JUSTICE SOUTER EMERGES
BY DAVID J. GARROW
New York Times (1857-Current file); Sep 25, 1994; ProQuest Historical Newspapers The New York Times (1851 - 2003)
pg. SM36

JUSTICE SOUTER EMERGES

ONCE THE STEALTH NOMINEE, HE HAS BECOME AN INTELLECTUAL LEADER – AND THE SUPREME COURT HAS BECOME POLITICALLY UNPREDICTABLE.

BY DAVID J. GARROW

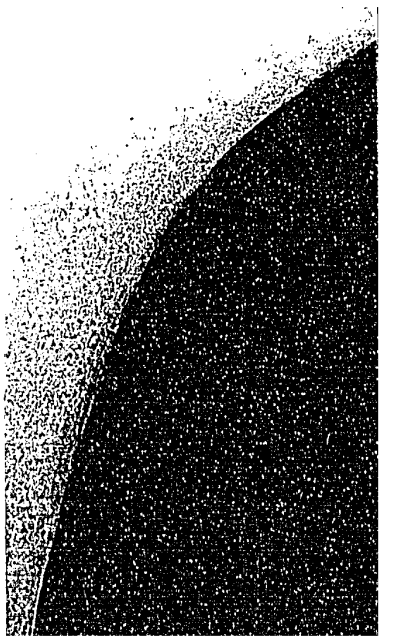
NO PUBLIC DOCUMENT — AND PROBABLY only a single very private one — marks April 23, 1992, as one of the more momentous days in recent Supreme Court history. Nothing of apparent note transpired at the Court that Thursday; oral arguments had taken place the day before and the Justices' weekly private conference, where they vote on cases, would not begin until Friday morning.

In his chambers on the far southeastern corner of the main floor, the Court's then-second-newest Justice spent the day in contemplation, pondering one of Wednesday's cases. A large portrait of Harlan Fiske Stone, a New Hampshire-born Republican Justice later named Chief Justice by a Democratic President, dominated the room. Many visitors would note that the office, unlike those of other Justices, had no computer terminal; only a few — particularly those visiting toward dusk — would realize that the office also had not a single electric desk lamp.

Only late in the day did the Justice reach a firm conclusion. Even though this was *the* case of the year, and perhaps of the decade, as of the day before, he had not — just as he had told the United States Senate and the American people almost two years earlier — decided what he would do. On Wednesday, during oral argument of the case, Planned Parenthood of South-

David J. Garrow, the author of "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade," won a 1987 Pulitzer Prize for "Bearing the Cross."

ILLUSTRATION BY PAUL DAVIS



A JUSTICE EVOLVES **Dramatic evidence of**  **Souter's intellectual leadership is the grow**

eastern Pennsylvania v. Casey, he had listened intently from his seat on the bench as Planned Parenthood's attorney, Kathryn Kolbert, began her argument:

"Whether our Constitution endows government with the power to force a woman to continue or to end a pregnancy against her will is the central question in this case.

"Since this Court's decision in Roe v. Wade, a generation of American women have come of age secure in the knowledge that the Constitution provides the highest level of protection for their childbearing decisions.

"This landmark decision, which necessarily and logically flows from a century of this Court's jurisprudence, not only protects rights of bodily integrity and autonomy but has enabled millions of women to participate fully and equally in society."

But now Roe's survival was very much in doubt, as was starkly revealed by the Pennsylvania anti-abortion regulations under review in Casey. Three years earlier, Chief Justice William H. Rehnquist and Justices Byron R. White, Antonin Scalia and Anthony M. Kennedy had signaled their desire to overrule Roe at the first available opportunity, and few observers doubted that the Court's newest and most controversial member, Clarence Thomas, was eager to join them as the fifth and decisive vote.

Justice Sandra Day O'Connor, who three years earlier had infuriated Scalia by refusing to provide a fifth vote to jettison Roe, interrupted Kolbert with the hour's first question, and she was soon followed by Scalia, Kennedy and Rehnquist.

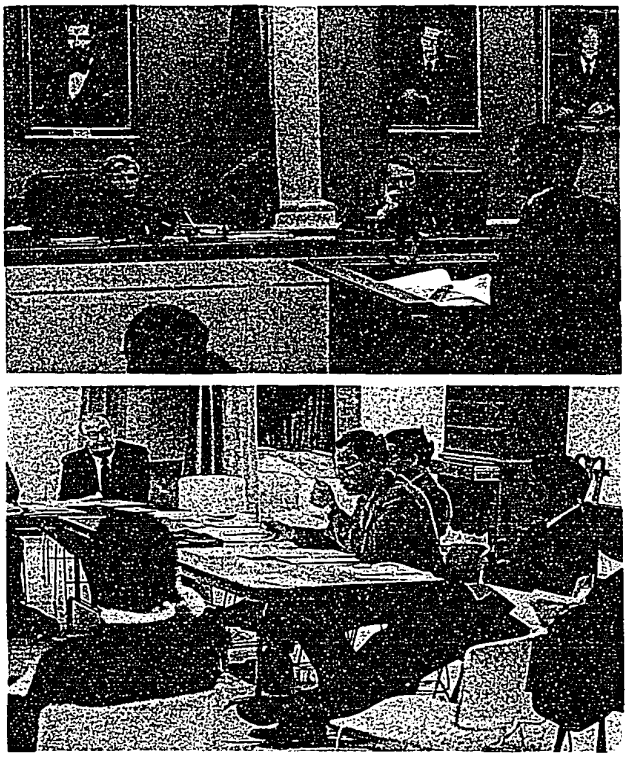
Pennsylvania's attorney general, Ernest D. Preate Jr., representing Gov. Robert P. Casey, followed Kolbert to the lecturn, but almost before he could begin, Justice Harry A. Blackmun, the 82-year-old author of the Court's landmark 1973 abortion decision, asked whether Preate had even read Roe. Then O'Connor peppered Preate with a series of skeptical questions, followed by John Paul Stevens, a firm supporter of Roe, and even by Anthony Kennedy, before Scalia jumped in to provide some cover.

Only as Preate's time was about to expire did the 52-year-old David Hackett Souter speak up to ask Preate a statistical question about the Pennsylvania provision that would require married women facing unwanted pregnancies to notify their husbands, even if they were separated or estranged, before seeking an abortion. Then, after United States Solicitor General Kenneth W. Starr, representing the anti-abortion views of the Bush Administration, succeeded Preate to second the attack on Roe, Souter pressed Starr to concede that if his position prevailed, states could outlaw *all* abortions except perhaps those where a pregnancy directly threatened a woman's life.

None of Souter's comments had telegraphed a clear position on either Casey or Roe. Had any abortion-rights activists been inclined to interpret his exchange with Starr as promising, they had only to remember how Souter's encouraging comments from the bench 18 months earlier in the abortion "gag rule" case of Rust v. Sullivan had proved utterly misleading. Souter had joined Rehnquist, White, Scalia and Kennedy in a 5-4 decision upholding statutory restrictions on what doctors in federally financed clinics could say to female patients.

Not for many years will any outsiders likely see any notes that may have been taken that following Friday morning when the Justices met to vote on Planned Parenthood v. Casey. But while seven Justices indicated that they would uphold most of the Pennsylvania restrictions, only four — Rehnquist, White, Scalia and Thomas — wanted to explicitly vitiate Roe. O'Connor, Kennedy and Souter, however, all believed the restrictions could be upheld at the same time that Roe was left standing. While Rehnquist himself undertook the drafting of Casey's apparent majority opinion, Kennedy's surprising stance gave Souter and O'Connor the opening toward an intermediate outcome for which they had been hoping.

Well before Rehnquist's opinion was circulated to other Justices in late May, Kennedy privately joined Souter and O'Connor in preparing an extensive separate statement. Sometimes all three Justices, sitting on the couch in Souter's office, would jointly review their progress, and their cooperation led to a stunningly unexpected result: Rather than Rehnquist and Scalia having five votes to void Roe, there were five votes — Souter, O'Connor and Kennedy, plus Blackmun and Stevens, to *uphold* Roe.



Top: Souter, right, and his then-colleague, David Brock, left, on the New Hampshire Supreme Court. Bottom: Souter, right, at a 1983 meeting of the New Hampshire Historical Society. Right: Three Attorneys General: Thomas D. Rath, Souter and Warren Rudman.

In early June, Souter, O'Connor and Kennedy distributed to their colleagues initial copies of their joint opinion. As David Savage later wrote in The Los Angeles Times: "Rehnquist and Scalia were stunned. So, too, was Blackmun." And so, on Monday morning, June 29, 1992, the final day of the term, commentators were unprepared for the result in Planned Parenthood v. Casey. Not since the famous 1958 Little Rock school desegregation case of Cooper v. Aaron, when all nine Justices signed a ringing reaffirmation of Brown v. Board of Education, had any Supreme Court opinion been presented to the American people as formally authored by more than one Justice. But now, symbolically invoking the powerful precedent of Cooper, Justices O'Connor, Kennedy and Souter issued their plurality decision in Casey as an explicit trio opinion.

"[T]he essential holding of Roe v. Wade should be retained and once again affirmed," they wrote in language that also spoke for Blackmun and Stevens.

"Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. . . . Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each."

When announcing decisions from the bench, Justices usually offer a summary or read brief excerpts. On this morning, however, each of the three — first O'Connor, then Kennedy and finally Souter — orally delivered major portions of the trio opinion. Journalists quickly realized they were witnessing an unprecedented event.

The most eloquent section of the opinion was the discussion of Roe and the principle of stare decisis — Latin for judicial respect of existing precedent — that had been crafted principally by

TOP, SOUTER IN THE 1966 HARVARD LAW SCHOOL YEARBOOK; JOHN NORDELL/J.B. PICTURES.

ng number of combative references directed at him by Antonin Scalia.

David Souter. Souter's words in Casey spoke not only for the Court, but also for the essence of America's judicial heritage and for the very core of Souter's own judicial background. That background had not been fully understood by the commentators and Senators who had debated what his 1990 nomination meant for the future of Roe and other fundamental rights. If they had, what was now happening in Casey would not have come as a surprise.

Souter's analysis reflected a realism not always found in high court pronouncements:

"For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

Then Souter moved to the core of his argument, two paragraphs that rank among the most memorable lines ever authored by an American jurist:

"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

"The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of Brown and Roe. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to re-examine a watershed decision would subvert the Court's legitimacy beyond any serious question."

Souter closed by reiterating that Casey, and Roe, were about far more than simply abortion: "A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today."

Harry Blackmun's concurrence accurately termed the Souter-O'Connor-Kennedy joint opinion "an act of personal courage and constitutional principle," and Blackmun added that "what has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch."

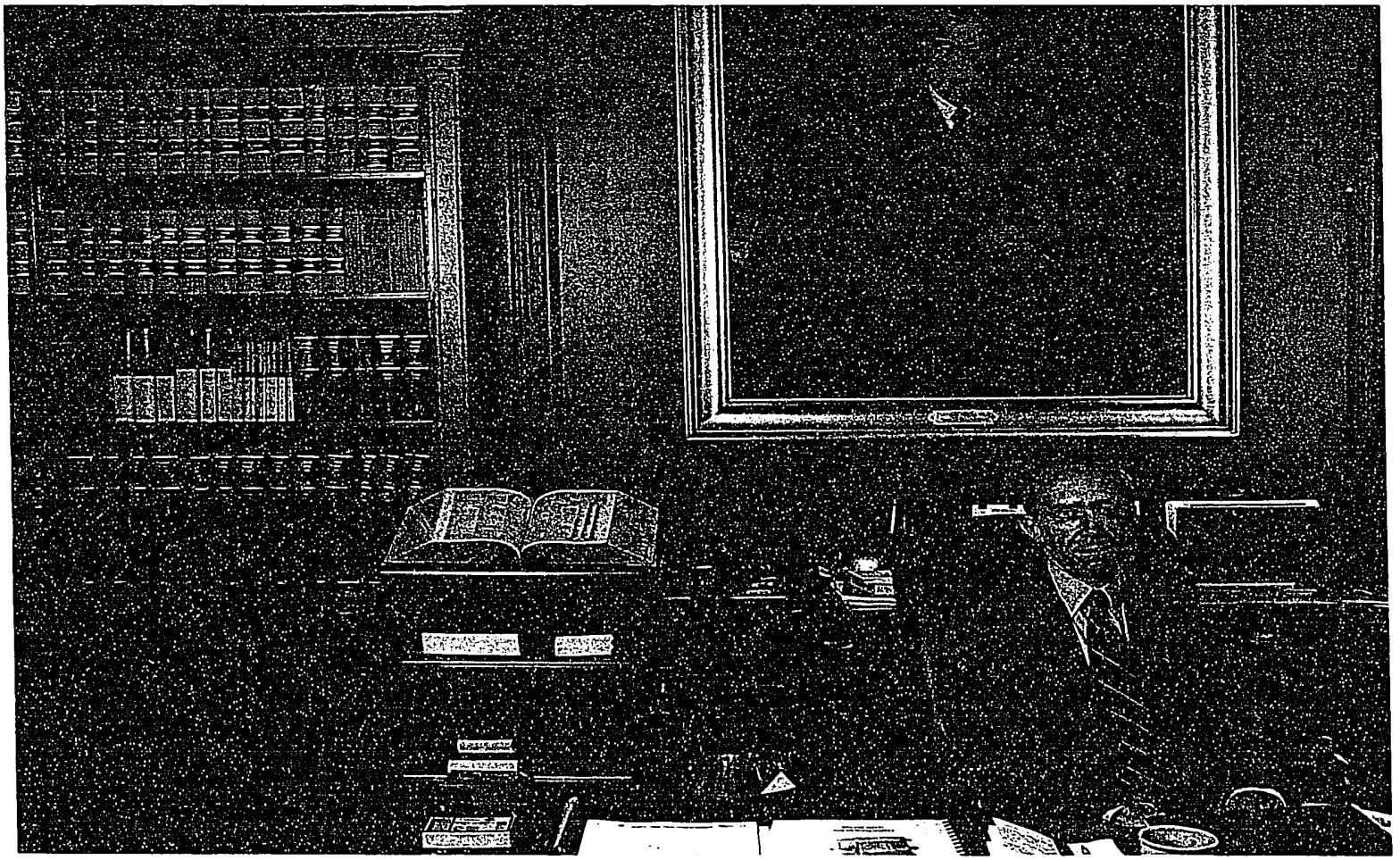
Casey *was* a watershed event in American history, the most institutionally significant decision for the Court since Brown. Although some abortion-rights activists failed to acknowledge their victory, expert observers like Laurence H. Tribe, the Harvard law professor, emphasized that the trio opinion "puts the right to abortion on a firmer jurisprudential foundation than ever before."

But the significance of Casey lay not just in its constitutional resolution of the 20-year battle over Roe, nor in its long-term importance to the Court's own institutional reputation; Casey also signaled the unexpected failure of the right-wing judicial counterrevolution that the Reagan and Bush Administrations had hoped to bring about by naming staunch conservatives to the Federal bench.

After Casey, hard-right commentators like the

LEFT, TOP: JIM COLE/ASSOCIATED PRESS. LEFT, BOTTOM: JOHN NORDELL/J.B. PICTURES. RIGHT: THE CONCORD MONITOR.

A JUSTICE EVOLVES People have failed to appreciate, says one friend, that "David's a judicial



columnist Robert Novak unleashed vituperative assaults on the trio of Republican Justices who had redeemed Roe, particularly the Roman Catholic Justice Kennedy. Gary L. McDowell, a Reagan Justice Department aide who had helped former Attorney General Edwin Meese articulate his harsh denunciations of Federal judges, lamented how "all that had been so vigorously fought for by Reagan and Bush, all that had been achieved, was suddenly lost."

But there is one other remarkable thing about Casey, both in the context of today's uncertainty about where the Court is heading and in the context of 1990's debate over how "stealth nominee" David Souter would vote on Roe: namely that it is impossible to find anyone who has long known Souter who was surprised by his resolution of Casey. How could something so obvious to those who know Souter best have eluded 1990's army of politicians and prognosticators? In that seeming puzzle lies the rich story of a humble yet utterly self-confident man who, far from being an odd recluse from another age, possesses both exceptional intelligence and a warm circle of friends.

DAVID HACKETT SOUTER, THE ONLY CHILD OF a quiet bank officer and an equally reserved homemaker, was born in Melrose, Mass., on Sept. 17, 1939; in 1950, the Souters moved to an old family homestead in the rural village of East Weare, N.H., a few miles west of Concord. Souter's father worked at a Concord bank. Weare was too small to have its own secondary school so David commuted to Concord High School, from which he graduated in 1957 and won admission to Harvard.

Following Harvard, Souter received a two-year Rhodes scholarship to Magdalen College at Oxford, where he completed a bachelor's degree in jurisprudence before entering Harvard Law School in 1963. Upon graduation in 1966, he happily returned home to New Hampshire to take an entry-level position with the well-respected Concord firm of Orr & Reno.

Law-office work gave Souter few opportunities for courtroom experience, and in late 1968 he eagerly enlisted as one of about 20 state assistant attorneys general. His first few years in the Attorney General's office were devoted more to criminal than to civil cases, but the most important development in Souter's young career came in 1970 when Gov. Walter Peterson of New Hampshire named Warren Rudman, previously his own legal counsel, to a five-year term as the state's new Attorney General.

Rudman quickly came to appreciate Souter as a "lawyer's lawyer" and within a few months named Souter his deputy. A gregarious politician, Rudman delegated much of the running of the office to Souter. Rudman's own mentor, Governor Peterson, was defeated for re-election in the 1972 Republican primary by Meldrim Thomson, an unpredictable conservative. Thomson's victory set off a decade-long ideological battle among New Hampshire Republicans, and although Rudman and Thomson quickly reached a grudging accommodation, one of

LEFT: DAVID BURNETT/CONTACT. RIGHT: JAMES COLBURN/PHOTOREPORTERS

conservative, not a political conservative."

Souter's main responsibilities was to insure the utmost professionalism in the office. As Souter explained to one young lawyer joining the staff: "We don't win cases. We don't lose cases. We *try* cases."

In 1976, with Rudman's term as Attorney General expiring, Rudman convinced Thomson to name Souter as his successor. Souter responded to the appointment by stressing that "the legal issues I feel most strongly about are not political ones." When reporters asked if he viewed the Attorney General's job as a steppingstone to a judgeship, Souter replied, "I'd have to decide if I were temperamentally suited to it."

As Attorney General, Souter named another Rudman protege, Thomas D. Rath, as his own deputy. The new post gave the 36-year-old Souter some public visibility; asked to deliver the commencement address at a small college, he reminded the graduates that "our whole constitutional history is a history of restraining power." However, when the idea was raised that the Attorney General's post be made elective rather than appointive, Souter termed the suggestion so "abominable" that "it sounds like something proposed by John Mitchell," Richard Nixon's convicted former campaign chairman and Attorney General.

Souter maintained a polite distance from Governor Thomson but, as the state's top law enforcement official, nonetheless was drawn into various controversies. When antinuclear demonstrators descended upon a partly constructed power plant at Seabrook on the New Hampshire coast, Souter took the lead in overseeing their arrests and prosecution. When legalized casino gambling was proposed for New Hampshire, Souter spoke out forcefully in opposition and later termed his successful effort "my greatest crusade."

Souter was popular with his staff, both because of the glowing professional reputation his and Rudman's appointments had won for the office and because of his friendly humility and wry humor. Outside the office, Souter — who was living with his now-widowed mother in Weare — pursued hiking and mountain climbing. His long walks around Weare expanded to serious treks up New Hampshire's Presidential peaks.

Early in 1978, Governor Thomson sought to fill a vacancy on the five-member New Hampshire Supreme Court with former Congressman Louis C. Wyman, but the Executive Council, the Colonial-era body charged with ratifying judicial nominations, declined to approve Wyman and several councilors suggested naming Souter to the seat. Thomson resisted and, seeking to eliminate Souter as an alternative to Wyman, offered instead to nominate Souter to a newly authorized judgeship on the Superior Court trial bench.

Faced with the choice, Souter hesitated. Thomson was not going to name him to the high court, and under longtime New Hampshire norms, almost every Justice appointed to the Supreme Court had been promoted from Superior Court. Souter could remain Attorney General for another two and a half years, but there was no reason to believe that whoever might be governor in 1980 would offer him a judgeship. With some ambivalence about becoming a trial judge simply as a steppingstone to an appellate post, Souter accepted Thomson's offer to nominate him and name his close friend Tom Rath his successor.

Souter's ascension to Superior Court also marked other milestones. First, his departure as Attorney General allowed him to begin dating a female lawyer in the office, Ann Cagwin. His romantic interest in Cagwin, his closest friends attest, was the most serious attachment of his life. No American is more discreet about his private life than David Souter, but when his relationship ended with Cagwin, who is now married and living in Maine, its demise left Souter emotionally crushed.

Left: Souter in his Court chamber, notable for lacking a computer and an electric desk lamp. Harlan Fiske Stone watches over him. Above: Kathryn Kolbert, who represented Planned Parenthood in the 1992 Pennsylvania abortion case, outside the Court.

Second, Souter's less burdensome workload as a judge allowed him to become the unpaid president of Concord Hospital's board of trustees. Before long, Souter was scheduling his Superior Court vacations so he could handle hospital affairs. For five years, the board presidency was "virtually a second job" and Souter later confessed that "at times the hospital's regulatory problems seemed to consume all of my time not otherwise spent on the bench or asleep."

Souter enjoyed the personal interactions his judgeship offered, particularly those with citizens serving as jurors. As a jurist, however, Souter was hard-nosed. For instance, he rejected a plea bargain that would have released on probation a young woman who had stolen a .357 Magnum revolver and instead sentenced her to nine months' imprisonment. He also was decidedly more rule-oriented than was generally the case under New Hampshire's informal courtroom customs. Word spread quickly, one lawyer recalls, that "you really had to know what you were talking about" when you appeared before Souter.

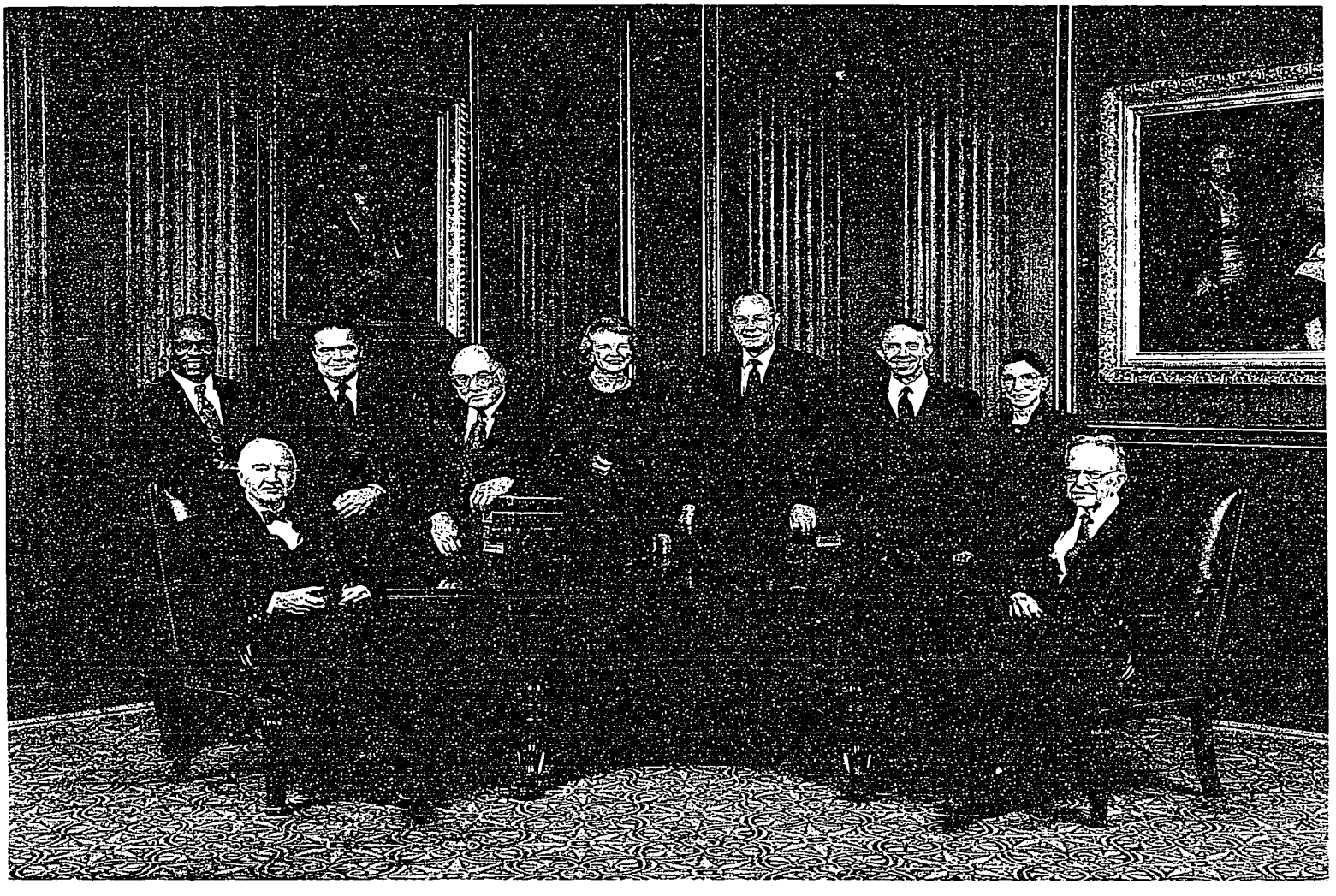
Even in Superior Court, that lawyer explained, Souter "was really an appellate judge sitting as a trial judge" and Souter filed many extensive though never publicly printed written decisions. The most significant of these was a 1981 ruling in State v. Barney Siel, in which Souter quashed several subpoenas issued to reporters by a local court acting at the behest of a criminal defendant. The New Hampshire Supreme Court later unanimously affirmed Souter's decision, commenting that "we adopt the well-reasoned position that the trial judge developed at length in his rulings."

But perhaps the best insights into David Souter's early years as a judge come from a posthumous appreciation he wrote concerning Laurence I. Duncan, a former New Hampshire justice. Duncan was a solitary, almost withdrawn man, with few close friends beyond his immediate family. But to Souter, Duncan's judicial record was that of "a consummate master craftsman of the law." Although Duncan was "the most private of men," Souter wrote in the July 1983 New Hampshire Bar Journal, "he would spend a lifetime quietly serving cultural and philanthropic organizations and the collegiate interests of his court." Souter added that Duncan thought "the world had a fair claim to the highest use of his power to bring order to human thought, for the sake of liberty and the common good. He satisfied the claim in full and saved the rest of his living for . . . his family and a very few others." Souter's conclusion was personally poignant: "He was my kind of judge. . . . He was an intellectual hero of mine, and he always will be." More than a decade later, a close Souter friend quietly stressed that "he's writing about himself."

Throughout Souter's years on the trial bench, Warren Rudman remained among his closest friends. Rudman won election to the United States Senate in 1980 after defeating a fellow Republican, John Sununu, in a hard-fought primary. After Sununu supported Rudman in the general election, Rudman returned the favor two years later in Sununu's successful gubernatorial campaign. Rudman never concealed his opinion that Souter was "the finest constitutional lawyer I've ever known," and when New Hampshire Supreme Court Justice Maurice P. Bois retired in mid-1983, Rudman immediately told Sununu that David Souter should be elevated to that court.

Sununu interviewed Souter and two other candidates before sending Souter's name to the Executive Council, which unanimously approved the nomination. Souter told reporters that the past five years had been "a very happy time," and later he would view his trial court tenure as the best experience of his professional life. But the promotion was exactly what he had long aspired

A JUSTICE EVOLVES **If David Souter has a**  **real secret, it's the diary.**



The 1993-94 United States Supreme Court, from left: Clarence Thomas, John Paul Stevens, Antonin Scalia, William H. Rehnquist, Sandra Day O'Connor, Anthony Kennedy, Souter, Ruth Bader Ginsburg and Harry A. Blackmun, who has retired.

to. A few days before his 44th birthday, David Souter was sworn in as the junior member of the New Hampshire Supreme Court.

The court that Souter joined in September 1983 contained two relatively young Thomson appointees, Charles G. Douglas and David Brock, and two older, less conservative men, the former Democratic Gov. John W. King and the political independent William F. Batchelder, who both had been named to the bench by Thomson's Democratic successor, Hugh Gallen. While Brock was not especially conservative, Douglas's far more pronounced ideology nonetheless featured a libertarian streak that in some criminal cases made the youthful senior justice paradoxically appear to be the court's most liberal member.

THE COURT WAS LOCATED IN A MODERN BUT somewhat isolated building across the Merrimack River from downtown Concord. At the end of each week in which cases had been heard, the justices would convene and take "straw votes" on each one. Then, in keeping with court tradition, the justices would draw lots from an antique silver pitcher in which the cases' docket numbers had been placed. If a justice drew a case in which he anticipated dissenting, the number would be returned to the pitcher and he would draw again, but otherwise each justice was responsible for writing the court's opinion in whichever cases he drew, irrespective of their subject matter or his preferences.

The court's egalitarian case assignment method obviated any battling over opinion-writing duties and forced justices to be generalists rather than specialists. Unanimity was the norm, and when written dissents were filed, no angry words ever appeared. In part, the justices' collegiality stemmed from the justices' regular interactions with one another; each working day the five would lunch together at the court.

The relative infrequency of dissent was also a product of the court's docket. Zoning disputes, commercial conflicts, utility rate increases and scores of routine criminal appeals — many involving family and/or sexual violence — constituted the regular staples of the New Hampshire court.

Souter quickly settled into the appellate routine. Reading the briefs in each case the week before oral argument, he would scribble questions on the covers. Prior to Souter's arrival, Chuck Douglas had been the most vocal member of the bench, but

TOP: SOUTER TAKING THE OATH AS FEDERAL APPELLATE JUDGE IN 1990; NEW HAMPSHIRE BOR

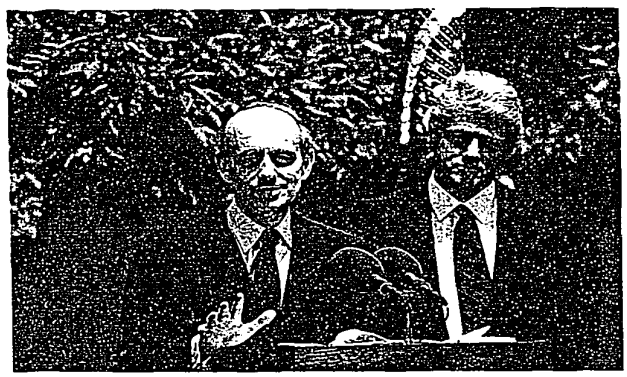
Souter soon equaled and then exceeded Douglas. Some lawyers, especially those representing criminal defendants, came to resent the persistent grilling they often received from the junior justice. James Duggan, the state appellate defender who appeared before the court more regularly than any other attorney, emphasizes that while Souter "would really hammer people," he nonetheless "was a pleasure to argue in front of" because his questions always focused on each case's toughest issues.

Especially in Souter's first year, he was slow to circulate drafts of opinions, in part because he, unlike most judges, did all his own writing rather than relying upon his two clerks. In one 1984 case, State v. Meister, in which the justices unanimously applied a 1981 precedent, Souter (whose own ruling as a trial judge had been reversed in the 1981 case by a 3-2 vote) filed a concurrence explaining that although he still agreed with the 1981 dissenters, "the consequences of what I believe was an unsound conclusion in that case are not serious enough to outweigh the value of stare decisis."

Souter's strong preference for judicial restraint, even in instances where his four colleagues felt differently, emerged most dramatically in two cases that raised the court's most hard-fought issue. The first, State v. Forrest Ball, had been argued before Souter's arrival. Following a new trend being championed by several other state supreme courts, Chuck Douglas used Ball — an appeal of a drug possession conviction where the defendant alleged that the police had not had "probable cause" to stop him — to rule that the New Hampshire court "has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution." The court would examine such independent state grounds as its first priority in every case where the issue appeared.

Souter believed that Ball's call for an expansive application of the New Hampshire Constitution could not be pursued without doing significant damage to the state constitution's text and traditions. In 1985, the Ball issue arose again in a case that highlighted Souter and his colleagues' differing perspectives on law enforcement. Donald Koppel and Norman Forest were 2 of 18 drivers whom the Concord Police Department had arrested for drunken driving during a six-month series of roadblocks that had stopped some 1,700 motorists. Both men appealed their convictions, arguing that the wholesale roadblocks — in which all drivers, not just erratic ones, were pulled over and questioned — violated the prohibitions against unreasonable searches and seizures contained in both the New Hampshire Constitution and the Fourth Amendment to the United States Constitution. All four of Souter's colleagues found that contention persuasive and concluded, in an opinion authored by David Brock, that "the State has failed to show that drunk-driving roadblocks produce sufficient public benefit to outweigh their intrusion on individual rights." Following Ball, they insulated their ruling from any United States Supreme Court review by declaring that "our holding rests solely on our interpretation of the New Hampshire Constitution."

Souter's dissent reflected considerable exasperation. Noting that the roadblocks delayed the average driver only some two minutes, Souter concluded that "the value of the roadblocks . . . significantly outweigh[s] the minimal disadvantage to the delayed drivers." There was no gain-saying that Souter had lost the analytical war over Ball, but a few years later his defense of D.W.I. roadblocks was vindicated by the United States Supreme Court in a case from Michigan.



Stephen Breyer, being introduced by President Clinton, likely will take his predecessor Harry Blackmun's place as a member of the Souter-Stevens-Ginsburg coalition.

Souter's colleagues and attentive lawyers appreciated his intellectual precision, but Chuck Douglas was not alone in viewing Souter as less inclined to favor individual rights claims than his colleagues. The state's appellate defender, James Duggan, and his then-deputy, Joanne Green, lost far more appeals than they won, and Green rues how Souter's opinions impressed her even when the outcomes were unwelcome: "I hated the fact that I agreed with his logic."

Nowadays, Chuck Douglas characterizes the David Souter of the mid-1980's as a "status quo, stare decisis conservative." At the time, Souter would not have quarreled with the characterization; a photo he gave one clerk was inscribed to "the conscience of a conservative these past two years, with gratitude from David, still the conservative." Some attorneys perceived more than a little competition between Douglas and Souter during oral arguments, and one court insider emphasizes that there was "no love lost between the two of them." Suddenly, however, in mid-1985, what promised to be a growing tussle for intellectual leadership of the court ended unexpectedly when Douglas returned to private practice, saying that the justices' $54,896 annual salary was too low.

Douglas's departure left Souter as the court's most powerful intellect. "He is by his nature a force at the table," one colleague explains. "When he came to the table, he had done his homework and knew his position." Souter's fellow justices, realizing Souter's "wonderful sense of humor," sometimes would tease him about the almost superstitious regularity of his behavior. Souter's habit of eating yogurt or cottage cheese and an entire apple, core and all, for lunch provided one splendid opportunity when someone brought in an article highlighting how apple seeds were potentially poisonous. As two still-sitting members of the court tell the story, from that day forward David Souter swallowed no more apple seeds.

Even a decade later, Souter is known to challenge the apple seed story in precise but good-natured detail: the article wasn't a news clipping brought in by another justice; it was a Dartmouth Medical School item Souter himself saw. The trace poison on the seeds was cyanide, not arsenic. Most important, since the article said seeds were harmful only in large quantities, he did not change his apple-eating habits, which continue to this day.

Souter's politely formal playfulness could manifest itself in thank-you notes handwritten in Latin or a bar of soap left on a clerk's desk the day after she had uttered a four-letter word.

IN MID-1986, CHIEF JUSTICE KING RETIRED, opening the door for what threatened to be the emotional climax of Souter's professional life. Brock, as the senior associate justice, was widely expected to be Governor Sununu's choice, given the controversy that had marked King's 1981 promotion over a more senior colleague in violation of unwritten tradition. Senator Rudman, however, mounted what one participant called "quite an effort" on Souter's behalf, and inside the court no one doubted that Souter was very interested in the center chair. One equally desirous colleague says the Chief Justiceship was Souter's "life ambition" and that Souter wanted it "in the worst way." A second justice agrees that "David wanted to be Chief Justice," but adds that "everyone wanted to become Chief Justice."

Sununu held 45-minute interviews with both Brock and Souter and then, in advance of the announcement, called Souter to say he was choosing Brock. Publicly, Souter suffered no embarrassment, for he had not been named as a possible choice, and news reports simply noted how "Brock Nomination Signals Return to Tradition of Seniority." Privately, however, Souter was deeply disappointed, and perhaps acutely wounded. One close observer called it "something of a slap," since Souter already was "intellectually the leader," *Continued on page 52*

ASSOCIATION. LEFT: THE SUPREME COURT HISTORICAL SOCIETY; RIGHT: MARTIN SIMON/SABA.

Continued from page 43

and another court insider thought Souter "deeply resented" Brock's selection. But Souter was inclined to think that things always happen for the best, and in the wake of his greatest professional disappointment, he began to ponder whether there might be life *after* the New Hampshire Supreme Court.

Few cases on the court's docket offered scintillating fare, but in one energetic 1987 dissent from his colleagues' unwillingness to follow a 1973 precedent, Souter emphasized that "only the weightiest of reasons could justify a refusal to honor the expectations" of those who "should be entitled to rely on the 1973 decision of this court."

Such opinions aside, however, for Souter the late 1980's was a time of increased introspection. One colleague thought he was "very unhappy" on the New Hampshire court, and not so much with mundane cases as with being "doomed to be an associate under David Brock." By 1989, close friends were certain that Souter was "ready for a new challenge." Privately, Souter admitted to friends that he was toying with ideas for a second career or extensive world travels, but Warren Rudman focused on a possibility much closer to home: New Hampshire's one judge on the Federal First Circuit-Court of Appeals, Hugh Bownes, was old enough to move to semiretired "senior status." When he did, Rudman, as New Hampshire's most influential Republican senator, would effectively control the Bush Administration's selection of his successor. Some intimates believe Souter initially was ambivalent about the Federal judgeship, but by the time that Bownes did "go senior" in the winter of 1989-90, any hesitation had disappeared. The First Circuit would offer a greater variety of cases than New Hampshire, and Boston — the First Circuit's home city — featured cultural attractions and was a manageable drive from Weare. A brief, almost pro forma hearing before the Senate Judiciary Committee was soon followed by unanimous Senate confirmation, and on May 25, 1990, David Souter was sworn into office by First Circuit Chief Judge Stephen Breyer.

SOUTER SPENT THE EARLY summer setting up his new office in Concord's Federal building and in June he traveled to Boston for his first sitting as a circuit judge. Then, early one Sunday afternoon in late July, a telephone call interrupted him at his Concord office: C. Boyden Gray, George Bush's White House counsel, explained that the President wanted to see Souter on Monday and Souter should fly to Washington that evening.

Souter had heard Friday's news of the retirement of Supreme Court Justice William J. Brennan and he knew that three years earlier Rudman had placed his name on the Reagan White House's list of Court prospects prior to the nomination of Justice Anthony Kennedy. Gray's call, however, was totally unexpected, as was the prospect of a face-to-face Presidential interview the next day. Souter's first reaction was to phone Rudman: "What have you done to me now?" he asked his longtime patron. Rudman gave him a pep talk and explained how Gray had called on Saturday to request a recommendation letter; Souter was on a Presidential short list of just four names. Then, a few minutes later, Souter called Rudman back: was it possible to fly directly from Manchester to Washington? Yes, Rudman said. Finally, after some reflection, Souter called for a third time: the White House ought to know that he would *not* discuss how he might rule in future cases. Rudman assured him no such questions would be posed and told Souter he'd take him to the airport for his 6 P.M. flight.

An aide to Attorney General Dick Thornburgh met Souter's plane and took him to another staff member's home to have dinner and spend the night. The next morning, Thornburgh's aide took Souter to the White House, where Boyden Gray asked him personal background questions aimed at exposing any skeletons. Unbeknown to Souter, Federal appellate Judge Edith H. Jones of Texas was also in the White House, undergoing similar scrutiny; over the weekend George Bush had narrowed his short list to two by deleting Federal appellate Judges Clarence Thomas and Laurence Silberman, both of Washington.

At 1:30 P.M., Souter was ushered into the Oval Office for a 45-minute meeting with Bush, Thornburgh, Gray and the White House chief of staff, John Sununu, who as New Hampshire Governor had named him to the state Supreme Court but had also preferred David Brock for Chief Justice. Bush and his aides had already interviewed Jones, and at the conclusion of the Souter meeting, those four, joined by Vice President Dan Quayle, spent an hour debating the pros and cons of each finalist, with Bush asking Quayle and Sununu to make the case for Jones and Thornburgh and Gray for Souter. Jones had a more conservative reputation than Souter, but Bush's aides feared that her ideological renown would hamper confirmation and the President had been highly impressed by Souter's intellectual seriousness. Bush spent almost an hour pondering the choice privately before deciding, and at 4:15 P.M. Souter was summoned back to the Oval Office to be offered the nomination. At 5 P.M., with a visibly stunned David Souter at his side, George Bush announced the selection in the White House press room.

Souter's transformation from obscurity to national celebrity was the greatest emotional shock he had ever experienced. That evening, Warren Rudman took his dazed friend to dinner before Souter turned in on a cot in Rudman's Southwest Washington apartment. Having anticipated only a one-day visit to Washington, Souter had just the suit he'd worn on Monday, plus a second tie, to carry him through the following three days of senatorial courtesy calls. Only on Friday did a shellshocked David Souter return home.

After a visit to his mother, who now lived in a Concord retirement community, Souter spent one night in Weare before heading to Tom Rath's lake-front summer home to escape the journalists descending upon Concord. Reporters failed to distill any clear ideological messages from Souter's New Hampshire Supreme Court opinions, but some seemed unable to grasp even the vast political difference between being a protégé of Warren Rudman rather than of Meldrim Thomson or John Sununu. Rudman proclaimed that "history will prove this to be one of the greatest nominations of all time," but he admitted that Souter led "an almost monastic life." Rudman emphasized that if Souter "has any fault . . . it's that he's worked too hard all his life." Some journalists were more interested in Souter's personal life than in his professional record, and Souter's closest friends soon became intensely angry at several reporters' preoccupation with Souter's "bachelor" status.

Souter found the intrusive media scrutiny traumatic. "This is the biggest mistake I've made in my life," he told one friend, and to another he confessed that "this has been the worst week of my life." By early August, with Senate Judiciary Committee confirmation hearings scheduled for mid-September, more and more speculation focused upon Souter's position on Roe v. Wade. New Hampshire's other United States Senator, Gordon Humphrey, an extreme conservative who barely knew Souter, anticipated that he would vote to overturn Roe. But the more astute James Duggan observed that even if Souter disagreed with Roe, "Whether he would be willing to overturn the decision . . . is a different proposition entirely." Liberal publications trumpeted the news that the conservative Free Congress Foundation had distributed a memo quoting John Sununu as telling one of its leaders that Souter's nomination was "a home run" for conservatives. Privately, as Sununu recently told this author, his belief that Souter would not uphold Roe was based upon "very detailed" confidential assurances from W. Stephen Thayer 3d, Souter's conservative junior colleague on the New Hampshire Supreme Court.

When the Senate Judiciary Committee hearing began on Thursday, Sept. 13, Senators and reporters quickly realized that Souter was an impressively erudite nominee. Souter spent three full days in front of the 14-member committee, and amid all the concepts and issues he was asked to address, two, in retrospect, stand out as most revealing: liberty and precedent. Most specifically, Souter stressed that in the due process clause language of the 5th and 14th Amendments, "the concept of liberty is not limited by the specific subjects" listed in the Bill of Rights. In protecting personal liberty, Justices had to search for "principles that may be elucidated by the history and tradition of the United States. And ultimately the kind of search that we are making is a search for the limits of governmental power."

More generally, Souter explained that in reading the Constitution, "my interpretive position is not one that original intent is controlling, but that original meaning is controlling," in that Justices ought to identify the "principle that was intended to be established as opposed simply to the specific application that that particular provision was meant to have by, and that was in the minds of those who proposed and framed and adopted that provision in the first place." He summed up his perspective in one memorable sentence: "Principles don't change but our perceptions of the world around us and the need for those principles do."

Souter's comments about precedent were potentially inseparable from the looming issue of Roe. He highlighted the concept of reliance: "Who has relied upon that precedent and what does that reliance count for today?" If a court reconsidered a precedent, it was important for judges to ask "whether private citizens in their lives have relied upon it in their

own planning to such a degree that, in fact, there would be a great hardship to overruling it now."

In his second day of testimony, Souter addressed Roe directly. "I have not got any agenda on what should be done with Roe v. Wade if that case were brought before me. I will listen to both sides of that case. I have not made up my mind." He added, however, that when an existing case was attacked, any reconsideration involved not only the correctness of the earlier decision but also "extremely significant issues of precedent." But regarding abortion itself, he emphasized that "whether I do or do not find it moral or immoral will play absolutely no role in any decision which I make, if I am asked to make it, on the question of what weight should or legitimately may be given to the interest which is represented by the abortion decision."

Legal observers reacted favorably to Souter's testimony, with Walter Dellinger, then a Duke University law professor, commenting that Souter was "the most intellectually impressive nominee I've ever seen." Most Senators agreed, and in late September the Judiciary Committee ratified Souter's nomination by a vote of 13-1. On Oct. 2, the full Senate followed suit by a margin of 90 to 9, and on Oct. 8, 1990, David Hackett Souter was sworn in as an Associate Justice of the United States Supreme Court.

Unfortunately for Souter, the Court was already one week into its 1990-91 term, and from the first day he arrived, Souter found himself playing an unwinnable game of catch-up. There was a huge volume of petitions to review and briefs to read, and Souter's relative unfamiliarity with Federal statutory issues made the process all the more difficult. He soon realized he was facing the most difficult professional challenge of his life.

Throughout the fall, Souter continued to room with Rudman before taking his own apartment at the same complex, but he spent almost all of his waking hours, on weekends as well as weekdays, at the Court. Asked about his Washington social plans by a New Hampshire magazine, Souter acknowledged that "I'm not a very sociable individual except among a fairly close circle of friends," most of whom lived in New Hampshire. And, he added, "I'm not going to change my personality as a result of getting a new job."

Souter's friends appreciated that the transition to Washington was more difficult than he had anticipated. Given Souter's "reverence" for the Court, Tom Rath explained, Souter was not only "in awe of the challenge" but also felt that "his first test was to satisfy himself that he was worthy" of the job. Those who saw him thought he looked more exhausted than ever before; those who phoned him could sense he was worried about keeping up with the caseload. Rath identified the stress succinctly: "David Souter's harshest critic is David Souter."

By the spring of 1991, journalists were wondering if Souter was foundering; prior to late May, only *one* case in which he had written an opinion had been decided, and as of mid-June, he had issued only five more opinions. Finally, in the last week of the term, another half-dozen Souter opinions appeared.

At the end of the term, a spent David Souter headed home to New Hampshire, grateful for a three-month respite from Washington. When he returned in September to begin the new term, he was fully prepared. The difference quickly showed in the pace and scale of Souter's output, and by the time Casey was argued in late April 1992, Souter had found his equilibrium. Even though he missed New Hampshire, he loved the Court and was a well-liked figure within the Court building.

Casey was the most important case of the 1991-92 term, but there were other impressive Souter successes. He, Kennedy and O'Connor also came together, again joined by Blackmun and Stevens, in a crucial establishment clause case, Lee v. Weisman, where they struck down the recital of religious prayers at public-school graduation ceremonies. Souter also stepped to the fore in humorously taking on the rhetorical excesses and interpretive shortcomings of Antonin Scalia, the intellectual leader of the Court's right wing. Indeed, of the term's 108 cases, Souter dissented in only 8. But Casey was the highlight of many a year, and both before the decision came down, as well as after, David Souter did not for a moment doubt the correctness or the importance of the trio's achievement.

IN THE IMMEDIATE AFTERmath of Casey, no one who knew David Souter well, irrespective of their position on abortion, was surprised by what Souter and his two allies had said and done. From

Chuck Douglas ("I was not surprised by the Casey decision") to James Duggan ("It should not be a surprise to anyone that David Souter is not voting to overturn precedent") to all of Souter's close friends, the reactions were virtually identical.

What Casey boiled down to, Tom Rath said, was "how the judiciary can bind a society together." David Souter, he told one questioner, "has a vision of the Court as a moderating influence," as "a conciliator and legitimizer," and that perspective represented "the essence of David Souter. That's the David Souter I've heard many a night on porches."

Another close friend, echoing how Casey "wasn't a surprise," especially given "David's respect for precedent," stressed that people did not appreciate how "David's a judicial conservative, not a political conservative." Jane Cetlin Pickrell — the former clerk who had received the thank-you note in Latin, and the bar of soap — felt similarly. He "may have had doubts about Roe," because "we debated that at some point," but "I knew what he would do with Roe v. Wade," and Casey had proved her correct.

David Souter was happy to have the constitutional battle over abortion behind him. The 1991-92 term had been vastly different from 1990-91, and in Casey the Court had triumphantly passed a crucial test. Given the workload, there was no way around having his clerks do some opinion drafting, but the amount of ink he added to almost every line of their drafts left the clerks with no doubts whose opinions they really were.

Neither the 1992-93 or 1993-94 terms would prove as significant as 1991-92. The most striking statistic of 1991-92, as Casey exemplified, was the degree to which Anthony Kennedy had shifted away from Rehnquist and toward Souter and O'Connor. But in the following year, as Kennedy reverted to greater agreement with the Chief Justice, Souter found himself on the minority side of far more split decisions.

In New Hampshire, some defense attorneys were pleasantly stunned by Souter's majority opinion in a Miranda-related criminal case, Withrow v. Williams. But Souter's most important opinion of 1992-93 was a concurrence in Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, a free-exercise clause challenge to a municipal prohibition of animal sacrifices that was targeted against Santeria religionists. Souter's long concurrence in Lee v. Weisman a year earlier had signaled his special interest in the First Amendment's separation of church and state, but Souter's Lukumi Babalu concurrence was striking in how it explicitly called for the Court to reconsider its reigning free-exercise clause precedent, a 1990 decision entitled Employment Division v. Smith.

At his confirmation hearing, Souter had said only that "my own religion is a religion which I wish to exercise in private and with as little ... expression in the political arena as is possible," but he now made it clear that Smith insufficiently protected religion from government intrusion. Since earlier cases contained "a free-exercise rule fundamentally at odds with the rule Smith declared," there now existed "an intolerable tension in free-exercise law." Quoting Felix Frankfurter's reminder that stare decisis "is a principle of policy and not a mechanical formula," Souter's message was obvious — Casey's affirmation of Roe notwithstanding — that Smith was a disposable precedent.

The 1992-93 decline of the Souter-O'Connor-Kennedy trio led some observers to highlight how Kennedy had moved back rightward, but Paul Barrett of The Wall Street Journal contended that actually the "most striking development" was Souter's "emerging liberal streak."

Once the 1993-94 term got under way, evidence seemed to mount that Barrett's characterization was no overstatement. James Duggan believed a Souter concurrence concerning the use of uncounseled convictions for cumulative sentencing in Nichols v. U.S. was almost "180 degrees different" from a 1984 Souter opinion, State v. Cook. A few weeks later, one New Hampshire Supreme Court insider, reacting joyously to a Souter concurrence on behalf of fellow Justices Blackmun, Stevens and Ruth Bader Ginsburg in a Miranda-oriented military murder case, Davis v. U.S., vehemently exclaimed that "that was not the David Souter that sat on this bench!"

But the most dramatic 1993-94 evidence of Souter's increasingly influential intellectual leadership of the Court's six mainstream members was the growing number of combative references that Antonin Scalia was directing to him in multiple opinions. Supreme Court insiders emphasize that in per-

Continued on page 64

Continued from page 55

son, the two justices "like each other" and "kid around," but based upon the written record, there is little doubt that Scalia now realizes — much as Felix Frankfurter did after the advent of Earl Warren and William Brennan — that he has decisively lost the struggle for intellectual leadership of the Court to someone who was not supposed to be a major player.

In one late June habeas corpus ruling, Heck v. Humphrey, three contentious Scalia footnotes criticized Souter by name; three days later, in one of the term's leading cases, Board of Education of Kiryas Joel Village School District v. Grumet, Scalia in angry dissent dismissed Souter's majority opinion as "facile" and petulantly invoked Souter's name again and again in criticizing the outcome. Seemingly both provoked and bemused, Souter responded that "Justice Scalia's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining."

The 1993-94 term witnessed Souter's highest output of his four years on the Court — 25 opinions (8 majority, 12 concurrences and 5 dissents), more than double the number he wrote his first year. In part, Souter's increased productivity reflected what he told friends was a lesson he had learned in each of his three judgeships: only after three years does one get fully up to speed.

But even though Souter was now completely at ease, the results of the 1993-94 term showed that he and his three most regular allies — Blackmun, Stevens and Ginsburg, who had been together in 11 of the year's 14 5-4 cases — had been the losing foursome in 8 of those 11, prevailing only in 3 criminal cases where they were joined by Kennedy. And if one looked at the 35 cases where Blackmun and Rehnquist had come out on opposite sides, perhaps Souter's "emerging liberal streak" was no exaggeration at all: While Ginsburg had sided 19 times with Blackmun and 16 with Rehnquist (and O'Connor only 7 with Blackmun and 27 with Rehnquist), Souter had been with Blackmun in 24 of the cases and with Rehnquist in only 11.

Right-wing Court watchers rued Souter's evolution. Thomas Jipping of the Free Congress Foundation, reminding the conservative Washington Times that "John Sununu told me directly that Souter would be a 'home run' for conservatives," offered a sarcastically dismissive metaphor: "The first term, I thought he might be a blooper single. After last year, I thought he was a foul ball. Now I think he's a strikeout."

But Linda Greenhouse of The New York Times saw it differently: "Souter's brand of moderate pragmatism and his willingness to engage Justice Scalia in direct intellectual combat is probably as responsible as any single factor for the failure of the conservative revolution."

A CHAGRINED JOHN SUNUnu readily concedes that he is "very surprised" — and deeply disappointed — by David Souter's evolution. In sharp contrast, however, former President Bush tells this author that he is proud of Souter's "outstanding" service and "outstanding intellect." Some antagonists, Bush recalls, greeted the nomination by dismissing Souter as "a predictable, extreme right-winger." Now Bush quietly exults over "how wrong his critics were. This quiet decent man will serve for years on the Court, and he will serve with honor always and with brilliance."

The arrival of new Justice Stephen Breyer will make for few changes in the Court's basic lineup. In controversial cases, Breyer likely will take his predecessor Harry Blackmun's place in the Souter-Stevens-Ginsburg quartet. Although Breyer will be more centrally involved in the Court's discussions than was Blackmun, the highly pragmatic Breyer likely will make few waves on what Harvard's Laurence Tribe calls a "fundamentally unadventuresome and cautious Court." The widely anticipated retirement of John Paul Stevens after the Court's 1994-95 term is expected to result in his replacement with a similarly mainstream voice, and only an unanticipated departure from the more conservative ranks of O'Connor, Kennedy, Rehnquist, Scalia and Thomas is likely to generate any significant ideological shift in the Court's alignment. If none of those justices leave prior to the 1996 Presidential election, the eventual timing of William Rehnquist's departure as Chief Justice — generally expected to occur after, rather than before, the 1996 balloting — looms as the next turning point in the Court's history. Whoever replaces Rehnquist as Chief

Continued on page 67

Continued from page 64

Justice — and whoever as President gets to make that choice — will be responsible for piloting the Court into the next century.

One of Souter's former New Hampshire judicial colleagues argues that Souter in his four Washington years has undergone "a remarkable jurisprudential transformation" into a "kinder, gentler" judge. Virtually all of Souter's personal friends reject that characterization as overstated; Tom Rath firmly contends that "I don't think David has changed as a judge."

But if Souter is indeed evolving as a jurist, personally little has changed from his days in Concord. "He was the same person as Attorney General as he is now," says one former assistant and longtime friend. Warren Rudman attests that Souter's "wonderful dry sense of humor" remains unchanged, and someone who has come to know him well since 1990 stresses that "he's a very funny fellow." Tom Rath insists that "David Souter hasn't changed a bit" and recalls how this pastNew Year's, Souter joined the Raths and another couple for a five-hour dinner of lasagna and wine. "It was exactly the same" as years past, Rath says almost in amazement. "He's still David" and "his real life is here."

But spending nine months a year in Washington rather than Weare has of course changed Souter some. One recent acquaintance expresses mild surprise at "how well informed he is about the way the world is," and an old friend explains that "he's become much more contemporary" in his cultural awareness. Asking if a listenerknows the New Hampshire Supreme Court story about a befuddled Souter saying that the only Garfield he'd heard of was a President, not a cat, the friend explains that Souter now is able — with prompting — to name all of the Teenage Mutant Ninja Turtles.

Another difference in Souter's Washington life is the importance that running has assumed in the relatively few waking hours when he's not at the Court. Souter aims to run at least four nights a week at Fort McNair's outdoor track, near his apartment, but even while jogging within McNair's guarded walls, one can sometimes hear the sounds of real-world gunshots not far away.

One change that Souter dislikes intensely is being recognized in public. Becoming a Justice has meant "losing his ability to be a private person," one friend says, and another recounts with distress how a few days after Casey, as they walked across Boston Common, "you could feel people turning to look." Especially in Boston, Souter enjoys going out in public — taking his goddaughter, Jane Cetlin Pickrell's 6-year-old, for swan boat rides in the Public Garden or afternoon tea at the Ritz-Carlton — and while he resents losing his anonymity, his innate politeness compels him to grin and bear it.

If David Souter has a real secret, it's the diary — the daily journal he has kept *since age 13*. In 1990, both The Los Angeles Times and The Concord Monitor mentioned it in passing, and former colleagues on the New Hampshire court nervously joke about what it may have on them. Friends say Souter's diary writing — which is largely devoted to recounting stories told by others, rather than the day's events — has increased sharply in Washington, in part because of the inspiration provided by such memorable storytellers as the late Thurgood Marshall. Intensely worried that widespread awareness of the diary could result in a burglary, Souter keeps none of it in Weare or in his Washington apartment.

Souter reveres the Court, and while he reads few newspapers, when clerks or friends show him published critiques of his colleagues — whether right-wing columnists trashing Anthony Kennedy or neo-liberals disparaging the careers of Byron White and Harry Blackmun — Souter can react angrily. And Souter's respect for the Court's institutional privacy extends to deep dismay at any personal publicity. "He doesn't like his friends speculating about his judicial opinions," stresses one intimate, catching himself doing just that.

"David is a much better politician than people give him credit for," one of his closest friends volunteers in explaining Souter's influence and success on the Court. Reluctantly, several acquaintances confess that Souter privately has talked about the possibility of stepping down at age 65 — 10 years hence — but none of them take the comment seriously. Personally happy and professionally fulfilled, David Souter likely will help lead the Court well into the second decade of the 21st century. Says one friend, "A man more comfortable with himself would be hard to find." ■