May 29, 2025

Justice Souter on Trial

There was only moderate attention given to the death of former Supreme Court Justice David Souter. Souter died on May 8, 2025, at age 85. Souter had left the Bench voluntarily so that he could retire to his home in New Hampshire. He did not leave because of controversy, inappropriate actions, or illness. He retired from the Bench because he believed that it was time to retire.

Justice Souter was elevated to the Court by President George H.W. Bush. There were those who worried, at the time of his ascension to the Supreme Court of the United States, that Souter would be an old style New England conservative.

In reality, Souter became something of an iconoclast. On some decisions he could be described as conservative and on others, he aligned himself with the so-called liberal block. Souter was no mouse in a cat's cage. He believed that the Constitution should be read as written, but that it was not totally inflexible. There were simply certain situations that could not be contemplated by the framers at the time when the American Constitution was written and amended.

To most who practiced law during the time that Souter served on the Court, he was **THE** thoughtful Justice. Souter was going to look at the issues based upon the discreet factual scenario and the application of established legal principles. That is how judges are supposed to conduct themselves, and many actually do. Souter was a template for what a judge or justice should be like. He served the American people with a moderate temperament and superb scholarly credentials.

One month after the 9/11 attacks on the World Trade Center in New York, I was invited to a meeting hosted by the Federal Bar Association at the Loews Hotel in Philadelphia. I presume that I was invited because I was the past President of the Central Pennsylvania chapter of the Federal Bar Association. One of the highlights of the meeting was that we

were going to hear from Justice Souter, who was still churning out opinions on the Court as though he would serve forever.

We were told that the Justice would meet with us after he arrived from Washington, D.C., at 7:00 or 8:00 p.m. The precise time eludes me after almost 25 years.

Justice Souter was more than fashionably late. He was even later than Bill Clinton would be for his commitments. Important people are entitled to be late, but an hour or two hours late? That is a horse of a different color.

We waited for Justice Souter just as long as we could. Finally, a friend of mine, who was a public defender in one of the districts, decided that we should go to the bar for at least one beer. After a couple of beers, we decided it was time to pack it in. It was obvious that Justice Souter was not going to show up. Stood up again!

Just as we were about to get up from the bar, a young man came rushing in and said, "Justice Souter is here. Justice Souter is here." We looked at him bleary eyed and told him that it was just too late for us, and we had meetings in the morning. He angrily responded, "It's Justice Souter. You can't walk out on him. He's here and I've got to get a few people in that room to listen to him."

So, the public defender came with me to a small room where it seemed like less than a dozen of us were gathered around to hear Justice Souter. He walked in amiably, barely smiled, and asked if we had any questions. Several lawyers in the room asked questions to which he gave very short, sometimes even one-word answers. It was becoming uncomfortable.

Finally, probably under the influence of the lateness of the evening and a bit of alcohol, I raised my hand and said, "Mr. Justice what is important to you about the law?" I figured that I would either be thrown out or ignored but, what the heck, it was worth anything to try to get demure justice to say a few words to us.

He turned to me, looked at the group, and responded with a 45-minute answer. I remember the answer vividly, and I would like to share it with my friends and colleagues.

The Justice first talked of the Dread Scott decision where slaves were held by the United States Supreme Court not to be citizens but rather were considered to be property. He then talked about the civil rights cases of 1883, five cases striking down anti-discrimination laws to assist newly freed slaves. The Justice then went on to speak of *Plessy vs. Ferguson*, the infamous separate but equal doctrine justifying school segregation. The penultimate case that the Justice referenced to was *Korematsu vs. United States*, legalizing the internment of Japanese American citizens during World War II.

In each of the cases, the Justice was precise in the detail; so explicit that the cases stood out to us as though they were still alive. What made them relevant was not that they are still the law but rather that they were decided in the way they were.

The Justice finished up by talking about *Brown vs Board of Education* which struck down segregation in the schools. He noted that our own Third Circuit Judge, Leon Higginbotham, was involved as trial counsel in *Brown*.

The Justice then abruptly stopped, turned to me and asked if I ever read Saroyan's *The Human Comedy*. I gagged and tried to avoid answering, but then I finally admitted that I had not. He said to me: "Well, I suggest that you get a copy and read it. **What the law is all about is how we treat other people**."

The Justice had more than answered by question. I believe that everyone walked out of that room more thoughtful than before, more engaged with the meaning of the law, and determined to read Saroyan.

I suspect that the Justice's response to my question had something to do with the fact that efforts were ramping up to respond to 9/11. There were those who feared an angry backlash in connection with civil rights and liberties because of the attack by Saudi Arabians in America's heartland. The World Trade Center Towers stood as a beacon of

American success, wealth, and dominance. They had been destroyed like mere sandcastles at the beach as a result of a terrorist plot paid for by our Arab Muslim allies and made possible by own internal failures and weakness. How would the United States react? After all, during World War II we placed loyal American Japanese citizens into internment camps. Many of them had actually worked or fought for the United States, but there was no attempt to separate the good from the bad.

Today we face similar dilemmas that were alluded to by Justice Souter. We need to fight against our enemies, both from within and without but, at the same time, preserve the civil liberties and justice which have made our country great, successful, and the ideal that other democracies aspire to. Can we maintain our principles and safeguard our democracy without losing the compass which points not to true north, but to the preservation of appropriate civil liberties?

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