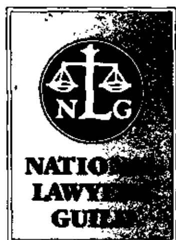

55 Avenue of the Americas
New York, NY 10013
212-966-5000

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September 18, 1990

TESTIMONY OF THE NATIONAL LAWYERS GUILD IN OPPOSITION TO THE NOMINATION OF DAVID SOUTER TO THE U.S. SUPREME COURT

Good afternoon. My name is Haywood Burns. I am immediate past president of the National Lawyers Guild and Dean of the City University of New York Law School at Queens College. I want to thank the Committee for allowing me to present you with the views of the National Lawyers Guild in strong opposition to the nomination of David Souter to the United States Supreme Court. On behalf of the Guild's membership in over 200 chapters across the country, I urge that, after careful consideration of David Souter's jurisprudence, as well as the testimony he has provided this committee, you withhold your consent to this nomination. I trust that you share with us a concern that any Supreme Court justice be committed to upholding the rights contained in our Constitution's Bill of Rights, and I urge that you do not accept a nominee who has not met the burden of demonstrating anything but a life long defense of those rights. Both through his testimony and the record he brought to these hearings David Souter has not met that burden.

Judge Souter's record on the bench, as well as the legacy he left behind in the New Hampshire Attorney General's office, reveal a jurisprudence of convenience which is grounded in a fundamental misconstruction of the role the Bill of Rights should play in the delicate relationship between government and the governed. What is more, Judge Souter's answers to your questions over the last few days, to the extent that he has provided answers, only confirms this view of the Constitution.

David Souter's record reveals a constitutional jurisprudence which fluctuates depending upon whether he is asked to construe the rights of government or the rights of the individual. In Richardson v. Chevrefils, State v. Denny, and Rockhouse Mountain Property Owners Assoc. v. Town of Conway, among other cases, Judge Souter expressed such an exceedingly narrow view of the due process protections contained in the Fifth Amendment, that the widest expanse of governmental conduct would be insulated from constitutional scrutiny. Indeed, in State v. Coppola Judge Souter's construction of the Fifth Amendment's privilege against self-incrimination was rejected when reviewed by the First Circuit Court of Appeals on a habeas corpus petition brought by the defendant. In a strongly worded opinion, the First Circuit wrote that Souter's interpretation of the Fifth Amendment "amounts to a rule of evidence whereby inference of guilt will trump a Fifth Amendment claim of the privilege ... Under the reasoning of the New Hampshire court any invocation of the privilege, no matter how worded, could be used by the prosecutor." Fortunately, habeas review in federal court of Judge Souter's decision allowed the Bill of Rights to prevail over prosecutorial overreaching. Ironically this is the same type of federal court habeas jurisdiction Judge Souter has testified here that he supports narrowing.

Contrast Judge Souter's narrow construction of individual rights with his broad reading of the Bill of Rights when construing the rights of government. In United States v. New Hampshire David Souter argued that requiring the state of New Hampshire to provide racial and ethnic statistical data to the EEOC amounted to a presumption that the state was guilty of discriminatory hiring practices in violation of the state's Fourth and Fifth Amendment rights. Under David Souter's view of the Bill of Rights, the state need not produce any information without a showing of probable cause; however, individuals can be compelled to incriminate themselves and produce physical evidence on less than a mere suspicion of wrongdoing. His approach time and time again increases the burden on individuals seeking to vindicate fundamental rights, while granting wide latitude to governmental action.

The expedience of his jurisprudence is no better characterized than by his unwillingness to express an opinion with respect to cases dealing with privacy rights, while displaying no reluctance in discussing specific voting rights, unemployment compensation or establishment clause holdings.

The National Lawyers Guild is concerned that in the zeal of the search for Judge Souter's privacy beliefs, his answers in those areas of law where he has expressed an opinion have been ignored -- areas that are of equal concern to the people who, like women, are not sitting on this committee. In these answers lie plenty of cause for people of color, poor people, working people, lesbians and gay men, and unmarried people to reject this nominee.

Most notably, in response to questioning from Senator Kennedy, Judge Souter reaffirmed his argument in a voting rights case that extending the franchise to persons who could not read the New Hampshire Constitution would dilute the voting rights of those who could. He told the Committee that this was merely a question of math. This mathematical view of the rights secured in the Bill of Rights exactly mirrors the testimony of Robert Bork. Recall that in Bork's view, the recognition of rights of one group could only come about as a result of the reduction of rights of others. This closed market view of constitutional rights led to your rejection of Robert Bork; it should do no less with David Souter.

Underlying David Souter's jurisprudence is the assumption that the courts represent a level playing field -- that is, that all litigants bring to their disputes comparable resources and power. In fact, nothing could be farther from the truth. Gender, class, race, age, sexual orientation, physical or mental ability all bear upon the relative power one can exercise as a litigant. Lost in David Souter's objective and rarified approach to the law are these real people. For this reason he testified before you that the New Hampshire literacy tests did not offend the constitution because there was no evidence that they were discriminatorily applied. This view of equal protection indicates an unwillingness to recognize that justice is no less offended by policies which are discriminatory in their effect, than where it results from discriminatory application. As was recently reaffirmed by the Congress in the Civil Rights Act of 1990, that which is neutral on its face can have profoundly discriminatory implications in its application.

The National Lawyers Guild strongly urges that the Senate reject this nominee. David Souter has shown himself lacking in requisite constitutional principles and averse to upholding the rights and responsibilities contained in our cherished Bill of Rights.