JUDGE DAVID SOUTER'S RECORD

ON

WOMEN'S CONSTITUTIONAL AND LEGAL RIGHTS:

CAUSE FOR SERIOUS CONCERN

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DAVID SOUTER'S RECORD ON WOMEN'S LEGAL AND CONSTITUTIONAL RIGHTS: CAUSE FOR SERIOUS CONCERN

Introduction:

This report discusses the Senate's role in examining and confirming Supreme Court nominees, and analyzes Judge David Souter's record in four key areas of particular concern to women: constitutional protections against gender discrimination, equal employment opportunity enforcement measures, rights to privacy and reproductive freedom, and freedom from crimes of sexual violence.

At a minimum, a Supreme Court nominee must demonstrate his or her adherence to the law's most basic guarantees of individual rights and equality. After reviewing Judge Souter's record, we cannot conclude that he subscribes to key constitutional and legal principles that protect women against discrimination and guarantee their fundamental rights to privacy and reproductive freedom. Unless Judge Souter offers adequate assurances of his commitment to protecting the legal rights of women, we will oppose his confirmation as a Justice of the Supreme Court.

The Senate has a constitutional obligation and a public responsibility to examine Supreme Court nominees as to their views on the Constitution, individual rights, and the role of the Court.

Because of its constitutional mandate to "advise and consent," the Senate has both the right and the duty carefully to

examine candidates for life tenure on the federal bench. Without question, this obligation assumes particular significance with respect to Supreme Court nominees, since at stake is the composition of "the final arbiter of those issues that most deeply divide our citizens from one another."[1] Senator Strom Thurmond underscored the gravity of this duty: "[T]he Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of prospective Justices or Chief Justices as it relates to broad issues confronting the American people and the role of the Court in dealing with these issues."[2]

Senator Joseph Biden, Chairman of the Senate Committee on the Judiciary, has carefully chronicled the Senate's historic willingness to undertake searching inquiry into nominees' views of the Constitution, individual rights, and the role of the Supreme Court;[3] such examination has led to the withdrawal, rejection, or indefinite postponement of nearly one-fifth of all nominees.[4]

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[1] Testimony of Shirley Hufstedler before the Senate Committee on the Judiciary, September 23, 1987.

[2] Hearings on the Nomination of Abe Fortas and Homer Thornberry before the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 180 (1968); see also 133 Cong. Rec. S10,526 (July 23, 1987).

[3] 133 Cong. Rec. S10,522-29 (1987).

[4] Of nearly 150 Supreme Court nominations, 28 have been rejected, withdrawn, or indefinitely postponed because of the Senate's opposition. David O'Brien, Judicial Roulette: Report of the Twentieth Century Fund's Task Force on Judicial Selection at 66-67 (1988); see also Laurence Tribe, God Save This Honorable

Moreover, constitutional law scholars urge that this scrutiny is fundamentally necessary to the preservation of our constitutional framework. As Professors Phillip Kurland and Laurence Tribe have written, "The Republic may demand -- and its Senators ought therefore to assure -- that its life tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process."[5]

The nomination of David Souter to the Supreme Court thus calls for the Senate's careful scrutiny of his commitment to equal protection and individual rights, including constitutional and legal protections for women. The Senate should require that Judge Souter resolve any doubts and ambiguities as to his views on these subjects. Given the Court's critical role in deciding the most important questions of law and policy, Judge Souter -- as a nominee for lifetime appointment -- must ultimately bear the burden of establishing his qualifications.

Judge Souter's public record raises serious concerns about his commitment to protecting the legal rights of women.

From Assistant Attorney General to Associate Justice for the state supreme court, Judge Souter has spent the last 22 years as a public servant; yet his public record on issues of bedrock importance to women is surprisingly spare. We find it remarkable

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Court (1986).

[5] Letter to the Senate Judiciary Committee, June 1, 1986.

that -- over the course of more than two decades as the state's advocate and jurist -- Judge Souter apparently has published no speeches, articles, or other writing on pressing issues of law and policy. Clearly he did not take advantage of the opportunity afforded him as a public official to promote individual rights and equal opportunity.

Consequently, what we know about Judge Souter's fitness to serve on our highest Court comes only from his judicial opinions and his actions as state attorney general. This record is extremely disturbing.

As discussed below, Judge Souter's record raises serious questions as to his acceptance of well-established American jurisprudence, including constitutional and legal protections against gender-based discrimination, as well as affirmative measures to redress past abuses. Nor are we convinced that the nominee recognizes women's constitutional rights to reproductive freedom and the importance of securing their freedom from crimes of sexual violence.

During the confirmation process, we will be looking for Judge Souter's recognition of a fundamental right to privacy that encompasses reproductive freedom -- including a woman's right to choose contraception and abortion. His recognition should embrace traditional Supreme Court analysis of this privacy right -- holding that any restrictions on such rights are constitutionally impermissible unless proved necessary to a compelling state interest. In any event, he must provide

assurances that he will not dilute the protections now afforded women by Roe v. Wade.

Judge Souter must also demonstrate that he is willing to strike down invidious gender-based classifications as violative of the Constitution's guarantees of equal protection. He must affirm his commitment to the law's safeguards of equal employment opportunity, including affirmative measures proven effective in battling on-the-job discrimination. And, he must provide adequate assurances that he will scrupulously uphold the law's protections against crimes of sexual violence.

The task before the Senate Judiciary Committee is an urgent one, as a lifetime appointment to the Supreme Court requires the fullest review. The confirmation process must fill in the gaps in Judge Souter's record and scrutinize its more troubling elements. As part of this process, the Senate must ascertain Judge Souter's position on these issues of our specific concern: equal protection, employment discrimination, the right to privacy -- including the right to choose abortion -- and freedom from crimes of sexual violence. Unless Judge Souter can clarify his views sufficiently to overcome the disturbing tenor of his record, he should not be a member of the Supreme Court.

Our major areas of concern are discussed below.

1. Judge Souter's challenge of the Supreme Court's heightened scrutiny standard -- which has often proved successful in eradicating gender discrimination -- raises serious questions as to his willingness to strike down invidious sex-based legal classifications as violative of the Constitution's equal protection guarantees.

Over the course of nearly 20 years, the Supreme Court has consistently held that sex-based classifications require careful scrutiny under the Fourteenth Amendment's Equal Protection Clause.[6] The Court recognized that such scrutiny is necessary since "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[7]

Thus, the Court has repeatedly ruled that sex-based classifications are unconstitutional unless they "serve important governmental objectives [that are] substantially related to achievement of those objectives."[8] This heightened scrutiny has proved critically important in battling sex discrimination. As Professor Tribe has noted, "Every law student learns that only the Supreme Court's development of much more closely structured

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[6] E.g., Craig v. Boren, 429 U.S. 190 (1976); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

[7] Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

[8] E.g., Craig v. Boren, 429 U.S. at 197. This approach is known variously as "heightened" or "middle-tier" scrutiny because it is more rigorous than the "rational-basis" or "minimal" scrutiny that evaluates legislative enactments with great deference, requiring only that they be "reasonable." Even more unyielding, however, is "strict scrutiny," the standard of review applied by the Court to race-based classifications or classifications that infringe upon fundamental rights.

forms of scrutiny of laws based on sex and race has led us predictably toward equality."[9]

Constitutional experts agree that "[i]t is clear that when the Supreme Court struck down sex discrimination in medical education and in other areas, it has done so only by applying a more rigorous standard. . . .For a great many years, [the rational basis test] was in essence the test that led to the upholding of almost all kinds of sex discrimination."[10] In fact, "the Supreme Court struck down not one single statute distinguishing between the sexes in the entire time it applied [the rational basis] standard to such cases."[11] Under this minimal standard of review, for example, the Court upheld the constitutionality of statutes excluding women from jury service, as well as laws preventing women from working as bartenders or in restaurants late at night.[12]

In contrast, the Court's development of heightened scrutiny analysis has proved enormously effective in battling blatant and harmful discrimination: "The Supreme Court's recognition that gender discrimination is presumptively wrong has had a tremendously positive impact on the lives of women in this

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[9] Testimony before the Senate Judiciary Committee, September 22, 1987.

[10] Id.

[11] Testimony of Professor Wendy Williams before the Senate Committee on the Judiciary, September 23, 1987 (emphasis in original).

[12] Hoyt v. Florida, 368 U.S. 57 (1961); Goesart v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

country. Under the Court's direction, the federal courts have invalidated dozens of laws excluding women from wage work and public life and devaluing the wages and benefits they receive."[13]

On at least two occasions, however, Mr. Souter has questioned heightened scrutiny analysis, preferring the more deferential rational basis standard (or "minimal scrutiny") instead. His views cast doubt on his commitment to eradicating invidious sex-based discrimination.

As state attorney general, Mr. Souter filed a brief before the First Circuit Court of Appeals that expressly rejected the notion that gender-based classifications are subject to heightened scrutiny.[14] Meloon v. Helgemoe involved a defendant's equal protection challenge to his conviction under a statute that held a male criminally liable for sexual intercourse with an underage female.

The Souter brief argued that the statute's concededly gender-based classification should not be subjected to a distinctly middle-tier level of scrutiny and, therefore, that it should be allowed to stand. After recounting the development of the Supreme Court's equal protection jurisprudence, the Souter

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[13] Testimony of Professor Sylvia Law before the Senate Committee on the Judiciary, September 23, 1987.

[14] Brief for Raymond Helgemoe and the State of New Hampshire, Meloon v. Helgemoe, 564 F.2d 602, cert. denied 436 U.S. 950 (1st Cir. 1977) (No. 77-1197).

brief concluded that sex-based distinctions were entitled to little more than rational basis scrutiny:

> "The State submits that the Reed-Craig substantial relation test is merely a heightened form of the traditional rational basis test. It is not an independent and median-level standard. Rather, it is a creature of the rational basis test, and on a graduated scale would fall much closer to that test than to the strict scrutiny standard."[15]

The Court of Appeals ruled against the state and held the statute unconstitutional. Judge Souter then even more affirmatively challenged the validity of heightened scrutiny in petitioning the Supreme Court for certiorari. The Souter petition urged the Court to reconsider -- and even abandon -- its standard for evaluating gender-based distinctions:

> "In sum, this Court has created a new equal protection test which resides somewhere in the 'twilight zone' between the rationale [sic] basis and strict scrutiny tests. This new standard lacks definition, shape, or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so 'diaphanous and elastic' as to permit subjective judicial preferences and prejudices concerning particular legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard."[16]

As a judge, Souter has not had an opportunity to rule on a gender-based equal protection challenge. But, just a few months ago, Judge Souter again expressed difficulty with middle-tier scrutiny, albeit in a context other than that of sex

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[15] Id. at 16.

[16] Petition for Certiorari for Raymond Helgemoe and the State of New Hampshire at 18-19, Meloon v. Helgemoe, supra, (1978) (No. 77-1058) (emphasis added).

discrimination. City of Dover v. Imperial Casualty & Indemnity Co.[17] applied the state's middle-tier level of review to evaluate the constitutionality of a municipal immunity statute. Dissenting from the majority's holding of unconstitutionality, Judge Souter argued that the majority had misapplied the state's middle-tier scrutiny, in that it had not been sufficiently deferential to the legislature's classification. In his discussion of the standard, Souter argued that it

> "suffers from a proven susceptibility to confusion with other standards of equal protection review . . . . Although the federal judiciary, like this court, has subsequently tried to use Royster's formulation to provide 'somewhat heightened' middle tier scrutiny, the very opinions cited in Carson as so applying it have reverted to type, as it were, by lapsing into rational basis terminology."[18]

Judge Souter's dissent thus echoed his earlier brief in suggesting that middle-tier scrutiny is really little more than minimal scrutiny, and intimating that a distinctly articulated middle-tier review is difficult, if not impossible, to apply.[19]

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[17] 1990 N.H. Lexis 39 (1990).

[18] Id. at 24-25 (citations omitted).

[19] However, in an earlier decision, Judge Souter noted federal courts' use of heightened scrutiny to evaluate discriminatory statutes. In rejecting an equal protection challenge to a statute limiting the deposition discovery rights of defendants accused of crimes against victims under sixteen years of age, Souter wrote that "the distinction in question does not rest on gender or legitimacy as to entitle the defendant to heightened scrutiny under the federal standard." State v. Heath, 523 A.2d 82, 88 (1986).

Since Judge Souter had no opportunity to evaluate a sex discrimination claim as a judge, we are unable to conclude whether this mention of heightened scrutiny demonstrates his acceptance of the analysis as necessary in eliminating discrimination, or mere recitation of existing federal precedent.

As the state's advocate, Judge Souter's willingness to have gender-based classifications reviewed under merely "a creature of the rational basis test" alarms us. Even more unsettling was his suggestion that the Court retreat from heightened scrutiny of such distinctions. His recent expression of judicial discomfort with the difficulty in applying middle-tier review does nothing to dispel these concerns.

Judge Souter's record thus gives us reason to doubt his willingness to apply the Court's equal protection jurisprudence in this critical area -- and, consequently, his readiness to invalidate statutes that discriminate on the basis of sex. His writings suggest that he might evaluate classifications by gender with little more than rational basis scrutiny -- a standard clearly inadequate for uprooting invidious discrimination. As history has taught us all too painfully, courts have used the lesser rational basis test to uphold gender-based distinctions that disable women from full participation in political, business, and economic arenas.

The Senate must further inquire into Judge Souter's willingness to strike down gender-based distinctions as violative of constitutional guarantees of equal protection. Absent his

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Nor are we able to analyze how he would actually undertake equal protection review of sex-based classifications -- i.e., whether his evaluation of such classifications, even if in the name of heightened scrutiny, would prove rigorous or deferential. For these reasons, Judge Souter's dicta in Heath offers us little guidance.

firm commitment to eliminating invidious sex-based classifications, Judge Souter should not be confirmed.

2. As state attorney general, Judge Souter actively opposed measures designed to enforce guarantees of equal employment opportunities. In challenging Equal Employment Opportunity Commission regulations, Mr. Souter's arguments revealed a fundamental misapprehension of Title VII and the role of the EEOC in achieving equal employment opportunity.

Although Mr. Souter -- as Attorney General -- appeared as counsel on all briefs filed by the state, they were often actually prepared by one of his Assistant Attorneys General. Nevertheless, Mr. Souter bore ultimate responsibility for the state's arguments. As Souter himself remarked, "At no time would I give testimony with which I disagree. And it would be irresponsible for the attorney general to support any state agency if he felt what they were doing was clearly wrong."[20]

Moreover, Souter was reluctant to expand the size of his relatively small staff for fear of relinquishing some measure of control: "I'm probably going to surprise you but I don't think it should be expanded. . . .I personally don't want to see [the staff] get any bigger than it has to be. When you talk about 20 or 30 lawyers, you talk about independent judgment. It can't be a tightly-knit, tightly-run organization."[21] Thus, it can be

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[20] "New Attorney General Said 'Lawyer's Lawyer,'" Concord Monitor at 14, January 7, 1976.

[21] "Next AG Plans Little Expansion," Manchester Union Leader at 10, December 28, 1975.

assumed that Mr. Souter was personally involved in developing the arguments in his office's major cases, especially those prepared for the Supreme Court.

This seems especially true when, as state attorney general, Mr. Souter challenged Equal Employment Opportunity Commission regulations that required states to submit reports listing their employees' race, national origin, and sex by job category.[22] New Hampshire was the only state during that period to balk at the EEOC's requirements, which, properly interpreted, can be used to determine the possibility of Title VII violations. Then-Solicitor General Robert Bork defended the reasonableness of the regulations against Mr. Souter's challenge.

Mr. Souter's petition for certiorari to the Court argued that the recordkeeping requirements forced employers to "become color-conscious rather than color-blind,"[23] thus violating

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[22] Interviews with others involved in New Hampshire's challenge of the EEOC regulations further suggest that Judge Souter endorsed the state's arguments. Edward Haffer, the Assistant Attorney General whose name appears on the briefs along with that of Mr. Souter, remembers that Souter was "supportive of and involved in the effort." Legal Times, Aug. 27, 1990, at 10. Moreover, then-New Hampshire Governor Meldrim Thomson recently recalled that Souter "did not discourage" pursuing the case all the way to the Supreme Court. "Souter, as State Offical, Opposed U.S. Racial Breakdown Rule," Washington Post, Aug. 1, 1990 at A4.

[23] Petition for Writ of Certiorari for the State of New Hampshire at 7-8, New Hampshire v. United States, (1976) (No. 76-453).

Interestingly, Mr. Souter's cert petition also urged that the EEOC regulations violated employees' constitutional right of privacy. The brief argued that "the right to refuse to inform the government of one's racial/ethnic background" was "a matter of individual privacy." Id. at 15. Whether Judge Souter's concern for privacy extends to a woman confronted with the difficult decision whether to continue or terminate a pregnancy

constitutional and Title VII principles. While offering no supporting evidence, the state maintained that employment quotas would be the "natural consequence" of keeping information on employees' race and sex -- even though the creation of such quotas would constitute a violation of Title VII.

Mr. Souter's argument reveals a fundamental misapprehension of the purposes underlying Title VII and the role of the EEOC in achieving equal employment opportunity. As the Supreme Court has recognized, one of Title VII's objectives is to serve as a catalyst for encouraging employers to examine their own practices to eliminate unlawful sex- and race-based discrimination.[24] And, as civil rights experts such as Bush appointee and EEOC chair Evan Kemp agree, this recordkeeping is necessary in evaluating possible cases of discrimination and in measuring progress in attaining equal employment opportunity.[25] Requiring employers to track the diversity of their workforce is a reasonable and effective enforcement measure fully in keeping with the EEOC's regulatory authority.

Over the past 25 years, Title VII has facilitated the slow but steady progress of women and people of color in achieving equal opportunity in the workplace. But its continued effectiveness hinges largely upon courts' enthusiasm for

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demands the Senate's further investigation. See Section 3, infra.

[24] E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

[25] Washington Post, supra note 23.

enforcing it. Judge Souter's assault on the EEOC's sensible recordkeeping requirements, coupled with his reported characterization of "affirmative action" measures as "affirmative discrimination,"[26] casts doubt on his understanding of and dedication to equal employment opportunity law.

The Senate must further examine Judge Souter's commitment to constitutional and legal protections against employment discrimination -- including affirmative efforts proven effective in translating the dream of equal opportunity into reality for women, especially women of color. Unless he makes clear his willingness to enforce these crucial laws and regulations, he should not be confirmed.

3. Judge Souter's record fails to demonstrate a commitment to protecting women's fundamental right to reproductive freedom, including the right to choose abortion.

A woman's ability to enjoy the full range of personal liberties guaranteed by the Constitution -- her privacy and her equality before the law -- hinges upon her freedom to choose when and whether to have a child. Judge Souter's position on this most fundamental of women's rights remains unclear. In a number of instances, however, he has taken positions that lead us to question his support of a woman's right to choose.

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[26] "Souter Raps Ethnic Preferment," Manchester Union Leader, May 31, 1976.

For example, in a 1977 interview, then-Attorney General Souter expressed opposition to legislative efforts to repeal the state's 19th-century laws criminalizing the performance of abortion[27] -- despite the fact that the laws' enforcement had already been enjoined as unconstitutional under Roe v. Wade. Mr. Souter was apparently worried that repeal would leave the state with no ban on abortion at all, even though Roe allowed state-imposed restrictions after viability. Although less than one percent of all abortions are performed in the third trimester, Mr. Souter feared that

> "Quite apart from the fact that I don't think unlimited abortions ought to be allowed, if the state of New Hampshire left the situation as it is now [by enacting the repeal], I presume that we would become the abortion mill of the United States."[28]

Mr. Souter went on to announce that "[n]ow that this bill has been received by the [state] Senate Judiciary Committee, I'm going to address that committee and advise we had better sit down and talk about this and decide what is to be done." Even if Mr. Souter's concern was based on a sincere desire to limit post-viability abortion, his opposition to the repeal of legislation that clearly violated the constitutional rights of women is troubling. As the state's top law enforcement officer dedicated to upholding both state and federal constitutions, we would expect Mr. Souter to have worked to modify the laws consistent

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[27] "Bill is Seen Making NH an 'Abortion Mill,'" Manchester Union Leader, May 19, 1977.

[28] Id.

with constitutional protections as outlined in Roe. The Senate should carefully explore Mr. Souter's position in this matter, inquiring as to any actual efforts he undertook to ensure that New Hampshire law complied with the constitutional requirements of Roe.

In 1981, on behalf of the state Superior Court, Judge Souter wrote a letter to New Hampshire's state legislature in opposition to a judicial bypass provision in a pending bill that would have required a minor to secure parental consent before obtaining an abortion. Expressly taking no position on whether parental consent should be required at all, the letter objected to a provision that would require a Superior Court justice to authorize a minor's abortion when in her best interest.

Judge Souter objected on two grounds: he felt that the provision would force judges to make fundamentally moral decisions without any standards for guidance; and he felt that the bypass provision would prove difficult for judges who believed that abortion was morally wrong or who felt unable to pass on the minor's best interests -- thus obligating them to refuse to authorize the minor's request for an abortion.

Judge Souter's views raise concern, even though he apparently wrote at the request of a pro-choice advocate. His criticism of judicial authorization runs counter to the Court's 1979 decision in Bellotti v. Baird.[29] There the Court invalidated a law that required a minor to notify her parents of

[29] 443 U.S. 622 (1979).

her plans for an abortion; absent their consent, she could then seek judicial authorization. The Court objected, inter alia, to the statute's failure to offer a minor the opportunity to get an independent judicial determination that she was mature enough to make the abortion decision herself or that an abortion would be in her best interests. Souter's obvious distaste for such judicial determination invites inquiry into whether he would vote to overrule Bellotti's requirement of a judicial bypass mechanism and to prohibit altogether minors' access to abortion absent parental consent.

More recent Supreme Court decisions have upheld certain parental consent and parental notification statutes so long as they allowed for a judicial bypass provision. Souter's expressed discomfort with judicial authorization of a minor's abortion, coupled with his silence on the parental consent question generally, leads us to wonder under what circumstances he would uphold and protect a minor's constitutional right to obtain an abortion at all.

Judge Souter's recent special concurrence to the New Hampshire Supreme Court's decision in Smith v. Cote[30] did nothing to dispel these concerns. There, the majority found a doctor negligent for his failure to test a pregnant woman for rubella and to warn her of possible risk to a fetus exposed to rubella, thereby depriving her of information on which she would have had an abortion. Souter wrote separately to raise an issue

[30] 513 A.2d 341, 355-56 (1986).

not before the Court -- discussing how a doctor who opposed abortion might discharge his or her professional obligations in such a situation.[31] In so doing, he referred to abortion only as "a sphere of medical practice necessarily permitted under Roe v. Wade." He entirely failed to discuss Roe's recognition of the right to choose as a fundamental liberty grounded in the Constitution itself.[32]

As was the case in his earlier letter to the state legislature, Judge Souter voiced concern for the rights of those who oppose abortion while remaining silent as to constitutional protections of women's reproductive freedom. On two separate occasions, he has abandoned his normal reticence out of distress for the professional hardships faced by anti-choice judges and doctors; he has yet to speak to the burdens faced by women struggling with the decision whether to terminate a pregnancy.

Judge Souter's commitment to protecting women's reproductive freedom remains entirely unclear. Because of the critical

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[31] Indeed, the majority opinion remarked on Judge Souter's decision to discuss an issue not before the court: "We do not reach the issue raised in the special concurrence of Souter, J., because it has not been raised, briefed, or argued in the record before us." 513 A.2d at 355.

[32] Id. The majority opinion, in which Judge Souter joined, also refused to reaffirm the right to choose as constitutionally based. Instead, it framed its decision as mandated by binding federal precedent, rather than compelled by the Constitution: ""The basic social and constitutional issue underlying this case thus has been resolved [by Roe]; we need not cover ground already traveled by a court whose interpretation of the National Constitution binds us. . . .As we indicated above, we believe that Roe is controlling; we do not hold that our decision would be the same in its absence." 513 A.2d at 344, 346.

importance of this issue, the Senate must probe for a more complete articulation of his views. And, unless he acknowledges a fundamental right to privacy under the Constitution -- providing assurances that he will not dilute the protections of this right now afforded women by Roe v. Wade -- he should not be confirmed.

4. Judge Souter's record -- which illustrates his failure to grasp the significance of rape shield laws in prosecuting and deterring rape -- does not demonstrate a commitment to enforce legal protections against rape.

Forty-six states and the U.S. Congress have enacted rape shield laws that bar evidence of a rape victim's prior sexual behavior with persons other than the defendant. Rape shield laws serve two important purposes: they prohibit using rape victims' private sexual lives as a means of courtroom harassment and intimidation; and they protect a woman's freedom to decide whether, when, and with whom she chooses to have sex by recognizing that her sexual behavior with others is entirely irrelevant to whether she consented to sex with the defendant.

Judge Souter's reversal of a rape conviction in State v. Colbath[33] is especially troubling in its misconception of the law's protections against sexual violence. In Colbath, Souter ruled that the complainant's sexual behavior with men other than the defendant could be relevant to the issue of consent, holding

[33] 540 A.2d 1212 (1988).

that the state's rape shield law did not preclude the admission of such evidence.

In ruling that the complainant's public behavior with others was probative as to her consent to sex with the defendant, Judge Souter ignored a primary purpose underlying rape shield laws. His reasoning suggests that a woman's consensual behavior with one person robs her of the ability to decline sex with another.

Judge Souter's opinion is no less disturbing for its adoption of the defendant's version of the facts over that of the prosecution:

> "[T]he two of them left the tavern and went to the defendant's trailer. It is undisputed that sexual intercourse followed; forcible according to the complainant, consensual according to the defendant. In any case, before they left the trailer the two of them were joined unexpectedly by a young woman who lived with the defendant, who came home at an unusual hour suspecting that the defendant was indulging in faithless behavior. With her suspicion confirmed, she became enraged, kicked the trailer door open and went for the complainant, whom she assaulted violently and dragged outside by the hair. It took the intervention of the defendant and a third woman to bring the melee to an end."[34]

Nowhere does Judge Souter attribute this narrative to the defense, nor does he mention the woman's very different version of events (that she was injured not by a jealous girlfriend, but by the defendant during a violent rape).[35] Judge Souter thus

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[34] 540 A.2d at 1212-13.

[35] Compare Judge Souter's opinion in State v. Colbath, 540 A.2d at 1212-13 with Brief for the State of New Hampshire, State v. Colbath at 3-5 (No. 86-390).

seemed to adopt the defense's version as his own, without indicating that the facts were in dispute.

Given Judge Souter's record of ruling in favor of the prosecution in an overwhelming majority of criminal cases,[36] his apparent readiness to adopt the defendant's version of events in this case is troubling. His opinion's concluding paragraphs further suggest a belief that women are wont to fabricate rape charges: he found that the victim could have "allege[d] rape as a way to explain her injuries and excuse her undignified predicament."[37] Two separate juries did not so find, making Judge Souter's speculation as to the victim's credibility all the more distressing.

Rape is a crime to which women are especially vulnerable; its constant threat limits their freedom and forces them to live in fear for their personal safety; its aftermath can be physically and psychologically devastating. Judge Souter's failure to grasp the significance of rape shield laws in prosecuting -- and thus deterring -- rape triggers our concern.

Again, the Senate must thoroughly explore Judge Souter's views on the prosecution of rape and the law's treatment of rape victims. Unless he fully articulates a firm commitment to the law's protections against crimes of sexual violence, he should not be confirmed.

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[36] A review by the National Association of Criminal Defense Attorneys found that Judge Souter ruled in favor of the prosecution in all but five of 75 criminal cases.

[37] 540 A.2d at 1217.

Conclusion

Judge Souter's record fails to demonstrate a commitment to constitutional and legal guarantees of freedom and equality for women; moreover, he has at times affirmatively challenged constitutional analyses and enforcement tools that are essential in fighting sex discrimination.

The Constitution requires and the public interest demands that the Senate carefully examine Judge Souter's views on equal protection and individual rights -- those most important protections largely dependent upon the Court for their continued preservation. Thus, unless Judge Souter can further articulate his positions in these areas -- including equal protection, employment discrimination, privacy rights that encompass the right to choose contraception and abortion, and freedom from crimes of sexual violence -- he does not meet the minimum standards for a seat on our nation's highest Court. Absent a coherent and convincing discussion of Judge Souter's commitment to upholding these protections, we will urge the Senate to reject his nomination.

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