

PANEL CONSISTING OF ANTONIA HERNANDEZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND; JOSEPH L. RAUH, JR., GENERAL COUNSEL, LEADERSHIP CONFERENCE ON CIVIL RIGHTS; AND JOAN BRONK, PRESIDENT, NATIONAL COUNCIL OF JEWISH WOMEN

STATEMENT OF ANTONIA HERNANDEZ

Ms. HERNANDEZ. Thank you, and I will try to do that.

I have submitted extensive written testimony and I will not try to at this point in time read it—

The CHAIRMAN. The entire statement will be entered in the record.

Ms. HERNANDEZ [continuing]. But I will try to consolidate the concerns that we have in my statement.

I am Antonia Hernandez, I am the president and general counsel of the Mexican-American Legal Defense and Education Fund. This statement is submitted on behalf of MALDEF in opposition to Senate confirmation of David Souter as an Associate Justice of the U.S. Supreme Court.

In this statement, I address three primary matters: The background of MALDEF's concerns about David Souter; second, Judge Souter's record antagonistic to civil rights and constitutional provisions which protect the rights of Hispanics; and, three, Judge Souter's refusal to disavow personally those antagonistic positions during his first 2 days of testimony before this committee.

Because of the Nation's history of invidious discrimination against Hispanics, and because of the U.S. Supreme Court's unique role for more than 30 years in beginning to vindicate the civil and constitutional rights of Hispanics, we Hispanics have placed particular reliance on the Supreme Court in assuring our civil and constitutional rights, and it is in light of our concern that we have serious fears and concerns.

We firmly believe that in 1990, no individual should be confirmed, unless he or she has demonstrated an understanding and a commitment to equal justice and views the Court as an appropriate vehicle to redress these rights and understands these commitments should be based on past records.

Our organization withheld opposition until we heard Judge Souter's testimony, and we take this position not lightly. But in listening to his 2 days of testimony—and I must confess that I did not listen to all of it yesterday, I was in flight between Los Angeles and Washington, DC, but in listening to the last 2 days of his testimony, we remain seriously concerned that Judge Souter has no understanding nor limited understanding or commitment to issues of concern to Hispanics.

Because of the fact that the incidents antagonistic to civil rights occurred when Judge Souter was acting in his official capacity as a lawyer, advocating the New Hampshire Office of Attorney General, and even aside from his oath of office and the manner in which he excessively pursued his position hostile to civil rights, we withheld judgment. Our hope was that maybe, just maybe his personal positions had been different from and more compassionate than the hostile position he had advanced in his official capacity on behalf of the State of New Hampshire, and that he had been misquoted by

the media in his sound bite characterization of affirmative action as affirmative discrimination. Our hope, however, was quickly dashed by Judge Souter's own testimony in his first 2 days before this committee.

In summary, he repeatedly declined to offer any personal views at the time contrary to the hostile positions to civil rights, in general, and to Congress' power under section 5 of the 14th amendment, in particular. He had aggressively pursued, on behalf of the State of New Hampshire, and, maybe even worse, Judge Souter failed to demonstrate any capacity for fairness to and, much less, compassion for the individuals who would be forever affected by his rulings and votes as Associate Justice of the Supreme Court.

This is not to deny and certainly not degrade the testimony he gave, finally recognizing that, still today, there is enormous need to remedy the wrongs done by our Nation and within our Nation through the history of invidious discrimination.

Although his testimony constitutes a fairly accurate summary of the constitutionality and legally permissible scope of affirmative action allowed under current Supreme Court rulings, nowhere in his testimony did Judge Souter deny the characterizations reported in his 1976 speech. In fact, almost nowhere did Judge Souter refer to his own views of affirmative action, either as a constitutional matter or as a matter of statutory construction or of congressional power.

All that Judge Souter has left with us, with any certainty, is that there are matters "which will be played out in constitutional litigation for some time ahead of us." But for those of us who are Hispanic and female, this is not just an intellectual game "to be played out."

Moreover troublesome, indeed, determinative for MALDEF, has been Judge Souter's repeated refusal, after repeated opportunities to discuss his personal views as possibly compassion on civil rights and more deferential to congressional power under section 5 of the 14th amendment. From the extreme and cold position he advanced as an assistant attorney general, as an attorney general, challenging Congress' pan on the literacy tests for voting as unconstitutional, and challenging Congress' title VII recordkeeping requirement as unconstitutional.

In Judge Souter's opening statement before this committee, he has said nothing about civil rights and nothing at all concerning the power of Congress under section 5 of the 14th amendment.

Judge Souter, on the other hand, did readily concede that one of the lessons learned by him as a trial judge, a lesson that is readily apparent to anyone who has ever been before a trial judge, was that, at the end of our judicial test, some human being is going to be affected.

Judge Souter's personal views on civil rights were inquired into thereafter by several Senators, but Judge Souter refused to disclose his personal beliefs or positions.

Apart from Judge Souter's overall nonresponsiveness in his 2 days of testimony, much less his apparently continuing hostility to the Supreme Court's recognition of Congress' power under section 5 of the 14th amendment and under section 2 of the 15th amendment, the fact of the matter is that, although provided with

plentiful opportunity to do so, Judge Souter has not demonstrated fairness for and any compassion about those of us, particularly Hispanics who for so long have been denied not just the promise of the American dream, but, more basically, the equal opportunity of the law. In addition to Judge Souter's nonresponsiveness, his evident lack of feeling and of compassion and his continued hostility to this committee on the issues that we care about should be a consideration. This fact pertains to Judge Souter's admiration for, among all Supreme Court Justices, of not the first Justice Harlan but the second Justice Harlan. Please remember that their philosophies are leagues apart.

The first Justice Harlan, now often remembered only for one historical dissenting opinion, provided the Supreme Court's sole dissent in *Plessy v. Ferguson*. This is not the Justice Harlan who Judge Souter admires. Instead, Judge Souter admires most, among all Supreme Court Justices, the second Justice Harlan, who wrote the dissenting opinion in *Katzenbach v. Morgan*, expressing the view that Congress essentially has no power whatsoever to legislate under section 5 of the 14th amendment from or beyond that already deemed to be unconstitutional by the judiciary.

I must add that in listening to former Attorney General Griffin Bell in his explanation of the issue of choice, that Congress definitely has the power under section 5 of the 14th amendment to deal with the *Roe v. Wade* issue, we are concerned that there is a question as to Judge Souter's belief that Congress does, in fact, have this power.

Judge Souter has not demonstrated fairness or even compassion for racial minorities, particularly with regard to our trying to win nondiscriminatory opportunities to equal employment, and to our most fundamental right under the Constitution and the laws of our country, the right to vote.

Therefore, accordingly, MALDEF opposes the confirmation of Souter as an Associate Justice of the Supreme Court. Thank you.
[The prepared statement of Ms. Hernandez follows:]