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TESTIMONY OF
MOLLY YARD
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Before the Judiciary Committee
of the United States Senate
against the
Confirmation of David Souter
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My name is Molly Yard. I am President of the National Organization for Women, the largest feminist organization in the United States, an organization which for twenty-four years has worked to achieve through legislation and political action full equality for all women in this society.

Thank you for this opportunity to state to the Senate Judiciary Committee our concerns about the nomination of David Souter to the Supreme Court. Your responsibility is an awesome one, made more so on this occasion because the nomination is for a replacement for Justice William Brennan. William Brennan stood for justice and mercy. He stood for freedom -- for individual rights and individual freedom. He understood why our ancestors came to these shores -- and why people keep coming from all over the world for the right to live their lives as they see fit, and to be let alone without a government telling them what to believe in politics, in religion or in anything else, and without government telling them how to behave, with whom to associate, and how they must live their private lives. Justice Brennan's resignation leaves all of us who cherish individual rights fearful, but women most of all are worried for he was a man who understood the treatment of women in this country as, and I quote Justice Brennan: " 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage."

Because Justice Brennan holds such a unique place in

American jurisprudence, and in our hearts, I am particularly grateful to you, Senator Biden, for your remarks last Tuesday on the Senate floor about William Brennan. We can surely celebrate his life but we are saddened by his resignation as the loss to all minorities and all women is overwhelming.

However, it is no more than empty words to laud Justice Brennan's principles and his extraordinary contributions on the Court, if by your votes, you confirm a nominee who would deny those principles and reverse those contributions.

In these Hearings much has been made of the New England background of David Souter. Lest you think that is somehow unique, let me tell you that my forebears on my mother's side sailed from England for the Massachusetts Colony in 1636 on the good ship "the Plain Joan" for whom my daughter Joan is named. She and I, and indeed all our family, have climbed many times those wonderful mountains of New Hampshire so cherished by David Souter.

There should be no doubt in the mind of any thoughtful citizen of the United States that our Supreme Court must play, and has played, a critical role in protecting the lives of all of us from arbitrary, unreasonable, or abusive legislative or executive excess or intrusion. It has done so largely under the Bill of Rights embodied in the first 10 amendments to our

Constitution as well as under the profoundly important Fourteenth Amendment.

NOW believes that all members of the Judiciary Committee must appreciate the grave responsibility which rests upon the Committee to "advise and consent" to the appointment of a new Justice to the United States Supreme Court. The Constitution is clear -- Article II, Section 2 provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint..."judges of the Supreme Court...." The appointment of a Supreme Court Justice is indubitably a joint appointment and not, as some believe, an appointment made unilaterally by the President, which may be rejected by the Senate only when some gross flaw emerges to preclude confirmation.

It is in light of this basic constitutional requirement that NOW wishes to make our comments concerning the pending nomination of Judge David Souter. The known record of David Souter and what he has said in answer to your questions to him give us serious concern. One issue -- clearly a major concern of NOW, as is well known -- involves the status of the landmark decision in Roe vs. Wade where Justice Blackmun wrote the compelling opinion for a solid majority of the Court. We were concerned before these hearings with Judge Souter's position on the constitutional right to abortion. Having heard his testimony, we are now concerned as

well with Griswold vs. Connecticut, Eisenstadt vs. Baird and the right to birth control, especially for unmarried people.

It is not my purpose today to engage in any discussion of the fundamentals of constitutional law. The NOW Legal Defense and Education Fund has prepared testimony for this Committee which is a careful analysis of Judge Souter's record and we stand fully behind it.

And now I want to state as clearly as I can what this appointment means to millions of women. And in doing so I want to remind you that in April of 1989, 650,000 Americans -- men, women and children -- marched and rallied in Washington in our "March for Women's Lives/Women's Equality to petition the government -- the Bush Administration, the Congress and the Supreme Court -- to leave intact Roe vs. Wade and not to restrict women's right to control their lives.

Marlo Thomas sings a wonderful song called "Free To Be Me" and that is what this hearing is about. When the Supreme Court, twenty-five years ago, affirmed a constitutional privacy right to use birth control and then eight years later extended that privacy right to include the right to choose abortion, the Court declared freedom for women. When our forefathers wrote the Constitution women were the property of their husbands and African-Americans were slaves. Women could not vote, own

property, serve on juries, or much of anything else. To declare freedom from slavery, this country had to fight a civil war. Women believed and hoped we could win freedom through the political process of a democratic society. We have, step by step, won a variety of rights and celebrate this year the seventieth anniversary of gaining the right to vote.

But winning the right to vote did not end our struggle for freedom. Women have a problem which none of you will ever face - we get pregnant. For years women in this country freely obtained abortions. It was not illegal to have one; indeed, their availability was advertised in the papers by ads saying if you had a "woman's problem" here was a place to go. I shall not go into the history of how and why abortion became illegal but it did so become.

But, legal or illegal, women in every society throughout the ages have sought and found those who perform abortions or they have self-aborted, often with dire consequences. Indeed today in many countries of Asia, Africa and South America abortion is illegal, but women continue to get them because they are desperate, desperate because they already have more children than they can afford to feed, desperate because they themselves are ill, desperate because they do not want to bring into the world a child they will have to abandon. (It is estimated in Brazil that 11 million children wander the streets abandoned because their

families can't feed them.) In fact they are so desperate they put their lives on the line. The World Health Organization conservatively estimates that 200,000 women die every year from botched, illegal abortions. As we sit here somewhere in this world every three minutes a woman is dying from these abortions.

When abortion became legal in our country in 1973 because of the Supreme Court ruling in Roe v. Wade, women in the United States became free because they could now control their reproductive lives. If one cannot decide for herself when or whether to have children she surely has no freedom -- no freedom to control her life, to plan her life, to decide what to do with her life. Any goal she sets can be completely disrupted by an unplanned pregnancy, and if she cannot end it then her life is being controlled, not by herself but by some law enacted by men which forces her to carry the pregnancy to term, and then be responsible for the child borne whether or not she has the emotional or financial resources to bear that burden.

Not only did Roe v. Wade free women, it also vastly improved women's health; prior to Roe, illegal abortion was the leading cause of maternal death in this country. Abortion must be available as a women's health measure -- the majority of women seek abortions because birth control fails or because there is some problem with the pregnancy. It's not a question of morality but a question of health as well as, more profoundly, a question

of freedom.

For seventeen years women have had this freedom, but by your consideration of David Souter for appointment to the Supreme Court you are really considering ending freedom for women in this country. We believe from Judge Souter's record that he will be the fifth vote to overturn Roe v. Wade and furthermore he might overturn Griswold vs. Connecticut. This country must not go back to illegal abortion or illegal birth control. If that happens the law will be broken! Courageous doctors will break the law. Desperate women will break the law. The underworld will flourish with back alley abortion butchers and women will die. There will not be enough jails to house the women who will have illegal abortions and those who will help maintain that option.

NOW is all too aware that four justices on the current Court are prepared to overturn Roe vs. Wade and on the basis of Judge Souter's briefs and opinions we believe he would be the fifth vote the right-wing of this country, led by President Bush and John Sununu, has sought for the purpose of overturning Roe. Certainly the President and his Chief of Staff have made every attempt to assure right-wing groups like the Coalition for America that he is one of them.

In Coe vs. Hooker (1976) a brief signed by Attorney General Souter, in dealing with the propriety of Medicaid funding for

abortions,⁶ referred to the "killing of unborn children." As Attorney General in 1977 Judge Souter spoke out strongly in opposition to legislation repealing New Hampshire's strict anti-abortion laws -- which had been passed prior to Roe. Judge Souter wrote a formal letter explaining his desire to keep the punitive legislation in force, and in an interview with the Manchester Union Leader on May 19, 1977 he said, "I don't think unlimited abortions should be allowed" and "I presume we would become the abortion mill of the United States."

Senators, this is the language of the right-wing. They would have you believe that women get abortions one after the other since they use them as birth control, and that any clinic which provides women's reproductive health services, including abortions, is running an abortion mill. These are the words of the right-wing which seeks to obfuscate and denigrate the health needs of women, and employs inflammatory language to cover up a proposition which is patently ludicrous. No woman obtains one abortion after the other as a birth control method -- if she did she would, during her reproductive years, have two or three a year, fifty or sixty during her life. No woman does that!

And why in Smith vs. Cote did Judge Souter go out of his way to worry about a doctor, whom the court found guilty of malpractice, because he did not counsel a pregnant woman exposed to rubella that she should be tested for risks to her fetus and

if problems were found she had the constitutional right to an abortion? Why did the Judge express concern about the doctor counseling his patient in this matter because the doctor might have "conscientious scruples against abortion?" This question was not part of the case. It was not raised in the lower court decision nor on appeal, and was gratuitously injected by Judge Souter. He seems overly anxious to place himself on the side of the opponents of abortion and, in fact, twice, in his answers to your questions, he described women seeking abortions as "the other side."

Senator Metzenbaum tried to discover whether he had empathy with a woman who found herself pregnant with an unplanned pregnancy. After a long pause Souter said he wasn't prepared for the question, no doubt because the Bush legal experts who coached him for this Hearing never themselves would have thought of that question because they have no empathy for anyone in that situation. Whatever the reason, Judge Souter finally answered by remembering the case of a girlfriend of a Harvard student who was pregnant and planning to self-abort. The student was worried about her and wanted Souter to talk to her and Souter did. This shows empathy? How do we know but what he may have cold bloodily told her she would be a murderer if she ended her pregnancy? What we do know from his answer was that he counselled her not to self-abort.

On the issue of birth control, Judge Souter was careful in his testimony always to describe the right to privacy as a marital right. Even in the case of married couples right to contraception, he carefully did not endorse the decision in Griswold vs. Connecticut and did not ever state that the right of married people to contraception is a fundamental right.

On the right of unmarried people to birth control, Judge Souter was even less supportive in his testimony, stating only his agreement with the Court's equal protection approach to the analysis in Eisenstadt, once Griswold had been decided.

It surely would be interesting to know whether Judge Souter's view of Roe vs. Wade and of Griswold vs. Connecticut was explored by, or on behalf of, the White House staff before his nomination was announced. Frankly we do not find credible that it was not; nor do we find credible that Judge Souter, portrayed as an intellect and scholar, could have no opinion on Roe vs. Wade.

Professor Alan Dershowitz reminds us that "...Judge Souter was nominated, in effect by John Sununu, a strident opponent of a woman's right to choose, of separation of church and state and of equal rights under the law. If Mr. Sununu believes that Judge Souter will make a great justice ... then the rest of us have something to worry about."

Apart from this, we have major concerns as to Judge Souter's views concerning the relevance and potential weight of precedent in the Court's interpretation of the Constitution. His general views as to the basic protections springing from the Bill of Rights -- including racial and sexual discrimination, separation of church and state and the right of privacy -- put all Americans at risk. We are, furthermore, very concerned about his standard of scrutiny on gender discrimination under the Fourteenth Amendment.

It seems to us after listening to Judge Souter's responses, that he has an apparent lack of appreciation of, and deference to, the unique nature of the responsibility and authority of the Supreme Court as the only body charged not only to uphold, but also to interpret the Constitution.

For example, Judge Souter emphasizes that Supreme Court Justices are not the only ones to take an oath to uphold the Constitution. He stressed the shared nature of this responsibility, and reminded the Committee that they, as well as the President, had taken the oath. Especially in the absence of a substantial body of scholarly or judicial writing from which may be gleaned a more refined view of Judge Souter's understanding of the scope of judicial, executive and legislative responsibilities as to our constitutional rights, our concern is that he is neither willing nor prepared to embrace the

responsibility which the Committee is considering entrusting to him.

On all such matters there is one obvious basic concern which this Committee must address: Does Judge Souter's total background of experience suffice to qualify him for the enormous responsibility which the next Justice of the U.S. Supreme Court inevitably must face?

As the members of this Committee well know there may be thousands of state and federal judges in the United States who have the basic qualifications and are available to fill this particular vacancy on the Supreme Court; persons eminently qualified to interpret and apply the deliberately broad language in many provisions of the U.S. Constitution.

Presumably the President's advisers, and certainly the Department of Justice, were in a position to suggest a number of such Judges for consideration by the President.

So we ask -- Why Judge David Souter?

What was the basic purpose in advancing this nomination of a man with no substantial discernible record?

Perhaps the White House staff knows more about the nominee

than do the rest of us -- including this Committee.

Judge Souter's assurances last week that he would approach all sensitive issues with an "open mind" is not enough.

It has been reported that Judge Souter greatly admires the works of Justice Oliver Wendell Holmes. No doubt some members of this Committee share this admiration. It thus seems pertinent to recall the immortal words of Justice Holmes in his dissertation on the Common Law --

"The life of the law has not been logic: it has been experience."

Those words were addressed, of course, to the development of the common law over many years. But Justice Holmes also wrote these words, which indubitably apply more generally --

"Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and tradition, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in

the last analysis." (The Common Law." 1963
Ed-Harvard Un. Press, p. 32)

We call your attention to two polls on the subject of abortion which relate to these Hearings:

1. Every year since 1973 Lou Harris has polled the voters of this country as to whether they support Roe vs. Wade. Each year a majority has supported it, generally at 53 or 54%. In 1989 this shot up to 64% support. In 1990 the support stands at 73%.

2. Planned Parenthood commissioned William Hamilton to poll 1000 registered voters between August 30 and September 4 regarding the Souter nomination. By 76% to 20% voters wanted the U.S. Senate to pose questions to Souter on his personal views on privacy, church-state relations, abortion and civil liberties. By 49% to 23% these voters said his responses should be a major factor in his confirmation. 47% said if he refused to answer this should be the deciding factor in whether to confirm.

In summary we repeat our opposition to the confirmation of Judge Souter. It is important that the Court maintain a balance. To replace Justice Brennan it is important to have someone more in his mold; Judge Souter will tip the Court dangerously out of balance and away from the strong support for individual rights

which Brennan so brilliantly upheld.

What is at stake for American women is far too important for us to do anything but urge you not to confirm him. American women's lives are literally on the line. If we should lose the right to control our reproductive lives the social fabric of our society will be torn apart.

Are you prepared to deny freedom to women?

Are you prepared to deny reproductive health to women?

Are you prepared for lawlessness, and for the death of your daughters and your granddaughters?

I tremble for this country if you confirm David Souter. But most of all I tremble for the women of America and their families.