OUR COLLEAGUE

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Courts, at their best, thrive from being a collection of distinct personalities, from diverse backgrounds, who—despite those differences—share a commitment to participating in the development of the American legal tradition. Our court was graced with having the inimitable Justice David Hackett Souter on it for more than a decade. He helped us to thrive through the more than one hundred opinions he authored for the First Circuit after retiring from the Supreme Court, the nearly five hundred decisions in which he took part during that time, and the singular presence that he was.

David, or even Dave—the familiar names he insisted on being called by all of us on our court—did not seek attention. Nor did he like tributes. But they came his way nonetheless. That was due to the force of his example and the depth of his character.

His style was all his own. There was the sound of King James and Lincoln in his cadence, but also the sound of a New England and a New Hampshire of an earlier era.

There was the vest, the books of Shakespeare piled up around his office, the indifference to the cold. But he

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was no antiquarian. He subscribed, as he put it, to "the historical way of looking at the world."[1]

That way did not imply—for him—looking only backward. That way saw history as something that has passed and is also yet to come. It thus implied recognition that we are products of time—and so law is too—but that times change—and so law does too.

David was fascinated, and wrote insightfully, both in his opinions and in scholarly works, about the difficulty—and importance—of judging with a sense of history, and thus of doing so in a way that understands law to be at one and the same time a spur to change and a caution about the risks of change. He revered precedent *and* knew that there is precedent for learning from past mistakes. He returned to the shame of *Plessy v. Ferguson*[2] and the insight of *Brown v. Board of Education*[3] again and again as he struggled to judge, case by case, fact by fact, from the ground up rather than the grand principle down.[4]

His unfailing graciousness, his deep conviction, his effortless integrity, his natural open mindedness and curiosity, and his deep but also clear-eyed faith in the importance of the American constitutional system and the need for the people of this country to participate in it, uphold it, and never take it for granted, touched all of us who had the privilege to know him.

That was so whether we knew him through a conversation over a yogurt and apple (his preferred lunch, not ours or, we dare say, anyone else's), the sound of his bracing voice in court, or the elegance of his pen. It was in his graceful script that he wrote so many beautifully handwritten notes to his colleagues on the First Circuit over the years—whether to mark a milestone, offer thanks for something we had suggested

1. David H. Souter, *The Humanities in a Civil Society*, at 35:40 (C-Span, March 9, 2009), http://www.c-span.org/video/?284498-1/humanities-civil-society.

2. 163 U.S. 537 (1896).

3. 347 U.S. 483 (1954).

4. *See* David. H. Souter, *Harvard University's 359th Commencement Address*, 124 HARV. L. REV. 429, 434–35 (2010).

he might read, or just to offer a kind word. It was also in his unique brand of prose that he wrote so many defining opinions for our court and one higher.

David "retired" from the Supreme Court at the close of its 2008–2009 term, but it was not a typical retirement. Law professors and lawyers from around the country would comment about what a unique person David must be, to give up judging at the peak of his powers to devote his remaining years to reading and hiking. He had not retired from judging, though. He had simply changed courts.

To be sure, David certainly now had more time to spend in the mountains of New Hampshire, and he did so. And, as for reading, his chambers in the New Hampshire Federal Courthouse, which bears the name of his friend, Senator Warren B. Rudman, were filled from floor to ceiling with all manner of dense, scholarly works, leaving almost no room to maneuver and precious little seating space. On a trip to one of our Circuit conferences, he carried with him two ancient, well-worn suitcases, one light and one heavy. The heavy one, it turned out, was filled with books that he had brought with him to give to judges who had displayed some interest in the topics.

Even while on the court, David understood that "judging" involved more than deciding. It involved being a member of a court, a colleague on it.

Our court has a practice, stretching back many decades, of taking lunch together during sitting weeks in Boston. When David was sitting with us, often one of us would ask what he was reading currently, and for the remainder of the lunch we would be treated to a master class in the topic. This is not to say that he dominated the table conversation. His lectures were by invitation.

At other times, David would engage in more private conversations with one or two tablemates, often intensely intellectual discussions, but just as often a personal conversation about family or health. It could be the tale of a trip that he had taken, while at Oxford, to the North of England to spend a weekend with a distant

relation and his harrowing hitchhiking journey back to campus. Or a story about once appearing in front of the Supreme Court and immediately after, more importantly to him, receiving a flattering critique of his performance from the legendary Archibald Cox. There were also the wry accounts of his time as the Attorney General of New Hampshire, a post he cherished—as well as the fond remembrances of this or that New Hampshire character and of those who had sat on the First Circuit when he was just coming up in the law.

When David first began sitting with us, then Chief Judge Sandra Lynch arranged a dinner in his honor. He would say that he didn't want to be honored, but that he would be delighted to participate. The dinner became a luncheon. David would always thank us with words to the effect of how grateful he was that we allowed him to be a part of our court and to keep his hand in deciding cases. So humble and so genuine. David loved judging and knew the value of it did not depend on the place of the court in the judicial hierarchy.

While on our court, David would sometimes ask the presiding judge to remember that he had only one law clerk. But he never shied away from taking on the most complex and difficult cases.

In *Congregation Jeshuat Israel v. Congregation Shearith Israel*,[5] David wrote for a panel of our court in a case involving a property dispute between two congregations over America's oldest synagogue, located in Newport, Rhode Island. The panel reversed "on the basis of the parties' own agreements determining property rights by instruments customarily considered by civil courts."[6] He recognized that "the Supreme Court has established a regime of limits on judicial involvement in adjudicating disputes between religious entities . . . when competing property claims reflect doctrinal cleavages."[7] But he explained that when "common instruments for establishing ownership and

5. 866 F.3d 53 (1st Cir. 2017).

6. *Id.* at 54.

7. *Id.* at 57.

control that most readily enable a court to apply the required, neutral principles in evaluating disputed property claims" are available, "they should be the lodestones of adjudication in these cases."[8]

Or consider *Griswold v. Driscoll*.[9] That case involved "whether a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise an advisory 'curriculum guide' . . . in response to political pressure violated the First Amendment."[10] The revision at issue concerned whether and how to teach a topic of heated disagreement between the Armenian and Turkish communities in Massachusetts.[11] The panel, in an opinion written by David, held that the revision did not violate the First Amendment.[12] David's opinion carefully described and distinguished the Supreme Court's fractured decision in *Board of Education v. Pico*,[13] in which a plurality of the Court had concluded that the First Amendment prohibited a school board from removing books from a library for the purpose of denying students access to ideas unpopular with board members.[14] David explained that the revision at issue in *Griswold* instead fell within the board's discretion to "set[] curriculum," which *Pico* had explicitly carved out and which found support in the Court's cases recognizing the important role of public schools in educating our citizenry, the reluctance of courts to intervene in conflicts that arise in the day-to-day operation of public school systems, and the authority of the government to choose viewpoints when it is itself speaking.[15]

Each of us benefitted from his extraordinary insights on our panels. Whether zeroing in on the need to resurrect one of a dozen dismissed securities fraud

8. *Id.* at 58.
9. 616 F.3d 53 (1st Cir. 2010).
10. *Id.* at 54.
11. *Id.* at 54–55.
12. *Id.* at 54.
13. 457 U.S. 853 (1982).
14. *Id.* at 870–71.
15. *Griswold*, 616 F.3d at 58–59.

counts, or to provide an extemporaneous historical account of grand jury practice in the United States to help place a novel grand jury issue in perspective, David routinely contributed to panels in ways that no one else could.

David's time on our court also provided many appellate advocates with an experience they will never forget. Countless lawyers have said appearing before him on our court was the highlight of their careers. Nearly as many also confessed that he had politely but firmly identified the weakness in their argument with a penetrating, and seemingly unanswerable, question from the bench.

David gave notice in 2015 that he anticipated sitting with us "if you'll have me" for another five years. He said that he had always planned to participate in our cases for ten years after he left the Supreme Court. In the ensuing years, we tried to persuade him to stay longer, but he knew his own mind. He informed the court in June 2020 during the coronavirus epidemic of his decision to stop hearing cases. He did, however, continue to go to work in his Concord, New Hampshire chambers (daily and then a few days each week) until his passing earlier this year. And until the end he continued to attend judicial ceremonies and periodic lunches with the judges who are resident in Concord.

David served briefly on our court before being appointed an Associate Justice. It was our court's great fortune that he chose to return for a more extended stint—one that we know he greatly enjoyed and one that enriched all of us who served with him.