Written by **Jack Kenny** on May 29, 2010

Souter's Defense of Judicial Activism

Retired Supreme Court Justice David Souter defended the court against what he described as "charges of lawmaking and constitutional novelty." Delivering the commencement address at Harvard University on Thursday, Souter said the criticisms "tend to miss themark" and reflect a "hunger for certainty and control that the fair reading model seems to promise."

Without mentioning Supreme Court nominee former Harvard law School Dean Elena Kagan by name, Souter predicted the confirmation hearings and the quickened pace of decisions at the end of the court's term will revive what he described as a "simplistic view of the Constitution" held by many of the court's critics.

"We will as a consequence be hearing and discussing a particular sort of criticism that is frequently aimed at the more controversial Supreme Court decisions: criticism that the Court is making up the law, that the Court is announcing constitutional rules that cannot be found in the Constitution, and that the Court is engaging in activism to extend civil liberties," Souter said.

Most cases reaching the Supreme Court are too complex to be resolved by "a straightforward exercise of reading fairly and viewing facts objectively," said Souter. The 70-year-old judge, who retired last year after close to 20 years on the Supreme Court, cited two well known cases as examples-the government's efforts to stop the publication of classified documents known as the "Pentagon Papers" in 1971 and the school desegregation decision in *Brown v. Board of Education* in 1954. While the court upheld the right of the *New York Times* to publish the Pentagon Papers, the decision was not based on a view of the First Amendment guarantee of the freedom of the press as an absolute right, Souter said.

"The Court's majority decided only that the Government had not met a high burden of showing facts that could justify a prior restraint, and particular members of the Court spoke of examples that might have turned the case to go the other way," he said. "Threatened publication of something like the D-Day invasion plans could have been enjoined; Justice (William) Brennan mentioned a publication that would risk a nuclear holocaust in peacetime." The case illustrates how values enshrined in the Constitution often come in conflict with each other, such as "the value of an unfettered right to publish, the value of security for the nation and the value of the President's authority in matters foreign and military." The explicit language of the Constitution does not resolve the conflict, he said. "The guarantee of the right to publish is unconditional in its terms and in its terms the power of the government to govern is plenary."

The use of the word "plenary" is troubling here, since the term means "full, complete, absolute, unqualified." Perhaps Souter meant only that the "power of the government to govern" is complete in

the sense of being adequate to the task, since it is in no way absolute or unqualified. As James Madison put it in No. 45 of *The Federalist Papers*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those that are to remain in the State governments are numerous and indefinite."

The constitutional argument in the Pentagon Papers case centered on the unequivocal language of the First Amendment: "Congress shall make no law … abridging the freedom of speech, or of the press." While the language, "by its literal terms forbade Congress from legislating to abridge free expression," Souter said, "the guarantees were understood to bind the whole government, and to limit what the President could ask a court to do."

By a verbal sleight of hand, Souter deftly substituted, as the Supreme Court has long since done, the term "free expression" for the freedom of speech and of the press-a substitution that has opened the court to claims of First Amendment protection for such "expressive conduct" as flag burning, which the court upheld, and nude dancing at a public lounge, which the court denied (with Souter as part of a 5-4 majority). But he also misses an important point concerning the language of the First Amendment.

The prohibitions in that amendment are directed solely at Congress, because the Constitution gives lawmaking authority exclusively to Congress. "All legislative Powers herein granted shall be vested in a Congress of the United States." Absent an act of Congress, there was precious little that "the president could ask a court to do."

The weakness of the government's case in the Pentagon Papers, then, was not only that the prior restraint it sought would, on its face, violate the First Amendment. It stemmed also from the fact that there was no legislative authority for it. Attorney General John Mitchell claimed the government could ban publication under Section 793 of the Espionage Act of 1917, which provided for a fine of up to $10,000 and imprisonment of up to 10 years for anyone who "communicates delivers, or transmits" to "any person not entitled to receive it" any information "relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation."

That led to arguments over whether it was reasonable to believe that publishing a history of the decisions made regarding the Vietnam War "could be used to the injury of the United States or the advantage of any foreign nation." And the statute said nothing about publishing. Would the readers of the *New York Times* and others who would read and hear about the information contained in the Pentagon Papers — i.e. the American public — be persons "not entitled to receive it"? More to the point, the law contained no authorization for the prior restraint on publishing the government was seeking — a power the First Amendment, expressly ruled out. Another version of Section 793, authorizing the President to prohibit the publication of "information relating to the national defense" in time of war or threat of war, had been rejected by Congress.

Moreover, Congress in 1950 amended Section 793 of the Espionage Act, adding:

> Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

"The Government does not even attempt to rely on any act of Congress," said Hugo Black, writing for the court's 6-3 majority. "Instead it makes the bold and dangerously far-reaching contention that the

courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law."

So it would appear that the Supreme Court, in the case of the Pentagon Powers, applied the "fair reading model" that Souter rejects as "simplistic." The court concluded that there was no authority for the power the government was seeking, based on a fair-minded reading of the Constitution and the relevant statute.

In Souter's other example, *Brown v. Board of Education*, he noted that nothing in the language of the 14th Amendment, guaranteeing "equal protection under the law," has changed since the Supreme Court, in *Plessy v. Ferguson*, refused to find segregated railroad cars unconstitutional. What had changed, he said, was the life experience of the judges. In 1896, with institution of slavery still a fresh memory, "separate but equal" facilities would have appeared unremarkable, perhaps even as a sign of progress. By 1954, he said, it was clear they imposed an undeniable badge of inferiority upon the minority race.

"For those whose exclusive norm for constitutional judging is merely fair reading of language applied to facts objectively viewed, *Brown* must either be flat-out wrong or a very mystifying decision," Souter said. Here Souter seems to be building something of a straw man. Those who advocate adherence to what Justice Antonin Scalia calls the "original understanding" of a law do not generally take the language as applied to facts of the case as their "exclusive norm." The history of the legislation and the debates over it in the Congress or state legislature offer evidence as to what the lawmakers intended when they passed an act and what the legislatures of the various states intended by ratifying a proposed constitutional amendment. And the history of the 14th Amendment strongly suggests that it was not intended to require an integration of public schools. There was no suggestion of it during the congressional debate on the amendment. The same Congress that approved the 14th Amendment established schools in Washington, D.C. exclusively for what it called "colored children." The majority of states that ratified the amendment either required or permitted segregated schools at the time. All of that was dismissed by Chief Justice Earl Warren in a couple of breezy sentences.

"In approaching this problem, we cannot turn back the clock to 1868 when the amendment was adopted," Warren wrote. "We must consider public education in the light of its full development and its present place in its present place throughout the nation." But if the intent of those who wrote and those who ratified the amendment do not matter, then what does interpreting the law mean? Is it to substitute a new and allegedly improved understanding of what the Constitution requires? If so, how does the court determine what our evolving values and improved understanding require?

The meaning of segregation, Souter opined in his Harvard speech, "is not captured by descriptions of physically identical schools or physically identical railroad cars. The meaning of facts arises elsewhere and its judicial perception turns on the experience of the judges, and on their ability to think from a point of view different from their own." And perhaps there may be some room in their decision making for what the law actually says.

"Meaning comes from the capacity to see what is not in some simple, objective sense there on the printed page," said Souter. But there is no telling how far beyond the printed page the judges will look and what they will find there. Finding the right to abortion in a Constitution that nowhere mentions nor even hints of it is one example of the court's visionary power. In *Planned Parenthood v. Casey*, Souter was among the five justices voting to uphold the right to abortion the court had fashioned and decreed

in its *Roe v. Wade* ruling. In so doing, he joined with Justices Anthony Kennedy and Sandra Day O'Connor in declaring: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

That grand philosophical statement is an example what passes for constitutional law when judges look beyond the language and history of the Constitution. Souter did not mention in his Harvard speech some of his own opinions, including one in which he found the recitation of a nondenominational prayer at a high school graduation to be a violation of the provision of the First Amendment that says "Congress shall make no law respecting an establishment of religion." The fact that there was no act of Congress involved, nor an establishment of religion as that phrase was understood when the Bill of Rights was passed, made no difference. It's "the judicial perception and the experience of the judges" that matter.

Finding that "certainty is generally an illusion," Souter nonetheless trusts in a power of "reason that respects the words the Framers wrote, by facing facts and by seeking to understand their meaning for the living."

"That is how a judge lives in a state of trust," he said, "and I know of no other way to make good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States."

We might wonder if it has ever occurred to Justice Souter that the job of a judge is not to make good on our aspirations — assuming he can determine what they are — but to uphold the Constitution in accordance with his oath of office. That is the "state of trust the judge should live in.