determine who sits on the Supreme Court. Before confirming Judge Souter, the Senate must insist that he provide the answers to these fundamental questions.

To deserve a seat on the Supreme Court, Judge Souter must be able to demonstrate to the Senate and the American people a lifelong commitment to equal justice and the Bill of Rights.

ABORTION

By CONSTANCE DeMARTINO
Constance DeMartino is a legal intern at Supreme Court Watch and a law student at CUNY Law School at Queens College, New York.

The New Hampshire Supreme Court has never dealt directly with the constitutionality of restrictions on a woman's right to obtain an abortion. In Judge Souter's only state Supreme Court decision on the crucial question of abortion, he authored a special concurrence to a majority decision which upheld a wrongful birth claim by the mother of a child born with congenital defects as a result of her exposure to German measles during pregnancy. *Smith v Cote*, 513 A. 2d 341 (N.H. 1986).

Here the mother's physician had failed to test for German measles and inform the mother of her exposure until the second trimester of her pregnancy. He further failed to inform her of genetic testing procedures which could detect possible fetal defects. As a consequence, the child suffered from heart disease, blindness, motor retardation and significant hearing impairment. The mother claimed that had she been informed of the possible birth defects and the availability of genetic testing, she would have considered the option of terminating her pregnancy by abortion. The court ruled that the physician was guilty of negligence in not advising her so that she could make an informed decision regarding whether to have the child. The mother was awarded substantial damages for the special medical and educational needs attributable to her child's impairment.

Judge Souter's concurrence raised an issue which had not been raised by the parties in the case, thus demonstrating his special concern with this issue. He said that physicians whose religious or moral principles condemn abortion should be able to avoid malpractice liability by referring their patients in a timely manner to other physicians for the testing and counseling that could lead them to decide to have an abortion. Judge Souter's raising this issue suggests a particular solicitude for physicians who hold anti-abortion views. His result, however, balances the right of the pregnant woman to be informed with the right of physicians not to perform or counsel their patients about medical procedures which violate their religious or moral beliefs.

Judge Souter makes no direct statements in his concurrence as to whether or not he agrees with the landmark *Roe v. Wade* decision which recognized a woman's constitutional right to a safe and legal abortion. He describes this right as "reasonably permitted" under *Roe v. Wade*, and goes no further in discussing this landmark decision. While the language might refer to the obligation of state courts to obey *Roe v. Wade* under the Supremacy Clause of the U.S. Constitution, it raises questions about whether he would, as a Supreme Court Justice, accept the decision in *Roe v. Wade* as constitutionally proper.

CRIMINAL PROCEDURE

By STEVEN FASMAN
Steven Fasman is a board member of Supreme Court Watch and an attorney at Paul, Weiss, Rifkind, Wharton and Garrison.

Judge Souter's judicial decisions on criminal procedure raise serious concerns about his commitment to the protection of civil rights and civil liberties.

These must be addressed during the nomination process. Supreme Court Watch has not yet had the opportunity to comprehensively review Judge Souter's existing record in this area. Nevertheless, our preliminary review of dozens of opinions authored by Judge Souter suggests that he has often taken an extremely narrow view of constitutional protections guaranteed to those involved in the criminal justice system. In particular, he has written disturbing opinions analyzing *Miranda* and its progeny, the right to due process of law, the right to counsel, the right to a speedy trial, and the right to searches based only upon warrants.

MIRANDA WARNINGS. In *State v. Coppola*, 536 A. 2d 1236 (N.H. 1987), Judge Souter's majority opinion extended several U.S. Supreme Court decisions which limit *Miranda's* effect on the refusal of a defendant to talk to police prior to arrest and before receipt of *Miranda* warnings.

Before his arrest and before getting *Miranda* warnings, the defendant told police, "If you think I'm going to confess to you, you're crazy." Judge Souter ruled that this statement was not a declaration of the defendant's right to remain silent, but was admissible as evidence of a guilty conscience. The opinion unfairly penalizes a defendant who has heard of *Miranda* warnings before his arrest and based on the *Miranda* litany refuses to talk to police.

In *State v. Rathbun*, 561 A. 2d 505 (N.H. 1989), Judge Souter's majority opinion affirmed a conviction based in part on incriminating statements made by the defendant. The defendant argued that previous New Hampshire decisions expanding on the Fifth Amendment and state constitutional rights protected by *Miranda* (and corresponding state decisions) should have led to suppression of the statements as improperly taken. Judge Souter limited the force of those New Hampshire decisions, struggling to diminish them so as to allow the defendant's statements to stand as spontaneously provided.

DUE PROCESS. The majority of the New Hampshire Supreme Court found a violation of the state constitutional guarantee of due process in *State v. Dewey*, 536 A. 2d 1242 (N.H. 1987), and reversed the conviction. The case turned on the defendant's refusal to take a blood test for alcohol. Judge Souter dissented, claiming that the due process right asserted by the defendant and upheld by the majority did not exist.

The majority held that the defendant's refusal to submit

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The Supreme Court Watch prepared this report in July 1990. It was based on preliminary research and does not include an analysis of Judge Souter's testimony at the Nomination Hearings.

to a blood test could not be used against him unless he was warned that such refusal would be admissible evidence Judge Souter dissented arguing that no such warning was required by due process and that, even if it were, the *Miranda* warning that anything said by the defendant could be used against him was sufficient

Judge Souter dissented in another due process case which involved testing for blood alcohol The legislature proposed to eliminate a requirement that the state preserve a quantity of a DWI suspect's blood sufficient to conduct two tests and also a requirement that, as a prerequisite to the admissibility of the state's alcohol test, the state preserve a sample of a DWI suspect's breath for the suspect's independent analysis

The majority in *Opinion of the Justices*, 557 A 2d 1355 (N H 1989) said that the abolition of the preservation requirement would violate the suspect's due process rights, arguing that the accused would not otherwise have an adequate alternative means of independently determining his blood alcohol content at the time of the test Failure to preserve a second breath sample would likewise deprive a suspect of the opportunity to test the integrity and accuracy of the state's evidence against him

Judge Souter in dissent argued that no such due process right exists Due process only requires that the state preserve evidence that might be expected to play a significant role in the suspect's defense Judge Souter suggested that the chance of a second blood test proving the suspect's innocence was very low He argued that defendants had alternative means to demonstrate their innocence, such as demonstrating the unreliability of the testing devices

RIGHT TO COUNSEL The Sixth Amendment and the equivalent clause in the New Hampshire Constitution guarantee the right to counsel upon indictment for a serious offense Cases interpreting these clauses protect this right by barring use of incriminating statements made by defendants under indictment without the presence of counsel

"JUDGE SOUTER'S JUDICIAL DECISIONS ON CRIMINAL PROCEDURE RAISE SERIOUS CONCERNS ABOUT HIS COMMITMENT TO THE PROTECTION OF CIVIL RIGHTS AND CIVIL LIBERTIES "

Judge Souter, writing for the majority in *State v Bruneau* 552 A 2d 585 (N H 1988) took an unlikely view of the facts before him in order to distinguish these prior cases and uphold the use of incriminating statements made by the defendant to police and police informers without the benefit of an attorney

SEARCH WARRANTS In *State v Valenzuela*, 536 A 2d 1252 (N H 1987) the court in an opinion by Judge Souter, upheld a conviction that relied on the fruits of a search conducted pursuant to a search warrant The court rejected claims that the evidence should have been suppressed because the warrant was improperly obtained even though the court admitted that the police officer's affidavit accompanying the warrant application contained several factual misstatements There were other problems with the application as well The court also upheld the use of "pen registers, which disclose numbers dialed from the defendant's telephone prior to the issuance of a warrant

WAIVER OF RIGHTS. Judge Souter reversed and remanded criminal convictions in two cases due to the failure of the trial courts to insure that the waiver of rights by the defendant had been proper In *Richard v MacAskill*, 529 A 2d 898 (N H 1987), Judge Souter ruled that a nolo contendere plea had been entered unknowingly without effective assistance of counsel In *State v Hewitt*, 517 A 2d 820 (N H 1986), the defendant, who remained silent when his lawyer agreed to the trial court's continuing with the trial after one of the jurors had been excused, did not waive his right to a 12-person jury

Judge Souter deserves credit for his recognition and protection of these important rights

JUVENILE CRIME. In *State of New Hampshire v DeFlono*, 512 A 2d 1133 (N H 1986), Judge Souter writing for a unanimous court, held that minors who commit misdemeanors in violation of motor vehicle laws will automatically be regarded by the criminal justice system as adults even though minors who commit felonies may be treated as adults only after judicial determination

Using a "rational basis" standard to evaluate the equal protection claim asserted by the defendant, Judge Souter argued that the legislature could rationally conclude that the only effective deterrent to wild teenage driving is adult penalties Incarceration of a 16- or 17-year-old with adult prisoners, Judge Souter wrote, is not cruel and unusual punishment

SPEEDY TRIAL. Previous New Hampshire decisions had established that a defendant's constitutional right to a speedy trial is presumptively violated if more than nine months elapse between arrest and trial A full year elapsed in *State v Colbath*, 540 A 2d 1212 (1988), but Judge Souter, writing for the majority, strove to mitigate the significance of the extraordinary delay by placing part of the blame on the defendant The court denied the speedy trial claim arguing that the defendant never initiated a speedy trial request, that he was out on bail and that he suffered no prejudice from the extended wait

RAPE SHIELD LAW The conviction in the *Colbath* case discussed previously, was ultimately overturned for other reasons The defendant in this case was charged with sexual assault Judge Souter, who generally rules against defendants in criminal procedure questions overturned this conviction on the ground that the trial judge erroneously excluded evidence about the victim's sexually suggestive behavior just prior to the attack

The defendant had testified that the victim left a bar with him voluntarily and had consented to sexual intercourse Judge Souter's opinion said that the state's rape shield law, intended to prevent victims from being put on trial, had to be interpreted in light of a defendant's right to a fair trial Judge Souter wrote that "evidence of the [victim's] openly sexually provocative behavior toward a group of men [could be taken] as evidence of her probable attitude toward an individual within the group "

In addition, he suggested that the victim could have alleged rape "as a way to excuse her undignified predicament " The court found that "the outcome of the prosecution could very well have turned on a very close judgment about the [victim's] attitude of resistance or consent " On retrial, the defendant was convicted again

CONCLUSION The importance of constitutional protections accorded to those involved in the criminal justice system cannot be overstated These guarantees protect all citizens from abuse by the sometimes overwhelming power of the state Any nominee to the Supreme Court should be someone who will seek to vindicate and uphold these rights

Judge Souter's record in this area is sufficiently troubling to justify a thorough examination by the Senate of his commitment to these basic rights

DUE PROCESS AND EQUAL PROTECTION

By ROBERT A SEDLER
Robert A Sedler is a board member of Supreme Court Watch and a Professor of Law at Wayne State University Detroit, Michigan

Constitutional challenges to state legislation on the basis of due process and equal protection derive from the Fourteenth Amendment This Amendment prohibits a state from depriving a person of life liberty or property without due process of law or equal protection of the laws State constitutions also have due process and equal protection clauses

Some due process challenges inquire whether, given the claimed state interest in the legislation and the individual right affected by the legislation, the legislation is valid Equal protection claims challenge state laws on the basis that laws unfairly discriminate between comparable categories of people

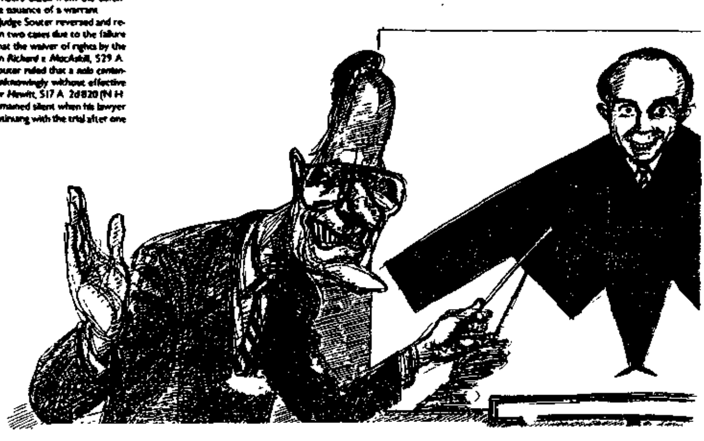
In both due process and equal protection analyses, "levels of scrutiny" or standards of review are used by the courts to scrutinize state action They differ depending on the importance of the individual interest involved The highest level of scrutiny applies when the law, or a classification contained in the law, discriminates on a suspect basis such as race or affects a fundamental right such as marriage and the family, a person's right to reproductive freedom, the right to vote, and the right to travel between states In such circumstances a heavy burden is put on the state to justify the legislation The state must show that the law or classification is the "least drastic means" of advancing a "compelling governmental interest

The lowest level of scrutiny in both due process and equal protection analyses is the "rational basis" standard which allows legislation to stand so long as it is not completely arbitrary or unfair A "middle level" of scrutiny seems to have evolved on the United States Supreme Court in cases of sex discrimination and discrimination against illegitimate children The higher the level of scrutiny used by the court, the less likely it is that the legislation can withstand the constitutional challenge

State courts can interpret state constitutions as providing greater protection for individual rights than are provided under similar provisions of the United States Constitution States also sometimes have special provisions protecting individual rights

New Hampshire like a number of other states has a constitutional prohibition against the legislature's limiting the right of accident victims and other tort claimants to recover damages against responsible parties In New Hampshire "middle level" scrutiny applies to legislation restricting this right to recover "Middle level" scrutiny also applies to laws interfering with land use The end result is that certain actions are unconstitutional under the New Hampshire Constitution that are not unconstitutional under the United States Constitution

Most of the due process and equal protection decisions in which Judge Souter participated as a member of the New Hampshire Supreme Court involved either challenges under the state constitution alone or challenges under both the state and federal constitutions Looking at these decisions, the following observations can be made about Judge



Souter s record as a member of the New Hampshire Supreme Court

1) While Judge Souter has joined in some opinions which find due process and equal protection violations under the state constitution he is less disposed to find a due process or equal protection violation than most of his colleagues

2) He has questioned the use of middle level scrutiny in cases involving the constitutionality of restrictions on tort liability and is more disposed than most of his colleagues to defer to legislative judgment

3) He has joined in opinions in the relatively few cases where the New Hampshire court invalidated laws under the less restrictive ' rational basis ' standard.

4) He has not ruled on any significant case involving issues of race alienage or gender discrimination

The court rendered an advisory opinion, holding that it was constitutional for the state to prohibit gays and lesbians from adopting children or acting as foster parents The court did hold however, that it was unconstitutional to prohibit gays and lesbians from operating day care centers

Some of the due process and equal protection cases in which Judge Souter participated on the New Hampshire Supreme Court include the following

PUBLIC BENEFITS Judge Souter wrote the opinion in *Appeal of Albert & Edward Bosselait*, 547 A 2d 682 (N H 1988) where the court unanimously upheld the denial of unemployment compensation benefits to two elderly workers who had been laid off from their part-time jobs

"JUDGE SOUTER HAS NOT RULED ON ANY SIGNIFICANT CASE INVOLVING ISSUES OF RACE OR GENDER DISCRIMINATION "

For 22 years they had shared a single full-time janitor s job each working four hours a day They argued that their poor health and age precluded their working full time and challenged the provision of the state law denying unemployment compensation to persons who are not ' available for and seeking permanent full-time work " Judge Souter first rejected claims that the restriction violated the Federal Age Discrimination Act (he found it was not adequately raised) or the Federal Rehabilitation Act (their inability to work longer because of their age did not constitute a ' handicap) He then addressed the equal protection claims and found that the requirement of being available for full-time employment as a condition for receipt of unemployment compensation benefits did not deny equal protection to those persons who only wanted to or only were able to work part time

Applying the ' rational basis ' test, he found that the restriction was rationally related to the state s interest in conserving available funds for those persons who needed them most — those who have no sources of income except for their paychecks He said that the state could conclude that those who work only part-time probably have another source of income Judge Souter s opinion in the case illustrates the application of the "rational basis" test with extreme deference to legislative judgment

RESTRICTIONS ON TORT RECOVERY. Under the New Hampshire Constitution restrictions on tort recov[...]e subject to "middle level" scrutiny Judge Souter has que[...]oned the application of this standard of review to restrictions on tort recovery and is more deferential than the majority of his colle[...]es to legislative judgment in this area

In *Opinion of the Justices*, 495 A 2d 1182 (N H 1985) Judge Souter joined his colleagues in an advisory opinion to hold that the state could not constitutionally limit recovery against the state to those who suffered death, bodily injury and property damage while denying recovery for other injuries The court also held unconstitutional absolute immunity for the state for all intentional wrongdoing by state employees, for tax assessment or collection, for detention of goods by law enforcement officers, and for the operation of public highways streets sidewalks and publicly-owned airports

Nevertheless in a dissenting opinion in *City of Dover v Imperial Casualty & Indemnity Co* , No 89006, 1990 N H Lexis 39, Judge Souter argued in favor of municipal immunity for injuries incurred while on municipal highways streets and sidewalks. The majority, in a suit by a woman who was injured while walking on a city sidewalk, held that a state law making cities immune from such suits violated the equal protection and right to remedy' provisions of the state constitution Applying "middle level" scrutiny the majority found that virtually complete municipal liability went too far in denying a category of citizens any remedy simply because the defendant was a municipality

Judge Souter s dissent argued that the court should have been more deferential to legislative judgment and that the law was justified because it provided for municipal liability in some circumstances and shielded municipalities from unmeritorious suits He criticized the manner in which the majority applied ' middle level' scrutiny in this case and called for a re-examination of the earlier New Hampshire Supreme Court precedent which had authorized middle level scrutiny in such cases

Similarly Judge Souter dissented in *Estabrook v American Hoist & Derrick*, 498 A 2d 741 (N H 1985) where the majority found that a 1978 amendment to the state workers compensation law barring a tort action by an injured employee against another employee (and so limiting the injured employee to the lesser recovery provided under the worker's compensation law) violated the state constitution

The case resulted from the wrongful death claim brought by the wife of a firefighter who died en route to a fire when the driver failed to negotiate a turn The majority held that the 1978 amendment violated the due process and equal protection rights of injured workers by depriving them of their common law right to a remedy against the negligent party without giving them a substituted remedy in return

While the state provided workers' compensation in exchange for the common law tort action against the employer, it provided the injured employees with no substitute for the loss of their common law action against a co-employee

Judge Souter argued in his dissent that it was sufficient for the injured employee to recover workers' compensation against the employer and that it did not matter that there was no substituted right against the co-employee The majority disagreed, noting that the original workers compensation act involved compensation for the injury caused by the employer, which was different from the right to a remedy for injury caused by a co-worker

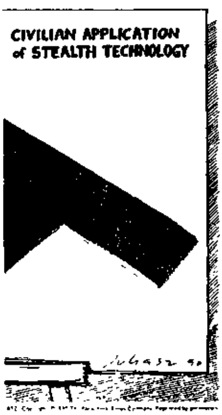
Judge Souter's dissents in these cases reflect his insistence on deference to legislative judgment in due process and equal protection cases, even when the legislation restricts the right to recover in tort, which is specifically protected by the New Hampshire Constitution

POLITICAL RIGHTS. In *Opinion of the Justices*, 554 A 2d 466 (N H 1989), Judge Souter joined a unanimous advisory opinion holding that a requirement that a notary public have been a registered voter for three years prior to being appointed violated the equal protection clause of the state and federal constitutions, but that such a requirement for justices of the peace did not The court was applying the "rational basis" test

PROPERTY RIGHTS. In *Town of Chesterfield v Brooks* 489 A 2d 600 (N H 1985), the court, applying ' middle level" scrutiny to interferences with property rights, held that a town zoning ordinance requiring mobile homes to be located 500 feet back from all paved roads or to be located on unpaved roads violated equal protection Judge Souter concurred only in the result

CONCLUSION Judge Souter s decisions in due process and equal protection cases coming before the New Hampshire Supreme Court indicate that he takes a very cautious approach to the use of these provisions to protect individual rights against governmental action On the whole, he is somewhat less disposed to find a due process or equal protection violation than most of his colleagues He has questioned the use of the ' middle level scrutiny that is employed by the New Hampshire Supreme Court to deal with the constitutionality of restrictions on tort liability and is more disposed than most of his colleagues to defer to legislative judgment and to uphold restrictions in these cases Moreover he is reluctant to interpret these provisions as providing greater protection than is provided by the due process and equal protection clauses of the federal constitution

At the same time, he has joined in a number of opinions striking down state laws on due process and equal protection grounds including those in the relatively few cases where the court has invalidated laws under the less restrictive "rational basis " standard He appears to be operating within the institutional framework of the New Hampshire Supreme Court although he is clearly at the more conservative end of the spectrum



RIGHTS OF GAYS AND LESBIANS

By GLORIA JAN and JUSTIN BRASCH
Justin Brasch, a student at Cardozo Law School and Gloria Jan, a student at Yale Law School are both legal interns at Supreme Court Watch

Judge Souter joined an advisory opinion to the New Hampshire House of Representatives which rejected a proposal to prohibit gays and lesbians from running day care centers, but held that provisions to exclude gays and lesbians from adopting children or becoming foster parents were consistent with the state and federal constitutions *Opinion of the Justices*, 530 A 2d 21 (N H 1987)

By taking this position, Judge Souter and his colleagues failed to follow the lead of the majority of other state courts which, like the dissent to this opinion by fellow New Hampshire Supreme Court Justice Batchelder, have rejected the use of sexual orientation as a factor in evaluating potential adoptive or foster parents The Court refused to consider gays and lesbians as a protected group such as women or racial minorities thus failing to challenge this nation s long-standing discrimination against gays and lesbians

Judge Souter and his colleagues reasoned that the state had a legitimate interest in providing role models for children and that the exclusion of gays and lesbians from being foster and adoptive parents would further this purpose The court s decision relied on the disputed theory that there is a "reasonable possibility that having a gay or lesbian parent might affect a child s developing sexual identity The rationale underlying this theory is that persons in the position of parents are the primary role models after whom children consciously or unconsciously pattern themselves "

The court conceded that there have been "a number of studies that find no correlation between a homosexual orientation of parents and the sexual orientation of their children " But the court concluded that since the source of sexual orientation is still inadequately understood " the state could in the best interests of children exclude gays and lesbians from adopting children or becoming foster parents

"JUDGE SOUTER AND HIS COLLEAGUES ON THE COURT REFUSED TO CONSIDER GAYS AND LESBIANS AS A PROTECTED GROUP SUCH AS WOMEN OR RACIAL MINORITIES, THUS FAILING TO CHALLENGE THIS NATION'S LONG-STANDING DISCRIMINATION AGAINST GAYS AND LESBIANS "

Justice Batchelder, in his dissent, found that the legislature and the majority of the Court provided no "rational basis" for concluding that gays and lesbians lack the skills necessary to be proper role models and parents He further noted that the legislature had received no evidence showing that gay and lesbian parents "endanger their children's development any more than heterosexual parents "

Justice Batchelder objected to the majority's evaluation of gays and lesbians solely on the basis of their sexual orientation rather than as individuals applying to adopt children or become foster parents "The bill presumes that every homosexual is unfit to be an adoptive parent or to provide foster and day care," thus precluding gays and lesbians from demonstrating their skills as parents Then-Justice Souter and his colleagues were willing to label gays and lesbians as unfit parents, which has broad implications for the rights of gays and lesbians not only to become foster or adoptive parents but also to retain custody of their children

As Justice Batchelder declared, "[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 a group of citizens because of ancient prejudices against that group "

FREEDOM OF SPEECH, PRESS AND ASSOCIATION

By AUDREY S FEINBERG
Audrey S Feinberg is a board member of Supreme Court Watch

Judge Souter s record on First Amendment issues is mixed Because no overall philosophy is discernible from his record the Senate should carefully probe his views in this area

FREEDOM OF THE PRESS Judge Souter has come down decidedly in favor of the press in two significant cases one o[n] confidential sources and one on libel He has also ruled against the press in a libel case

(continued on next page)

On the Superior Court Judge Souter quashed subpoenas against student reporters at the University of New Hampshire who refused to divulge confidential source material sought in connection with a murder trial Even though New Hampshire had no statutory shield law to protect reporters Judge Souter ruled that disclosure by reporters would be ordered only when the defendant demonstrates that the information sought is relevant and material to his defense and that he has unsuccessfully attempted to obtain the same information by all reasonable alternatives (Associated Press Dec 2 1980) Given the absence of state legislation Judge Souter s ruling represents a strong statement of protection for the press

Similarly Judge Souter came down strongly in favor of the press in a libel case against *Hustler* magazine in *Keeton v Hustler Magazine Inc*, 549 A 2d 1187 (N H 1988) Dissenting from the majority of the New Hampshire Supreme Court Judge Souter urged that the verdict of libel be thrown out He wrote that the person suing for libel should be time-barred because she did not reside in New Hampshire and had sued there only because the state had the longest statute of limitations (six years) Judge Souter based his opinion on technical issues he did not cite First Amendment concerns See also 682 F 2d 33 (1st Cir 1982) *rev'd* 465 U S 770 (1984) reversing the earlier dismissal of the case on personal jurisdiction grounds

FREEDOM OF SPEECH Judge Souter has ruled both ways in cases involving the free speech rights of individuals

Ruling in favor of the individual exercise of free speech Judge Souter joined an advisory opinion of the New Hampshire Supreme Court that found a law that prohibited harassment of hunters was unconstitutional under the New Hampshire Constitution The law prohibited someone from verbally provoking hunters to dissuade them from hunting and thus represented an illegal content based regulation of speech *Opinion of the Justices* 509 A 2d 749 (N H 1986)

Also Judge Souter wrote a concurring opinion to a decision that ruled in favor of an individual attorney who did not want to be part of the tort reform lobbying efforts of the state bar association which he was required to join Judge Souter's separate concurrence however stressed the narrowness of his decision indicating that if the bar association had been lobbying on issues closer to its legal objectives he might have ruled differently *Petition of Chapman* 509 A 2d 753 (N H 1986) See also *In re N H Disabilities Rights Center* 541 A 2d 208 (N H 1988) in which Judge Souter held that despite state statutes indicating otherwise the center could serve non poor disabled as well as poor disabled on First Amendment grounds of right of association

On the other side Judge Souter ruled against an individual who stood on a sidewalk demonstrating support for voter registration and political candidate Lyndon LaRouche by distributing pamphlets verbally advocating his views and displaying signs Judge Souter upheld the conviction for violating a law against posting signs seeing it as a constitutional content-neutral restriction He also overturned the conviction for violating another ordinance prohibiting sidewalk encumbrances as inapplicable to political speech *State v Hodgkiss* 565 A 2d 1059 (N H 1989)

PROSECUTION OF SEABROOK NUCLEAR POWER PLANT PROTESTORS

By AUDREY S FEINBERG

While Judge Souter was Attorney General of the State of New Hampshire his office was often in the news for its prosecution of members of the Clamshell Alliance protesting at the construction site for the Seabrook Nuclear Power Plant Nuclear power, and the Seabrook plant in particular, was a highly controversial issue in New Hampshire and the nation Hard battles were fought on many fronts including all three branches of the New Hampshire government Throughout the Seabrook plant had the support of New Hampshire governors Meldrim Thomson and John Sununu

While the prosecution of demonstrators at Seabrook for criminal trespass was unquestionably a legitimate responsibility of the attorney general s office certain aspects of the way in which the office handled the prosecutions raises troubling questions These questions and the extent of Judge Souter's personal involvement in the events should be explored further during the nomination process

A few questions arise from a demonstration of approximately 200 people in August of 1976 The New Hampshire attorney general s office prosecuted several protestors for criminal contempt and sought and got jail time (six month sentences with three months suspended) a harsh punishment Further in at least two cases one against a protester and one against a legal observer from the New Hampshire Civil Liberties Union who was present as a neutral witness the prosecutors sought no bail pending appeal of the convictions The New Hampshire Supreme Court swiftly ordered the defendants' release pointing out that bail pending appeal was to be granted for all but the most violent and troublesome convicts pursuant to a New Hampshire statute and American Bar Association guidelines The Court noted that bail was particularly appropriate in these cases because otherwise the defendants would serve their full sentences before their appeals would be heard Indeed in the case of the legal observer his conviction was eventually overturned, *State v Gross* 363 A 2d 400 (N H 1976) — bail *State v Gross*, 379 A 2d [illegible] (N H 1977)—conviction overturned, *State v Adams* [illegible] A 2d 410 (N H 1976) — bail

More questions arose from the more publicized demonstration of over 1400 protestors on May 1 and 2 1977 While praising the lack of violence during their arrests protestors complained of constitutional irregularities during arrests bookings and arraignments They also complained of unhealthful and unsanitary conditions in the four large armories where they were held, with one armory having only one shower for 700 people Other protestors complained of being held for hours in military trucks with no food or water and being denied telephone calls (Associated Press, May 2 1977, May 4, 1977, May 6 1977)

In addition to the complaints regarding the arrest procedures and armory holding pens, the protestors complained that on Attorney General Souter's recommendation, they were being required to post bail pending trial rather than being released on their own recognizance The protestors further charged that then-Governor Thomson interfered with the legal process and that bail was being set arbitrarily (Associated Press, May 2, 1977, July 6, 1977)

Further the attorney for the Clamshell Alliance argued that the sentences imposed, 15 days jail time and a $100 fine, and bail of $500 pending appeal were unduly harsh for the misdemeanor of trespass which usually carries only a fine The first protestor sentenced had initially received a suspended sentence, but the judge changed his mind after Attorney General Souter personally appeared in court to ask for jail time He called the protest "one of the most well-planned acts of criminal conduct in the state or nation" (Associated Press, May 5, 1977, World News Digest, May 28, 1977)

"CERTAIN ASPECTS OF THE WAY ATTORNEY GENERAL SOUTER'S OFFICE HANDLED THE PROSECUTION OF DEMONSTRATORS AT SEABROOK RAISE TROUBLING QUESTIONS THESE QUESTIONS SHOULD BE EXPLORED FURTHER DURING THE NOMINATION PROCESS "

Many of the protestors' complaints were brought in a million dollar federal civil suit they filed against Governor Thomson and Attorney General Souter The court dismissed the suit finding that Thomson and Souter had no advance knowledge of the mass arrests and that the armory conditions were due to an emergency created in part by the protestors But the case leaves unanswered many questions concerning the involvement of the attorney general's office in the bail process the armory conditions and the sentencing of protestors (Associated Press July 6 1977)

Judge Souter continued to be faced with issues affecting the Seabrook nuclear power plant after he was appointed to the bench As the nuclear plant construction was delayed and became more costly, the owners of the plant repeatedly sought additional financing to avoid bankruptcy Twice, in 1984 and again in 1986 the New Hampshire Supreme Court including Judge Souter approved new multi-million dollar bond issues for the plant s owners amid great controversy (United Press International Nov 19 1984, The New York Times, Feb 1 1986) However, in 1988, the Court in an opinion written by Judge Souter upheld the refusal of the Public Utilities Commission to raise electric rates to consumers in the amount requested by the plant s owners even though the refusal resulted in the bankruptcy of the owners *Appeal of Public Service Co*, 547 A 2d 269 (N H 1988)

Judge Souter was involved in additional Seabrook decisions that have not yet been reviewed

SEPARATION OF CHURCH AND STATE

Attorney General Souter had one major encounter with the constitutional issue of separation of church and state in 1978 He and his office supported then-Governor Thomson's proclamation to fly flags on all public buildings at half mast on Good Friday After a U S District Court judge suggested that the proclamation might be permissible if the governor declared a secular context, Governor Thomson issued a declaration emphasizing "the historical impact" of the life and teachings of Jesus Christ At one point in the fast-paced legal proceedings Attorney General Souter filed handwritten papers to the United States Supreme Court on the issue The United States Supreme Court eventually upheld an injunction prohibiting the proposal (Washington Post May 25, 1978)

Editorial assistance on this report by DAN RUBEN, legal intern at Supreme Court Watch and a law student at Pace University Law School and CONSTANCE DeMARTINO

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WHAT ARE THE GOALS OF SUPREME COURT WATCH?

1. We believe that the protection of civil rights and civil liberties is not the exclusive province of any one political party We work to bring public attention to these issues by examining and reporting on the judicial record of all nominees to the Supreme Court

2. We are dedicated to the principle of raising the judicial standards currently applied to nominees to the nation's highest court

3. We are committed to maintaining a persistent vigil over the Supreme Court's decisions into the 1990 s in the areas of reproductive rights affirmative action drug testing the death penalty the right to die, and other areas of potential infringements upon individual freedom

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SUPREME COURT WATCH is dedicated to public education and research on the Supreme Court Founded in 1981 Supreme Court Watch is a project of The Nation Institute In coordination with a national network of academic and legal scholars law students private legal practitioners investigative journalists and concerned citizens, Supreme Court Watch researches the civil rights and civil liberties records of potential and actual nominees to the Supreme Court Supreme Court Watch holds conferences and publishes information about the decisions and trends of the Court Supreme Court Watch also produces a radio program on WBAI-FM in New York City which will be distributed nationally beginning September, 1990, via the Public Radio Satellite System

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ANNEX B

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SUPREME COURT WATCH STATEMENT ON THE NOMINATION OF JUDGE DAVID H. SOUTER

Supreme Court Watch works to focus public attention on the protection of civil rights and civil liberties by examining and reporting on the judicial record of Supreme Court nominees. It is dedicated to the principle of maintaining the highest judicial standards for Supreme Court nominees.

Analysis of Judge Souter's record does not reveal his judicial philosophy on a number of the most significant areas of individual freedom, including reproductive choice, race and gender discrimination, separation of church and state, and many aspects of freedom of speech. Furthermore, what can be discerned of his views in other areas of due process and equal protection and in criminal procedure and access to the courts raises serious concerns about his commitment to the protection of civil rights and civil liberties. Supreme Court Watch therefore is unable to endorse his candidacy at this time.

Supreme Court Watch believes that it is incumbent upon the Senate to probe Judge Souter deeply and thoroughly – perhaps more extensively than it examined Judge Bork, since so much less is known – in seeking to unearth his judicial philosophy. Only in light of the most thorough examination of Judge Souter's perspectives on fundamental rights, and the Senators' gaining the deepest confidence in his commitment to those rights, should the Senate not reject his nomination.

– September 7, 1990

The appointment of a Justice to the U.S. Supreme Court is an act of the greatest significance to the nation. The Supreme Court occupies the pinnacle of the federal judiciary and arbitrates between the legislative and executive branches. A change in its membership can thus be of comparable importance to a change in the composition of the Congress or in the occupancy of the White House, and perhaps of more enduring effect.

The Supreme Court defines our most precious rights and liberties; its pronouncements reflect not only what kind of society we are, but also what kind we want to be. Through our elected representatives, we must exercise the greatest care in choosing individuals to assume this awesome responsibility.

From the earliest days of the Republic, the Senate has vigorously examined and debated not only the fitness and qualifications of Supreme Court nominees, but also their judicial, political, economic and philosophical views.[1] The Senate has declined to confirm nominees of Presidents George Washington and James Madison, as well as, in more recent times, those of Lyndon Johnson, Richard Nixon and Ronald Reagan.[2] Nominations have been refused for reasons far beyond cronyism and mediocrity; nominees have been examined and found ill-suited for their views on such fundamental issues as federalism, slavery, discrimination, labor relations and judicial philosophy.[3]

Thus, to ask whether a nominee considers that *Roe v. Wade* was correctly decided, and if not, whether it should be overturned, is neither inappropriate nor unprecedented: it is mandatory.

The Senate's duty of advice and consent is vitiated if it cannot gain a clear understanding of the candidate's position on the very issues that implicate the rights and liberties of all Americans.

The decisive role of the Senate in the appointment of Justices has its roots in the framing of the Constitution. Early proposals ranged from Congressional appointment to Presidential prerogative; the compromise of the Constitutional Convention was for the President to nominate candidates, who are appointed "by and with the Advice and Consent of the Senate."[4] Historically, the Senate has carried out its mandate: it has not assented to nearly one in five of all Presidential nominees to the Court,[5] and, on more than one occasion, the Senate's "advice" to the President was that a specific candidate be nominated.[6]

Thus, there is no historical or legal basis for the recent outcry from certain political corners that the Senate was overstepping its bounds in its examination and rejection of nominee Robert Bork.[7] There, as before, the Senate was exercising its self-evident role in the appointment process: to act as a democratic counterweight to the President's initiative, thus ensuring a broader consensus and more representative process of selection.[8]

In fulfilling this role, there is no apparent reason why the Senate should not consider every relevant aspect of the appointment.[9] In reviewing Judge Bork's record, the Senate's concern about his constitutional philosophy caused it to seek a more thorough understanding of his stance on many important precedents and issues. This is no more – and no less – than it has done since the days of George Washington's first nominations to the Supreme Court.

The Supreme Court defines our most precious rights and liberties; its pronouncements reflect not only what kind of society we are, but also what kind we want to be.

In reviewing the Bork nomination, as in a number of previous cases,[10] the Senate was also legitimately concerned about the effect that his confirmation would have on the composition of the Court as a whole.[11] The effects of appointments to the Supreme Court can endure far beyond the tenure of the politicians making the appointments; it is appropriate for the Senate, acting as a counterbalance to the initiative of the Executive, to decline to confirm a nomination which would work too radical a change in the philosophical inclinations of the Court, or which would entrench a tendency which the Senators believe inconsistent with the national interest.[12] The critical importance of the Court in this country's constitutional framework, and the effect of life tenure for Justices, combine to require nothing less.

It has been said that ethical considerations and the independence of the judiciary limit the permissible scope of the Senate's inquiry into a candidate's judicial philosophy.[13] To be sure, it is improper to demand that a candidate commit to a position on an identified *case* which may be reviewed by the Court; each case must be decided in its context and on its merits.[14] But inquiry into a candidate's views on a specific *area of the law* is something different: it affords an opportunity to flesh out judicial philosophy, of concern with respect not only to that *issue* (versus an identifiable, pending *case*) but also to constitutional analysis as a whole.[15] Thus, to ask whether a nominee considers that *Roe v. Wade* was correctly decided, and if not, whether it should be overturned, is neither inappropriate nor unprecedented:[16] it is mandatory.

Moreover, it seems clearly out of step with the Constitutional order for a candidate to take the position that propriety or the independence of the judiciary requires that he or she make no statement on any *issue* which may come before the Court.[17] The Senate's duty of advice and consent is vitiated if it cannot gain a clear understanding of the candidate's position on the very issues that implicate the rights and liberties of all Americans. Any candidate who adopts such a posture, and particularly one whose record is silent or unclear on such issues, should arouse in each Senator the greatest reservations.

Similarly, a candidate with a "blank slate" should have no place on the Court: if his or her views cannot be discerned from the record, the Senate cannot truly discharge its duty to advise and consent on the nomination.[18] Further, one may begin to question whether such a nominee would be appropriate to assume the critical role our Justices play in shaping this nation's course. There is an important truth in Professor Tribe's observation in 1985 on the Senate's examination of Supreme Court nominees: "A blank slate is not the sign of an open mind, but of an empty one – of immaturity and inexperience, and perhaps of indifference."[19]

Historically, the Senate has carried out its mandate: it has not assented to nearly one in five of all Presidential nominees to the Court.

The nomination of a "blank slate" candidate – as a number of commentators have characterized Judge David H. Souter,[20] President Bush's nominee to fill the seat vacated by Justice William J. Brennan, Jr. – should be most troublesome to the Senate. In order to discharge its duty of advice and consent, the Senate would have no record upon which to rely in assuring itself of the appropriateness of the candidate, and thus would be forced to rely upon the testimony of the candidate. Even assuming the most forthcoming of candidates, it is worrisome to consider that the candidate must, in effect, campaign for the position. Any President who proposes such a "blank slate" candidate bears the risk that the Senate reject the candidate because of its inability to determine whether the nomination truly is in the best interest of the nation.

Nominations have been refused for reasons far beyond cronyism and mediocrity; nominees have been examined and found ill-suited for their views on such fundamental issues as federalism, slavery, discrimination, labor relations and judicial philosophy.

Christopher Ryder, the author of this statement on behalf of the board of Supreme Court Watch, is an attorney at Paul, Weiss, Rifkind, Wharton and Garrison. Jan Kleeman, a board member of Supreme Court Watch and an attorney at Paul, Weiss, Rifkind, Wharton and Garrison, provided editorial assistance.

NOTES

[1]The tremendous breadth of Senatorial consideration of past nominees is examined in many of the numerous historical and analytical studies of the Senate's role in the appointment process. *See, e.g.*, Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 663 (1970); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 Geo. L. Rev. 913, 944-47 (1983); L. Tribe, *God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* 77-92 (1985); Ross, *The Functions, Roles and Duties of the Senate in the Supreme Court Appointment Process*, 28 Wm. & Mary L. Rev. 633, 659-66 (1987) [hereinafter *Functions, Roles & Duties*]; Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 Tul. L. Rev. 109, 116-39 (1987) [hereinafter *Questioning Nominees*]; Freund, *Appointment of Justices: Some Historical Perspectives*, 101 Harv. L. Rev. 1146, 1148-56 (1988); Carter, *The Confirmation Mess*, 101 Harv. L. Rev. 1185, 1189 (1988); Monaghan, *The Confirmation Process: Law or Politics?*, 101 Harv. L. Rev. 1202, 1202 (1988); Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 Emory L.J. 559, 559-61 (1988); Slinger, Payne & Gates, *The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography* 64 Notre Dame L. Rev. 106, 109 (1989); see generally C. Warren, *The Supreme Court in United States History* (rev. ed. 1926); J. Harris, *The Advice and Consent of the Senate* (1953); H. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (2d ed. 1985). Slinger, Payne & Gates, *supra*, is an informative review of the literature of judicial appointments.

[2]The details and outcome of Supreme Court nominations through 1981 are briefly summarized in L. Tribe, *supra* note 1, at 142. Considerably more extensive (and fascinating) statistics are included in H. Abraham, *supra* note 1, and a predictive model of the likely outcome of a nomination, depending upon prevailing political variables, can be found in

Watson & Stookey, *Supreme Court Confirmation Hearings: A View from the Senate*, 71 Judicature 186 (1988).

[3]For the broad variety of reasons for which nominees have been rejected, see Black, *supra* note 1, at 663; L. Tribe, *supra* note 1, at 86-89; Rees, *supra* note 1, at 945; *Functions, Roles & Duties*, *supra* note 1, at 643; Freund, *supra* note 1, at 1148-56; Monaghan, *supra* note 1, at 1202 ("for virtually every conceivable reason").

[4]U.S. Const. art. II, Sect. 2, cl. 2. The historical antecedents of this clause are examined in Black, *supra* note 1, at 661-62; *Functions, Roles & Duties*, *supra* note 1, at 635-42; Freund, *supra* note 1, at 1147; Slinger, Payne & Gates, *supra* note 1, at 109-10, and authorities cited therein.

[5]L. Tribe, *supra* note 1, at 78. *See also* Slinger, Payne & Gates, *supra* note 1, at 107 (28 nominees not confirmed, 104 confirmed).

[6]L. Tribe, *supra* note 1, at 80-81; *Functions, Roles & Duties*, *supra* note 1, at 643; *see also* Monaghan, *supra* note 1, at 1205.

[7]There is a broad consensus throughout the literature as to the historical and constitutional precedent supporting the Senate's actions in the Bork nomination. *Functions, Roles & Duties*, *supra* note 1, at 644, 659; Slinger, Payne & Gates, *supra* note 1, at 107. The desirability, as a political matter, of such a role, is almost as unanimously supported. Black, *supra* note 1, at 657, 663-64; Rees, *supra* note 1, at 923-25; L. Tribe, *supra* note 1, at 132-37; *Functions, Roles & Duties*, *supra* note 1, at 659, 681; *Questioning Nominees*, *supra* note 1, at 109; Monaghan, *supra* note 1, at 1204; Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 Harv. L. Rev. 1213, 1229 (1988); *but see* Rees, *supra* note 1, at 926-28; Fein, *A Circumscribed Senate Confirmation Role*, 102 Harv. L. Rev. 672 (1989).

[8]This counterbalancing role as a check on the initiative of the President was clearly intended by the Framers. Black, *supra* note 1, at 660-61; Rees, *supra* note 1, at 937-38, 941; L. Tribe, *supra* note 1, at 132-33; *Functions, Roles & Duties*, *supra* note 1, at 644; Carter, *supra* note 1, at 1187; Monaghan, *supra* note 1, at 1204; Slinger, Payne & Gates, *supra* note 1, at 109-10. It is the obvious effect of the compromise struck at the Constitutional Convention. Black, *supra* note 1, at 661; Rees, *supra* note 1, at 937, 939; L. Tribe, *supra* note 1, at 132-33; *Functions, Roles & Duties*, *supra note 1, at 639-40.*

[9]*Functions, Roles & Duties*, *supra* note 1, at 659-60, 681-82; Carter, *supra* note 1, at 1199-1200; Monaghan, *supra* note 1, at 1203. Indeed, as numerous commentators have remarked, it would make little sense if the Senate, in acting as a counterbalance to the Executive, could not consider all issues taken into account by the President in making the nomination, and whatever other issues it found relevant. Black, *supra* note 1, at 658, 660, 663; Rees, *supra* note 1, at 924-26, 948-49; *Questioning Nominees*, supra note 1, at 111-12.

[10]*See* L. Tribe, *supra* note 1, at 90-91, 106-24; Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164, 1165-67, 1171-75 (1988).

[11]*See* Ackerman, *supra* note 1, at 657, 663-64; Monaghan, *supra* note 1, at 1203.

[12]Black, *supra* note 1, at 657, 663-64; Monaghan, *supra* note 1, at 1203. Indeed, the Senate might consider inappropriate a nominee whose views were consonant with those of the current majority of the Court, if the Senate were troubled by the potential effect of the nomination on the composition of the Court. *See* L. Tribe, *supra* note 1, at 90-91, 106-24.

[13]*See* Rees, *supra* note 1, at 950-66; L. Tribe, *supra* note 1, at 101; *Questioning Nominees*, *supra* note 1, at 110-11, 112-13, 129-30; Totenberg, *supra* note 7, at 1218; Slinger, Payne & Gates, *supra* note 1, at 113. For an interesting analysis of judicial recusal as it relates to public statement disqualification and Justice Rehnquist's confirmation hearings, see Stempel, *Rehnquist, Recusal, and Reform*, 53 Brooklyn L. Rev. 589 (1987); *Questioning Nominees*, *supra* note 1, at 113-16.

[14]*See* Rees, *supra* note 1, at 950-65; Stempel, *supra* note 13, 596-97 & *passim*, *Questioning Nominees*, supra note 1, at 123-25, 174.

[15]*See* Stempel, *supra* note 13, at 594-97; Rees, *supra* note 1, at 949-65 & *passim*; *Questioning Nominees*, *supra* note 1, at 173-74.

[16]*See, e.g.*, *Questioning Nominees*, *supra* note 1, at 125-52; Carter, *supra* note 1, at 1189 n.9. For example, Justice Stewart was specifically asked at his confirmation hearings whether he would vote to overturn *Brown v. Board of Education*. He stated he would not. L. Tribe, *supra* note 1, at 89.

[17]*See, e.g.*, Rees, *supra* note 1, at 917-23, 947-49, 950-66; *Functions, Roles & Duties*, *supra* note 1, at 666-67; *Questioning Nominees*, *supra* note 1, at 111-12, 115-16, 116-23; Freund, *supra* note 1, at 1158-62; Totenberg, *supra* note 7, 15 1219-23.

[18]*See* Rees, *supra* note 1, at 919, 948; *Questioning Nominees*, *supra* note 1, at 111-12; Freund, *supra* note 1, at 1162-63.

[19]L. Tribe, *supra* note 1, at 101. In a similar formulation, then-Associate Justice Rehnquist stated that "Proof that a Justice's mind at the time he joined the court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (recusal memorandum). The relevance of this statement to public statement disqualification in confirmation hearings is discussed in Stempel, *supra* note 13.

[20]*See, e.g.*, Lacayo, "A Blank Slate", *Time*, Aug. 6, 1990, at 16; Apple, "Senate's Carte Blanche vs. Souter's Blank Slate", *N.Y. Times*, Aug. 6, 1990, Sect. A, at 14, col. 5; Will, "Bush's Blank Slate", *Washington Post*, at C7; Lewis, "Souter's Blank Slate Just Won't Do", *N.Y. Times*, July 25, 1990, Sect. A, at 19, col. 1.