

WebMemo



Published by The Heritage Foundation

No. 2424
May 5, 2009

Not a Zero-Sum Game: Replacing Justice Souter Risks a More Activist Court

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Though certainly no originalist, in numerous cases Justice David Souter has not bought into the worst excesses of judicial activism, either. In these cases, he has rejected the activist “empathy” standard promoted by President Barack Obama to instead cast votes and write opinions that are in accord with the demands of the Constitution and the rule of law. And particularly in the areas of crime and punishment and lawsuit abuse, he has broken ranks with the Court’s more liberal wing to do so.

Here is a sampling of some of Justice Souter’s most significant stands in favor of the rule of law:

- **Punitive Damages.** In *Exxon v. Baker* (2008), Souter authored a majority opinion, which was joined by Justices Roberts, Scalia, Thomas, and Kennedy, explaining that maritime common law imposes limits on excessive punitive damages. He thus rejected a lower court ruling that would have required Exxon to pay billions in punitive damages for the Valdez oil spill in addition to the money it had already paid out in damages to compensate for actual injuries, as well as the \$2.1 billion it spent on cleanup efforts. This decision was widely viewed as a major loss for trial lawyers, who count on excessive punitive damages to justify bringing otherwise low-damage, often frivolous lawsuits.
- **Lawsuit Abuse.** In *Bell Atlantic v. Twombly* (2007), Souter authored a majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, holding that a plaintiff initiating a lawsuit must go beyond stating a bare accusation by laying forth facts that “raise a reasonable expect-

ation” that he may have a right to relief. This decision, the consequences of which are still being worked out in the lower courts, was seen as a major loss for trial lawyers, who frequently initiate lawsuits without any factual basis and then abuse the discovery process to conduct fishing expeditions to find some basis to coerce an expensive settlement.

- **Lawsuit Abuse.** In *Rockwell International Corp. v. U.S.* (2007), Souter joined an opinion by Justice Scalia limiting the class of individuals who may bring lawsuits against government contractors under the False Claims Act. The Act allows third parties to sue on behalf of the government, and potentially obtain significant money awards, when they have independent information that a contractor has defrauded the government. The opinion joined by Souter held that such third parties must possess “direct and independent knowledge of the information” on which the actual allegations of fraud are based and may not use the Act to conduct a lucrative fishing expedition in search of a payout.
- **Privacy.** In *Kyllo v. U.S.* (2001), Souter provided a crucial fifth vote to a majority opinion by Justice Scalia holding that government agents

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/wm2424.cfm
Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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need a judge-issued warrant, supported by probable cause, to believe that a crime is being committed and to use a thermal imaging device to explore details of a home that would have otherwise been unknowable without physical intrusion. In this way, the Court preserved the Fourth Amendment's protections of the home from the threat of modern technologies that could allow the government to search inside without, as had historically been necessary, physically entering the home.

- **Victims' Rights.** In *Payne v. Tennessee* (1991), Souter authored an opinion arguing that the Constitution does not prohibit the consideration of a crime's impact on the victim and the victim's survivors during the sentencing phase of a trial.
- **Crime.** In *Virginia v. Moore* (2008), Souter joined a majority opinion by Justice Scalia holding that a drug dealer did not have to be released from custody because he had initially been picked up by police for driving with a suspended license, a minor offense that (according to the dealer) should not have led to the arrest and search that uncovered his drugs.
- **Crime.** In *Illinois v. McArthur* (2001), Souter joined a majority opinion by Justice Breyer holding that a police officer, stationed outside a home believed to contain drugs while his partner obtained a search warrant, did not have to allow a suspect to enter the home unaccompanied, where he could have interfered with evidence.
- **Crime.** In *Arizona v. Evans* (1995), Souter joined a majority opinion by Justice Rehnquist holding that a defendant convicted of drug possession would not have to go free due to a clerical error that led a police officer to stop and search his car.
- **Crime.** In *Lockhart v. Fretwell* (1993), Souter joined a majority opinion by Justice Rehnquist holding that a convicted murderer sentenced to death would not have to be resentenced or released because his lawyer failed to raise an objection that would not have changed his conviction or sentence.
- **Crime.** In *Scott v. Harris* (2007), Souter joined a majority opinion by Justice Scalia holding that

the Constitution does not prevent a police officer from ramming his patrol vehicle into the car of a fleeing suspect to put an end to a dangerous high-speed car chase that threatens the lives of innocent bystanders. On the other side, Justice Stevens authored a dissent stating that he would second-guess the police officer's snap judgment on the grounds that he saw no "close calls" with bystanders in a video of the chase.

- **Crime.** In *Harmelin v. Michigan* (1991), Souter joined an opinion by Justice Kennedy holding that the sentence of life without the possibility of parole for possession of a large amount of cocaine did not violate the Cruel and Unusual Punishments Clause and that judges should almost always defer to legislatures' determinations of the appropriate punishment for a criminal offense.
- **Crime.** In *Clark v. Arizona* (2006), Souter authored a majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, explaining that the Constitution does not prevent a state from limiting its insanity defense to the question of whether the perpetrator lacked the capacity to discern whether an act was right or wrong, excluding other evidence of his mental capacity. Had the Court held otherwise and "discovered" a right to present such evidence in the Due Process Clause, it would have upset thousands of existing convictions and undermined the ability of states to put violent criminals behind bars.
- **Crime.** In *County of Riverside v. McLaughlin*, Souter provided the swing vote to a majority opinion holding that persons placed under arrest may be held for up to 48 hours before a probable cause determination is made by a magistrate. The dissenting justices would have required that a probable cause hearing must be provided "immediately upon completion of the administrative steps incident to arrest," a standard that would impose a great burden on law enforcement and risk setting free many criminals over legal technicalities.
- **Crime.** In *United States v. Banks* (2003), Souter authored a unanimous opinion finding no Fourth Amendment violation when police bearing a search warrant knocked on the door, announced their intentions, and waited 20 seconds before

battering down the door when they had reason to believe that evidence was being destroyed inside the residence.

- **Death Penalty.** In *Stringer v. Black* (1992), Souter authored a dissenting opinion, joined by Justices Scalia and Thomas, arguing that the majority improperly gave retroactive effect to its recently minted constitutional rule that state statutes making the “especially heinous, atrocious or cruel” nature of a crime an aggravating factor in sentencing violated the Eight Amendment.
- **Death Penalty.** In *Lankford v. Idaho* (1991), Souter joined a dissenting opinion by Justice Scalia criticizing the majority for overturning the death sentence of a murderer who did not have adequate notice that he might be sentenced to death when at arraignment, months before trial, he had said that he understood that he might be sentenced to death.
- **Abortion.** In *Rust v. Sullivan* (1991), Souter provided the swing vote to a majority opinion upholding regulations that prohibit organizations receiving federal family-planning grants from engaging in counseling concerning, referrals for, and activities advocating abortion.
- **Pornography.** In *Barnes v. Glen Theatre* (1991), Souter provided the swing vote in a decision upholding the enforcement of Indiana’s public indecency law against a challenge by establishments wanting to provide totally nude dancing. In a concurring opinion, Souter wrote that while nude dancing may be subject to a degree of First Amendment protection, the State’s interest in preventing the secondary effects of adult entertainment establishments—prostitution, sexual assaults, and other criminal activity—is sufficient to justify its law against nude dancing.
- **Crime.** In *Arizona v. Fulminante* (1991), Souter cast a crucial fifth vote in a decision finding that appeals courts need not throw out every conviction

where an involuntary confession is admitted, but should instead apply harmless-error analysis, considering whether there was more than enough other evidence presented to the jury to allow a reasonable person to conclude that the accused was guilty even in the absence of the confession.

- **Crime.** In *Atwater v. City of Lago Vista* (2001), Souter provided a crucial fifth vote and authored an opinion holding that the Fourth Amendment to the U.S. Constitution does not forbid a warrantless arrest for minor misdemeanor violations. This ruling was a major victory for federalism, reaffirming states’ power to define criminal offenses, procedures, and punishments.

In nearly all of these cases, more liberal members of the Supreme Court sought outcomes inconsistent with the Constitution and the rule of law. That block would find additional strength if President Obama appoints a liberal activist to the Court to replace Justice Souter, a center-left moderate, and many cases like those listed above would have had different outcomes. As a result:

- Violent criminals would be freed for minor blunders by police,
- Tough sentences for violent crimes would be struck down,
- Trial lawyers would have more opportunities than ever to launch frivolous, but expensive lawsuits, and
- Victims of crimes would be denied a role in the criminal justice system.

The bottom line: Justice Souter was no conservative and no originalist, but replacing him with a far-left activist would change the balance of the Court for the worse.

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