DAVID SOUTER, THE DARK SIDE

Statement by Daniel H. Pollitt, Professor of Law
University of North Carolina at Chapel Hill

David Souter, carefully groomed, scrubbed and coached, presented himself to the Senate Judiciary Committee as an articulate, thoughtful, moderate and mainstream constitutional lawyer; a not unattractive nominee for the Supreme Court. What we saw we may not get. His record as a New Hampshire prosecutor and judge tells us there is more to this "stealth" candidate then met the eye in three days of televised hearings. There is a darker side, concealed both by what he said and by what he refused to say. Lets look for the real David Souter. Lets look at his record.

JUDICIAL PHILOSOPHY

The Supreme Court is the ultimate guardian of the fundamental rights and liberties guaranteed by the Constitution. But how are these basic rights and liberties -- Due Process of Law, Equal Protection, Freedom of Speech, Establishment of Religion -- to be read, construed and interpreted? Chief Justice John Marshall, early on in our Constitutional history, interpreted the Constitution broadly to meet current needs: because the Constitution was "intended to endure for ages to come" and because "It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly and which can be best provided for

as they occur." McColloch v. Maryland, 4 Wheat. 316 (1819). Robert Bork, on the other hand, interprets the constitution narrowly, and three years ago torpedoed his nomination to the Supreme Court with his claim that our Constitutional rights are frozen in time as of 1787 when the Constitution was ratified by We The People. Under his cribbed theory, the Supreme Court was wrong when it ended school segregation in the 1954 Brown decision.

Where does David Souter stand? With John Marshall or with Robert Bork? He told the Senate Committee that sometimes, Judges could find meaning in the Constitution beyond the words of its text and the specific intent of its framers. Here he seemed to stand with John Marshall. But there is another David Souter. Interviewed earlier this year Souter stated that on constitutional matters, "I am of the interpretivist school." The "interpretivist school" limits constitutional protection to those rights "the Framers had consciously in mind," those rights identified "by specific language of the Constitution." Massachusetts Lawyers Weekly, May 28, 1990.

As a Judge on the New Hampshire Supreme Court he applied the state constitution in this restrictive, "Borkian" fashion. Estate of Henry Dionne, 518 A.2d 178 (N.H. 1986). A New Hampshire law authorized litigants to call special sessions of the probate court upon payment to the probate judge of $175.00 per day. The New Hampshire Supreme Court ruled that this practice violated the 1784 New Hampshire Constitution, which

guaranteed to "every subject of the state" the right to obtain justice freely "without being obliged to purchase it." The Court ruled that "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 David Souter could tolerate it, and dissented. The Court's "interpretative task" he wrote "is to determine the meaning of the Constitutional language as it was understood when the farmers proposed it and the people ratified it," i.e. back in 1784. But he went centuries further back then that. The 1784 New Hampshire Constitution has it roots in the Magne Carta, when in 1215 on the fields of Runnymede King John agreed with his mutinous barons that "to no one will we sell, to no one will we deny, or delay, right or justice."

The purpose of this provision of the Magna Carta, wrote Souter in 1986, was to end "the evil practice of the Anglo-Norman King in extorting money from the administration or retardation of justice." Souter reasoned that since the 1784 New Hampshire Constitution went back to Magna Carta, it too, must have been "intended to forbid bribery, not the imposition of fees and costs." Therefore to him, the New Hampshire "rent a probate judge" law was constitutional.

Is Souter a Bork in John Marshall clothing? The record so indicates.

STARE DECISIS AND ADHERENCE TO JUDICIAL PRECEDENT

An unanswered question is whether Souter, if confirmed, will

respect or reverse the decision in Roe v. Wade, which protects women's freedom to choose an abortion in the first two trimesters of pregnancy. Will he follow precedent, i.e. apply the legal doctrine of stare decisis, or will he follow his own predilections, go his own way?

His record demonstrates that, like other judges, he respects the stare decisis doctrine in areas of property and commercial law "where people have arranged their affairs in reliance upon the expected stability of a decision." But in areas of constitutional protections, his record demonstrates a willingness to reverse established liberties. Suffice here one illustration. Others occur throughout the following sections.

The Fourth Amendment guarantees "the right of the people" to be secure in their "persons, houses, papers and effects" against "unreasonable searches and seizures." In 1914 the Supreme Court held that when the federal police break into a man's house without a search warrant, they may not utilize the lottery tickets seized in the illegal search as evidence in the subsequent criminal trial. Were it otherwise, reasoned the Court, "the protection of the Fourth Amendment ... might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). Six year later, Justice Holmes reaffirmed the so-called "exclusionary rule" because without its "deterrent standard" the Fourth Amendment "would have been reduced to a form of words." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). In 1961 the Supreme Court extended the

"exclusionary rule" to state trials in a case where local policemen, without a warrant, forced their way into a house, ransacked it from top to bottom, seized some obscene pictures from a trunk, and used them as evidence in a subsequent criminal trial. Justice Clark wrote that "without the exclusionary rule" the assurance against unreasonable searches and seizures would be "valueless" and "undeserving of mention in a perpetual charter of inestimable human liberties." Mapp v. Ohio, 367 U.S. 643, 655 (1961). Despite all this, in 1971 Attorney General David Souter urged the Supreme Court to overrule Mapp v. Ohio and the exclusionary rule. Petition of New Hampshire for Rehearing in Coolidge v. New Hampshire. So much for a half century of legal precedent.

WOMEN'S RIGHTS

Justice Brennan, whose vacant Supreme Court seat Judge Souter might fill, recognized that "Our Nation has had a long and unfortunate history of sex discrimination" rationalized by an attitude of "romantic paternalism" which in practical effect, "put women not on a pedestal but in a cage." Frontiero v. Richardson, 411 U.S. 677 (1973). Since the early 1970s the Supreme Court under Brennan's urging, has been in the vanguard of the movement to open wide the cage doors, and give women opportunities and responsibilities equal to those enjoyed by men.

This advance was achieved by changing the standard by which the court reviewed discriminatory gender laws. Prior to 1970, the Supreme Court looked with a blind eye when reviewing sexiest

laws, and sustained them whenever a "rational basis" could be hypothesized for the gender discrimination. Discriminatory laws almost always were sustained under this lax standard of review. In the 1970s come a "heightened scrutiny" standard of review whereby discriminatory laws were invalidated unless the state could prove as a fact that the gender discrimination was "substantially related to the necessary achievement of an important government interest." Craig v. Boren, 429 U.S. 190 (1976). Few discriminatory laws passed this higher, more stringent, level of review.

In 1978, Attorney General David Souter petitioned the Supreme Court to abandon the "heightened standard of review" and go back to the lax, "rational basis," "anything goes" standard of review which prevailed in former years. Petition for Writ of Certiorari in Helgemoe v. Meloon, No. 77-1058 (Jan. 25, 1978 at pp. 18-19).

This is his record, possibly difficult for a non-lawyer to appreciate, but deadly in operation.

There is more to the Souter anti-feminist record.

At one time in rape cases the victim would be cross examined about her sexual life-style, former boy friends, and the like to prove that she had consented to the defendant's sexual assault. There was general revolt against putting the victim of crime on trial this way. After all, even a prostitute can be raped. New Hampshire was one of the many states to enact a "rape shield" law which prohibits evidence concerning sexual activity between the

victim and any person "other than the defendant." Despite New Hampshire's "rape shield law," Judge Souter held that it was error from the trial court to exclude evidence to the effect that earlier in the afternoon of the alleged rape, the victim had engaged in "sexually suggestive behavior" at a bar by "sitting in the lap of one of defendant's companions" and "hanging all over everyone." State v. Colbath, 540 A.2d 1212 (N.H. 1988).

Professor Susan Estrich, an expert on such matters, wrote that this ruling "reflects the most traditional, backward, sexist view of women and sexual relations."

He affirmed his "backward view" on the status of women in his brief in a case called Wooley v. Maynard. New Hampshire required all licence plates to carry the state motto "Live Free or Die." For religious reasons, Mr. and Mrs. Maynard obliterated these objectionable words from their license plates. Mr. Maynard (but not Mrs. Maynard) was convicted three times in the local court for "Misuse of Plates." He did not appeal in the state court system but instead, with his wife as a co-plaintiff, filed suit in the federal court for protection of their religious liberty. Souter moved the federal court to dismiss the case because Mr. Maynard had failed to "exhaust his state remedies" by filing an appeal with the New Hampshire Supreme Court. He could not repeat this argument against Mrs. Maynard, as she had never been prosecuted. Instead he down played her very "personhood" with the argument that "but for the religious convictions and criminal conduct of Mr. Maynard, it is highly doubtful that Mrs.

Maynard would have instituted federal litigation."

This comment takes one back to Oliver Twist and the days when the law held the husband responsible for the crimes of his wife. When Mr. Bumble was informed that he was guilty of his wife's crime "for the law supposes that your wife acted under your direction" his ringing reply was "if the law supposes that the law is a ass--a idiot." The law has come a long way since a wife was considered an appendage of her husband, leaving David Souter behind in the dark decades of Charles Dickens.

FREEDOM TO CHOOSE AN ABORTION

The most important and hotly-contested issue of women's privacy rights is the right to choose an abortion, established back in 1973 in the landmark decision of Roe v. Wade. Souter does not support freedom of choice. In 1976 the federal government required the states to reimburse Medicaid-eligible women for the cost of abortions. Attorney General Souter fought this requirement in the courts. Why? Because "Many thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant." (emphasis supplied) Memorandum in Support of Defendant's Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, 406 F.Supp. 1072 (1976).

He continued to use this inflammatory language of the anti-choice movement. The following year, the New Hampshire House voted to repeal the New Hampshire abortion law of 1848 as obsolete and largely ineffective under Roe v. Wade. Attorney

General Souter was quick to point out that the 1848 state law was not completely ineffective, as Roe v. Wade permits the states to regulate abortions in the final trimester. Approximately .01% of abortions are performed during this period, generally because of severe fetal abnormalities discovered late in pregnancy. When the measure to repeal the 1848 abortion law reached the state Senate, attorney General Souter wrote a formal letter in opposition. He explained in an interview with the Manchester Union Leader May 27, 1877, that if the legislation passed, New Hampshire "would become the abortion mill of the United States."

CIVIL RIGHTS

Through much of this century, the Supreme Court has played a critical role in protecting and advancing civil rights and racial equality. Nominees to the Supreme Court must share this basic commitment to civil rights and equality. David Souter does not.

The right to vote is the most fundamental of all fundamental rights, and in 1970 Congress extended the ban on literacy tests to every state in the Union. But New Hampshire defied the federal law. When the United States filed suit to enforce it, Souter argued that the Voting Rights law was unconstitutional. Why? Because permitting illiterates to vote would "water down" the votes of other citizens. A three-judge federal court firmly rejected this argument. United States v. New Hampshire, (D. N.H., Civil Action No. 3191, Oct. 27, 1970). All members of the Supreme Court upheld this enactment in a related case because "literacy tests unduly lend themselves to discriminatory

application, either conscious or unconscious." Oregon v. Mitchell, 400 U.S. 112 (1970).

New Hampshire, alone among the fifty states, again defied the United States when the Equal Employment Opportunities Commission sent a questionnaire requesting the racial, ethnic and gender breakdown of its work force. Governor Thompson replied by designating all state employees as "American." The United States then filed suit to compel compliance with the federal law, and Attorney General Souter argued that the required statistics would lead to impermissible job quotas, and would promote discrimination. The federal court flatly rejected these claims because the statistic are "highly useful" in investigating discrimination and the regulations were "clearly constitutional." When Souter petitioned the Supreme Court to review his claim that the federal requirement was "abusive" and "contrary to constitutional principles," it was, ironically, Solicitor General Robert Bork who successfully opposed the petition as totally without merit. Memorandum for the United States in New Hampshire v. United States, (filed Nov. 1976).

A former Chair of the EEOC described Souter's claim as a "fatuous argument raised by people who are fundamentally against giving equal employment opportunity." Washington Post, Aug. 1, 1990, p. 4.

In a commencement speech that year at the Daniel Webster College, David Souter told his student audience that the government should not be involved in affirmative action because

affirmative action is "affirmative discrimination." Manchester Union Leader, May 31, 1976.

OTHER FEDERAL POWERS

Not only does David Souter challenge the authority of Congress to protect minority voting rights and employment opportunities, he also challenges the authority of Congress to cope with other pressing needs of our times.

In a 1978 speech to the Newport Chamber of Commerce Souter warned against a strong central government and cited three instances where the federal government exceeded its constitutional authority: (i) the nationwide 55 mph speed law, (ii) unemployment benefits for state and local government employees, and (iii) education for handicapped persons, Concord Monitor, Dec. 29, 1983.

The Constitution was established "to form a more perfect union," and to this end it authorizes Congress to regulate interstate commerce and to tax and spend for the general welfare. It is far too late in the day to assert that Congress cannot regulate gasoline consumption with a speed limit; that it cannot regulate the minimum wages and fringe benefits paid employees; and it was President Adams back in the 1820s who first proposed federal aid to education.

David Souter's concept of an impotent Congress may sit well with a well-paid professional living a monastic life; but it bodes ill for the rest of us.

CHURCH-STATE RELATIONS

The very first clause of the First Amendment provides that "Congress shall make no law respecting the establishment of religion" or "prohibiting the free exercise thereof." Thomas Jefferson wrote that this was intended to erect a "Wall of separation between church and state." David Souter tried to batter down that wall on three occasions.

1. The Lord's Prayer case. In 1962 the Supreme Court invalidated New York's "school prayer law" as a prohibited Establishment of Religion. Engle v. Vitale, 370 U.S. 421. The following year it invalidated the school prayer laws in Pennsylvania, Abington School Dist. v. Schempp and in Maryland, Murray v. Curlett, 374 U.S. 203 (1963). Non-the-less New Hampshire continued to authorize each school district to require "the recitation of the traditional Lord's prayer in public elementary schools," along with the reminder that "this Lord's prayer is the prayer our pilgrim fathers recited when they came to this country in search of freedom."

Suit was filed in 1976 to prohibit the school prayer. With no regard at all for the earlier Supreme Court rulings Souter stated his office would do "everything we can to uphold the law," Concord Monitor, Jan. 28, 1976 and he offered to file a brief in support of the law. Manchester Union Leader, Feb. 7, 1976. Needless to say, the federal court held that the New Hampshire school prayer law was "patently and obviously unconstitutional." Jacques v. Shaw, Civil Action No. 76-26 (D.N.H.)

2. The Good Friday Proclamation.

In 1977, as in previous years, Governor Meldrim Thompson issued a Proclamation that "Good Friday represents a day of solemn prayer and rededication" because of "the everlasting debt we owe to our Creator." He appealed to citizens of New Hampshire to "reverently observe Good Friday with due meditation in church or chapel" and announced that "Flags would be flown at half-mast" on our buildings "to memorialize the death of Christ on the Cross on the first Good Friday."

A number of ministers filed suit, alleging that the Proclamation and flag-lowering violated the Establishment Clause. The Federal court issued the requested injunction because the Proclamation "not only seeks to advance religion, but a particular religion."

Attorney General David Souter appealed this decision by trivializng the religiosity surrounding the Crucifiction of Christ. He argued that Jesus Christ "although primarily a religious figure may be respected and revered for secular purposes as well;" further

> "The issuance of a proclamation and the neutral act of the symbolic lowering of a flag to commodate the death of an individual does not arises to the establishment of any religion." (emphasis added).

Needless to say, the Courts did not buy his argument that Good Friday is not a religious occasion.

Since his nomination, reports have surfaced suggesting that Souter may have disagreed with Governor Thompson on the

39-454—91——33

Proclamation and lowering on the flag. Manchester Union Leader, July 25, 1990. But the attorney who actually argued the case reported that Souter "directed the effort" and his "advice and counsel was important." Washington Times, July 26, 1990.

3. Live Free or Die. The background of this case goes back to 1943 when Jehovah Witnesses filed suit in West Virginia protesting the requirement that their children salute the flag each day in school. Their religious beliefs included a literal version of Exodus 20:4 and 5 that "Thou shalt not make unto thee any graven image ... thou shall not bow down thyself to them nor serve them." To the plaintiffs, the flag was a "graven image" and they refused to salute it.

The Supreme Court agreed that the required flag salute violated the Free Exercise of Religion. Justice Jackson wrote as follows:

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can proscribe what shall be orthodox in politics, nationalism, religion, or force citizens to confess by work or act their faith therein." Board of Education v. Barnette, 319 U.S. 624 (1943).

Some fifteen years later Mr. and Mrs. Maynard covered over the state motto Live Free or Die on their license plate. They did so out of a "deeply held personal religious conviction" that "death is an unreality for a follower of Christ." They filed suit in the federal court to enjoin the repeated criminal suits

against them for "Misuse of Plates."

Once again David Souter ignored the Supreme Court precedent, and defended the state law (as in the Good Friday case) by trivializing the religious beliefs of the Maynards. He argued to the Supreme Court that their conduct was "interpretable only as whimsy or bizarre behavior" which fell "far short of First Amendment protection." The Supreme Court, as expected, upheld the right of the Maynards to "refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." Wooley v. Maynard, 430 U.S. 705, 707 (1977).

The only time David Souter has been sensitive to the religious views of others was in the unlikely situation when the federal government sued New Hampshire to compel compliance with a federal regulation that the state fund the abortions of its indigents. Souter objected because

> "May thousands of New Hampshire residents find the use of tax revenues to finance the killing of unborn children morally repugnant. These are deep, often religious beliefs, giving rise to strong emotion." Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, 406 F.Supp. 1072 (1976).

A CARING, OR MEAN SPIRITED PERSON?

Perhaps first and foremost, the quality we want most in a Supreme Court justice is a respect and concern for human beings; in short, a caring person. Here David Souter is lacking. A few illustrations must suffice.

Appeal of Bosselait, 547 A.2d 682 (N.H. 1988) concerned two brothers, Albert and Edward. Well into their 70s, for a number of years they had shared a janitor's job; each working four hours a day. When the job was discontinued they applied for Unemployment Compensation. Naturally, they did not retain a lawyer. When told that New Hampshire law requires that those seeking Unemployment Compensation must be "ready, willing and able" to perform "full-time" work, they said they could not accept new jobs calling for more than four hours of work each day. Albert said he had a "weak back that goes out of joint when least expected." Edward said he was limited by "partial eyesight and angina." Edward added that "we don't dare to work more than four hours a day at our age" and he was "not gonna play with his health." When told again of the "full time" requirement Edward responded that the statute is "discriminating against old fellas ... old people."

Their claim for unemployment compensation was denied, and with the aid of the legal clinic at the Franklin Pierce Law Center they appealed. They argued that the "full time" requirement, as applied to sick and elderly persons, violated the (i) federal Age Discrimination Act, the (ii) federal Rehabilitation Act, and (iii) the constitutional guarantee of equal protection.

Judge Souter wrote the opinion denying their appeal. Why? Because these issues had not been properly raised at the Employment Compensation hearings. Souter wrote that "The record

below contains no reference to the Age Discrimination Act" and although Edward Bosselait said the state law discriminated against the elderly, "his remark could not reasonably have been understood as initiating a statutory claim under federal law." 547 A.2d at 686. This is mean-spiritedness with a vengeance.

David Souter was equally calloused in his consideration of the rights of the mentally ill. See State v. Ballou, 481 A.2d 260 (N.H. 1984). Kevin Ballou pleaded not guilty to a minor crime "by reason of insanity," and was committed to the New Hampshire State Hospital. Under then existing law the commitment was valid for two years only. At the end of that time the law required that he be released unless the court was satisfied that he still suffered from a mental disease. There after, the state legislature extended the length of committal orders from two to five years. Ballou now could be held for five years without court consideration of his mental condition. The New Hampshire Supreme Court held that this extension, as applied retroactively to Ballou, violated the New Hampshire Constitution forbidding retrospective or ex post facto laws.

Judge Souter dissented because Ballou had no "vested right in the continuance of the earlier statutory provision regulating the length of commitment." Consequently, adding the additional three years between Court examinations was not "punishment" within the Ex Pact Facto provision. To borrow the words of the majority opinion, this overlooks "the practical realities of the institutional life of a mental patient."

Finally, note must be made of Souter's harshness against the Seabrook demonstrators. In the mid 1970s, construction of the Seabrook Nuclear Power Plant in New Hampshire became a major controversy, and a rallying point for those who opposed nuclear power. On the May Day weekend in 1977, thousand of people gathered at Seabrook to protest the plant. They were orderly. The protest was peaceful. The demonstrators trespassed on the Seabrook property, but abided by a prior agreement not to enter a 40 acre section of the site where construction had already begun.

Over 1400 protestors were arrested that day. Attorney General Souter was in charge of the prosecution. He insisted on a cash bail for everyone, because the protest was "one of the most well-planned acts of criminal conduct in the state or the nation." The state was required to house 1,400 detainees at enormous cost, and it gratefully accepted a gift of $74,000 from Seabrook to help finance the continuing prosecution and detention of the protestors. Who was calling the shots?

Trial began, and per agreement of the local district attorney, the trial court gave the protesters suspended 15 day sentences. When he heard of this, Souter rushed to the scene and demanded that all protestors be give 15 days at hard labor, $200 fines and no suspensions: in short, the maximum penalty allowed by law. He wanted the last ounce of flesh.

Several weeks later Souter testified before the state Finance Committee. In response to a question he said that if there was a next time around, the state might use police dogs and

fire hoses to keep demonstrators from the site. Manchester Union Leader, June 3, 1977. Shades of Bull Connor and the Birmingham civil rights demonstrations of the early 60s!!

PERSONAL RESPONSIBILITY

Those who support Souter defend his mean spirited acts and attitudes on the theory that he was an attorney nearly doing the bidding of his clients Governors Thompson and Sununu. But we are all accountable for our acts. The "Good German" defense went out with the World War II War Crimes trial in Neurenberg.

True enough, some attorney, the so-called "hired guns," consider their law licenses as authority to advise clients on how to skirt, avoid, postpone, or even disregard their legal responsibilities. Most attorneys, fortunately, have a higher sense of professional responsibility. They advise their clients on how best to comply with the law. If the clients ignore their advice, they dump them.

At one time Governor Kerr Scott (later Senator Scott) was warned that his stand on behalf of rural unfortunates might cause political problems. He replied: "I don't have to be Governor of North Carolina." Souter did not have to continue on as legal advisor to Governors Thompson and Sununu. Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned their high posts rather then breach their faith and a Justice Department regulation when ordered by President Nixon to fire Special Prosecutor Archibald Cox during the Watergate investigations. This is the manner of a man or woman we want on

our highest court.

When we call the roll of the Supreme Court: Holmes, Brandeis, Hughes, Cardozo, Rutledge, Murphy, Black, Douglas, Warren, Brennan; it easily appears that David Souter does not belong in this company of high minded, high principled, justices.