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Souter defends judicial activism

Says perspectives change with time

By Jonathan Saltzman



Harvard awarded 7,125 degrees yesterday at the 359th commencement. K.J. Kim (right) took pictures during the event. (David L. Ryan/Globe Staff)

CAMBRIDGE — Retired Supreme Court justice David H. Souter, delivering the commencement speech at Harvard University yesterday, defended justices who interpret the Constitution and identify rights not explicitly mentioned in America’s founding document.

As the Senate prepares to hold confirmation hearings for former Harvard Law School dean Elena Kagan, President Obama’s nominee for the high court, Souter said that people who contend that deciding constitutional cases simply entails a straightforward “fair reading” of the Constitution are being unrealistic.

Not only does the Constitution contain “a lot of general language in order to be useful over long stretches of time,” the 70-year-old jurist told a sea of new graduates and alumni, but it “contains values that may well exist in tension with each other, not in harmony.”

“The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is

truly at odds with another,’’ Souter, a 1961 graduate of Harvard College and a 1966 graduate of Harvard Law School, said at the university’s 359th commencement. The university awarded 7,125 degrees and 89 certificates at the ceremony in the outdoor Tercentenary Theater.

Souter’s speech, which touched on landmark Supreme Court cases such as the Pentagon Papers and *Brown v. Board of Education*, appeared to repudiate strict constructionism, a legal philosophy championed by conservatives who want judges to apply the Constitution only as it is written.

As he spoke beneath sunny skies, Souter never mentioned Kagan by name nor used the words liberal or conservative. But he said the confirmation hearings would undoubtedly feature criticisms of judges who engage in “activism to extend civil liberties,’’ commentary that he said “tends to miss the mark.’’

Inevitably, he said, the Supreme Court’s perspective changes with time.

In 1896, when slavery was still in the recent past, the Supreme Court ruled in *Plessy v. Ferguson* that it was no violation of the Constitution’s equal protection guarantee to require blacks to ride in a railroad car that was separate but equal to the car for whites. When the high court decided *Brown v. Board of Education* 58 years later, the court concluded that separate was inherently unequal.

Souter, who was nominated by President George H.W. Bush in 1990 and served as a justice for 19 years, came to Washington with the reputation for being a moderate conservative. But he soon became a reliable liberal vote and was one of the four dissenters in the 2000 decision in *Bush v. Gore* that gave George W. Bush a victory in that year’s presidential race.

Harvard president Drew Gilpin Faust, who jokingly referred to herself as “Justice Souter’s warmup act,’’ said before he spoke that Souter embodies Harvard’s fundamental ideals: a graduate who used his education to provide a valuable public service. The New Hampshire resident still hears arguments occasionally on the US Court of Appeals for the First Circuit in Boston.

Faust encouraged graduates to continue the public service that many had begun while at school though it might be less profitable than other pursuits. She talked about two students who turned down jobs at J.P. Morgan and IBM to participate in Teach for America, which recruits outstanding college graduates to teach for two years in urban and rural public schools.

She said an increasing number of graduates are taking public service jobs, although that might have a lot to do with the bad economy. “We and the world need you,’’ Faust said.

Nick Stenzel, 35, who works at the university’s planning office and graduated with a master’s in liberal arts and creative writing, said Souter’s remarks that the Constitution

contains many shades of gray struck a responsive chord. Stenzel is writing what he described as a coming-of-age historical novel — he penned the first 80 pages for his thesis — and avoids a world of black and white in his fiction.

But another graduate had a different perspective.

Jude Marfil, 35, who earned a master's degree in liberal arts with a concentration in journalism, said she had to awaken at 5:30 a.m. to line up for the conferring of degrees later that morning. By the time Souter took the stage shortly after 3:30 p.m., she said, she was wiped out.

“I didn't pay much attention,” she said, with a laugh.

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Correction: *Because of an editing error, the headline of this story mischaracterized the thrust of former Supreme Court justice David H. Souter's remarks. Souter's theme was that those who complain about what critics call judicial activism miss the fact that justices are charged with interpreting a Constitution that often “gives no simple rule of decision for the cases in which one of the values is truly at odds with another.”*■