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John J. Capowski
*Widener University School of Law*

# Commentary

# Justice Brennan's Legacy and the Potentially Jilting Souter

by John J. Capowski, Esq.

Many of last term's Supreme Court decisions were both of great importance and fascination. However, the most fascinating and most important decision concerning the Court may have been who shall be on the bench.

Justice Brennan's departure from the Supreme Court in 1990 ended his nearly thirty-four years as a major force on the Court. One can see the dramatic changes in the Court during his tenure simply by remembering the justices who were on the Court when Brennan was appointed in 1956, none of whom is on the Court today — Earl Warren, William O. Douglas, Hugo Black, John Harlan, Tom Clark, and one of Brennan's professors at Harvard, Felix Frankfurter. Justice Brennan's impact during his years on the Court was so great that Mark Tushnet, a constitutional law scholar at Georgetown University, said of Brennan, "[f]rom his appointment on, he was the Court's central figure. . . . People call it the Warren Court, but in many ways, it was the Brennan Court. On all the key issues, he put together the coalitions and persuaded the others."[1] While persuading the other justices, Brennan earned a reputation as a supporter of civil rights, abortion rights, and as an uncompromising opponent of the death penalty. His impact can be seen in two of the Court's best known opinions, ones in which he authored the majority opinions — *Baker v. Carr*[2] and *New York Times Co. v. Sullivan*.[3]

*Baker* was the landmark reapportionment case that established the principle of one person — one vote. Before *Baker,* rural areas had disproportionate control in most state legislatures. For example, in Maryland, Harry Hughes, the state senator from Caroline County, represented approximately 20,000 persons while a young state senator from Baltimore City, Joseph Curran,[4] represented about 300,000. Although the one person — one vote principle of *Baker* seems obvious with hindsight, it was achieved over prophecies of impending chaos from Justice Frankfurter and others.

The principles developed in *New York Times Co. v. Sullivan,* the landmark libel and first amendment case, also now seem obvious. The case arose from an effort by Alabama officials to keep the national press from covering the civil rights struggles in the early '60s, a time when libel was outside the first amendment freedoms of speech and press. Justice Brennan found that the libel label could not be used to subvert "the central meaning of the first amendment."[5] He helped preserve the right to criticize public officials and aided the civil rights struggle.

In addition to his legacy in guiding the outcomes of cases, Justice Brennan helped to establish a jurisprudence that views the Constitution as a growing set of principles. In a 1985 speech at Georgetown University he said:

> Current justices read the Constitution in the only way that we can: as twentieth-century Americans. . . . [T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[6]

In a speech before the New York City Bar Association in 1987, he told the group that constitutional interpretation "demands of judges more than proficiency in logical analysis. It requires that we be sensitive to the balance of reason and passion that mark a given age and the ways in which that balance leaves its mark on everyday exchanges between government and citizen."[7] Justice Brennan's view of constitutional interpretation contrasts markedly with the view of those now termed "originalists." Anna Quindlan, in a column in the *New York Times,* described one originalist as "a fan of the framers, those increasingly popular guys who actually made up the Constitution and whose intent has become a matter of great moment to some jurists . . . . We have judges who talk about the framers as though they played squash with them regularly."[8]

The changes in the Court's personnel and how these changes have affected the Court's decisions can be seen in the record of Justice Brennan's dissents and in his alignment with chief justices. When Justice Brennan joined the Court in 1956, he rarely dissented and was most often aligned with Chief Justice Earl Warren. In later years, Justice Brennan became one of the Court's most frequent dissenters. When he could not convince his fellow justices, he said he was writing for future generations. He and Chief Justice Rehnquist were on opposite sides in all but one of the Court's thirty-seven 5-4 decisions during the Court's last term.[9]

Justice Brennan will also be missed on the Court for his skills as a coalition builder. A prime example of this skill is the 5-4 majority opinion he authored in *Metro Broadcasting, Inc. v. FCC*[10] that affirmed the constitutional power of Congress to devise affirmative action programs. Justice Brennan's skill and persuasion convinced Justices White and Stevens to join in the opinion despite their anticipated opposition based on earlier decisions. Justice Souter, in

his testimony before the Senate Judiciary Committee, described Justice Brennan as "one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have."[11] Justice Brennan surely will be missed by supporters of affirmative action, the right to abortion, the separation of church and state, and strong first amendment freedoms.

Given Justice Brennan's prominence on the Warren Court and the positions he took, it is hard to think of Justice Souter as his replacement. It may be even more difficult to predict how Justice Souter, the youngest justice, dubbed "the stealth nominee" by Alabama Senator Howell Heflin, will decide some of the major controversies likely to reach the Court during his tenure.

However, one thing is clear, Souter will take his position on the far left of the Court. This probably surprises those who are not familiar with the seating arrangement of the Court. The newest justice customarily sits on the left of the Chief Justice and with the departure of Brennan, the most senior justice, some other members of the Court will move right. This move to the right may not solely reflect a seating change, for it is difficult to predict where Justice Souter will sit ideologically.

Justice Souter, during his testimony before the Senate Judiciary Committee, described himself as an "interpretivist" who searches for "principle" when deciphering the Constitution.[12] He appeared to repudiate "originalism" when he said, "we know that the tenth amendment today is something we can't look at through the eyes of the people who wrote it. Any approach to the tenth amendment today has to take into consideration constitutional developments outside the framework of the tenth amendment which would have astonished the framers."[13]

Justice Souter seemed to eschew strict constructionism when he described the ninth amendment, a constitutional source for the right to privacy, as evidence that the list of rights in the Constitution "was not intended to be in some sense exhaustive."[14] Justice Souter's testimony contrasted sharply with the view of Judge Robert Bork who had derided the amendment as a "water blot on the Constitution."[15] Justice Souter went on to say that he accepted the right to privacy as fundamental under the facts of *Griswold*,[16] but balked at further discussion.

Justice Souter disappointed conservative senators when he was asked about instances where the Supreme Court had improperly created constitutional rights. Appearing unable to come up with an example, he launched into a defense of the *Miranda* decision[17] and other criminal law rulings of the Warren Court. Senator Charles Grassley, an Iowa Republican involved in the questioning, had cited these cases as examples of improperly created rights.

Justice Souter's praise of the Warren Court's criminal rulings surprised not only conservative senators but also those familiar with his criminal law decisions. It is in this area that Justice Souter has left the strongest paper trail, and his decisions have generally supported the state's position. Adding to the enigma, he recently joined the Supreme Court's liberals in a 5-4 decision setting aside a Florida death sentence.[18] The case is interesting because of Justice Souter's alignment with Justices Marshall, Stevens, and Blackmun. However, because of its unique facts, the case is a poor predictor of how Justice Souter will rule in future death penalty cases. Rather, it may have more to say about how much deference he will give to state court decisions.

***"Brennan surely will be missed by supporters of affirmative action, the right to abortion... and strong first amendment freedoms."***

Justice Souter's testimony, like his position in the Florida death penalty case, may ease the concerns of many moderates and liberals who were thinking, "any friend of John Sununu is no friend of mine." However, testimony, during confirmation hearings is not always telling. When Justice Kennedy, as a nominee, was questioned about his views on the right to privacy, he said that the Constitution's Due Process Clause "is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage."[19] Now, as a justice on the Court, he appears ready to overturn *Roe v. Wade*.[20] However, Justice Brennan surprised many after his confirmation hearing, including President Dwight Eisenhower who appointed him and who reputedly referred to Brennan's appointment as his worst mistake.

Justice Souter's testimony before the Senate Judiciary Committee leaves many unanswered questions, and his first questions to those appearing before the Court provide us with only scant information. Justice Souter's first questions from the Supreme Court bench came in *Rust v. Sullivan*,[21] a case that challenged federal regulations barring all discussion of abortion in family planning programs that receive federal money. When Solicitor General Kenneth Starr argued that the regulations properly prohibited a doctor from recommending abortion, even where pregnancy poses a serious health threat, Justice Souter stated, "you are telling us that a physician can't perform his usual professional responsibility. You are telling us that the secretary in effect may preclude professional speech."[22] Justice Souter went on to question Starr about whether the regulations went beyond the statute. His questions and comments in this case, where the constitutional status of abortion was not directly an issue, lead one to believe that Justice Souter is not an idealogue on that issue and that he is likely to use standard principles of interpretation.

While the verdict on Justice Souter is not close to being in, for those of us who would like to see the legacy of Justice Brennan continue, one can hope that George Bush might some day have to take a page from President Eisenhower and say: "Read my lips, David Souter was the worst mistake I ever made."

**Endnotes**

[1]Greenhouse, *An Activist's Legacy: From Personal Liberties to Voting Rights, Brennan Led Way in Changing the Nation,* N. Y. Times, July 22, 1990, at 1, col. 5.

[2]369 U.S. 186 (1962).
[3]376 U.S. 254 (1964).
[4]J. Joseph Curran, Jr. is now the Maryland Attorney General.
[5]*New York Times Co. v. Sullivan,* 376 U.S. 240, 273 (1964).
[6]Brennan, *The Constitution of the United States: Contemporary Ratification,* 27 S. Tex. L.J. 433, 438 (1986) (originally delivered as a speech at Georgetown University on Oct. 12, 1985).
[7]Greenhouse, *supra* note 1, at col. 4.
[8]Quindlen, *Justice and Mercy,* N.Y. Times, July 29, 1990, at E19, col. 6.
[9]Greenhouse, *supra* note 1, at col. 4.
[10]*Metro Broadcasting Inc. v. FCC,* 110 S. Ct. 2997 (1990).
[11]Lewis, *Souter Seems Sure to Win Approval, Key Senators Say,* N. Y. Times, Sept. 15, 1990, at 1, col. 1: Buckley, *The Valor of Judge Souter: Comparison of Confirmation Hearings of David Souter and William J. Brennan,* 42 Nat'l Rev. 94 (Oct. 15, 1990).
[12]*Excerpts from Senate Hearings on the Souter Nomination,* N. Y. Times, Sept. 18, 1990, at B6, col. 3.
[13]Greenhouse, *Souter Tacks Over Shoals: Bork's Defeat Echoes as Questioning Starts,* N. Y. Times, Sept. 14, 1990, at B5, col. 1.
[14]*Id.*
[15]Lewis, *Abroad at Home; Respecting the Court,* N. Y. Times, Sept. 21, 1990, at A31, col. 5.
[16]*Griswold v. Connecticut,* 351 U.S. 479 (1965).
[17]*Miranda v. Arizona,* 384 U.S. 436 (1966).
[18]*Parker v. Dugger,* 111 S. Ct. 731 (1991).
[19]Greenhouse, *Opponents Find Judge Souter Is a Hard Choice to Oppose,* N.Y. Times, Sept. 9, 1990, at E4, col. 6.
[20]*Roe v. Wade,* 410 U.S. 113 (1973).
[21]111 S. Ct. 1759 (1991).
[22]Greenhouse, *Souter Questions a Curb on Doctors: Justices Skeptical of Federal Bar to Advice on Abortion,* N. Y. Times, Oct. 31, 1990, at A1, col. 3.

**John Capowski** is the director of Education and Training for the Maryland Office of the Attorney General. This article is based on comments made at the 1990 annual meeting of the Maryland Office of the Attorney General. The views expressed do not necessarily reflect those of the Office of the Attorney General nor the *Law Forum.*