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## ‘No More Souters’ Degrades a Non-Blinking, Honest Judicial Style

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*Former Souter clerk Kermit Roosevelt writes that Justice Souter avoided zingers and didn't adopt a theory like originalism, but instead believed that judges must confront difficult questions and wrestle with them honestly.*

When Justice David Souter retired in 2009, the public understanding of him had already taken a pretty definite form. Souter was quirky, people thought, an 18th- or 19th-century man somehow catapulted onto the modern Supreme Court. He wrote his opinions longhand with a fountain pen and ate yogurt and apples for lunch, including the cores. He fled Washington for his beloved New Hampshire as soon as the court's term ended.

The stories were true, and I could add more—how he scorned overcoats, even in winter; how he wrote me a note on a napkin I'd left on my desk, rather than waste a sheet of paper. He would let his office get dark in the evenings and read by moonlight at the window, rather than squander electricity by turning on the lights.

It was all colorful and amusing, but it missed the important part, which was that his personal quirks came from a true humility and authenticity. He did not think of himself as more important than anyone else: Even as a Supreme Court Justice he didn't feel entitled to use more paper or electricity than he needed. He felt uncomfortable in a Washington social scene that valued people by the positions they held.

On his judging, the reviews were more mixed. The Republicans who nominated him were disappointed that he strayed from the party line. “No more Souters” became a rallying cry: With future nominees, they would make sure to know what they were getting. Even people who were sympathetic to his independence lamented that he hadn't written more memorable lines or high-profile opinions, that he didn't have a theory of constitutional interpretation to inspire acolytes. He was a good and thoughtful judge, the conventional wisdom went; it was a shame he wouldn't have more of a legacy.

Here again, there was some truth. Souter didn't write zingers in the manner of an Antonin "Ask the nearest hippie" Scalia. I tried to sneak in some one-liners while I was clerking—whenever I couldn't read his ornate script, I resolved the difficulty by putting in something funny, which never survived the next round of editing. And he didn't have a theory to market, again in stark contrast to Scalia's championing of originalism.

But again, the conventional wisdom missed the important part. Souter didn't have a theory that gave him the single right answer to difficult questions of constitutional law. He had a philosophy, which was that difficult questions were in fact difficult, and that no theory could absolve a judge of the responsibility to confront that difficulty and wrestle with it honestly.

Souter listened carefully to both sides; he understood the arguments in their strongest form; and he acknowledged that the Constitution might not provide a clear answer. The Constitution embodies different values that may be in tension with each other, he observed in his 2010 Harvard commencement address, one of his very few public speeches. But that is not a flaw unless we demand a simplistic certainty. Indeed, he said, "the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises."

Finding that way was what Souter did, what he believed judges should do. He did it well, but without ostentation. For him it was the work that mattered, not the man who did it. But that creates its own kind of legacy.

Before his retirement, we held annual clerk reunions, where we'd gather over dinner and catch up, and then towards the end of the evening the justice would talk. His topics varied over the years, but one that sticks with me was the story he told of a New England ancestor of his, a judge or magistrate of some sort who had stopped the madness of the Salem witch trials from spreading to his town. The people brought a girl before him, insisting she was a witch, and he ordered her released with a simple phrase: "We will have none of that here."

I don't remember that man's name now, but I think we can call him a Souter, someone who stood for reason and moderation against excesses of passion. Souter understood the longing for certainty, for the mechanical theory or simple answer. He understood, too, that the insistence that hard questions can be resolved mechanically "devalues our aspirations, and attacks our confidence, and diminishes us." And he understood that the truest faith in America and the Constitution is the belief that "in an indeterminate world I cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future."

That was the judging that Souter modeled for everyone, but perhaps especially for his clerks. And to the extent that we were influenced by the example, we became a little more like him. That is the sort of legacy he would have wanted, not a monument reared up but a ripple spreading out through the people whose lives he touched, making us each a little more thoughtful, a little more decent.

I used to repeat the slogan "no more Souters" as a lament. It's true, I think, that we won't see another David Souter on the Supreme Court. But I say it now too as a hope and a promise. We can be decent to each other; we can understand. We can face a world that encourages us to demonize our opponents and erase the humanity of those with whom we disagree, that tells us we need more extremists and more partisans. We can face that world with David's wry smile, and we can say "No. More Souters."

*This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.*

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