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Hon. Joseph R. Biden, Jr., Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

September 14, 1990

Dear Mr. Chairman:

This letter is submitted in response to your Committee's invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion regarding the nomination of the Honorable David H. Souter to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Souter is based on its investigation of his professional competence, integrity, and judicial temperament.

THE PROCESS

The Committee investigation began on July 24, 1990 and ended on September 4, 1990.

Committee members contacted judges throughout the United States. Those contacted included members of the United States Supreme Court, members of the Federal Courts of Appeals, members of the Federal District Courts and members of State Courts, including Judge Souter's colleagues from the New Hampshire state courts.

Committee members contacted practicing lawyers throughout the United States with particular emphasis on those who had occasion to appear before Judge Souter and colleagues of Judge Souter during his tenure in the office of the Attorney General of the State of New Hampshire.

Committee members contacted deans and faculty members of law schools throughout the United States, including professors at the law school which Judge Souter attended, and constitutional and Supreme Court scholars.

Because of the nature of Judge Souter's experience, most of those interviewed who were able to contribute to the Committee's evaluation were those who had worked with him, served with him on the New Hampshire courts or

appeared before him either at the Superior Court or Supreme Court level.

Judge Souter was interviewed by three members of this Committee.

At the request of this Committee, all of Judge Souter's more than 200 New Hampshire Supreme Court opinions were reviewed by:

1. A Reading Committee chaired by Rex E. Lee, former Solicitor General of the United States and presently President of Brigham Young University;
2. A Reading Committee chaired by Professor Ronald Allen of the Northwestern School of Law in Chicago; and
3. A Reading Committee chaired by Dean Paul Brest of the Stanford Law School.*

The results of the reviews by those three Reading Committees were independently analyzed and evaluated by each member of the Committee. In addition, each member of the Committee independently read and analyzed selected New Hampshire Supreme Court opinions authored by Judge Souter. All of Judge Souter's opinions as Attorney General and many of his Superior Court opinions were also reviewed, analyzed and evaluated.

This Committee also had the benefit of a very thorough and most recent investigation of Judge Souter for appointment to the First Circuit Court of Appeals. While the same factors considered with respect to the lower federal courts are relevant to an appointment to the United States Supreme Court, this Committee's Supreme Court investigations are based upon the premise that the Supreme Court requires a person with exceptional professional qualifications. For that reason, a Supreme Court investigation by this Committee, while directed to the same professional qualifications of integrity, professional competence and judicial temperament, requires a new and expanded investigation. In this instance, because of the recency of our investigation for Judge Souter's appointment to the First Circuit Court of Appeals, much of the preliminary work had already been accomplished. Building upon that base, each member of the Committee conducted an investigation within his or her own circuit which, as noted above, included calls to federal and state judges, practicing lawyers, law school professors and deans and those who had known Judge Souter as a Rhodes Scholar, in law school, during his tenure in the Office of the Attorney General of New Hampshire and while on the Superior and Supreme Courts of New Hampshire, with special emphasis on interviews of those who had appeared before him, or served with him, during his 12-year tenure as a judge.

* Members of these three Reading Committees who participated are listed in Exhibit A to this letter.

EVALUATIONIntegrity

Judge Souter's integrity, character and general reputation appear to be of the highest order and without blemish.

Judicial Temperament

Judge Souter's judicial temperament appears to meet the high standards of this Committee's definition.

Comments such as "no biases, very fair," "very honorable and fair," "dignified demeanor," and "very honest, decent, kind" were made repeatedly throughout the interviews.

A small number of those interviewed expressed concern about Judge Souter's method of aggressively questioning appellate lawyers. After exhaustive interviews, the Committee is satisfied that Judge Souter is always very well prepared and that his questioning is in fact searching but generally regarded as not unpleasant. As one lawyer phrased it, Judge Souter:

. . . is always prepared and has an incredible ability to cut through and ask terrifying questions and is fun to appear before because he always challenges your presentation.

A very few of those interviewed questioned Judge Souter's evenhandedness in his treatment of parties and issues. Concerns that Judge Souter is "too deferential to the Legislature" or "biased in favor of government action" or "brings his personal predilections to his opinions" were thoroughly investigated by this Committee. Each of these concerns was discussed with Judge Souter and examined in detail by the Committee in light of all the other information we had gathered. We concluded that Judge Souter's opinions are shaped by his conception of the role of an appellate judge and not by any lack of evenhandedness.

Professional Competence

Judge Souter's professional competence appears to meet the high standards of the Committee.

Professional Background. The Committee was favorably impressed with Judge Souter's professional training and experience. His undergraduate and law school education at Harvard, his selection as a Rhodes Scholar, his experiences in the Office of the Attorney General of New Hampshire, and his judicial service provide a solid background for service on the Supreme Court of the United States.

Interviews. Those interviewed who had direct knowledge of Judge Souter's professional work spoke in very positive terms about

his intellectual capacity, writing and analytical ability, knowledge of the law, industry, and diligence.

Phrases such as "very scholarly," "a sharp mind," "absolutely brilliant," "intellectually gifted," "very industrious," "a significant intellect" were repeatedly used. No one questioned Judge Souter's intellectual capacity, analytical ability, industry or diligence.

Writings. This Committee's independent evaluation of Judge Souter's writing satisfied it that his opinions are on the whole technically and persuasively crafted, fair and evenhanded and generally do not go beyond points at issue. Based upon its independent evaluation, this Committee satisfied itself that Judge Souter has the ability to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases.

As noted above, three Reading Committees were asked to review Judge Souter's New Hampshire Supreme Court opinions and to furnish to this Committee their opinions of Judge Souter's analytical ability and writing skills in the context of his professional competency. There was remarkable consistency among the three Reading Committees in their independent evaluations of his writings. They described his writing as well organized and comprehensive and concluded that he is an exceedingly intelligent and capable jurist. One commentator noted that he is an extremely able state appellate court judge in the classic mold of a common law jurist." Another noted that "there is . . . no question that he possesses highly sophisticated legal skills that are not daunted by the intricacies of complex cases."

An occasional reviewer described Judge Souter's prose as "relatively dry" or "somewhat discursive." This Committee concluded that such stylistic criticisms did not substantially affect its opinion as to his overall qualifications.

A very few members of the Reading Committee questioned whether Judge Souter's opinions reflect the capacity to deal ably with complex constitutional matters, suggesting that matters before the courts on which he sat generally did not involve such issues. Others were satisfied that he does possess the intellectual and analytical skills to deal with issues presented to the United States Supreme Court.

In the course of their responses to their charge, the Reading Committees made numerous references to concurrences or dissents authored by Judge Souter as examples of the quality of his work. It was clear from their comments, and from the independent analyses of Judge Souter's writing by this Committee, that the best examples of Judge Souter's writing and intellectual abilities were found in his dissents and concurrences. By way of example only, reference was

made to his dissent in Keeton v. Hustler Magazine, Inc., 549 A.2d 1187 (N.H. 1988) where Judge Souter engaged in a careful interests analysis which was characterized as demonstrating ". . . a clear ability to pierce traditional formulas in the course of forging coherent law." Similarly, reference was made to his dissenting opinion in State v. Koppel, 499 A.2d 977 (N.H. 1985) which prefigured the analysis adopted by the majority when the United States Supreme Court upheld the constitutionality of sobriety checkpoints in Michigan State Police v. Sitz, 496 U.S. ___, 110 L.Ed.2d 412 (1990). It was also pointed out that in his concurrence in Petition of Chapman, 509 A.2d 753 (N.H. 1986) Judge Souter anticipated by four years the Supreme Court's decision in Keller v. State Bar of California, 495 U.S. ___, 110 L.Ed.2d 1 (1990) (prohibiting use of mandatory Bar dues for certain lobbying activities).

Based upon its own independent evaluation of the opinions authored by Judge Souter and the responses of the Reading Committees, and based upon the results of the rest of its investigation, including extensive interviews with Judge Souter, this Committee is satisfied that whether one agrees or disagrees with the court's holdings, the opinions are carefully crafted, analytically sound and clearly professionally competent.

It is the opinion of the Committee that Judge Souter is highly competent and possesses the scholarly, analytical and writing skills necessary to serve successfully on the Supreme Court of the United States.

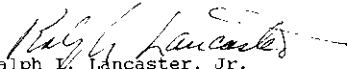
CONCLUSION

Based upon all of the information available to it, this Committee concluded that Judge Souter is entitled to its highest rating for a nominee to the Supreme Court of the United States.

Accordingly, this Committee unanimously found Judge Souter "Well Qualified" for appointment to the Supreme Court of the United States.

The Committee will review its report at the conclusion of the hearings and notify you if any circumstances have developed that dictate modification of these views.

Respectfully submitted,


Ralph V. Lancaster, Jr.
Chair

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