STATEMENT OF JUDITH L. LICHTMAN,
PRESIDENT OF THE WOMEN'S LEGAL DEFENSE FUND,
URGING THE SENATE JUDICIARY TO RECOMMEND AGAINST
THE CONFIRMATION OF JUDGE DAVID SOUTER
AS A JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

September 18, 1990

Three full days of hearings on the nomination of Judge David Souter to the Supreme Court have now been completed. Last week, as the hearings opened, we were seriously concerned that he does not possess the bottom-line qualification for confirmation to the Supreme Court: a meaningful committment to protecting the legal rights of women. We had reviewed Judge Souter's record on women's constitutional and legal rights and were not assured by it that he subscribes to key constitutional and legal principles that protect women against discrimination and guarantee their fundamental rights to privacy and reproductive freedom.[1]

We listened to Judge Souter's responses to the questions of the Judiciary Committee with hope that they would answer our questions and resolve our concerns. But we did not receive the assurances that we had hoped for, and that Judge Souter could have given. To the contrary, Judge Souter avoided answering the very questions about women's rights that would have assured us of his commitment; he did not even state the principles against which he would test violations of women's rights. For this reason, after having listened to and analyzed his responses as well as his record, we reluctantly conclude that we must oppose his confirmation as a Supreme Court Justice.

Our bases for this conclusion are several. First, despite extensive discussion of the law governing the constitutionality

[1] A copy of our report, "Judge David Souter's Record on Women's Constitutional and Legal Rights: Cause for Serious Concern" (September 10, 1990), is attached and submitted for the record.

of sex discrimination, Judge Souter never expressed his commitment to the protections against sex discrimination that current Supreme Court cases afford. Nor did he affirm his support of the rights of women and of people of color to equal employment opportunity by approving of current Supreme Court precedent upholding affirmative action in certain circumstances. Finally, and most important, Judge Souter refused to acknowledge a fundamental right to privacy that protects women's rights to procreative choice. In fact, he refused to give any indication of how he would rule on restrictions on women's right to choose whether and when to bear children.[2]

Throughout the hearings, he was given opportunity after opportunity to demonstrate his understanding of women's rights, his commitment to the constitutional principles that protect women's rights. He consistently failed to explain what those principles might mean, in practice, to real women's lives. In contrast, when discussing other areas of the law, he did, more than once, express his opinions about legal principles and explain their effect.[3]

By failing to affirm women's rights principles, Judge Souter puts the country in an untenable position. He is asking the American people to support his nomination to the Supreme Court without assurances that he will protect our rights once on that Court.

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[2] These concerns are discussed in depth below.

[3] For example, Judge Souter expressed both his personal views on and his understanding of prevailing law in the area of the first amendment's guarantees of freedom of religion -- an area of the law no more settled than women's rights. He went on to discuss the analysis that he would apply to cases alleging infringement of these guarantees. Tr. at 42-48 (Sept. 14, 1990).

What's at stake is not some mere theoretical principle. The freedoms and fundamental rights of all Americans are at stake. The livelihoods, the health, and even the lives of millions of American women are at stake. With so much hanging in the balance, Americans need to know that those who are "to make the provisions of the Constitution a reality for our times, and to preserve that Constitution for the generations that will follow"[4] are also committed to protecting their legal rights.

I. Judge Souter failed to articulate a firm commitment to eliminating invidious sex-based classifications under the Equal Protection Clause.

For women, the only constitutional protection against laws that discriminate against them on the basis of gender is found in the supreme court's interpretations of the Equal Protection clause of the Fourteenth Amendment. Under these Fourteenth Amendment cases, gender-based laws and regulations are unconstitutional unless they meet the following test: that the government can show that they are "substantially related to an important government interest." This test is called "heightened" or "intermediate" or "mid-level" scrutiny.[5] Under this test, which the Court adopted in the 1970's, laws and regulations that discriminate on the basis of sex have generally been held unconstitutional. Prior to development of the "intermediate scrutiny" test, on the other hand, the court relied on a lower level of scrutiny under the equal protection clause, called "minimal scrutiny" or the "rational basis test." Under that lower level of review, the Court virtually always upheld sex discrimination.

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[4] Testimony of Judge Souter, Tr. at 99 (Sept. 13, 1990).

[5] "Intermediate" scrutiny is not as high as the "strict" scrutiny that is given to classifications on the basis of race or that affect fundamental rights, but it is higher than the "minimal" scrutiny that is given to other classifications, such as commercial classifications.

In several briefs and one opinion, Judge Souter had criticized mid-level scrutiny, and in one brief even argued that sex-based classifications should be evaluated under the rational basis test. We were very eager to hear Judge Souter's explanation of these writings.

Judge Souter explained more about his views on equal protection analysis in the context of sex discrimination, but his explanation left a major question unanswered. He agreed that gender-based discrimination should be subject to more than the lowest level of scrutiny afforded economic classifications. Further, he testified that he thought the middle-tier scrutiny for reviewing sex-based classifications is "too loose" -- that it is "not a good, sound protection" -- that such classifications should be reviewed under a "less flexible" standard than the mid-level scrutiny test now employed.[6] Similarly, he testified that he did not necessarily reject application of the strict scrutiny standard to sex discrimination.

These comments suggest that Judge Souter thinks that sex discrimination is deserving of a more exacting standard of review than that afforded by the current mid-tier level of scrutiny. Yet despite repeated invitations from Senators to discuss the appropriate test, Judge Souter gave no assurances that he would afford at least as much protection from sex discriminatory rules as such rules currently receive. For him to have made the simple affirmative statement that that standard should be at least as exacting as the current test would have been so simple that its omission is startling. Judge Souter never articulated a firm

[6] Tr. at 157 (September 13, 1990).

commitment to eliminate invidious sex-based classifications under the Equal Protection clause.[7]

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[7] Judge Souter's mischaracterization of the Supreme Court's approach in Cleburne v. Cleburne Living Center further calls into question his understanding of the invidious nature of sex-based distinctions under the equal protection clause.

In an exchange with Senator DeConcini, Judge Souter inaccurately described Cleburne as explaining why sex-based classifications were only entitled to middle-tier scrutiny -- as opposed to the more rigorous strict scrutiny: First, "the likelihood that a [sex-based] classification might really have a legitimate reason behind it, a legitimate basis, and the case law, the experience with the cases coming up in the Court's view has simply been that there is a greater chance that there may be a legitimate basis for some sex classification, in other words that it may not amount to invidious discrimination than would be the case in the racial area." And second, "in the area of sex discrimination, there was more likely to be some political responsiveness than our history has shown in racial discrimination, so that is why they put it in the middle." Tr. at 211-12 (Sept. 13, 1990).

In fact, Cleburne clearly stated that sex-based distinctions are generally not legitimate. Discussing why sex-based classifications deserved a heightened standard of review, Justice White wrote that "[rather] than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985).

In contrast, the Cleburne Court discussed the two considerations mentioned by Judge Souter -- the likelihood of the classification's legitimacy and the history of political responsiveness -- in explaining why it felt classifications based on mental retardation should not be entitled to middle-tier scrutiny and why the much more deferential rational basis test should be applied instead.

Judge Souter's failure to acknowledge that Cleburne -- and the Court's equal protection jurisprudence generally -- stand for the proposition that sex-based distinctions are presumptively unconstitutional further fuels our concern.

II. Judge Souter failed to articulate a firm commitment to affirmative action to enforce the rights of women and of people of color to equal employment opportunity.

Fundamental to the achievement of equal employment opportunity for women and for people of color is the use of affirmative action -- including sex- and race-conscious efforts -- to overcome the barriers of years of discrimination in employment. While Judge Souter discussed affirmative action in generally approving terms, he stopped short of endorsing it in a number of contexts. Thus, he did not give the full commitment to affirmative action that American women need.

For example, Judge Souter did not fully explain the speech in which he is reported to have stated that affirmative action is "affirmative discrimination;" to the contrary, his "explanation" -- that he was talking about "discrimination in the sense that benefits were to be distributed according to some formula of racial distribution" -- makes no sense. His disapproval of that kind of affirmative action program suggests that the "affirmative action" of which he does approve is much more limited than the full breadth of affirmative action that the courts have upheld.

Similarly, Judge Souter never expressed agreement with or approval of another settled principle of affirmative action law: that voluntary affirmative action, including gender- or race-based initiatives is permissible.

III. Judge Souter failed to acknowledge a fundamental right to privacy that fully protects women's rights to procreative choice.

Judge Souter's failure to endorse women's rights is most glaring in the area of reproductive rights. It is true that he acknowledged that he believes that the Constitution protects a right of marital privacy from governmental intrusion. But he rendered this statement almost meaningless when he absolutely

refused to say whether he thought that right was "fundamental" or to discuss in any way what governmental interests might be sufficiently compelling to override it. For example, when asked by Senator Biden whether women have a fundamental right to privacy after conception, Judge Souter replied,

> "[I]n the spectrum of possible protection that [interest] would rank as an interest to be asserted under liberty, but how that interest should be evaluated, and the weight that should be given to it in determining whether there is in any or all circumstances a sufficiently countervailing governmental interest is a question, with respect, I cannot answer."[8]

His failure to say whether the right is a fundamental one is crucial. If the right to privacy is not fundamental, then even if a state law -- such as a law restricting abortions -- infringes on it, Judge Souter could find that that state law is constitutional. In other words, he would not follow one of the essential legal principles underlying Roe v. Wade.

Furthermore, Judge Souter's articulation of the right to privacy that he does accept was extremely crabbed. He was not even willing to say that the constitutionally protected privacy right extends to unmarried people's right to purchase contraceptives.[9] Nor was he willing to accept the rationale of

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[8] Tr. at 120 (Sept. 13, 1990).

[9] When Senator Biden asked Judge Souter whether he believes the privacy right extends to the right of unmarried people to purchase contraceptives, Judge Souter said he didn't know, that he would have to carry out an inquiry that he had not yet engaged in: "I don't know the extent an answer to that question can be given in the abstract without the kind of Harlan inquiry I'm talking about. It was not made and I have not made it. . . . [E]xactly the same kind of analysis that Harlan would have used and did use in his concurring opinion should be used to address the same issue of non-marital privacy." Tr. at 27 (September 17, 1990).

Judge Souter did say that he agreed with the holding in Eisenstadt v. Baird, the Supreme Court case striking down a

Griswold, even though he agreed with its result -- and even though the Griswold principles are as well settled as the principles in other cases, such as Brown v. Board of Education, that Judge Souter did accept.

Even when Judge Souter did give substantive answers relating to women's right to reproductive freedom, his answers did not evince a commitment to that right. More than one Senator asked Judge Souter to assess the effects of overruling Roe v. Wade. In response to Senator Kennedy, he acknowledged that "thousands of lives will be affected."[10] This statement is ambiguous: whose lives would be affected? Indeed, this statement could have been made as easily by an anti-choice as by a pro-choice proponent.

When Senator Leahy asked him this question on the morning of September 17, Judge Souter said that if Roe were overturned, the practical effect would be that the issue would become a matter for different judgment in every state, which would pose complicated issues of federalism.[11] Senator Leahy responded by describing a heart-rending example of a case of a botched abortion, which he had prosecuted before Roe legalized abortion. Senator Leahy's real-life story demonstrates his compassion and understanding of the effect of Supreme Court rulings on real people -- a demonstration that Judge Souter never succeeded in

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state's restriction on the purchase of contraceptives by unmarried people, but that he based his agreement not on extension of the right of privacy but on application of equal protection principles, because the Court had already held that states cannot restrict the purchase of contraceptives by married people in Griswold v. Connecticut. Tr. at 25-26 (Sept. 17, 1990).

[10] Tr. at 216 (September 17, 1990).

[11] Judge Souter said, "The issue of federalism would be a complicated issue." Tr. at 113 (September 17, 1990).

making, despite his repeated expressions of concern about those effects.

It is true that Judge Souter said that he "has not made up his mind" -- that he has "not got any agenda on what should be done with Roe v. Wade, if that case were brought before [him]."[12] This statement is a far cry, however, from demonstrating a commitment to the underlying constitutional principles that protect women's right to procreative choice.

Conclusion

The United States Supreme Court is at a crossroads. At this time in history, any appointee to that Court must have a demonstrated commitment to the law's most basic guarantees of individual rights and equality -- for women and for all people. David Souter has failed to demonstrate that commitment. For that reason, we urge the Senate Judiciary Committee not to recommend him, and the full Senate to reject him, as a Supreme Court Justice.

[12] Tr. 128 (Sept. 14, 1990).