STATEMENT

On Behalf Of The

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
("MALDEF")

By

ANTONIA HERNANDEZ
PRESIDENT AND GENERAL COUNSEL

Before The

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN OPPOSITION TO THE
CONFIRMATION OF DAVID H. SOUTER
AS AN ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

101st CONGRESS
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STATEMENT OF ANTONIA HERNANDEZ

I am Antonia Hernandez, the President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). This Statement is submitted on behalf of MALDEF in opposition to Senate confirmation of David H. Souter as an Associate Justice of the United States Supreme Court.

In this Statement, I address hereafter three primary matters: (1) the background of MALDEF's concern about David H. Souter; (2) Judge Souter's record antagonistic to civil rights laws and constitutional provisions which protect the rights of Hispanics; and (3) Judge Souter's refusal to disavow personally these antagonistic positions during his testimony before this Committee.

I. The Background of MALDEF's Opposition to Judge Souter

Because of our nation's history of invidious discrimination against Hispanics, and because of the United States Supreme Court's unique role for more than thirty years (1954-1988) 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.

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the

mid-Nineteenth Century to date,[1] has been not unlike that suffered by African Americans. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied employment, and often treated badly when employed. We have been denied the opportunity to serve on juries. And we have even been denied the most fundamental of rights, the right to vote.

But we Hispanics, like African Americans in our country, were finally given hope in 1954 by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously decided that Mexican Americans were protected by the Fourteenth Amendment, and unanimously held that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

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1. This nation's discrimination against Hispanics dates back at least to the period following the 1848 Treaty of Guadalupe-Hidalgo, through which Mexico ceded to the United States territory which would become the states of Arizona, California, Colorado, New Mexico, and Texas, and which would become parts of Nevada and Utah. Article IX of that Treaty guaranteed all persons of Mexican origin continuing to reside in that territory not only United States citizenship but also "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution," including of course "free enjoyment of their liberty and property." Despite these guarantees, what the once-Mexican population received instead was more than a century of subjugation.

This fight to establish our basic civil and constitutional rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the multimember district diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single-member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the 1980s -- we faced a divided Supreme Court, a Court which in fact often was very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent

underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justice Lewis Powell joining the majority decision written by Justice William Brennan.

Following the resignation of Justice Powell and his replacement by Justice Anthony Kennedy, the Supreme Court -- within a matter of weeks in June, 1989 -- rendered usually on five-to-four votes a series of decisions devastating to the rights of Hispanics, other minorities, and women to a discrimination-free workplace. These decisions[2] are, of course,

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2. These decisions, listed roughly in chronological order, include the following: Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (June 5, 1989) (reallocating burdens of proof, among other things, in Title VII disparate impact cases); Martin v. Wilks, 490 U.S. ___, 109 S.Ct. 2180, 104 L.Ed.2d 835 (June 12, 1989) (permitting "reverse discrimination" collateral attacks on consent decrees at any time); Lorance v. AT&T Technologies, Inc., 490 U.S. ___, 109 S.Ct. 2261, 104 L.Ed.2d 961 (June 12, 1989) (striking down EEOC charges as untimely under Title VII when filed shortly after the discrimination affected the female charging parties); Patterson v. McLean Credit Union, 491 U.S. ___, 109 S.Ct. 2363, 105 L.Ed.2d 132 (June 15, 1989) (eviscerating § 1981 by limiting it to intentional discrimination only in the formation of contracts); Jett v. Dallas Independent School District, 491 U.S. ___, 109 S.Ct. 2702, 105 L.Ed.2d 598 (June 22, 1989) (further eviscerating § 1981 in the public sector by subjecting it to the "policymaker" constraints governing § 1983 lawsuits); Independent Federation of Flight Attendants v. Zipes, 491 U.S. ___, 109 S. Ct. 2732, 105 L.Ed.2d 639 (June 22, 1989) (disallowing statutory attorneys fees to successful Title VII plaintiffs who had to litigate for years against an intervening defendant's attack on their back pay and seniority remedies); cf. Public Employees Retirement System of Ohio v. Betts, 492 U.S. ___, 109 S.Ct. 2854, 106 L.Ed.2d 134 (June 23, 1989) (insulating discriminatory benefit plans from age discrimination challenges under the ADEA).

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well known to the United States Senate given the vast amount of time that the Senate has had to expend to try to restore prior law through the Civil Rights Act of 1990 (S. 2104), legislation initially passed two months ago by the Senate on a lopsided 65-34 vote.[3] In the meantime, the effect upon Hispanics of these recent Supreme Court decisions has been particularly devastating in view of the increased discrimination against Hispanics, as revealed by recent documentation showing that as many as 19% of all employers are now engaging in discrimination against "foreign-looking" or "foreign-sounding" employees and job applicants.[4]

Whether last year's Supreme Court decisions hostile to the civil and constitutional rights of Hispanics actually signal a Supreme Court retrenchment or turning-back-of-the-clock on civil rights, I have little doubt that the next person confirmed as an Associate Justice on the Supreme Court will in fact have a major impact upon the future course of Supreme Court adjudication: either at least occasionally respecting and vindicating the civil and constitutional rights of Hispanics, or denying our rights altogether.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will not this time be

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3. Virtually identical legislation, H.R. 4000, was passed by the House last month by a similarly lopsided vote of 272-154.

4. United States General Accounting Office, GAO Report to the Congress: Employer Sanctions and the Question of Discrimination, 5-7, 37-79 (March, 1990).

replacing Justice Powell, who had been a swing-vote moderate on the Court. Instead, the next nominee will be replacing Justice Brennan, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

With Justice Brennan no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the capacity for fairness and compassion of the person nominated to succeed Justice Brennan.

II. Judge Souter's Record Reflects Antagonism to Civil Rights Laws and Constitutional Provisions which Protect the Rights of Hispanics

Judge Souter did not come to his confirmation hearing before this Committee with an extensive record on matters of national origin and racial discrimination barred by federal civil rights laws and by the equal protection clause of the Fourteenth Amendment.

On the other hand, Judge Souter does have a limited written and oral record on these matters, a record which is noteworthy for the singular fact that in every instance in which he expressed himself his actions and expressions were hostile not only to civil rights laws but also to constitutional provisions essential to protect the rights of Hispanics. Equally troubling to me is the fact that several of these hostile actions and expressions were taken by Judge Souter at a time when, as an

Attorney General or an Assistant Attorney General, he was under an oath of office requiring him to uphold the Constitution of the United States.

The hostile incidents to which I am referring, as the Members of this Committee are aware, involve Judge Souter's actions and expressions in the areas of employment discrimination law, voting rights, and affirmative action. I briefly review hereafter Judge Souter's past actions and expressions in each of these three areas of particular importance to Hispanics.

A. Employment Discrimination Law

Two of the most troublesome parts of Judge Souter's record are both the arguments he made and the extent he went to make those arguments in his constitutional challenge to Title VII's recordkeeping requirements in the case of United States v. New Hampshire, 539 F.2d 277 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976). In order to understand both aspects, it may be useful first to set forth the factors relevant to both the factual and constitutional context of this litigation.

1. Our nation's basic law barring employment discrimination, Title VII of the Civil Rights Act of 1964, initially barred discrimination only in the private sector. Based thereafter on a record of discrimination in the public sector and of a need for effective remedies therefor, Congress through the Equal Employment Opportunity Act of 1972 extended

Title VII to the public sector.[5] It is thus at this time that Title VII became applicable to New Hampshire.

2. At the time of Congress' extension of Title VII to the states under its enforcement power in Section 5 of the Fourteenth Amendment, it had been hornbook Supreme Court law for nearly one hundred years that "Congress is authorized to enforce the prohibitions [of the Fourteenth Amendment] by appropriate legislation." Ex Parte Virginia, 100 U.S. 339, 345 (1880) (emphasis by the Court, brackets added). And it is pursuant to Section 5 of the Fourteenth Amendment that the Supreme Court upheld the constitutionality of the arguably more intrusive Voting Rights Act of 1965.[6]

3. A section of Title VII crucial to its effective enforcement expressly requires every employer covered by Title VII to maintain and to preserve "records relevant to the determination of whether unlawful employment practices have been or are being committed," and to make "such reports therefrom" as requested by the EEOC.[7] Despite the clarity of this statutory

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5. Public Law No. 92-261 (March 24, 1972), 86 Stat. 103, amending Public Law No. 88-352 (July 2, 1964), Title VII, § 701, 78 Stat. 253, codified at 42 U.S.C. §§ 2000e et seq.

6. Katzenbach v. Morgan, 384 U.S. 641 (1966); cf. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (similar result under § 2 of the Fifteenth Amendment). The Supreme Court had earlier upheld under the commerce clause the constitutionality of the Civil Rights Act of 1964 as applied in the private sector. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

7. See Section 709(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c), which states in pertinent part:

> Every employer ... subject to this title

requirement, and despite the routine provision by employers to the EEOC annually of employer workforce data by national origin, race, and gender, New Hampshire refused to provide the EEOC with national origin and race data for 1973 and refused to provide any data whatsoever for 1974. New Hampshire, in fact, was the only state to refuse compliance.

Against this backdrop, the United States had to file suit against New Hampshire in mid-1975 to compel compliance with our nation's most fundamental employment discrimination law. New Hampshire's answer to this lawsuit was that the information required by the statute was irrelevant and that Title VII in any event was unconstitutional. On cross motions for summary judgment, the United States District Court entered a one-page order ruling against New Hampshire and thus compelling compliance. United States v. New Hampshire, No. 75-197 (D.N.H. Dec. 22, 1975).

The extent of Assistant Attorney General Souter's involvement in formulating this "states' rights" policy of resistance and in initially defending the policy remains unclear.

> shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder.

See also the accompanying EEOC regulations, 29 C.F.R. Part 1602.

Undisputed, on the other hand, is his direct involvement in the appeals he zealously pursued after being sworn in as Attorney General in January, 1976.

The appellate brief he filed in the United States Court of Appeals for the First Circuit reflects a profound misunderstanding (or a hoped-for refutation) both of evidentiary proof in civil rights cases and of established congressional power under Section 5 of the Fourteenth Amendment. The essence of both misunderstandings (or hoped-for changes in the law) is reflected in Attorney General Souter's summary contention that the statutorily required recordkeeping "adds nothing essential to the program against unlawful employment practices; it only creates a gratuitous layer of accountability to the federal government, contrary to constitutional principles limiting federal power." Brief for Appellant at 7. This summary contention, like his subsidiary claims, was unanimously rejected by the Court of Appeals. United States v. New Hampshire, 539 F.2d 277 (1st Cir. 1976).

As to the probative value of statistical evidence, Attorney General Souter incredibly claimed: "For a determination of an individual's charge of an unlawful employment practice, group statistics are not 'relevant.'" Brief at 14. Rejecting this claim, the Court of Appeals observed that, to the contrary, statistical workforce data in fact are "highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular

factual context," 539 F.2d at 280; and the Court of Appeals cited four other Courts of Appeals' decisions all standing for the still-extant evidentiary rule that in cases of alleged "'racial discrimination, statistics often tell much, and Courts listen,'" id. (citations omitted).[8] Equally compelling if not more so at this time -- except to Attorney General Souter -- were nearly half-a-dozen Supreme Court decisions referencing the relevance of statistical data in Title VII cases.[9]

Having constructed his factual claim on a foundation of sand, Attorney General Souter subsequently advanced as one of his legal claims that Title VII's recordkeeping requirements could only lead to the use of "quotas," making Title VII's recordkeeping requirements themselves unconstitutional and hence beyond congressional power under Section 5 of the Fourteenth Amendment. Brief at 24, 37-45. The Court of Appeals dismissed Attorney General Souter's foundation-of-sand "quotas" claim in two cursory footnotes, 539 F.2d at 280 nn. 4 & 5; and easily dismissed his lack-of-congressional-power assertion under Section 5 of the Fourteenth Amendment, 539 F.2d at 280-81, through

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8. Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962), quoted in Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305 (5th Cir. 1973); see also Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).

9. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

reliance on solid supreme Court precedents commencing with Ex Parte Virginia, 100 U.S. 339, 345 (1880), running through Katzenbach v. Morgan, 384 U.S. 641, 648-51 (1966) (upholding the constitutionality under § 5 of the Fourteenth Amendment of Congress' limited ban on literacy tests in the Voting Rights Act of 1965), and most recently in Fitzpatrick v. Bitzer, 427 U.S. 455 (1976) (unanimously upholding Congress' power under § 5 of the Fourteenth Amendment to make the states liable for monetary remedies under Title VII).

Apparently not content with arguing Title VII's unconstitutionality only under Section 5 of the Fourteenth Amendment, Attorney General Souter also challenged at length the constitutionality of Title VII under the Constitution's commerce clause, as unauthorized "evidence of unchecked centralized government." Brief at 29. This claim was rejected by the Court of Appeals with little discussion in view of Title VII's obvious constitutionality under Section 5 of the Fourteenth Amendment. 539 F.2d at 281-82.[10]

Apparently so as to leave no stone unturned in his crusade to defeat proof of discrimination on grounds of national origin, race, and gender, Attorney General Souter also asserted that Title VII's recordkeeping requirements somehow also violated the Tenth Amendment's reservation of power to the states, the

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10. As stated by the Court of Appeals, Attorney General Souter's claim of unconstitutionality under the commerce clause was entirely "beside the point, however, because Congress principally relied on the fourteenth amendment when in 1972 it included states within the purview of Title VII." 539 F.2d at 281.

Thirteenth Amendment's ban on slavery, and the constitutional rights of the state's employees to liberty, privacy, and due process. Brief at 45-59. The Court of Appeals in a footnote dismissed these claims as not even "deserving of discussion". 539 F.2d at 282 n. 6.

Having been soundly trounced on appeal, Attorney General Souter nevertheless zealously continued his attack on Title VII and on congressional power under § 5 of the Fourteenth Amendment by filing with the Supreme Court a Petition for a Writ of Certiorari. A mere three-page Memorandum in Opposition was filed by Solicitor General Robert Bork. The Supreme Court denied certiorari. New Hampshire v. United States, 429 U.S. 1023 (1976).

B. Voting Rights

Attorney General Souter's misunderstanding of -- or his disagreement with -- congressional power under Section 5 of the Fourteenth Amendment in his challenge to the constitutionality of Title VII is even more profound in view of the sound judicial rejection of his virtually identical challenge to congressional power six years earlier in United States v. New Hampshire, No. 3191 (D.N.H. Oct. 27, 1970) (three-judge court).

This is the case -- listed in his Senate Questionnaire at 29 as one of the most significant cases he had ever handled -- in which Assistant Attorney General Souter unsuccessfully challenged Congress' power under Section 5 of the Fourteenth Amendment to

ban literacy tests, as a prerequisite to voting, through Title II of the Voting Rights Act Amendments of 1970.[11]

At the time that Assistant Attorney General Souter in the fall of 1970 defended New Hampshire's literacy tests in this case by challenging Congress' power, four significant developments affecting the right to vote had occurred in the previous decade, significant developments which fundamentally changed this nation's approach to suffrage. One such development was Congress' recognition of historical and continuing denials of the right to vote on grounds of race and national origin, coupled with Congress' enactment of highly creative remedies therefor through the Voting Rights Act of 1965. The other three developments were judicial, involving the Supreme Court's reiteration of congressional power under Section 2 of the Fifteenth Amendment to remedy racial and national origin discrimination in voting; the Supreme Court's reiteration of congressional power under Section 5 of the Fourteenth Amendment to break down barriers to equality in general; and the Supreme Court's entry into the political thicket of legislative reapportionment to curtail vote dilution through the Court's application of the one-person-one-vote principal under the equal protection clause of the Fourteenth Amendment, coupled with the Supreme Court's declaring unconstitutional various restrictions on the right to vote. Because of the fact that all of these

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11. Public Law No. 91-285 (June 22, 1970), Title II, § 201, 84 Stat. 315, amending Public Law No. 89-110 (Aug. 6, 1965), Title I, 79 Stat. 437, codified at 42 U.S.C. §§ 1973 et seq.

developments in combination should have affected the approach taken by any reasonable attorney to New Hampshire's literacy tests and to congressional power in the fall of 1970 -- but did not at all appear to affect the position taken that fall by Assistant Attorney General Souter -- it may be useful here to summarize initially each of these four developments which together so substantially altered and improved our nation's new commitment to the constitutional promise of equal protection under law.

1. Denial of the right to vote through practices such as literacy tests, and dilution of a vote through myriad other practices, not only have limited the franchise in our democracy but also have historically disenfranchised Hispanics, African Americans, and other minorities altogether. Based on an extensive record of disenfranchisement, and based upon Congress' intent to provide new and effective remedies therefor, Congress initially enacted the Voting Rights Act of 1965, and subsequently extended and strengthened the Act in 1970, 1975, and 1982. As to the initial 1965 Act, one section of the Act barred the use of literacy tests in jurisdictions where Congress deemed the effects of past discrimination to have been most severe; another section of the 1965 Act barred the use of literacy tests in New York without regard to any past discrimination whatsoever. Both sections of the 1965 Act were challenged thereafter as an unconstitutional exercise of congressional power.

2. In South Carolina v. Katzenbach, 383 U.S. 301 (1966),

the Supreme Court reviewed the constitutionality of various sections of the Voting Rights of 1965, including Section 4(a) which temporarily suspended literacy tests in seven southern states, in Alaska, and in various counties in Arizona, Hawaii, and Idaho where such tests had been recently used and where voter registration was low. Rejecting the contention that only the judiciary could strike down state statutes and procedures, the Supreme Court unanimously upheld Section 4(a) of the Act as an appropriate exercise of Congress' power under Section 2 of the Fifteenth Amendment (which states that "Congress shall have power to enforce this article by appropriate legislation").

3. Several months later, in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court reviewed the constitutionality of Section 4(e) of the Act, through which Congress had suspended English literacy tests for all persons educated through the sixth grade in a language other than other English in American-flag schools. Although Congress in enacting Section 4(e) had not relied on the racially discriminatory effect of English literacy tests, and although the use of such tests was not then forbidden by the Fourteenth Amendment's equal protection clause itself, the Court in seven-to-two decision authored by Justice Brennan ruled that Congress' enactment of section 4(e) was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment [which states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"]." 384 U.S. at 646 (footnote omitted, brackets added).

In reaching this result, the Court relied on its holding in Ex Parte Virginia, 100 U.S. 339, 345 (1880):

> It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.

Katzenbach, 384 U.S. at 648, quoting Ex Parte Virginia, 100 U.S. at 345 (emphasis in original). The Court also noted that its fairly recent "decision in Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments is inapposite" because Lassiter "did not present the question [of congressional power] before us here." Katzenbach, 384 U.S. at 649. In other words, the recently sustained constitutionality of literacy tests is irrelevant to congressional power under Section 5 of the Fourteenth Amendment.

4. The final and arguably most profound development during the decade was the Supreme Court's guarantee against unconstitutional vote dilution under the Fourteenth Amendment through application of the one-person-one-vote principle in Reynolds v. Sims, 377 U.S. 533 (1964) (per Justice Brennan). Additionally, and in part because of the Court's recognition in Reynolds that the right to vote "is of the essence in a democratic society, and any restrictions on that right strike at

the heart of representative government," 377 U.S. at 555, the Supreme Court thereafter began striking down as unconstitutional under the Fourteenth Amendment numerous restrictions on the right to vote. See, e.g., Carrington v. Rash, 380 U.S. 89 (1965) (state could not deny the right to vote to persons solely because they were members of the armed services); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (persons unable to pay poll fees could not be denied the right to vote); Kramer v. Union School District, 395 U.S. 621 (1969) (bachelors cannot be barred from voting in school board elections).

Against this backdrop, Assistant Attorney General Souter, in United States v. New Hampshire, No. 3191 (D.N.H. Oct. 27, 1970), defended New Hampshire's literacy tests, which had been suspended by Congress through Congress' nationwide suspension of literacy tests in Title II of the Voting Rights Act Amendments of 1970. Important here is not so much the fact of his defense, but the manner of it, as is set forth in his Memorandum of Law filed on October 2 in opposition to the United States' motion for a preliminary injunction.

On the law, as noted, Assistant Attorney General Souter challenged Congress' suspension of literacy tests as beyond Congress' power. Although he cited Katzenbach v. Morgan, 384 U.S. 641 (1966), nowhere in his Memorandum did he describe it, much less analyze it. Instead, he claimed that New Hampshire's literacy tests were constitutional on their face under Lassiter v. Northampton Election Board, 360 U.S. 45 (1959) -- a case which

the Supreme Court had held to be "inapposite" in Katzenbach, 384 U.S. at 649 -- and he incorrectly argued in the face of Katzenbach that "authority is wanting for the proposition that a blanket suspension of all literacy tests may be compelled by Congressional legislation, absent the showing of correlation between areas in which suspension is effected and areas in which the tests have been used for ultimately unconstitutional purposes." Memorandum at 4-6.

Ignoring the constitutional dimensions of every adult citizen's right to vote, Assistant Attorney General Souter actually asserted that the "individuals [denied the right to vote] can claim, therefore, no more than that they are the fortuitous and incidental beneficiaries of a legal, rather than a constitutional, right to vote"; that their right to vote is "of a merely legal nature"; and that the right is "of a wholly incidental legal nature." Memorandum at 8-9 (brackets added). He also asserted, even more shockingly, that "allowing illiterates [persons not literate in reading and writing English] to make a choice in such matters is tantamount to authorizing them to vote at random, utterly without comprehension," and that "detriment to the state and its citizens will occur in watering the value of every literate citizen's vote." Memorandum at 7-8 (brackets added).

Assistant Attorney General Souter's narrow view of congressional power was unanimously rejected by the three-judge federal court. United States v. New Hampshire, No. 3191 (D.N.H.

Oct. 27, 1970). Less than two months later, in an original-jurisdiction action, the Supreme Court unanimously rejected better formulated arguments and upheld Congress' ban on English literacy tests under either or both of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Oregon v. Michell, 400 U.S. 112 (1970).

c. **Affirmative Action**

Following his 1976 argument to the United States Court of Appeals for the First Circuit that Title VII's recordkeeping requirements would lead to the unconstitutional imposition of quotas, Attorney General Souter gave a commencement speech on May 30, 1976. Under a banner headline stating "Souter Raps Ethnic Preferment" in the Manchester Union Leader the following day, Attorney General Souter was quoted as characterizing affirmative action as "affirmative discrimination," and stating that government "should not be involved in this." "There are some things government cannot do," he was reported to have said, "and our whole Constitutional history is a history of restraining power."

In the years subsequent to his delivery of this speech, the Supreme Court upheld as constitutional or otherwise as lawful race-conscious affirmative action admissions to obtain diversity in higher education, University of California v. Bakke, 438 U.S. 265 (1978); voluntarily adopted affirmative action goals and timetables in employment to overcome minority

underrepresentation, United Steelworkers of America v. Weber, 443 U.S. 193 (1979); see also Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); strict goals and timetables ordered by courts to remedy past discrimination, United States v. Paradise, 480 U.S. 149 (1987); and minority set-aside programs authorized by Congress to alleviate underrepresentation, Fullilove v. Klutznick, 448 U.S. 448 (1980).

III. Judge Souter, in His Testimony Before This Committee, Did Not Reveal Personal Positions Sufficient to Rebut His Record of Antagonism to Civil Rights

Because of the fact that the first two of the three foregoing incidents antagonistic to civil rights occurred when Judge Souter was acting in his official capacity as lawyer-advocate in the New Hampshire Office of Attorney General -- and even aside from his oath of office and the excessive manner in which he excessively pursued his positions hostile to civil rights -- MALDEF withheld final judgment pending his testimony before this Senate Committee on the Judiciary.

Our hope was that maybe, just maybe, his personal positions had been different from and more compassionate than the hostile positions 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 two 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 Fourteenth Amendment in particular -- he had aggressively pursed on behalf of the State of New Hampshire. And, maybe even worse, Judge Souter failed to demonstrate any capacity for fairness to, much less compassion for, the individuals who would be forever affected by his rulings and votes as an Associate Justice of the Supreme Court.

This is not to deny and certainly not to degrade the testimony he gave finally recognizing that still today there is an enormous need to remedy the wrongs done by our nation and within our nation through a history of invidious discrimination. For example, under questioning by Senator Ted Kennedy, Judge Souter to his credit testified:

> I hope one thing will be clear and this is maybe the time to make it clear, and that is that with respect to the societal problems of the United States today there is none which, in my judgment, is more tragic or more demanding of the efforts of every American in the Congress and out of the Congress than the removal of societal discrimination in matters of race and in the matters of invidious discrimination which we are unfortunately too familiar with.

> That, I hope, when these hearings are over, will be taken as given with respect to my set of values.

Hearing Transcript at 150 (Sept. 13, 1990). And, during his testimony the following day in response to questioning by Senator Paul Simon about Attorney General Souter's reported characterization of affirmative action as "affirmative discrimination," Judge Souter testified that he hoped he hadn't been quoted exactly:

> I think that -- I hope that was not the exact quote because I don't believe that. The kind of discrimination that I was talking about in the speech was discrimination, as I described it and as I recall being quoted in the paper about it, a discrimination in the sense that benefits were to be distributed according to some formula of racial distribution, have nothing to do with any remedial purpose but simply for the sake of reflecting a racial distribution.

Hearing Transcript at 111 (Sept. 14, 1990). Judge Souter continued:

> That is to be contrasted in two absolutely essential respects, from on the one hand affirmative action and on the other hand the kind of distributive remedy which it

is appropriate for courts and, to a degree yet to be fully developed, appropriate for Congress to consider.

I would suppose it would go without saying today that if we are in the United States to have the kind of society which I described yesterday as the society which I knew or found reflected in my home, there will be a need -- and I am afraid for a longer time that we would like to say -- a need for the affirmative action which seeks out qualified people who have been discouraged by generations of societal discrimination from taking their place in the mainstream and in all of America and in all the distribution of its benefits and its burdens. That is an obligation of individuals, and it is an obligation of government.

I think it also goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say undo it. That is a

> judicial obligation to make good on the Fourteenth Amendment.
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> And as I said a moment ago, one of the developments in American constitutional law which is at the stage, I would say, of exploration now is to the development about the particular power of Congress to address a general societal discrimination as opposed to a specific remedy for a specific discrimination. That is a concern which will be played out in constitutional litigation for some time ahead of us.

Hearing Transcript at 111-13 (Sept. 14, 1990).

Although the foregoing testimony constitutes a fairly accurate summary of the constitutionally 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, and 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 these are matters "which will be played out in constitutional litigation for some time ahead of us." Hearing Transcript at 113. But for those of "us" who are Hispanic and female, this is not just an intellectual game to be "played out."

More troublesome, indeed determinative for MALDEF, has been Judge Souter's repeated refusals -- after repeated opportunities -- to distance his personal views, as possibly compassionate on civil rights and as more deferential to Congress' power under Section 5 of the Fourteenth Amendment, from the extreme and cold positions he advanced as an Assistant Attorney General and as Attorney General challenging Congress' ban on literacy tests for voting as unconstitutional, and challenging Congress's Title VII recordkeeping requirements as unconstitutional.

In Judge Souter's opening statement before this Committee, he said nothing at all about civil rights, and nothing at all concerning the powers of Congress under Section 5 of the Fourteenth Amendment. Hearing Transcript at 93-100 (Sept. 13, 1990).

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] task some human being is going to be affected." Hearing Transcript at 99 (Sept. 13, 1990).

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. For example, Senator Kennedy pointedly asked Judge Souter:

> Did you agree with the position of the State of New Hampshire that it is

> unconstitutional for Congress to require employers to provide statistics about racial composition of the workforce?

Hearing Transcript at 141-42 (Sept. 13, 1990). Judge Souter declined to state his personal position, stating instead only: "I did not know whether it was unconstitutional or not." Hearing Transcript at 142 (Sept. 13, 1990). As to Judge Souter's personal views about Congress' power under Section 5 of the Fourteenth Amendment, Judge Souter again provided no such personal views but instead -- despite the Supreme Court's seemingly definitive ruling in Katzenbach v. Morgan, 384 U.S. 641 (1966) -- stated that to him there was "probably no question that there will be further years of litigation before the exact limits of that power are defined." Hearing Transcript at 142 (Sept. 13, 1990).

Pursuing a follow-up question to try to learn about Judge Souter's personal views, Senator Kennedy again quite pointedly asked:

> So, did you at the time formulate any personal view about the legitimacy of the Congress in attempting to root out discrimination in the workplace?

Hearing Transcript at 143 (Sept. 13, 1990). Despite the opportunity again provided to Judge Souter to distinguish his possibly compassionate personal views from those he over-zealously had advocated on behalf of the State of New Hampshire,

Judge Souter instead coldly replied that he had come "to no comprehensive view of Section 5 at that time." Hearing Transcript at 143 (Sept. 13, 1990).[12]

With regard to Judge Souter's arguments defending the literacy tests and again challenging Congress' power under Section 5 of the Fourteenth Amendment, Judge Souter in his testimony again refused to give his personal views, and also declined to recognize the practical effect of maintaining literacy tests. Hearing Transcript at 147-51 (Sept. 13, 1990). As to the practical effect, the most compassionate response that Judge Souter could summon was that: "There is some question as to what its practical effect was in those days." Hearing Transcript at 151 (Sept. 13, 1990). As to the governing law applicable at the time flowing from the Supreme Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), which validated Congress' power under Section 5 of the Fourteenth Amendment, Judge Souter most inappropriately and misleadingly stated in his

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12. Interestingly, although Judge Souter refused to distance his personal view from the legal position he had advanced in 1976 to strip Congress of its powers under Section 5 of the Fourteenth Amendment, he indicated a lack of knowledge about the relevant facts of the case even at that time. For example, Senator Kennedy asked:

> Tell me, why did you file information with regard to gender in employment ... but not with regards to race?

Hearing Transcript at 146 (Sept. 13, 1990). To this question, Judge Souter responded, id. at 147:

> If you were to ask me cold whether the State was filing gender information at that time, I could not have told you.

testimony, id:

> There was one thing that we did know very clearly about the law in those days, and that was that the use of a literacy test for a non-discriminatory purpose was constitutional under the Fourteenth Amendment.

Judge Souter, in his second day of testimony and again under questioning by Senator Kennedy, showed himself to be even more hostile to civil rights than he had previously proved. Hearing Transcript at 182-208 (Sept. 14, 1990). For example, with regard to Judge Souter's aggressive litigation attacks challenging the unconstitutionality of Title VII's recordkeeping requirements and of the Voting Rights Act Amendments' nationwide ban on the use of literacy tests for voting, Senator Kennedy asked:

> What I would like to ask you is whether you formed any personal view when you were preparing those cases. Did you form any personal view about the rightfulness or wrongfulness?

Hearing Transcript at 190-91 (Sept. 14, 1990). Judge Souter dodged this question yet again. In fact, eschewing any personal views, opinions, or even responsibilities, Judge Souter ducked behind his often-asserted advocacy mantle, stating in part: "Our responsibility in those circumstances is the responsibility to be

the best advocates that we can." Hearing Transcript at 191 (Sept. 14, 1990).

Desiring at least a semblance of a personal response, Senator Kennedy pressed the point. He reminded Judge Souter of the testimony the day before in which Judge Souter had stated that in judicial decision making, "at the end of our task some human being is going to be affected," Hearing Transcript at 99 (Sept. 13, 1990); and Senator Kennedy thereupon asked whether Judge Souter had ever weighed the negative impact upon Hispanics, African Americans, and women in his personal views while challenging the constitutionality of Title VII's recordkeeping requirements and of the Voting Right Act Amendments' suspension of literacy tests, Hearing Transcript at 191-92 (Sept. 14, 1990). The best -- any yet worst -- answer that Judge Souter could master was to deny any different personal views: "Senator, I doubtless formed an opinion, but the opinion was related to the case that I was arguing," whereupon Judge Souter again lapsed into another defense of his them-and-now-meritless challenges to congressional power. Hearing Transcript at 192 (Sept. 14, 1990).

Pressed yet again by Senator Kennedy -- this time as to whether Judge Souter's unsuccessful arguments had been wrong, and whether the judiciary's rejections of his arguments had meant that "the right result was achieved" -- Judge Souter finally conceded that "the right result for the Nation was, indeed, achieved." Hearing Transcript at 192-92 (Sept. 14, 1990). But he refused to say that he "agreed" with any of the court

decisions rejecting his challenges to congressional power under Section 5 of the Fourteenth Amendment. Hearing Transcript at 193 (Sept. 14, 1990).

Finally, under even more questioning, Judge Souter at last made the minor concession that under today's Supreme Court precedents recognizing Congress' power under Section 5 of the Fourteenth Amendment, "I think today the outcome [in each case] is right." Hearing Transcript at 194 (emphasis and brackets added). But what about tomorrow? Indeed, what about tomorrow if Justice Souter is recommended by this Committee for confirmation by the Senate as the next Associate Justice of the Supreme Court?

Apart from Judge Souter's overall nonresponsiveness in his two days of testimony -- much less his apparently continuing hostility to the Supreme Court's for-now recognition of Congress' power under Section 5 of the Fourteenth Amendment and under Section 2 of the Fifteenth Amendment -- the fact of the matter is that, although provided with plentiful opportunities to do so, Judge Souter has not demonstrated fairness for or any compassion about those of us (particularly Hispanics, African Americans, and women) who for so long have been denied not just the promise of the American dream, but more basically the equal protection of the laws.

In addition to Judge Souter's nonresponsiveness, his evident lack of feeling and of compassion, and his continued hostility to Congress' current power under Section 5 of the Fourteenth Amendment, there is yet another fact that this Committee and the

full Senate need to bear in mind. This fact pertains to Judge Souter's admiration, from among all Supreme Justices, of not the first Justice Harlan but of the second Justice Harlan. Please, please remember that the philosophies of the these two jurists were 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, 163 U.S. 537, 552-64 (1896). This, alas, 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, 384 U.S. 641, 659-71 (1966), expressing the view that Congress essentially has no power whatsoever to legislate under Section 5 of the Fourteenth Amendment different from or beyond that already deemed to be unconstitutional by the judiciary.

CONCLUSION

Judge David H. Souter has not demonstrated fairness to 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.

MALDEF accordingly opposes the confirmation of David H. Souter as an Associate Justice of the Supreme Court.