

**Why Not the Best?
David Souter Fails to Meet
Minimal Standards for the Supreme Court**

**A Report Compiled By
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Introduction

The Coalition for a Just Supreme Court emphatically rejects the nomination of David Souter to the Supreme Court of the United States. David Souter is unfit for the nation's highest court: his performance as judge and Attorney General¹ demonstrates an inherent hostility and insensitivity to the rights of most Americans -- namely, working people, women, people of color, gay men and lesbians, immigrants, poor people, and criminal defendants.

Moreover, David Souter is hostile to the Constitution itself, and to the precious doctrine of "liberty and justice for all." Unlike Justice Brennan, David Souter does not regard the Constitution as a "living, breathing document" through which the conditions of our changing and diverse society must be examined. Rather, David Souter would further constrict fundamental rights: to him, what comes first are the needs of a few, and what is sacrificed are the needs of many. Time and time again, Souter has protected the interests of the wealthy over the needs of the

¹ David Souter's tenure as Attorney General of the State of New Hampshire is an appropriate area of inquiry because the attorney general does not serve at the pleasure of the Governor in New Hampshire. Indeed, there is a significant precedent in the state for the attorney general to refuse to defend or enforce the Governor's agenda in the case of a political or legal disagreement. For this reason, the New Hampshire Governor has his or her own counsel. Significantly, David Souter's predecessor in the attorney general's office, now-Senator Warren Rudman, frequently refused the direction of then-Governor Peterson. Consequently, David Souter's performance as attorney general is not shielded from inquiry on the theory that he was only acting as an agent of the governor; rather he bears accountability for his actions during that period.

poor; time after time, he has championed the destructive notion of "reverse discrimination" rather than sought to redress the impact of racism. His record demonstrates a proclivity to identify only with the litigant most similar to himself. As such, he identified exclusively with anti-choice physicians rather than the right of women to control their bodies. Souter is hardly a "blank slate": his record shows ample evidence of a judicial activist bent on subjugating the Constitution to the will of a privileged few.

As a judge, David Souter has forged a "jurisprudence of convenience", in which he blows in one judicial direction and then quite nimbly in another. When it serves his end, he is a strict constructionist as in the case of In Re Dionne, where he rejected a constitutional challenge to court fees on the basis of a reading of the New Hampshire Constitution as it was understood in 1784, yet in U.S. v. N.H. he invoked a radical theory of the right to privacy in order to withhold demographic information from the EEOC. When push comes to shove, however, when the rights of individuals are weighed against those of the State, the State wins.

Judge Souter has also demonstrated a jurisprudence inimical to the Constitution. Whenever possible, he has avoided the affirmation of constitutional rights by shifting the focus of attention from public to private actors, and by construing constitutional claims as "mere" statutory rights. In so doing, he has shown himself unwilling to recognize that the rights

secured in the Constitution are paramount to the will and whim of particular legislatures.

Our analysis reveals that Souter has little idea what the courts have to do with justice. To him, adept legal phrasing and esoteric arguments mean more than the conditions of real people's lives. Like many conservatives, he appears to believe that all litigants come to court on a level playing field, despite different life experiences. He does not recognize the differences between the experiences of men and women, between people of color and white people, between gay men and lesbians and the heterosexual majority, between the poor and the wealthy, between the able bodied and the disabled, and between the young and the elderly. Rather than viewing diversity as something which enriches society, his record shows that at best he views equal opportunity as a burden and an inconvenience, and that affirmative action in his eyes is affirmative discrimination. Rather than using law to implement a truly humane vision of justice, he manipulates legal theory to mete out a desiccated intellectual notion of "justice" as if it were unrelated to social conditions. At best, he is insensitive; at worst, he furthers the limitations of a society steeped in many unacceptable biases. We deeply object to Souter's approach to the law, which is dehumanizing and out of touch with the complexities of our society.

We urge the Senate to reject David Souter. We need not await artful dodging of tough questions; we have enough

information to know where this man stands.

WOMEN'S RIGHTS

Souter's record in areas that directly and uniquely affect women's lives is cause for great alarm. In cases involving economic rights, abortion, family law, and constitutional equal protection, David Souter has distinguished himself with a penchant for stereotype, arcane notions of gender and a laissez-faire notion of justice. Indeed, Souter's myopic view of the Constitution inevitably leads to a world outlook where women are unequal players to men because they are invisible or inconsequential. This makes perfect sense given his insistence upon construing the Constitution in terms that were relevant in the 1790's -- a time when the interests and concerns of women were never brought to the table. This philosophy is not acceptable in a judge who will sit on the court into the twenty-first century.

This hostility to recognizing the oppression of women was made quite clear in Helgeos v. Meloon, in which he asked the U.S. Supreme Court to reduce the standard under which laws that discriminate against women are examined under the Constitution. Souter argued that the intermediate scrutiny standard developed by the Supreme Court in Craig v. Boren would "permit subjective judicial preferences and prejudices." In other words, the courts should not impose a constitutional check on the judgments of legislators even if that legislative judgment amounted to

flagrant sex discrimination.

With respect to reproductive rights, Souter has made it quite clear that in considering the issue, the interests of women will be far from his mind. In Smith v. Cote and in a letter he authored to the legislature when he was on the Superior Court regarding judicial by-pass provisions of a parental consent law, Souter was concerned not with the hardships faced by pregnant young women, or women who have received inadequate prenatal care, but rather with the problems faced by anti-choice judges or doctors -- that is, the people on the periphery of these issues, who happen to be the people with whom he could most identify with personally.

His insensitivity to women's lives was made further manifest in New Hampshire v. Colbath, a rape case in which Souter found that the defendant had a right to have the jury consider the victim's "sexually provocative behavior" toward other men present just prior to the rape, which he considered relevant to the issue of consent. He held that perhaps the victim falsely accused the defendant of rape as a way to excuse her "undignified predicament."

Souter is more than a conservative judge. He is a judge who apparently believes that some of the most perplexing constitutional issues of our time should be decided solely by reference to the thinking of men in 1784. This posture has dramatic negative implications for equal protection, due process and privacy rights. Most importantly, this record demonstrates

that Judge Souter is wholly unfit to sit on the U.S. Supreme Court.

RIGHTS OF LESBIANS AND GAY MEN

In a decision that is steeped in stereotype and draconian notions of family, David Souter joined an advisory opinion of the New Hampshire Supreme Court which upheld the legislature's declaration that gay men and lesbians are per se unfit to be foster care or adoptive parents. In Opinion of the Justices, a majority of the court found that the proposed law did not run afoul of the due process, equal protection, privacy and freedom of association provisions of the federal and state constitutions.

By taking this position, Judge Souter and his colleagues ignored the majority of legal precedent on this issue which has rejected the use of sexual orientation as a factor in evaluating parental rights. The opinion in which Souter joined reasoned that the state has a legitimate interest in assuring heterosexual role models for children, and that the exclusion of lesbians and gay men from foster or adoptive parenting would further this purpose. The court's decision relied on the universally discredited theory that there is a "reasonable possibility" that having a gay or lesbian parent might affect a child's "developing sexual identity." 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." Nevertheless, the court rejected these studies and concluded that since the "source of sexual orientation is still inadequately understood," the state could exclude lesbians and gay men from these parenting options because they are not appropriate role models.

While this opinion represents a profound assault on the rights of lesbians and gay men, its constitutional analysis is equally troublesome for all people, regardless of sexual orientation. In finding that the proposed law did not run afoul of the state and federal constitution, the court found that it deserved only a minimal level of scrutiny because there is no fundamental right to parent. Souter and his colleagues reasoned that the "mere expectation" of parenting created by the state's foster care and adoption laws did not rise to the level of a right protected by either the due process or equal protection clauses of the federal and state constitutions. The offensiveness of this argument is made manifest by Judge Batchelder's dissent, in which he observed that existing New Hampshire constitutional law recognized a liberty interest in access to interscholastic sports sufficient to trigger constitutional due process protections, while the Souter majority refused to find that "parenting is so ingrained in our culture that to deny the opportunity to adopt or provide foster care is a deprivation of liberty." Indeed, the majority opinion was so insensitive that it provoked Justice Batchelder to write that "the state is never less humanitarian than when it denies public

benefits to a group of citizens because of ancient prejudices against that group."

CIVIL RIGHTS AND LABOR

Of one thing we can be sure -- once on the Supreme Court, David Souter would roll back much of the gains of the Civil Rights and labor movements by gutting Title VII and the rights of working people.

U.S. v. State of New Hampshire, Souter led a challenge to a federal requirement that public employers provide the Equal Employment Opportunity Commission (EEOC) with annual reports setting out the racial and ethnic make-up of their employees. These reports were mandated as part of the EEOC's monitoring of compliance with Title VII's non-discrimination in employment provisions.

In his 1st Circuit Court brief Souter insisted that the collection of statistics was irrelevant to the enforcement of rights under Title VII and argued, instead, that the reporting requirements could only result in the "enforcement of racial quotas." In essence, Souter believed so little in the state's ability to employ non-discriminatory hiring practices, that resort to racial quotas would be the only way to avoid a racially imbalanced workforce.

Most surprisingly, Souter put forward a radical privacy theory in defense of the state's resistance to reporting the racial and ethnic makeup of its workforce. He argued that the collection of this information was just as offensive to the

employee's privacy rights as inquiring of employees about the "frequency with which [they] have psychiatric treatment or the frequency with which they have sexual relations." Further, Souter had the gall to invoke the Constitution's anti-slavery protections by arguing that the classifications required by the EEOC constituted "badges and incidents of slavery" contrary to the mandates of the 13th Amendment.

Finally, in a shameful display of insensitivity and ignorance, Souter presented complicated theories of racial identity in an attempt to obscure the need to gather racial/ethnic data essential to the successful enforcement of the law's anti-discrimination provisions. For example, Souter asks hypothetically, how do you classify a Mexican-American woman who looks Caucasian but identifies herself as Chicana? Or a Native-American man who does not appear Caucasian but identifies with his own Caucasian parent more than with his Native American parent?

Perhaps most interesting about this case is the fact that after losing in the 1st Circuit, Souter petitioned for certiorari to the U.S. Supreme Court; and the petition was opposed by none other than Robert Bork, the Solicitor General at the time.

DAVID SOUTER IS ANTI LABOR

If David Souter's nomination to the United States Supreme Court is confirmed, he will undoubtedly assist big business in its campaign to roll back the New Deal and to destroy employees'

gains in wages, hours, working conditions and the ability to organize.

Just as in other areas of the law, Judge Souter's jurisprudential vision naively or disingenuously assumes that litigants are equally equipped to compete in the courtroom and in society. His judicial philosophy is a product of Adam Smith's 18th century economics with its fiction that we enter the job and consumer arenas as equals. Souter can be viewed as a neutral arbiter only in the context of the hypothetical world of the "level playing field."

His New Hampshire judicial opinions indicate that he is either covertly pro-employer or dangerously unaware of the realities of the job market and the workplace.

When Judge Souter denied unemployment compensation benefits to two elderly disabled brothers who had been laid off after 22 years of employment, he wrote an opinion that reveals the depth of his insensitivity to people who enjoy less privilege than he does. Souter refused to consider whether the state's unemployment compensation law discriminated against disabled and elderly workers because the brothers had not raised the discrimination issues at the trial. Souter resorted to this procedural escape valve to avoid considering the discrimination claims even though the brothers had no legal assistance at the trial, and the statute was discriminatory on its face. Appeal of Bosselait, 130 N.H. 604, 547 A.2d 682 (1988), cert. denied, ___ U.S. ___, 109 S.Ct. 797 (1989).

Souter has perpetuated the doctrine that at-will employees (those without a contract) have no job protection. Richardson v. Chevrefils, 131 N.H. 227, 552 A.2d 89 (1988).

He has endorsed an extremely restricted view of employees' rights in his dissent from a decision which recognized the contractual rights of a non-tenured teacher. Appeal of City of Nashua, School District #42, ___ N.H. ___, 571 A.2d 902 (1990).

He has conveniently forgotten his supposedly principled deference to the legislative branch and his aversion to judicial activism in a case involving the arbitrability of a labor contract. He raised an issue that neither party had presented, and created, without prior legislative or judicial basis, a new unfair labor practice: the union's wrongful demand to arbitrate. School District #42 of the City of Nashua V. Murray, 128 N.H. 417, 514 A.2d 1269 (1986).

David Souter's judicial philosophy is a disaster for the average American. He will redress only the most technical of grievances, he elevates procedure over substance and exhibits no commitment to real justice.

VOTING RIGHTS

In 1970, while Souter was Assistant Attorney General to Warren Rudman he argued U.S. v New Hampshire, a case he recently singled out as one of the most gratifying cases in which he had ever been involved. In that case the United States, pursuant to the provisions of the Voting Rights Act of 1965, sought to enjoin

New Hampshire's use of a literacy test mandated by the state constitution and statutes which conditioned the right to vote on one's ability to read and write the New Hampshire constitution in English. Unlike many states that stopped using literacy tests and other devices once notified by the U.S. Department of Justice of the illegality of such tests after passage of the Voting Rights Act, David Souter, on behalf of New Hampshire, vigorously fought for the right to continue using the literacy test.

In his brief, Souter argued vehemently that the rights of the State to determine voter qualifications and the rights of literates are constitutional, while the rights of illiterates² are "merely legal." He maintained that because illiterate people "can claim...no more than that they are the fortuitous and incidental beneficiaries of a legal, rather than a constitutional, right to vote" and because "the claims of the State and hence of its literate voters, are of constitutional proportions," the risk of harm is greater to the State and its literate voters. In fact, he argued that since it was virtually impossible for the state to provide a means whereby illiterate voters could vote "intelligently," their votes would result in "watering the value of every literate citizen's vote"

Given the history of limited access to and inadequate education as well as the social oppression of the poor and people

²Note that "illiterate" for these purposes means all persons who cannot read and write the New Hampshire Constitution. Such an overbroad definition of the term may very well draw within its scope a majority of residents of the state.

of color in this country, Souter's attempt to prevent "illiterates" from voting amounts to an attempt to prevent the poor and people of color from voting. At best, his argument indicates either an unacceptable insensitivity to U.S. socio-economic conditions, while at worst it represents an unacceptable racist and classist ideology.

Although the brief in this case had both Rudman and Souter's names on it, the fact that Souter argued it is a strong indication that he wrote it too. What is more alarming is that in his Senate Judiciary Committee Questionnaire, Souter wrote that "participation in the argument of that case [was] one of the most gratifying events of my life" because "the argument included a genuinely dialectical exchange between the great jurist [Judge Gignoux] and me." He sees the case as a mere intellectual exercise and has no sense for the erosion of civil rights that the views expressed in his brief represent.

SOUTER'S RECORD ON CRIMINAL JUSTICE AND THE RIGHT TO DISSENT

An examination of Souter's judicial record reveals a man who belittles the rights of the accused and is oblivious to the courts' role in guarding against police misconduct.

Under New Hampshire law, if the police take blood or breath or urine samples from someone accused of drunken driving, the police must make an identical sample available to the accused for independent testing. In 1989, the legislature asked for the state Supreme Court for an advisory opinion as to whether it would be

constitutional to repeal the two-sample law.

The majority of the Supreme Court said that repealing the two-sample law would turn DWI arrests into unconstitutional violations of suspects' due-process rights.

Souter and another judge joined in a dissent, which concluded that the proposed change would be constitutional. Their dissent turns the presumption of innocence on its head by stating that the chances are "extremely low" that a second sample would be helpful to the defendant because the police would not take any samples if they did not have good reason to believe that the accused was drunk. The dissent also asserted, without explanation, that two samples were not necessary because the accused could have a second sample taken at his/her own expense. Opinion of the Justices, 557 A. 2d 1355 (N.H. 1989).

In another Supreme Court decision, Souter wrote a majority opinion that seriously undermines the Miranda protection against involuntary self-incrimination. Souter wrote that when a defendant refused to answer questions by declaring "...if you think I'm going to confess to you, you're crazy," the refusal itself was admissible as evidence of a guilty conscience. State v. Coppola, 536 A. 2d 1236 (N.H. 1987). The 1st Circuit reversed Souter in a strongly worded opinion which observed that Souter's interpretation of the Fifth Amendment "amounts to a rule of evidence whereby inference of consciousness of guilt will trump a fifth amendment claim of the privilege ..." Under the reasoning of the New Hampshire court any prearrest invocation of the

privilege, no matter how worded, could be used by the prosecutor.

When Souter was New Hampshire Attorney General, he exhibited extreme antipathy for the rights of political dissenters in his treatment of the environmental protesters at the Seabrook nuclear power plant construction site. Beginning in 1976, when Souter was Attorney General and New Hampshire's chief law enforcement officer, the State Police initiated a full-time undercover operation against the Clamshell Alliance, which continued at least until 1981. State police agents and paid informers regularly attended Clamshell meetings and reported their observations to the police, in apparent violation of the Clamshell members' First Amendment rights.

Souter has stated he had no knowledge of the undercover operation, but the chief of undercover operations for the police has testified in a deposition that he sent his reports on the operation to the Attorney General's office. Whatever the state of Souter's knowledge of the police spying on the Clamshell Alliance, his behavior raises grave doubts about the judgement of a high official who would give the police unbridled authority to prejudice the First Amendment rights of political protesters.

Similar doubts are raised about the judgement of Attorney General Souter in May 1977, during large-scale civil disobedience actions at Seabrook. As a result of a series of decisions by Souter, more than 1400 demonstrators were arrested and held, contrary to normal New Hampshire practice, without the opportunity to be released on their personal recognizance. Since

Souter had made no preparations to hold so many prisoners, the protesters were detained in grossly substandard conditions in makeshift jails.

CONCLUSION

Although David Souter has been presented to the American public as a "blank slate" and a brilliant jurist, the facts demonstrate otherwise. He is no blank slate, and his jurisprudence betrays a startlingly limited vision. Whether Souter is brilliant or dull, what is at issue is his approach to the Constitution and the liberties it protects. Souter's record as Attorney General and judge displays an aversion to those rights which are the cornerstone of a healthy, diverse, and just society.