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### **Supreme Court Mis-Appointments**

Two Supreme Court Justices, appointed by two different Republican presidents, have held liberal opinions continually on the court. David Souter, appointed by H.W. Bush in 1990, voted to uphold the *Roe vs. Wade* decision two years after his appointment (Paulsen, 92).

William Brennan, appointed by Dwight D. Eisenhower in 1956 (Greenhouse, par. 5), frequently ruled in favor of labor, and some of his opinions “frustrated” Eisenhower (Lindquist, Yalof, and Clark 796). How did this happen? What could make a Republican president appoint a strong liberal to the court? Did the justices switch their ideology after being appointed? Both justices had liberal influences in their lives before the Court. The presidents who appointed them overlooked these influences, believing their appointees to be at least somewhat conservative or moderate. Thus, in spite of subtle indications of the candidates’ liberality, Bush and Eisenhower were convinced that these candidates would carry their presidential legacy well beyond their four- or eight-year terms.

A survey of Souter’s life and career shows several possible conservative influences, and well as conservative aspects. Cockburn suggests that a Supreme Court nominee’s parental background can be a guide to how the nominee will act on the Court (Cockburn, par. 5). Cockburn points out that the father of liberal Justice William Brennan began his career as a laborer shoveling coal. Though he worked his way up the socio-economic ladder, eventually running the Department of Public Safety in Newark, New Jersey, he remained a champion of

laborer's rights (Cockburn, par. 3-4). The implication is that Brennan had a liberal paternal legacy, and that this influenced his liberal views on the Court.

Souter's father, Joseph Souter, had a different story. He worked as banker ("Souter, David H.," par. 3). This is a higher socio-economic position than what Brennan's father started out with. While Joseph was not as wealthy as most bankers (Broder, par. 16), he was not poor, as Brennan's father was in the beginning of his career. Apart from his higher socio-economic standing, Souter Sr. was also "conservative; a perfect gentleman," as a family friend described him (quoted in Broder, par. 15). If Cockburn's suggestion of parental influence were true in the case of Souter and his father, it would follow that Souter would have turned out conservative on the court.

Justice Souter had more than his father's influence to be conservative, however. According to an article written in 1991, Souter has been a long time member of an Episcopalian church in New Hampshire, and friends have described him as "deeply religious" ("Souter, David H.," par. 26). One would expect a "deeply religious" person to tend towards the conservative side of politics. Moreover, civil libertarians saw Souter as disconnected from the modern concerns of Americans ("Souter, David H.," par. 20). Indeed, as an adult Souter had always lived by himself in the farmhouse he grew up in (Marcus and Pichirallo, "Seeking Out the Essential Souter," par. 15). A friend, J. Michael Beecher, said of Souter: "He's essentially a person who has never changed—in any respect" (qtd. in Marcus and Pichirallo, "Seeking Out the Essential Souter," par. 23). He was creature of habits, and one of his teachers in high school remarked that the soon-to-be justice did not "give a hoot about what other people were doing," believing his way was right (Marcus and Pichirallo, "Seeking Out the Essential Souter," par. 31-33). Thus, the concerns of those libertarians that he was disconnected from society are understandable.

Souter also supported several very conservative policies as New Hampshire Attorney General. As Attorney General, he served under “ultraconservative” Meldrim Thomson, Jr. Thomson strongly opposed the Equal Rights Amendment (“Souter, David H.,” par. 11). One of the governor’s conservative policies that Souter upheld in court was the conviction of a Jehovah’s Witness for covering up the state motto on a license plate (“Souter, David H.,” par. 11). Souter argued that the action was not protected under the First Amendment (Marcus and Pichirallo, “Souter’s Life in the Law,” par. 22). Souter also defended Thomson’s proposition to lower flags to half-staff in recognition of the death of Jesus Christ, (Marcus and Pichirallo, “Souter’s Life in the Law,” par. 24). He argued that the order did not conflict with the constitutional the separation of church and state, since it treated Jesus as a historical character (“Souter, David H.,” par. 11). In yet another case, Souter argued on behalf of the state for the arrest of 1400 protestors, who had demonstrated against the construction of a nuclear power plant (“Souter, David H.,” par. 12). This case dealt with the constitutional right of free speech. Since Souter took a conservative position for each of these cases, it would seem that he was indeed ideologically conservative. Furthermore, since the Supreme Court deals frequently with issues of constitutional rights, this time that Souter spent as Attorney General carried significance for those attempting to predict his position on the Court (“Souter, David H.,” par. 13). Since Souter upheld conservative positions on many of the Constitutional issues he dealt with, it’s not surprising that some would have expected Souter to turn out conservative once actually on the Court.

Despite these conservative influences and characteristics, however, Souter was not a staunch conservative. When he was appointed by Bush, there was uncertainty in the Senate as to his position on the central issue of conservative politics at the time—the *Roe vs. Wade* decision.

The new justice described himself as “open-minded” (Komarow, par. 17). While some democratic senators expressed concern that Souter would “oppose abortion rights” (Komarow, par. 1), it was by no means clear that he would vote conservatively on such matters. In fact, Paulsen reveals that prior to Souter’s appointing, he believed there was “a substantial likelihood” that Souter would vote liberally on the abortion issue (93). Paulsen writes that he, along with several colleagues, feared that Souter would not turn out to be a solid judicial conservative—that he would be “squishy”—or even drift leftward under various influences and pressures (88). Paulsen and his colleagues worked in the Office of Legal Counsel, and one of their tasks was preparing background reports on various potential supreme court candidates. While the democratic senators mentioned above feared that Souter would turn out too conservative, these men whose job it was to research the possible appointees feared the opposite. True, Paulsen was a conservative employed by a republican administration. When faced with a candidate whose ideology remained unclear, it was natural for Paulsen to fear the candidate would lean to the opposing side, just like it was for the democratic senators. But the point remains: Justice David Souter was not a staunch conservative in all areas.

In fact, there were several indications in Souter’s pre-court life that he would turn out as a liberal justice. While Souter lived by himself, he did have close friends—some of whom were “liberal democrats and abortion-rights activists”. His political support in New Hampshire came not from conservatives but moderate Republicans (Marcus and Pichirallo, “Seeking Out the Essential Souter,” par. 18). Many of the people surrounding him thus served as potential liberal influences. Souter also took great interest in the US Supreme Court, and in particular the ideas of Justice Oliver Wendell Holmes (Marcus and Pichirallo, “Seeking Out the Essential Souter,” par. 20). Souter wrote his senior honors thesis on Holmes’ philosophy of judicial positivism, the idea

that law is not a predetermined set of morals (Marcus and Pichirallo, “Seeking Out the Essential Souter,” par. 41). This is a liberal judicial philosophy, and the fact that Souter spent much time researching it for his thesis suggests that he must have been influenced by it to some degree. Indeed, the Justice voted in support of the Roe vs. Wade decision and women’s freedom to have an abortion (“Souter, David H.,” Par. 26), a procedure that was previously considered reprehensible. Souter was not opposed to the remaking of society’s standards of right and wrong—which is not surprising, given his interest in Holmes’s belief that law is not a predetermined set of morals. This is a very liberal characteristic.

In his career in the law, prior to his appointing to the US Supreme Court, there are several indicators of his liberal leaning as well. As mentioned above, Souter supported several policies of ultraconservative governor Thomson as Attorney General. Souter did not, however, share Thomson’s viewpoint often—but as Attorney General, it was his job to support the state (Marcus and Pichirallo, “Souter’s Life in the Law,” par. 17-18). Democratic leader of the New Hampshire house Mary Chambers said, “There’s no question David Souter was just being Mel Thomson’s lawyer when he did some of those things” (qtd. in “Souter, David H.,” Par. 14). Just because Souter supported these conservative causes as Attorney General does not mean that he supported them personally. It was a devotion to duty, not a personal ideology, that led him to support the state.

Justice Souter actually had several liberal influences and characteristics during his pre-Court life and career. It is not surprising that he turned out liberal as a justice of the Supreme Court, though he was appointed by a Republican president. William Brennan was also appointed by a Republican—how was it that he turned out liberal on the Court as well?

As in the case of Souter, some aspects of Brennan's pre-court life make his frequent liberal positions a bit surprising. Markman and Regnery call him "a study in ironies" (38), and give several examples:

A family man with three children, [Brennan] is the judge largely responsible for the availability of pornography in every major city in America; a Catholic, he has played an instrumental role in the unfettered availability of abortion across the country and has found... legislative chaplains unconstitutional; appointed to the Court by a Republican because of his ostensibly conservative views and because of his experience as a state court judge, it is he who... has made a substantial contribution to the shift of power from the states to the federal courts; the son of-hardworking Irish immigrant parents, he nevertheless has made significant strides in elevating the welfare state to constitutional status (Markman and Regnery, 38).

While these ironies seem to make Brennan's liberal stances on the Court surprising, he, like Souter, actually had several liberal influences in his pre-court life.

Though Markman and Regnery's last example contrasts Brennan's hardworking immigrant parents with one of his liberal positions, his parental background was actually one of the liberal influences in his life. As previously stated, Brennan's father started out as a laborer, shoveling coal (Cockburn, par. 3). Brennan senior worked his way up in society to higher class positions, but always had sympathy for laborers—a traditionally liberal characteristic (Cockburn, par. 4). Adam describes the Justice Brennan's background as "rooted in labor and Democratic Politics" (par. 2). Woodward and Armstrong point out that the future justice grew up in the poorer part of Newark, and learned "the rough and tumble of politics" from his father (qtd. in Adam, par. 2). Justice Brennan's liberal voting record on the Court is thus not surprising. The

family is usually the primary source of political socialization, and in a sense, the liberal ideology Brennan displayed on the Supreme Court was but a family legacy.

In the case of justice Brennan, Cockburn's earlier cited recommendation of parental background as a somewhat reliable guide to how a justice will vote on the court holds true. This is even more evident when the Supreme Court opinions of Brennan are taken into account. Just as Brennan's father was a champion of labor union rights, so the justice was also. Adam writes that Justice Brennan was a significant player in the development of labor law in the US. He wrote many opinions that agreed with the positions of the National Labor Relations Board or labor unions (par. 5). In *NLRB v. Allis-Chalmers*, Brennan held with the majority that United Automobile Workers (UAW) had the right to fine union members who went back to work during a strike (Adam, par. 6). This was not the only case. *United Steelworkers of America v. Weber*, *United Steelworkers v. Rawson*, and *Belknap, Inc. v. Hale* were all cases in which Brennan ruled in favor of labor (Adam, par. 5, 8, 10). Like his father, Brennan was a champion for labor rights. His stances on the Court were influenced by his parental background.

Both Souter's and Brennan's liberal voting on the Supreme Court is not surprising, given certain liberal influences in their lives and characteristics of their careers. Yet the fact remains that they were appointed by Republican presidents. How is this the case? Did Bush and Eisenhower just miss the liberal influences in these men's lives that are pointed out earlier in this paper?

The key area where Justice Souter showed his liberal leaning was the issue of abortion. According to Devroy and Marcus, the focal point of the 1990 nomination process was the issue of abortion ("Court Nomination Expected," par. 6). Conservatives were hoping for a candidate that would vote along with the four current justices currently opposed to the *Roe v. Wade*

decision (“Court Nomination Expected Soon” par. 5). However, as mentioned earlier, Souter did not hold a clear or firm position on the issue. And neither did H. W. Bush. Paulsen writes that while Bush was pro-life, he did not feel strongly on the issue (95). Paulsen further reveals that Bush simply did not push too far into any particular candidate’s position on the abortion issue (95). Why did Bush not want to know? Devroy writes that Souter was picked over Edith Jones because he was thought to be the least “controversial in Senate confirmation hearings” (“In the End, Souter Fit,” par. 3). This is why Bush didn’t push too far into Souter’s views on abortion—indeed, Paulsen asserts that Bush didn’t ask Souter’s position due to “political concerns about confirmability and plausible deniability” (95). Bush wanted his candidate to pass the Democratic Senate’s inspection. As mentioned above, Souter declared himself open-minded on the *Roe v. Wade* issue, and since Bush didn’t probe this issue much, it shouldn’t come as a surprise that Souter voted liberally on the issue of abortion even though he was appointed by a republican.

President Bush was not the only player in this game of selecting the next Supreme Court Justice. As mentioned above, his appointee had to pass the Senate’s approval. This affected his criteria for a candidate. But another set of players in this game is the people surrounding the president who researched the candidates for him. For example, Paulsen, as mentioned above, was an employee in the Office of Legal Counsel. Also mentioned above, a task of the OLC in the first two years of the Bush Administration was to gather background information on potential candidates for the Court (Paulsen, 87). A president is always a busy man, and cannot devote a significant time of research into the backgrounds of each Supreme Court candidate. This is why the OLC did it. Furthermore, Bush made his decision quickly (Paulsen, 91), and this, combined with the fact that the president probably didn’t look too deeply into Souter’s personal background, accounts for why Bush failed to see just how liberal Souter would turn out.



Another significant player in the decision was Warren B. Rudman. A moderate republican, Rudman had previously worked with Souter in the attorney general's office (Marcus and Pichirallo, "Souter's Life in the Law," par. 6). Rudman was the reason Souter's name was on the list of appointees during the Reagan administration (Devroy, "President Selects Souter," par. 21). Rudman also pushed for Souter's nomination to the US 1<sup>st</sup> Circuit Court of Appeals (McGrory par. 9). Such strong support from a Republican, though a moderate one, would have been noticed by Bush, and the already distant personal background of Souter would fade even more.

Bush had found someone who seemed Republican, but more importantly, who would likely pass the democratic Senate's inspection—and the administration "assured the GOP hard right that David Souter would be 'a home run'" (Barrett par. 3). But what about Eisenhower's decision to appoint William Brennan? Brennan, as stated above, also had liberal influences in his life. Did the president simply miss these?

Eisenhower may not have been looking for an ideologically similar candidate, at least not as his first priority. The president looked primarily in higher state and federal courts for potential candidates, showing a desire to find the best of the best ("Brennan for the Court," par. 2). Indeed, the "major consideration" in Brennan's selection was his experience and "excellent record" ("Brennan for the Court," par. 1). As Eisenhower stated, "We must never appoint a man who doesn't have the recognition of the American Bar Association...He must be a man of unimpeachable character and accomplishment" (qtd. in "Justice Brennan to the Supreme Court," par. 2). Age was also an important characteristic to Eisenhower. He wanted a candidate of "reasonable age," and as Brennan was younger than any of the current justices of the time at age fifty-seven, he fit this qualification well ("Justice Brennan to the Supreme Court," par. 2-3).

Thus, while Brennan was a democrat (Driscoll 1008), Eisenhower looked more to qualifications other than ideology to make his decision.

This is likely because Eisenhower was a military man, and not a politician. Before he became president in 1953, he had never run for nor occupied any public office (de Santis 190). He spent his career in the US Army, and did not gain recognition in the political arena until World War II (de Santis 190). Thus, he was inexperienced in the realm of politics (de Santis 191). His popularity and military accomplishments played a big part in getting him into office, but it was more his “lack of commitments” to any political ideology that won him the presidency (Hyman and Sheatsley 460). As a military man and a non-partisan president, it makes sense that Eisenhower’s criteria for choosing a new Supreme Court justice rested not upon ideology, but on experience and age, as stated previously.

As a result of Eisenhower’s non-partisan nature, a similarly middle-of-the-road candidate would have appealed to him. And he saw this middle-roader aspect in Brennan. Driscoll writes:

Eisenhower and his aides thought they were getting a centrist judge or, at worst, a moderately liberal one. Contemporary news accounts echo this assessment... *Life* magazine reported that “The opinions [Brennan] has delivered in his seven years on the New Jersey bench are clear, forceful and middle-of-the road.” *U.S. News and World Report* welcomed the appointment, finding... that “he cannot be counted on to join either a 'liberal' or a 'conservative' bloc on the nation's highest tribunal” (1009).

This “assessment” of Brennan as a moderate was likely due to his recommendation to the president by both a liberal and a conservative. Herbert Brownell, a liberal, was the president’s attorney general and “prime confidant” (“It turns out Ike was a leader,” par. 12). Brownell had been impressed by Brennan at a judicial conference, and strongly recommended him to

Eisenhower (Markman and Regnery 30). Also recommending Brennan to the president was Arthur Vanderbilt, “staunchly Republican” chief justice of the New Jersey Supreme Court (Markman and Regnery 30). According to Whipple, Vanderbilt was allegedly prevented from being appointed as chief justice of the US Supreme Court by a White House mistake in 1953, the same year Eisenhower became president (par. 13). Vanderbilt did not hesitate to call Brennan’s good fortune as “a wonderful appointment” (qtd. in Whipple, par. 12), and his recommendation was a key factor in Brennan’s appointment (Whipple, par. 12). This joint recommendation by both a liberal confidant and a staunch Republican indicated falsely to Eisenhower that Brennan would prove to be a middle-of-the-road judge.

Liberal Justices David Souter and William Brennan were chosen by Republican presidents because those presidents overlooked several liberal influences in the justices’ past lives, and believed them to be at least mildly conservative or moderate. While Souter’s life has many conservative aspects to it, the liberal influences present conforms with his liberal opinions on the Supreme Court. Brennan too had conservative aspects in his life, but his liberal parental legacy makes his liberal opinions on the Court no surprise. When Bush appointed Souter, he overlooked these liberal influences, focusing more on how Souter would pass the Senate’s approval. Eisenhower, no politician, chose Brennan because of his talent and apparent moderate ideology. Thus, while a Republican appointing a liberal justice of the Supreme Court of the US seems unthinkable, the many variables involved, from childhood influences to recommendations by politicians to specific goals of a president, show the complexity of the situation, and how a candidate’s subtle liberal qualities can be missed by the Republican appointer.

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