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THE CONFIRMATION HEARINGS OF JUDGE DAVID SOUTER:
THE LEGAL AND POLITICAL CONTEXT

The circumstances surrounding Judge Souter's nomination are exceptional. For the first time in the history of the United States, the Supreme Court is poised to take away a fundamental constitutional right. This is a direct result of an unprecedented, decade-long effort on the part of the Reagan and Bush Administrations to appoint judges and Justices who would use their positions on the federal bench to dismantle the fundamental right to choose. Judge Souter's nomination may be the final component of this strategy, which to date has been frighteningly successful: the Court is at best one vote away from overturning Roe v. Wade. The Senate has a responsibility not to acquiesce in the Bush Administration's anti-choice agenda, but to use its "advice and consent" role to ensure that Justices are not appointed on the basis of their willingness to deprive Americans of their fundamental rights. Unless Judge Souter openly recognizes the fundamental right to privacy, including the right to choose abortion, the Senate should not confirm his nomination.

Abortion: Fundamental Right or Ordinary Liberty Interest

An acknowledgement by Judge Souter that privacy is an ordinary liberty interest or a generalized value or right protected by the United States Constitution would provide absolutely no reassurance that as a Supreme Court Justice he would protect the fundamental right to choose. Virtually all -- including those who would overrule Roe -- acknowledge that the right to privacy is constitutionally protected.

- Chief Justice Rehnquist and Justices White and Kennedy voted to overrule Roe in Webster v. Reproductive Health Services, while at the same time stating that the right to choose abortion is a "liberty interest" protected by the due process clause of the 14th amendment.

- During his confirmation hearings Justice Kennedy, who voted in Webster to overrule Roe, stated that the Constitution protects the right to privacy: "I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage."

- Justice White and then-Justice Rehnquist in a dissent in Thornburgh v. American College of Obstetricians and Gynecologists calling for the overruling of Roe, stated that they "certainly agree with the proposition . . . that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." Justices White and Rehnquist were the original dissenters in Roe v. Wade and have been calling for its reversal ever since.

The critical question is whether the right to choose abortion is protected as a fundamental right. Only fundamental rights, such as the right to free speech and the right to privacy, including the right to use contraception and to choose abortion, receive strict scrutiny from the courts -- the highest level of constitutional protection afforded any right. Under the strict scrutiny standard, a law that infringes a fundamental right is unconstitutional unless it is necessary to further a compelling state interest.

Ordinary liberty interests are protected by the lowest level of constitutional protection available. Under the rational relation test, a law that infringes on a liberty interest is constitutional as long as the law furthers a reasonable state interest. Whereas the strict scrutiny standard provides strong protection for the

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rights of individuals, the rational relation test is extremely deferential to the power of government to interfere with ordinary liberty interests.

Judicial Appointments and the Reagan/Bush Anti-Choice Agenda

The Souter nomination must be recognized for what it is: part of a decade-long legacy under which Presidents Reagan and Bush have appointed judges based on their hostility toward the fundamental right to choose abortion.

* The Republican Party Platforms of 1980, 1984 and 1988 include a commitment to appoint only those judges and Justices who do not support a woman's fundamental right to decide whether to have an abortion.

* Judge Souter was on the list of potential Supreme Court nominees passed on from President Reagan to President Bush.

* White House Chief of Staff John Sununu offered personal reassurances to ease the fears of conservatives who were concerned that Judge Souter might not vote to overturn Roe. Sununu indicated that for conservatives the nomination is "a home run -- and the ball is still ascending. In fact, it's just about to leave earth orbit."

* "Strict construction", "judicial restraint" and other key phrases used by the Bush Administration to describe Judge Souter's judicial philosophy are recognized by anti-choice leaders as code words for a predisposition to overrule decisions protecting the fundamental right to privacy, in particular the right to choose abortion.

Judge Souter's Record on Privacy and Abortion

A careful review of Judge Souter's record reveals that he has not recognized privacy as a fundamental constitutional right and that, given the opportunity, he is likely to join those on the Supreme Court who have voted to overturn Roe v. Wade.

* In a case that Judge Souter lists among his "ten most significant opinions," he applied the doctrine of "original intent." Original intent is the extremely restrictive judicial philosophy employed to argue not only against constitutional protection for the fundamental right to privacy and to choose abortion, but also against any heightened constitutional protection for women from sex discrimination.

* As Attorney General, Judge Souter opposed the repeal of New Hampshire's 1848 law criminalizing virtually all abortions, citing as his reason his unfounded fear that repeal would make New Hampshire the "abortion mill" of the United States.

* Also as Attorney General for New Hampshire, Judge Souter submitted a brief that describes abortion using biased and inflammatory language that is inappropriate to a legal brief. The brief refers to the exercise of the constitutionally protected right to choose as the "killing of unborn children."

* A fundamental responsibility of our independent judiciary is to protect the rights of individuals against unwarranted governmental interference. As a New Hampshire Supreme Court Judge, David Souter time and time again embraced the power of the state over the rights of individuals.

JUDGE SOUTER'S RECORD ON THE RIGHT TO PRIVACY AND ABORTION

President George Bush's nomination of Judge David Souter follows a decade of appointments of federal judges by Presidents Bush and Reagan under an anti-choice litmus test. The Republican Party Platforms of 1980, 1984 and 1988 called for "the appointment of judges at all levels of the judiciary who respect . . . the sanctity of innocent human life." With the appointments during that time of Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy, the Supreme Court now stands on the brink of depriving Americans of a recognized fundamental constitutional right for the first time in our Nation's history.

In order to allay the concerns of conservatives who feared that Souter might not vote to overturn Roe, conservative activist Pat McGuigan circulated a memo detailing a private meeting in which John Sununu indicated that the Bush Administration has a clear sense of where Judge Souter stands and that conservatives should be pleased with the nomination. Sununu described the choice of Souter as follows: "This is a home run -- and the ball is still ascending. In fact, it's just about to leave earth orbit."

Characterizations of Judge Souter's Judicial Philosophy: 1990
President Bush has made Judge Souter's judicial philosophy a key issue in the confirmation process by citing it as the basis for his nomination. The Bush Administration's descriptions of Judge Souter's judicial philosophy -- "original intent," "strict construction" and "judicial restraint" -- are recognized by leaders of groups that oppose legal abortion as code words for a predisposition to overrule decisions protecting the fundamental right to privacy, including the right to choose abortion.

Dissent in In re Estate of Dionne: 1986
Judge Souter's most revealing -- and alarming -- opinion while on the New Hampshire Supreme Court is one that he has listed among his "ten most significant opinions." In a dissent interpreting a provision of the New Hampshire Constitution in In re Estate of Dionne, 518 A.2d 178 (1986), Judge Souter used the extremely restrictive judicial philosophy of "original intent." This doctrine would limit the meaning of a constitutional provision to the specific practices and beliefs that were prevalent at the time the provision was adopted, freezing the Constitution in the past and allowing for no adaptation to current times. If the U.S. Supreme Court were to apply this approach, the Court would overrule not only Roe v. Wade, but also other cases involving the fundamental right to privacy, including the right to use contraception. Under a strict application of this reasoning, Brown v. Board of Education could not have put a halt to the racial segregation of our Nation's schools, and women would be afforded no constitutional protection from sex discrimination.

Concurrence in Smith v. Cote: 1986
Judge Souter concurred in a decision allowing a woman to sue her doctor for negligence for failing to warn her of the possibility of birth defects and the option of abortion. In a separate opinion, however, Judge Souter went beyond the issue before the court and expressed concern that the court would be misunderstood as instructing anti-choice physicians to render tests and counseling despite their personal opposition to abortion. Judge Souter concluded that timely disclosure of the physician's moral scruples and referral to another physician would suffice. Significantly, Judge Souter refers to abortion as "necessarily permitted under Roe v. Wade," rather than describing abortion as a fundamental right protected under the Constitution. This calls into question whether

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Judge Souter would uphold the right to choose if he were not bound to follow Supreme Court precedent.

Letter to the Legislature about "Parental Consent" Bill: 1981
Judge Souter, as a New Hampshire Superior Court judge, wrote a letter in 1981 to the state Legislature on behalf of the Superior Court concerning a pending bill that required teenagers to obtain the consent of their parents or a judge before obtaining an abortion. Judge Souter's letter objected to the proposed judicial involvement, on the ground that the bypass procedure would force judges to engage in "acts of unfettered personal choice" and to make "fundamental moral decisions." The letter took no position on the underlying question of whether young women should be required to obtain parental consent. The letter was used by pro-choice activists to defeat the parental consent bill then before the legislature, because the U.S. Supreme Court had at the time declared that a judicial bypass must be part of any law requiring parental consent. Yet the letter suggests that, because of his opposition to the judicial bypass, Judge Souter might vote with the Justices who would allow states to mandate parental consent in every case, without any judicial escape valve even for teenagers who are the victims of family violence. The letter is also disturbing in that it advocates the principle of "judicial restraint," which is often used as a code word by those who seek to overrule Roe.

Opposition to Repeal of Criminal Abortion Law: 1977
While Attorney General of New Hampshire, Judge Souter successfully opposed the repeal of a law enacted in 1848 which imposed criminal penalties for the performance of an abortion. Only abortions necessary to save the life of the pregnant woman were excepted; the law contained no exception for rape, incest or health endangerment. Although the law was clearly unconstitutional and unenforceable under Roe v. Wade, it remained on the books (and still does). In an attempt to justify his opposition to the repeal of this extreme law, Judge Souter used the specious threat of large numbers of women pouring into New Hampshire for post-viability abortions: "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, I presume we would become the abortion-mill of the United States." In fact, few women choose to have post-viability abortions -- only .01 percent of abortions currently are performed after 24 weeks -- and those who do have very compelling reasons, including serious risks posed to their health by pregnancy and severe fetal abnormalities detected late in pregnancy.

Brief Submitted in Coe v. Hooker: 1976
A 1976 brief, submitted by Judge Souter as Attorney General on behalf of the state, refers to the constitutionally protected choice of abortion as "the killing of unborn children." This language is the same rhetoric commonly used by extreme opponents of the right to choose and is inappropriate for a state attorney general to use in a legal brief. The brief argued against state funding of abortions for poor women, a position which in no way required the use of language and reasoning that evidenced strong hostility to the fundamental right to choose.

Vote while Member on Hospital Board: 1973
Judge Souter was a board member of Concord Hospital and an overseer for the Dartmouth Medical School, which is affiliated with the Dartmouth Hitchcock Medical Center; both hospitals perform abortions. A month after the Roe v. Wade decision, Judge Souter participated in a vote of the Concord Hospital's board to allow doctors to perform abortions there. The minutes of the meeting reflect no discussion or dissent on the part of Judge Souter or other board members.

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JUDGE DAVID SOUTER'S JUDICIAL PHILOSOPHY

In reviewing Judge David Souter's record, NARAL's Legal Department has come across an opinion that is, thus far, the most significant in providing insight into his judicial philosophy and how he might rule on critical issues of individual rights, including the right to privacy. In interpreting the New Hampshire Constitution in a dissenting opinion in In re Estate of Dionne, 518 A.2d 178 (1986), Judge Souter used the extremely restrictive judicial philosophy of "original intent," which limits the meaning of a constitutional provision to the specific practices and beliefs that were prevalent at the time the provision was adopted. If the U.S. Supreme Court were to apply this approach, the Court would overrule not only Roe v. Wade, but also other cases involving the fundamental right to privacy, including the right to use contraception. In fact, this is the very approach that was used at the time of Brown v. Board of Education to argue that states should be permitted to continue segregating schools by race.

Judge Souter's opinions do not reveal to what extent he would apply his reasoning in Dionne when interpreting federal constitutional provisions protecting individual rights. Yet this opinion cannot be dismissed as atypical. In response to a Senate Judiciary Committee questionnaire following his recent nomination to the U.S. Court of Appeals for the First Circuit, Judge Souter listed his dissent in Dionne as one of his "ten most significant opinions." Given the profound implications if he were to use an originalist approach as a Supreme Court Justice, Judge Souter must be closely questioned during his Senate confirmation hearings about the Dionne case and his judicial philosophy concerning interpretation of the U.S. Constitution.

Judge Souter's Use of "Original Intent"

In Dionne, the Supreme Court of New Hampshire held that a statute requiring citizens to pay a fee to a judge in exchange for a special court session violated the state constitution, which guaranteed to citizens the right "to obtain justice freely, without being obliged to purchase it." Although this mandatory payment to a judge clearly contradicted the plain language of the constitution and -- in the words of the four justices in the majority -- "smacks of the purchase of justice," Judge Souter alone dissented. He stated that in interpreting the state constitution, the court could look only to the precise practices the framers intended to prohibit in 1784, and he used as his principal evidence of that intent the way in which a similar clause of the Magna Carta of 1215 had been interpreted.

Judge Souter's dogmatic approach to original intent in Dionne is cause for alarm. If Judge Souter's originalist approach were used to interpret the equal protection clause of the Fourteenth Amendment, the relevant evidence would be the prevailing practices at the time of the Amendment's adoption in 1868. Brown v. Board of Education could not have put a halt to the racial segregation of our nation's schools, and women would be afforded no constitutional protection from sex discrimination. In Brown, Chief Justice Earl Warren -- writing for a unanimous Supreme Court -- explicitly rejected an originalist approach, stating, "[w]e cannot turn back the clock to 1868 when the amendment was adopted."

If confirmed, Judge Souter would replace Justice William Brennan, who believed that the true intent of the Framers was for the Constitution to provide broad principles capable of adapting over time to new and unforeseeable circumstances. In Justice Brennan's view,

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"the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Implications for Roe v. Wade

The doctrine of original intent has been used by ideologically conservative judges, such as Judge Robert Bork and Justice Antonin Scalia, to deny the existence of the fundamental right to privacy and call for the overruling of Roe v. Wade. As Judge Bork stated, "I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended." Accordingly, Bork stated that "Roe, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned."

President Bush has made Judge Souter's judicial philosophy a key issue in the confirmation process by citing it as the basis for his nomination. The phrases being used to describe Judge Souter's judicial philosophy -- "original intent," "strict construction" and "judicial restraint" -- are recognized by the most vehement opponents of legal abortion as code words for a predisposition by Judge Souter to overrule decisions protecting the fundamental right to privacy, including the right to choose abortion:

> Pro-Life Action League leader Joe Scheidler: "[A]ny judge who truly seeks to follow the original intent of the framers of the Constitution in applying the law will be hard-pressed to find anything in the Constitution to support a right to abortion. Since the care of human life is the first object of good government, David Souter or any other strict constructionist must seek to overturn Roe."
>
> Susan Smith, Associate Legislative Director of the National Right to Life Committee: "President Bush has said that this is a man who is committed to interpreting the Constitution, not legislating from the bench and since Roe v. Wade is really the zenith of judicial activism, I think it's reasonable to assume that a Justice like Judge Souter would continue the erosion of a tragic constitutional error that is Roe v. Wade."

Conclusion

Judge Souter's strict adherence to the doctrine of original intent in the Dionne case, and the Bush Administration's repeated characterization of his judicial philosophy as one of judicial restraint, place in serious question whether Judge Souter, if confirmed, would continue to protect Americans' fundamental right to privacy. It is therefore essential for the Senate Judiciary Committee to question Judge Souter regarding his precise judicial philosophy. Americans must know if Judge Souter will limit our constitutional guarantees to those of centuries past, leaving us without protection from unwarranted governmental intrusion into our most personal decisions.

PRESIDENT GEORGE BUSH'S RECORD ON REPRODUCTIVE RIGHTS

President George Bush's nomination of David Souter to the U.S. Supreme Court must be considered in the context of Bush's overall record of catering to the anti-choice minority. For the last decade, Bush has been part of administrations that again and again have gone to great lengths to deprive women of their fundamental right to choose abortion. At the heart of the assault on the right to choose is a strategy to overrule Roe v. Wade by changing the make-up of the federal judiciary -- and in particular the U.S. Supreme Court -- by appointing only judges who pass an anti-choice litmus test. With this vacancy on the Supreme Court, following the appointments since 1980 of three Supreme Court Justices, a new Chief Justice and over half the federal judiciary, President Bush is now on the brink of achieving that objective.

Republican Party Platforms of 1980, 1984 and 1988

President Bush -- like President Ronald Reagan before him -- ran on a Republican Party platform committed to creating a federal judiciary that would be hostile to the right to choose and ultimately overrule Roe v. Wade and its progeny.

The 1980 Republican Party Platform states:

> We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.[1]

The 1984 and 1988 Republican Party Platforms state:

> We applaud President Reagan's fine record of judicial appointments, and we reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.[2]

Judicial Appointments

Judge David Souter was included among what White House Counsel C. Boyden Gray described as the "files and institutional memory" on potential Supreme Court nominees passed on from President Reagan to President Bush.[3]

When asked if President Bush uses the same "screening apparatus" that President Reagan used to "insure that judicial candidates were sympathetic to . . . conservative jurisprudence," White House Counsel C. Boyden Gray replied, "It's structured a little bit differently, but the result is very much the same." He added that the Administration's aim "is to shift the courts in a more conservative direction."[4]

Ethan Bronner, in his book Battle for Justice, states, "During Reagan's first term . . . [a] nine-member Presidential Committee on Federal Judicial Selection sifted through the [Court] nominees' writings and speeches in search of genuine conservative ideology. Those present at interviews said potential nominees were asked about their views on abortion and on the rights of criminal defendants."[5]

Herman Schwartz, in his book Packing the Courts, states, "White House Counsel Fred

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Fielding . . . admitted that the Reagan Administration tries to choose only 'people of a certain philosophy' and that someone 'actively prochoice' or 'for defendants' rights' would not make 'the final cut.'"[6]

Attorney General Edwin Meese conceded that "we do discuss the law with judicial candidates . . . In discussing the law with lawyers there is really no way not to bring up cases -- past cases -- and engage in a dialogue over the reasoning and merits of particular decisions."[7]

Bruce Fein, who worked on judicial selection in the Justice Department during Reagan's first term, told Newsweek: "It became evident after the first term that there was no way to make legislative gains in many areas of social and civil rights. The President has to do it by changing the jurisprudence."[8]

Other Appointments

When Bush's selection for HHS Secretary, Louis Sullivan, said in an interview that he favored a woman's right to choose abortion, anti-choice groups pledged to fight the nomination. To appease the anti-choice extremists, the White House worked to silence Sullivan and put together a "package" of approved anti-choice appointees for top staff at HHS, including Kay James, a former National Right to Life Committee official.[9]

Prior to her nomination as Surgeon General, Antonia Novello was questioned to satisfy the Bush Administration that her abortion views were consistent with President Bush's opposition to the right to choose.[10]

Dr. William Danforth, a candidate for director of the National Institutes of Health, withdrew his name from consideration because of his disagreements with the White House on abortion-related issues. Only two questions were asked of him by a White House personnel officer: "What are your views on abortion? And what are your views on fetal research?" Similarly, the White House physician, Dr. Burton Lee, withdrew his name from consideration for the Surgeon General post because he did not share President Bush's opposition to the right to choose.[11]

A candidate to be chair of the Legal Services Corporation, Caldwell Butler, was eliminated from consideration for indicating to interrogators that he thought a pregnant woman should have access to information on her legal right to choose abortion.[12]

Other Anti-Choice Policies

Under both President Bush and President Reagan, the U.S. Justice Department urged the Supreme Court to overrule Roe v. Wade and deprive women of the fundamental right to choose. Most recently, the Bush Administration argued in Hodgson v. Minnesota, decided June 1990, that the Court should reach out and overrule Roe, even though the parties had not raised the issue and the case involved the narrower issue of the constitutionality of legislation requiring teenagers to notify their parents before obtaining abortions.[13]

In 1990, an interagency group convened by the White House proposed funding school-based clinics. Although the White House acknowledged that the plan would be effective in reducing teen pregnancies and the number of single-parent families, it rejected the proposal, fearing "political problems among groups that are opposed to

birth control."[14]

In 1989, Congress voted to restore the availability of Medicaid funds for abortions in cases of rape and incest, but President Bush vetoed the bill. He also twice vetoed a bill that would have allowed the people of Washington, D.C. to use their own locally generated tax dollars to pay for the abortions of poor women.[15]

In 1989, the Bush Administration extended a ban on federally funded research involving fetal tissue transplants, ignoring the recommendations of an advisory panel convened by the National Institutes of Health and elevating the absolutist views of anti-choice extremists over the well-being of millions of Americans who suffer from Alzheimer's disease, Parkinson's disease, Huntington's disease, radiation sickness, diabetes and other serious illnesses.[16]

The Reagan-Bush Administration severely restricted Title X of the Public Health Service Act, which provides reproductive health care services for low-income women and is the largest single source of federal support for family planning in the United States. Through regulations -- which are currently being defended by the Bush Administration in a legal challenge before the U.S. Supreme Court -- federal funding is denied to any family planning clinic that uses even entirely private funds to advise its clients that abortion is a legal option or to refer clients elsewhere for abortion services, unless this information is provided in physically and financially separate facilities.[17]

The Reagan-Bush Administration sponsored and administered the Adolescent Family Life Act, which gives federal funds to anti-choice religious groups to teach adolescents about sexuality. Under this program, religious groups have discouraged teens from using contraception by teaching them that it is a sin and by providing teens with entirely false information about the health risks associated with the various methods of contraception.[18]

The "Mexico City Policy" supported by President Bush denies funds to overseas family planning programs that provide privately funded abortion services or counseling. Bush vetoed a bill containing funds for "cherished" foreign policy programs because it contained family planning funds for the United Nations Family Planning Fund. The Reagan-Bush Administration withdrew all federal funding ($17 million) from the International Planned Parenthood Federation because the Federation used some of its money (less than one percent, and all private funds) for abortion-related activities. The Federation estimated that the loss of federal funding would result in an additional 776,000 unwanted pregnancies and 100,880 abortions in more than 100 countries.[19]

Notes

1. Congressional Record, vol. 28, daily edition, July 31, 1980.

2. Congressional Record, vol. 22, daily edition, Sept. 5, 1984; Republican Platform, An American Vision: For Our Children and Our Future, Aug. 15, 1988, p. 32.

3. Ann Devroy, "In the End, Souter Fit Politically," Washington Post, July 25, 1990, p. A1

4. Neil Lewis, "Bush Travels Reagan's Course in Naming Judges," New York Times, Apr 10, 1990, p A1.

5. Ethan Bronner, Battle for Justice: How the Bork Nomination Shook America, (New York: W.W. Norton and Co., 1989): 120.

6. Herman Schwartz, Packing the Court: The Conservative Campaign to Rewrite the Constitution, (New York: Charles Scribner's Sons, 1988): 86.

7. Id.

8. Bronner, p. 120.

9. Spencer Rich and David Hoffman, "Bush Defends HHS Designee In Second Flap on Abortion," Washington Post, Jan. 25, 1989; Tom Kenworthy and Ann Devroy, "Sullivan Backpedals, Says He Opposes Roe v. Wade," Washington Post, Jan. 26, 1989, p. A9; People for the American Way, Government by Litmus Test: George Bush, the Far Right and Abortion, (Washington, D.C., 1990): 4.

10. Michael Specter, "Woman Picked as Surgeon General," Washington Post, Oct. 18, 1989

11 Julie Rovner, "Abortion: Litmus Test for Nominees?" Congressional Quarterly, Oct. 21, 1989, p. 2791.

12. David Broder, "Weak Knees at the White House," Washington Post, Oct. 11, 1989.

13. Brief for the United States as Amicus Curiae, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); Brief for the United States as Amicus Curiae, Hodgson v. Minnesota, 58 U.S.L.W. 4957 (U.S. June 25, 1990).

14. Robert Pear, "Administration Rejects Proposal for New Anti-Poverty Programs," New York Times, July 6, 1990, p. 1.

15 "Bush Vetoes HHS, DE Money Bills . . ," Washington Memo, (New York: Alan Guttmacher Institute (AGI), Nov. 8, 1989): 1. "House Lets Stand DC Abortion Funding Policy," Washington Memo, (New York: AGI, Aug. 2, 1990).

16. Richard Lacayo and Nancy Traver, "Pro-Choice? Get Lost," Time, Dec. 4, 1989, p. 44, People for the American Way, Government by Litmus Test, p. 13-14; Philip Hilts, "Citing Abortion, U.S. Extends Ban on Grants for Fetal Tissue Work," New York Times, Nov. 2, 1989, p. A1; "Congress, NIH Panel Address Fetal Research Controversies," Washington Memo, (New York: AGI, Nov. 1, 1988): 2.

17. Title X, Public Health Service Act, 42 U.S.C. sec. 59.2, 300 et seq.

18. Adolescent Family Life Act, Title XX, Public Health Service Act, 42 U.S.C. sec 300z et seq.; Patricia Donovan, "The Adolescent Family Act and the Promotion of Religious Doctrine," Family Planning Perspectives, vol. 16, (New York: AGI, Sept./Oct. 1984): 224.

19. Jeannie I. Rosoff, "The Politics of Birth Control," Family Planning Perspectives, vol. 20, (New York: AGI, Nov./Dec. 1988): 312, 317. People for the American Way, Government by Litmus Test, p. 24. Russell W. Peterson, "How Reagan Promotes Abortions," New York Times, Mar 26, 1985, p. A27.

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THE ROLE OF THE SENATE IN SUPREME COURT APPOINTMENTS

There is a long, distinguished and bi-partisan history of Senators questioning nominees to the U.S. Supreme Court about their judicial philosophy and their views with regard to the "great issues of the day." President Bush has explicitly and repeatedly stated that judicial philosophy was one of the key reasons he selected Judge David Souter. It is hypocritical and without constitutional foundation for the President to suggest that the Senate has no right even to inquire about the very judicial philosophy that was the basis for his nomination of Souter. Certainly no one suggests that the President's reasons for exercising his veto power should be constrained because it is the Congress's prerogative to legislate

For the last decade, the Bush and Reagan Administrations have appointed federal judges -- amounting to over half of the federal judiciary -- according to an anti-choice litmus test. The 1988 Republican Party Platform -- upon which President Bush was elected -- echoed the platforms of 1980 and 1984: "we reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." President Bush's deliberate selection of a nominee with no public record only intensifies the Senate's obligation to ask critical questions.

No one is suggesting that Judge Souter is required to state how he would decide a specific fact-contingent case prior to reviewing the record and reading the briefs. At issue are questions concerning the constitutional standards and legal reasoning that would be generally applied to all cases dealing with Americans' right to privacy and reproductive autonomy. As is made clear by the following quotations from various Senators, as well as excerpts from the writings of Chief Justice William Rehnquist, such questions are entirely appropriate, indeed essential.

The Supreme Court is now on the brink of depriving Americans of a fundamental constitutional right for the first time in our Nation's history. In 1958 nominee Potter Stewart was asked for his views of the Court's recent and controversial decision in Brown v. Board of Education. Americans today have a right to know where a nominee stands on the fundamental right to privacy in making decisions concerning reproduction.

I. Quotations from United States Senators Concerning the Role of the Senate in Confirming Supreme Court Nominees

Sen. Arlen Specter (R-PA) (re: nomination of Anthony Kennedy):

"There is widespread misunderstanding about the Senate's role . . . . These proceedings constitute really the apex of the separation of powers under our Constitution. All three branches are involved The President makes the nomination; it is up to the Senate to consent or not; and then the nominee who is successful goes to the court and has the final word over both the executive branch and the legislative branch. So there are really very important issues involved." (1987)

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Sen. Samuel Ervin (D-NC) (re: nomination of Thurgood Marshall):
"I believe that the duty which . . . .the Constitution imposes upon a Senator requires him to ascertain as far as he humanly can the constitutional philosophy of any nominee to the Supreme Court." (1967)

Sen. Strom Thurmond (R-SC) (re: nomination of Abe Fortas):
"It is my contention that the 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." (1968)

Sen William Borah (R-ID) (re: nomination of John J. Parker):
"Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental politics are involved." (1930)

Sen. George Norris (R-NE) (re: nomination of John Parker):
"When we are passing on a judge, . . . we ought not only to know whether he is a good lawyer, not only whether he is honest -- and I admit that this nominee possesses both of those qualifications -- but we ought to know how he approaches these great questions of human liberty." (1930)

Sen. John McClellan (D-AR) (re: nomination of Abe Fortas):
"I think we have greater responsibility than to determine that the nominee is honest and has the required legal ability because today, particularly in these troubled times, it is the philosophy and the approach that a judge may make in arriving at decisions, that can be even more dangerous than lack of ability or lack of complete integrity. If we should be ruled by a dangerous philosophy, we can surely come to a tragic end." (1968)

Sen. Harry Byrd, Jr. (D-VA) (re: nomination of Abe Fortas):
"[I]f we do not examine their philosophy, if we do not determine where they stand on the great issues of the day, then . . . it seems to me we might as well go back to our hometowns and practice law, run a newspaper, or do whatever we want to do, and cease being a part of the processes of the U.S. Senate." (1968)

In a Senate Executive Report Sens. Birch Bayh (D-IN), Philip Hart (D-MI), Edward Kennedy (D-MA), and John Tunney (D-CA) wrote (re: nomination of Rehnquist):
"The Executive has the . . . burden of proof when it comes forward with a Supreme Court nominee. . . . [I]t must run the risk that the Senate will act on the basis of the only substantive record available and, on this "best evidence," reject the President's choice." (1971)

II. **Quotations from now-Chief Justice William Rehnquist, Harvard Law Record, "The Making of a Supreme Court Justice," Oct. 8, 1959.**

"The Court in Brown v. Board of Education held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what 'due process' and 'equal protection' meant . . . . Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal

protection and due process? . . . . The only way for the Senate to learn of these sympathies is to 'inquire of men on their way to the Supreme Court something of their views on these questions.'" p. 10.

"Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process." p. 7.

On the confirmation of Charles Evans Whittaker: "Examination of the Congressional Record for debate relating to his confirmation reveals a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation." p. 7

"Given . . . the fact that Mr. Justice Whittaker had been an eminently successful courtroom lawyer, the fact that he had been a leader in the activities of the organized bar, and the fact that he had been very highly regarded as a judge of the lower federal courts -- all of which he was -- the Senators could still have no indication of what Mr. Justice Whittaker thought about the Supreme Court and segregation or about the Supreme Court and Communism." p. 8.

III. Sample Questions and Answers Concerning the Reasoning in Specific Cases from Senate Confirmation Hearings

Confirmation hearings of Justice Kennedy:

Sen. Edward Kennedy (D-MA):
How do you respond to the concern that your opinion reflects a narrow approach to the civil rights laws as the Supreme Court has interpreted those laws?
Judge Kennedy responded:
"It is entirely proper, of course, for you to seek assurance that a nominee to the Supreme Court of the United States is sensitive to civil rights."

Sen Arlen Specter (R-PA):
"I would like to begin with Brown v. Board of Education, the desegregation case. In examining the issue of the framers' intent . . . Congressman Wilson, the sponsor in the House of the 14th Amendment, stated, 'Civil rights do not mean that all citizens shall sit on juries or that their children shall attend the same schools.' . . . . Now my question is; Is it ever appropriate for the Supreme Court to decide a case at variance with the framers' intent?"
Judge Kennedy responded:
". . . . In my view, the 14th amendment was intended to eliminate discrimination in public facilities on the day that it was passed. . . . I think Brown v. Board of Education was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think Plessy v. Ferguson was wrong on the day it was decided."

Sen. Strom Thurmond (R-SC):
"Judge Kennedy, 20 years have passed since the Miranda v. Arizona decision which defined the parameters of police conduct for interrogating suspects in custody. Since this decision the Supreme Court has limited the scope of Miranda violations in some cases. Do you feel that the efforts and comments of top law-enforcement officers throughout the country have had any effect on the Court's views, and what is your general view concerning the warnings this decision

requires?"

Judge Kennedy responded:

"The Court must recognize that these rules are preventative rules imposed by the Court in order to enforce constitutional guarantees; and that they have a pragmatic purpose; and if the rules are not working they should be changed."

Confirmation hearings of Justice O'Connor:

Sen. Charles Grassley (R-IA):

"Unlike the other nominees, Judge O'Connor, you do not have a strong record on major judicial issues for us to review. That is not your fault; that is because you served on State courts as opposed to Federal courts. . . . I hope that you will understand that in light of your lack of written record on major issues, it is our obligation in this hearing to attempt to insure that you do not prove as great a surprise to President Reagan as Earl Warren was to President Eisenhower."

Sen. Patrick Leahy (D-VT):

"Senator Biden asked you a question about Brown v. The Board of Education. It was on the subject of judicial activism, a term that I guess means many things to many people. You said that it did not create new social policy by the Court but was simply the Court reversing a previous holding based on new research, but that new research was not any new research into the Constitution or into the law was it? Was not that new research rather the effects of segregation on minorities? It certainly was not into congressional debates over the 14th amendment."

Judge O'Connor responded:

"Senator, I think there was an element indeed of the examination of the intent of the drafters of the amendment. I am sure that particular case was impacted also by perceptions of the social impacts in that particular instance."

* * * *

"Senator, I consider it as an accepted holding of the Court."

In response to a question concerning Miranda v. Arizona, Judge O'Connor stated:

"I think the exclusionary rule . . . has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police."

1986 Confirmation hearings of Chief Justice Rehnquist:

Sen. Joseph Biden (D-DE):

"Do you think that the decision ultimately reached in Brown was the incorrect decision?

Justice Rehnquist responded:

"When Brown came down?"

Sen. Biden:

"When Brown came down."

Justice Rehnquist:

"No, I do not think I did, because when the Court went on record saying that, the stare decisis problem was gone.

NARAL

ANALYSIS OF SUPREME COURT DECISIONS CONCERNING THE RIGHT TO PRIVACY

PRIOR TO ROE V. WADE (prior to 1973)

The origins of the fundamental right to privacy are deeply rooted in our nation's legal tradition, as the Supreme Court recognized in Roe v. Wade, 410 U.S. 113 (1973). Over the past century, the Court has held that profoundly personal decisions are protected against unwarranted governmental interference by the right to privacy. See Loving v. Virginia, 388 U.S. 1 (1967) (right to privacy protects the decision when and whether to marry); Pierce v. Society of Sisters, 268 U.S. 510 (1925) & Meyer v. Nebraska, 262 U.S. 390 (1923) (right to privacy protects decisions on how to raise one's children).

The Court has long recognized that decisions concerning procreation are at the core of the right to privacy. Laws that interfere with an individual's procreative freedom are to be "strictly scrutinized" and are unconstitutional if not necessary to further a "compelling" state interest. Thus, in 1942 the Court invalidated a law that provided for the sterilization of "habitual criminals," Skinner v. Oklahoma, 316 U.S. 535. In 1965 and 1972, the Court invalidated laws that prohibited the use of contraceptives, Griswold v. Connecticut, 381 U.S. 479; Eisenstadt v. Baird, 405 U.S. 438. The Court has described the right of the individual to decide when and whether to conceive or bear a child as being "at the very heart" of the fundamental right to privacy. See Carey v. Population Services, 431 U.S. 678, 685 (1977).

ROE V. WADE AND DOE V. BOLTON (1973)

The Supreme Court declared in Roe v. Wade that the fundamental right to privacy, protected by the Fourteenth Amendment's guarantee of liberty, includes the right of a woman to decide whether or not to have an abortion. The Court invalidated a century-old Texas law prohibiting abortions not necessary to save the woman's life. This decision followed directly from the Court's 1965 ruling in Griswold, 381 U.S. 479, protecting the right to use contraception. Thus, the government may not interfere with a woman's abortion decision without demonstrating that a restriction is necessary to further a compelling state interest.

The Court in Roe recognized two state interests sufficiently compelling to justify restrictions on a woman's right to choose. After fetal viability -- a point that varies with every pregnancy, but usually falls between 24 and 28 weeks -- a state may prohibit abortion to protect the potentiality of life of the fetus, but only in cases in which the woman's health or life is not endangered by the pregnancy. A state may also regulate the abortion procedure after the first trimester -- 12 weeks -- if the regulations are necessary to further the state's interest in protecting the woman's own health.

The day the Court decided Roe, it also decided a second case concerning the right to choose abortion, Doe v. Bolton, 410 U.S. 179 (1973), which helps to clarify the Court's ruling; the Court stated in Roe, "that opinion and this one, of course, are to be read together." 410 U.S. at 165. In Doe, the Court struck down as unconstitutional a more recently enacted Georgia law that required that all abortions be performed in hospitals and that women secure the approval of a hospital committee and three doctors before obtaining an abortion. Thus, the Court recognized that the Constitution prohibits not

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only laws that would directly outlaw abortion, but also any restriction that may undermine the right to choose through unwarranted governmental interference with women's abortion decisions.

AFTER ROE V. WADE AND BEFORE WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1973 to 1989)

The Supreme Court most recently reaffirmed its holding in Roe in 1986 in Thornburgh v. American College Obstetricians and Gynecologists, stating that "few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision . . . whether to end her pregnancy." 476 U.S. 747, 772. In the thirteen years between Roe and Thornburgh, the Court invalidated a wide variety of restrictive abortion laws, including laws that required women to obtain their husbands' consent prior to having an abortion, Planned Parenthood v. Danforth, 428 U.S. 52 (1976), forced women to wait a specified period of time before obtaining abortions, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), and imposed biased, lengthy and inflexible "informed consent" requirements, Thornburgh, 476 U.S. 747; Akron, 462 U.S. 416. Although the Court repeatedly reaffirmed Roe during this period, the margin by which it did so steadily narrowed: Roe was decided by a decisive 7-2 margin, but by the 1986 Thornburgh decision, the vote to uphold Roe was 5-4.

Even during this time period in which the Court continued to reaffirm Roe, the Court upheld restrictive abortion laws in two important areas. Contrary to the reproductive freedom of young women and poor women, the Court upheld parental involvement requirements and restrictions on public funding of abortions. Nevertheless, even in its decisions upholding these restrictions, the Court expressly reaffirmed the basic principle that the government may not interfere with an adult woman's fundamental right to decide whether or not to end a pregnancy. The Court ruled that a state may require some "immature" minors to obtain parental consent prior to having abortions. This decision was based on the erroneous assumption that government-mandated parental involvement is beneficial to some minors who are too immature to make decisions about abortion on their own. In the public funding cases, while the Court reaffirmed that the Constitution prohibits the government from imposing obstacles in the path of a woman's choice of abortion, it found that the government may refuse to remove obstacles to abortion that the government did not itself create, such as a woman's indigence.

WEBSTER V. REPRODUCTIVE HEALTH SERVICES (1989)

In Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), the Supreme Court upheld the constitutionality of challenged provisions of a restrictive Missouri abortion law, including a prohibition on the use of public facilities (broadly defined) and public employees to perform abortions and a requirement that doctors perform tests to determine fetal gestational age, weight and lung maturity before performing an abortion on a woman believed to be more than nineteen weeks pregnant.

The Webster case was the first time in the sixteen years since Roe that only a minority of the Justices (four Justices) recognized the fundamental right to choose and voted to reaffirm Roe. Four other Justices voted in effect to overrule Roe: Justice Scalia did so explicitly and another three Justices did so implicitly, by reducing the fundamental right to choose to a "liberty interest," not entitled to the same high level of constitutional protection, and describing the state's interest in the fetus as "compelling" even in the earliest stages of pregnancy.

Justice O'Connor provided the fifth, essential vote to uphold the Missouri law, but she did so on narrow grounds, stating that it was unnecessary to reconsider Roe because the law passed the "strict scrutiny" standard of review. Thus, Webster did not overrule Roe. Justice O'Connor indicated, however, that she favors adopting a different standard of review for abortion laws -- an "undue burden" standard -- which would provide less protection than is afforded fundamental rights and would, if adopted, amount to an overruling of Roe.

SINCE WEBSTER (1989 to present)

On June 25, 1990 the Supreme Court decided two cases -- in a complicated series of separate opinions -- that involved the constitutionality of state statutes that placed restrictions on the ability of minors to obtain legal abortions. In Hodgson v. Minnesota, ____ U.S. ____, 58 U.S.L.W. 4957 (U.S. June 25, 1990), the Court essentially upheld the constitutionality of a Minnesota statute requiring 48-hour advance notification of both parents with a judicial bypass option, but ruled that a state must provide a judicial bypass as an alternative to a two-parent notice requirement. In Ohio v. Akron Center for Reproductive Health, ____ U.S. ____, 58 U.S.L.W. 4979 (U.S. June 25, 1990), the Court upheld an Ohio statute requiring 24-hour advance notification of one parent with a judicial bypass that was challenged as deficient. Although the Court had in prior cases allowed states to restrict teenagers' access to abortion services, these decisions allow for even greater state interference.

In terms of the continued vitality of Roe v. Wade, as in Webster, only a minority of the Justices reaffirmed Roe. In fact, the Hodgson decision undermined Roe even further. For the first time, Justice O'Connor -- who, prior to Justice Brennan's retirement, was clearly the critical vote on the right to privacy -- applied her "undue burden" standard of review in voting with the majority to uphold a restrictive abortion statute. Moreover, she applied this new standard in a manner that affords little constitutional protection: she found no "undue burden" in requiring minor women to notify both parents without any judicial bypass option, even in cases of divorce or desertion and over the objections of the custodial parent, although she did find that this requirement was irrational. Although Justice O'Connor will likely apply this "undue burden" standard in future abortion cases, including those involving adult women, Roe v. Wade remains the law of the land. Lower courts must continue to apply strict scrutiny in reviewing abortion restrictions until such time as the Supreme Court may actually overrule Roe and adopt a new standard of review.

FUTURE CASES

With Justice Brennan's recent resignation, only three remaining Justices on the Supreme Court recognize the fundamental right to privacy, including a woman's right to decide whether or not to have an abortion. Even if Justice O'Connor refrains from casting her vote to overrule Roe, there is no longer a majority on the Supreme Court to reaffirm Roe. If Justice Brennan is replaced with a Justice who will not protect a woman's fundamental right to decide whether or not to have an abortion, there will be a clear majority on the Court who will vote to overrule Roe v. Wade.