National Association of Women Judges

September 25, 1990

Senator Joseph R. Biden, Jr.
Senate Judiciary Committee
Russell Senate Office Building
Room 221
Washington, DC 20510

Re: Judge David Souter

Dear Senator Biden,

Enclosed is the memo you requested. I have covered as much of the material as the short time allows. I hope it will be helpful to you and your Committee.

Thank you on behalf of the NAWJ for your endurance and courtesy in those rather grueling hearings.

Very truly yours,

Judge Sophia H. Hall
President
NAWJ

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National Association of Women Judges

MEMORANDUM

TO: Senator Joseph R. Biden, Jr.
Chair, United States Senate Judiciary Committee

FROM: Judge Sophia H. Hall
President, National Association of Women Judges

RE: Judge David Souter

DATE: September 25, 1990

At your request, I have reviewed the excerpts of Judge Souter's testimony which you have provided. I do not find a significant difference between his original meaning doctrine and the usual original intent process of analysis. Accordingly, I find no reason to change the NAWJ's statement of concern.

In In Re Estate of Dionne, Judge Souter's dissent demonstrates his view that you determine the framers' understanding of constitutional language by looking at the evidence of the thinking at the time the language was adopted. Judge Souter's statement that the decision in Brown v. Board of Education is consistent with his doctrine of original meaning, as exemplified in Dionne, is not supported by his testimony because in discussing Brown he does not use the same process of analysis he used in Dionne. He uses a different analysis which I call the doctrine of "previously ignored evidence."

Judge Souter attempts to distance himself from conventional views of the original intent doctrine by narrowly defining the doctrine.

> "I do not believe that the appropriate criterion of constitutional meaning is this sense of

> original intent, that you may never apply a provision to any subject except the subject specifically intended by the people who adopted it. I suppose the most spectacular example of the significance of this is the case of Brown v. Board of Education." 9/13 p. 214

> "... when I speak of original intent ..., I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted or ratified the provision, ..." 9/17 p. 195

He contrasts his doctrine of original meaning by saying that it is not confined to determining instances or problems in the minds of the framers.

> "What we are looking for then, when we look for its original meaning is the principle that was intended to be applied, and if that principle is broad enough to apply to school desegregation, as it clearly was, then that was an appropriate application for it and Brown was undoubtedly correctly decided." 9/13 p. 216

> "We have been placed upon courts to impose the will that lies behind the meaning of those who framed and by their adoption intended to impose the law and the constitutional law of this country upon us all." 9/14 p. 7

Judge Souter explained his doctrine of original meaning by referring to his analysis in his dissent in Dionne. In that case, the New Hampshire Supreme Court was applying a phrase in its constitution which provided that "[e]very subject of this state is entitled... to obtain right and justice freely without being obligated to purchase it...." In his dissent Judge Souter stated his original meaning doctrine in somewhat different terms than he uses now. "The court's interpretive task is therefore to determine the meaning of the article 14 language as it was

understood when the framers proposed it and the people ratified it as part of the original constitutional text...." 518 A.2d at 181.

In the opinion, he stated that the "...[e]vidence of that understanding comes from two sources. The first is the body of scholarly and judicial commentary on the meaning of the clause of the Magna Carta of 1215...." from which the New Hampshire constitutional language was derived. 518 A.2d at 181 The second source was the history of New Hampshire statutes" "... as a record of what New Hampshire judges and legislators regarded as consistent with English liberties during the early period of our history, and as consistent with the State Constitution after 1784." 518 A.2d at 182 Judge Souter, based on this evidence of the framers' understanding, found that "...the people who framed and adopted article 14 meant principally to guard against bribery of the sort that had corrupted the early medieval judiciary." 518 A.2d at 183-184

In his testimony, Judge Souter described his original meaning analytical process. He said that you first must look at the text. 9/14 p. 60 He did not characterize the next step, but, from the process he used in Dionne, the second step is to look at the evidence of the understanding of the framers at the time they adopted it. In Dionne, he found that evidence in scholarly and judicial commentary of the time and in the conduct of legislators and judges.

Judge Souter, however, does not use this analytical process when he explained how the decision in Brown v. Board of Education

is consistent with his original meaning method of analysis. He did state that first you look at the text of the equal protection clause. It is broad and not limited to race. 9/14 p. 60 The next step he should have testified to, pursuant to his Dionne process, would be to find the framers' understanding when they used the language, by looking at the evidence of the thinking of the times when the Fourteenth Amendment was passed or when Plessy v. Ferguson was decided 30 years later.

Instead, Judge Souter discusses a different analytical process which I call the doctrine of "previously ignored evidence."

> "The majority who decide Plessy v. Ferguson in 1896 accepted as a matter of fact that in the context in which they were applying the Fourteenth Amendment there could be separateness and equality. Whatever else we may see in Brown v. Board, there is one thing that we see very clearly and that is that the Court was saying you may no longer in applying this separate but equal doctrine, ignore the evidence of non-tangible effects. When you accept that evidence, then you see that you cannot have separateness and equality.
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> In 1954 they saw something they did not see in 1896.... ...they saw an application for a principle which was not seen in 1896, and they saw the factual impossibility of applying the terms of 1696 in 1954.
>
> I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses." 9/17 p. 196-197 (Emphasis supplied)

In this testimony, therefore, Judge Souter proposes to disregard what the framers "accepted as a matter of fact" at the time, and use evidence that was presumably ignored by the

framers. This is obviously not the analysis Judge Souter used in Dionne. There, he assiduously relied on the thinking of the times rather than, as here, hypothesize that thinking by supplying evidence not then considered. If he had used his Brown analysis in Dionne, he might have sided with the majority.

In conclusion, Judge Souter's original meaning doctrine as used in Dionne relies on contemporaneous evidence to understand the meaning of language used at the time. His explanation of why the Brown decision is consistent with the Dionne case is not persuasive because he uses a different analysis. Whether Judge Souter's analysis is called original intent or original meaning, the NAWJ finds his analytical process cause for concern, and, particularly so, in light of his shift in analysis in discussing Brown before the Committee.