

Testimony of:

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Mr. Chairman, my name is Howard Phillips. I am chairman of The Conservative Caucus, a non-profit, public-policy advocacy organization based in Vienna, Virginia.

The Declaration of Independence asserted that "We are endowed by our Creator with certain inalienable rights, and that, among these are life, liberty, and the pursuit of happiness." The Declaration rested on the assumption that there exist "the laws of nature and of nature's God."

Our law system is necessarily rooted in and legitimated by that fundamental recognition of higher authority.

In considering David Souter's suitability to cast what in many cases will be the deciding opinion on the Supreme Court of the United States, it is necessary to go beyond Mr. Souter's intellectual capacity and his stated opinions, and to assess his character and moral courage in their relationship to the responsibilities of a Supreme Court justice.

One moment of truth for Mr. Souter came in February, 1973, when, as a member of the board of trustees of Concord Hospital, he participated in a unanimous decision that abortions be performed at that hospital.

Advocacy of, or even acquiescence in, such a decision is morally distinguishable from the judicial conclusion, profoundly

incorrect in my view, that women have a constitutional right to destroy their unborn children.

It is also distinguishable from and far more troubling than the political argument by politicians who maintain that they are "personally opposed" to abortion even as they advocate its decriminalization.

It is one thing to intellectually rationalize the case for permitting legal abortions while still opposing the exercise of such legal authority; it is quite another---something far more invidious morally---to actually join in a real world decision to cause abortions to be performed, routinely, at a particular hospital.

Those abortions whose performance was authorized by David Souter were not mandated by law or court opinion. In fact, laws have remained to this day on the books in New Hampshire which provide criminal penalties for any "attempt to procure miscarriage" or "intent to destroy quick child". Indeed, section 585:14 of the New Hampshire Criminal Code establishes the charge of second degree murder for the death of a pregnant woman in consequence of an attempted abortion.

Nor were those abortions which Mr. Souter authorized performed merely to save the life of the mother. Nor were they limited to cases of rape or incest.

If the unborn child is human, and if innocent human life is to be defended and safeguarded, why did Mr. Souter acquiesce in those abortions? Why did he not speak out against them? Why did he, through 12 years on the Concord Hospital board in a position of responsibility, help cause those abortions to be performed, and invest his personal reputation in clearly implied approval of those abortions?

The overarching moral issue in the political life of the United States in the last third of the Twentieth Century is the question of abortion.

Is the unborn child a human person entitled to the protections pledged to each of us by the founders of our nation?

The issue is much more than one of legal or judicial philosophy. There are men and women in the legal profession, in elected office, and on the bench who acknowledge abortion to be morally repugnant, but who assert that, in present circumstances, it cannot be constitutionally prohibited.

Whatever Mr. Souter's legal and judicial philosophy may be (and, on the record, it seems to be one which rejects the higher law theories implicit in the Declaration of Independence), it is a chilling fact which the Senate must consider that Souter has personally participated in decisions resulting in the performance of abortions where such abortions were in no way mandated or required by law or court decision.

By his own account, Mr. Souter served as a member of the board of trustees for the Concord Hospital from 1971 until 1985. Following service as board secretary, he was president of the board from 1978 to 1984.

In 1973, shortly after the Supreme Court's January 22 *Roe v. Wade* decision, the Concord Hospital trustees voted to initiate a policy of performing abortions at Concord Hospital.

Similarly, Dartmouth Hitchcock Hospital (which is associated with the Dartmouth Medical School of which Judge Souter has been an overseer) has performed abortions up to the end of the second trimester.

During the period of Mr. Souter's tenure as a decision-maker of these two institutions, many hundreds of abortions were performed under his authority with no indication that he ever objected to or protested the performance of these abortions. Even though the *Roe v. Wade* decision did in fact authorize abortions through the ninth month of pregnancy, nothing in the Supreme Court's decision required or obliged any hospital to conduct abortions, whether in the ninth month, the sixth month, or even the first month of pregnancy.

If Judge Souter is confirmed as a justice of the Supreme Court, he will, in all likelihood, be given the opportunity to address not only the issue of Roe v. Wade, but broader issues involving the sanctity of innocent human life.

Justice John Paul Stevens wrote in the 1986 Thornburgh v. American College of Obstetricians and Gynecologists case: "There is a fundamental and well recognized difference between a fetus and a human being. Indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."

Mr. Stevens was wrong in a very deadly way.

If an unborn child is not human, I would ask Justice Stevens, "What is he?" "What is she?" But at least Mr. Stevens was logical in defending his support for the majority opinion in Roe v. Wade.

In the Roe v. Wade decision, the Supreme Court indicated that, if the unborn child is a person, the state could not allow abortion even to save the life of the mother. In fact, in the majority opinion deciding Roe v. Wade, the Supreme Court said that "if the personhood of the unborn child is established, the pro-abortion case 'collapses', for the fetus's right to life is then guaranteed specifically by the Fourteenth Amendment."

As Notre Dame law Professor Charles Rice has pointed out, "This is so, because the common law does not permit a person to kill an innocent non-aggressor, even to save his own life."

Does David Souter believe that the unborn child---the fetus in the mother's womb---is a human person, deserving of all the protections which are guaranteed to human beings after the moment of birth?

Seemingly, Mr. Souter's answer is an unequivocal "no". By agreeing that abortions be performed at institutions under his authority, Mr. Souter established clearly that he did not recognize the personhood of the unborn child, for surely, if he did acknowledge the unborn child to be a human person, Mr. Souter

would not have agreed to authorize the extinguishment of so many precious lives at medical facilities for which he bore responsibility.

One must conclude that either Mr. Souter accepts the view that the life of the unborn child is of less value than the convenience and profit of those who collaborate in the killing of that child, or that, despite his recognition of the fact that each unborn child is human, a handiwork of God's creation, he lacked the moral courage or discernment to help prevent the destruction of so many innocent human lives when he had the authority---indeed the responsibility---to do so.

Either way, in such circumstances, unless there are mitigating factors or extenuating considerations which have not yet been brought to public attention, it is difficult to regard Mr. Souter as one suitable for participation in judicial decisions at the highest level of our nation.

If, during his years of responsibility at Concord Hospital and Dartmouth Hitchcock Hospital, Mr. Souter believed each fetus to be a human person, and failed to act against the performance of abortion, he was morally delinquent.

If, on the other hand, he justified himself by denying the human qualities of the unborn child, then he placed himself in the ambit of those who have argued against the very philosophy which his sponsor, President George Bush, purported to embrace during his 1988 presidential candidacy.

On the basis of the information now available, Mr. Souter should not be confirmed.