Testimony of Eleanor Cutri Smeal
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Before the Senate Committee on the Judiciary
on the Nomination of David Souter for the Supreme Court

I am Eleanor Smeal, president of the Fund for the Feminist Majority. The Fund for the Feminist Majority is a national non-profit research, action and advocacy association, dedicated to empowering women and eliminating discrimination. We are the first group to form based on the reality that current public opinion polls demonstrate that a majority of Americans self-identify as feminists (people who advocate women's equality) or supporters of the women's rights movement.

It is ironic and a testimony to the need of groups such as the Fund for the Feminist Majority that seek to empower women, that I must come before this all male Judiciary Committee begging once more for the fundamental rights of women. I express strong and unequivocal opposition to the confirmation of David Souter for a position as an Associate Justice on the United States Supreme Court.

My testimony has been prepared after exhaustive research of our professional staff and with the expert assistance of Erwin Chemerinsky, Professor of Law at the University of Southern California at Los Angeles. We have carefully reviewed and investigated David Souter's record in New Hampshire; as Deputy Attorney General, Attorney General, and as a Justice on the New Hampshire Supreme Court. There is nothing -- not a shred of evidence -- that indicates any willingness to uphold or advance civil rights for women and minorities. In fact, every brief, every opinion, takes a repressive and regressive approach to constitutional protections for women and minorities.

Thus, the burden was on David Souter to show during these hearings that the picture which emerges from his prior work is inaccurate; that he is committed to civil rights for women and minorities. But his testimony -- and I have listened carefully to his testimony -- contains little more than platitudes, unacceptable non-answers, and troubling replies when it comes to these issues. There is nothing but blind faith to justify believing that he will uphold basic constitutional freedoms. And blind faith is not enough. A judicial nominee must not be confirmed without substantial evidence that he or she will protect fundamental constitutional guarantees. No such evidence exists for David Souter.

Although I believe that David Souter poses a threat to constitutional rights in many areas, my testimony will focus on women's rights. At the outset, it is important to emphasize that the rights of more than half of the population must not be dismissed as merely the concerns of a special interest group. I hope that every member of this Committee -- Democrat and Republican, liberal and conservative -- agrees that an individual who does not understand women's rights or has no opinions about women's fundamental liberties under the Constitution has no place on the United States Supreme Court. A person should not be confirmed for the Supreme Court unless he or she evidences commitment to certain basic constitutional values; reproductive privacy and gender equality must be among them. Because David Souter's record and testimony offer no reason to believe he is committed to these values, and every reason to fear that he is

opposed to them, I respectfully urge you to refuse to confirm him for a seat on this nation's highest court.

In general, it must be noted that David Souter's approach to constitutional interpretation poses a real risk for real women. Souter has termed himself an "interpretivist" before this Committee. Traditionally, that has meant a judicial philosophy that limits the Constitution's protections to what the framers intended. Indeed, as a New Hampshire Supreme Court Justice, David Souter wrote a dissenting opinion upholding filing fees in probate cases on the grounds that they were not inconsistent with the framers' intent in drafting the state constitution. Estate of Dionne, 518 A.2d 178 (N.H. 1976).

But adherence to this theory of constitutional interpretation poses a grave threat to women. Women were viewed as chattel with no rights when the Constitution was drafted. And the framers of the Fourteenth Amendment did not intend to eliminate gender discrimination. Robert Bork was properly rejected for a seat on the Supreme Court because of his commitment to this unacceptable method of constitutional interpretation. David Souter, however, said that he is not wedded to "original intent," but instead he would follow "original meaning" or "original understanding." How is this more than a mere word game to make his views seem more palatable? The original meaning of the Constitution with its blatant sexist and racist provisions was disastrous to women, blacks, and unlanded men.

A review of David Souter's record and testimony on the issues of reproductive privacy and gender discrimination reveals that he

is very much the interpretivist he proclaims to be: he finds little, if any, protection for women in the Constitution. His past record on these two crucial issues raises profound concerns and his testimony, if anything, heightens these concerns about what David Souter would be like as a Supreme Court Justice.

An analysis of his record on the issue of privacy must begin with a brief filed by his office, when he was Attorney General, which called abortion the "killing of unborn children." (Memorandum in Support of Defendant's Motion for Suspension of Injunction Pending Appeal in Coe v. Hooker, at 5). The state of New Hampshire could have opposed public funding of abortion without describing abortion in this inflammatory manner. As a public official sworn to uphold the Constitution -- the Supreme Court already had interpreted the Constitution to protect a right to abortion -- Attorney General Souter should not have allowed the State to describe abortion in that manner to a federal court.

Attorney General Souter's own statements indicate that the brief likely reflected his strong anti-abortion sentiments. In 1977, he opposed repeal of New Hampshire's strict criminal anti-abortion law. The law had been rendered a virtual nullity by Roe v. Wade and served no real purpose. Nonetheless, Souter opposed its repeal arguing that without it the state would become an "abortion mill." (Manchester Union Leader, May 19, 1977 quoted in Manchester Union Leader, August 4, 1990, p. 1). His position and his language indicate a person opposed to constitutional protection for abortion rights.

Nor does his testimony before this Committee offer the

slightest reason to believe that he would protect constitutional privacy if confirmed for the Supreme Court. Initially, women's rights advocates were concerned about the constitutional protection of the right to abortion; after hearing Judge Souter's testimony we believe that the constitutional protection of the right to birth control for both married and unmarried individuals is also in jeopardy.

In response to repeated questioning, the most David Souter would say is that he believes that the Constitution protects certain aspects of marital privacy, but he was vague as to which specific aspects are protected. Although he was willing to express general support for Griswold v. Connecticut's protections of marital privacy, he refused to endorse its holding or its opinion. Indeed, when asked by Senator Leahy if he considered marital privacy a matter of settled law, he said that "one simply could not say that it is settled."

Most startling, Judge Souter has refused to answer any questions on the Eisenstadt decision which gave single people the right to birth control. When asked by Senator Biden about the guaranteed right of privacy for unmarried couples, Souter stated that privacy rights for unmarried individuals are "not a simple question to answer," and in fact proceeded to say that there is a State interest in precluding people "under those circumstances from obtaining contraceptive information and devices" that should be weighed against this privacy right. What sort of compelling State interest could there be in blocking access to birth control information and contraceptives?

Millions of Americans use birth control and contraceptive devices. They would be shocked to learn that a nominee for the United States Supreme Court does not consider this right as a settled point of law. Millions of women depend on access to abortion and birth control for their very health and well-being.

In his testimony before this Committee, David Souter gave women little reassurance. He stated that he agreed with the late Justice John Harlan on determining when to regard a right as fundamental; that "inquiry into the history and traditions of the American people as being the basis upon which a fundamental valuation should rest."

Repeatedly, Judge Souter has described his judicial philosophy on due process questions as identical to that of Justice Harlan. Yet, a reading of Justice Harlan's opinions reveals that he likely would not have protected a constitutional right for unmarrieds to engage in sexual relations or to purchase and use contraceptives. In Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Harlan quoted his earlier opinion in Poe v. Ullman, 367 U.S. 497 (1961), that the content of due process is determined by history. Although Justice Harlan spoke of the tradition of protecting marital privacy, he expressly recognized the ability of the government to criminally punish "adultery, homosexuality, fornication, and incest." Justice Harlan explained that "Adultery, homosexuality, and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife in necessarily as essential and accepted feature of the institution of marriage an institution which the State not only

must allow, but which it always has fostered and protected."

In other words, Justice Harlan -- and therefore apparently David Souter -- would deny constitutional protection for unmarried sexual activity, including the use of contraceptives. This position is unthinkable in a civilized society. Indeed, it reflected the profound difficulties in limiting the Constitution, an organic evolving document, only to that which has been protected historically.

We have been told that we should be comforted by the fact that David Souter permitted abortions to be performed at Concord Hospital while he served on its Board of Directors. But in reality, very few abortions are performed there, and women are routinely referred away from Concord Hospital. New Hampshire has five hospitals which perform abortions, yet overall, they perform only 5% of abortions in New Hampshire. In most states, hospitals provide 10% of all abortions. If anything, New Hampshire hospitals perform half the level of abortions of other states.

And we are also supposed to gain solace from Mr. Souter's dramatic recollection of counseling a pregnant women for two hours 24 years ago. But he refused to tell us how he counseled her other than away from her original direction, and refused to reveal how he would respond to the same situation today. Such a "confirmation recollection" does not reassure us that our rights are safe or that he would listen.

And Mr. Souter's warm, compassionate, confirmation image melted away in yesterday's hearings, when Senator Leahy asked the pointed question, "What would be the practical consequences, not the

legal, of overturning Roe v. Wade -- the **practical** consequences?" Mr. Souter coldly replied that ."There would be the obvious practical immediate political consequences that the issue would become a matter for legislative judgment in every state. It is safe to say that legislative judgment would not be uniform. There would be, I dare say, a considerable variety in the scope of protection afforded or not afforded. The issue of federalism would be a complicated issue."

Mr. Souter did not answer, as he had been asked, in terms of the impact on real people. Instead, he focused on the political consequences. There was no sign of Souter feeling any compassion or understanding for the devastating and lethal impact that overturning Roe v. Wade would have on women. Mr. Souter saw it as a cold, detached, and theoretical discussion rather than one of grave human suffering and misery, and one where we know for sure that women will die.

Over and again, David Souter refused to answer your questions about abortion and reproductive privacy. Of course, members of the Committee did not ask him how he would vote if confirmed for the Court; you wanted to know his views on the subject as of now. But he refused to offer the slightest indication of whether he supports this constitutional right. You were not asking him about an unresolved, speculative future issue; you were asking him about a constitutional right that was established almost two decades ago.

He said that he could not discuss the matter because the Supreme Court might be asked to overrule Roe v. Wade. This answer

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seems disingenuous in light of his willingness to discuss other matters, such as affirmative action and criminal procedure, that will come before the Court. Furthermore, the fact that the Court might rule on abortion questions does not excuse him from sharing his beliefs as of now. The people know how other members of the Court likely view the abortion question; there is no reason that they must guess as to how David Souter feels. He would no more be disqualified from sitting on an abortion case than any other Justice who has views that have been expressed. If David Souter has beliefs, there is no point pretending that he does not. And if David Souter truly has no views on abortion and Roe v. Wade, then he is probably the only lawyer, judge, or adult in America without such an opinion.

Under other circumstances, the failure to answer question might not be fatal to a nomination. But here, where David Souter's record shows hostility to reproductive rights for women, it is incumbent on him to show his willingness to uphold these basic constitutional freedoms. And it is incumbent upon this body to determine beyond a reasonable doubt that he will uphold these freedoms. His silence does not create the impression of open-mindedness, but of likely antipathy to abortion rights in light of his earlier positions and the lack of any other evidence.

Reproductive freedoms are not simply one more right among many. They are basic civil liberties guaranteed by the Constitution and essential to the life and health of women. Studies show that forty-six percent of all women will have an abortion. The vast majority of adults will use contraceptives. Without

constitutional protection, women will die and suffer from illegal abortions and unwanted pregnancies. At this point in constitutional history, reproductive freedoms hang by a thread and there is every indication that David Souter will cut that thread.

A person is unsuitable for the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms. Reproductive privacy is one of these guarantees. Moreover, throughout history, the Senate has considered the likely effect of a nominee at the time of confirmation. The simple reality is that the next Justice could decide the future of abortion rights and reproductive freedom. There is nothing in David Souter's record or testimony -- not a scrap of information -- to justify believing that he would safeguard these basic liberties. On this ground alone, I urge the Senate to reject him and to protect American women.

David Souter's unduly restrictive view of constitutional privacy is reflected in his ruling that New Hampshire constitutionally could prevent homosexuals from adopting children or providing foster care. Opinion of the Justices, 525 A.2d 1095 (1987). The New Hampshire House of Representatives requested an advisory opinion from the State Supreme Court on the constitutionality of a state law that would have restricted the ability of homosexuals to adopt or care for children. Justice Souter joined the Court's majority opinion in holding that the proposed law would not deny equal protection by preventing homosexuals from adopting children or being foster parents. Despite copious evidence to the contrary, the Court found that the

state had a legitimate interest in providing heterosexual role models for children. This decision reflects a very narrow conception of constitutional privacy and a view of gays and lesbians based on homophobic stereotypes, not facts.

In addition, David Souter's position on gender discrimination makes him unsuitable for the nation's highest Court. As Attorney General, David Souter filed a brief in the United States Supreme Court urging the Court to abandon the use of intermediate scrutiny for sex-based classifications. The petition for a writ of certiorari argued that intermediate scrutiny created a "twilight zone" that "lacks definition, shape, or precise limits." (Petition for Writ of Certiorari, in Helgemoe v. Meloon, 1978, at 18-19).

Nothing in the nature of this case required Attorney General Souter to argue for lessening the standard for constitutional protection for women. He could have defended that state's statutory rape laws under intermediate scrutiny. In fact, the Supreme Court later upheld such statutes under intermediate scrutiny. See Michael M. v. Sonoma County, 450 U.S. 464 (1981). As a public officer sworn to uphold the Constitution, there is no reason why he should have been arguing that the Supreme Court should overrule its precedents protecting women.

In his testimony before this Committee, Souter was given the opportunity to express a commitment to prohibiting and remedying gender discrimination. Surprisingly, his response to questions centered on criticizing intermediate scrutiny in terms almost identical to those used in the certiorari petition filed by the

Attorney General's office. Although he indicated that he favored using more than rational basis review for gender discrimination, he did not provide any indication of how he would apply the equal protection clause or of a willingness to protect women from discrimination.

Indeed, nothing in his record indicates the slightest sensitivity to issues of gender or race discrimination. As a Justice on the New Hampshire Supreme Court he authored an opinion declaring unconstitutional the application the application of the State's rape shield law. Violence against women is tragically widespread in this society. One in three women will be raped in her lifetime. According to the 1989 Uniform Crime Report and the National Crime Survey, every hour 16 women confront rapists, and every six minutes a women is raped -- close to one million women annually. Yet Mr. Souter referred to this pervasive violence against women as an "undignified predicament." His description of the situation of women who are raped reveals an underlying lack of compassion, understanding and empathy. Would he view male victims of life-threatening assaults with such contempt and insensitivity?

Over the past decade, the rape rate has risen four times as fast as the total crime rate, and 60 - 80% are date or acquaintance rapes; of those only 3% are prosecuted. Many states have adopted rape shield laws to encourage women to report sexual assaults by preventing questioning about their sexual history. New Hampshire's law prohibited testimony of "prior consensual sexual activity between the victim and any person other than" the defendant. State v. Colbath, 540 A.2d 1212 (N.H. 1988). Such

laws reflect the fact that a woman's behavior with others is totally irrelevant to the defendant's guilt.

Virtually no court ever has held it unconstitutional to apply a rape shield law. But Judge Souter, writing for the New Hampshire Supreme Court, found that it was unconstitutional to exclude evidence of a rape victim's allegedly "sexually suggestive" behavior toward several men at a bar. But dress and flirtatious conduct are not an invitation to rape. Judge Souter's opinion reflected tremendous insensitivity to women and the problem of sexual assault.

Likewise, his statement before this Committee that it is a "mathematical" fact that literacy tests "dilute" the votes of other citizens reflects his attitude toward civil rights. The statement once again shows an insensitivity which is inappropriate for a Justice on the United States Supreme Court. If Souter was from a Southern state and defended literacy tests, he would not even be considered in the running for a seat on the Supreme Court. His defense, to this very day, that this literacy test as used in New Hampshire was not discriminatory shows that he does not understand how such tests are fundamentally and inherently discriminatory. There is no way such testing can be used without discriminating. This is not only relevant to the civil rights of minorities, but also the rights of women.

For years I have worked to eliminate discriminatory tests which are used to deny women and minorities educational and employment opportunities; to think that the United States Senate would approve someone who defends the most elementary of discriminatory

tests, one used to bar one of the most fundamental rights of citizenship -- voting -- is chilling indeed. How can we expect him to comprehend the devastating, yet more subtle, sex-biased and race-biased standardized testing commonly used in employment and education?

And Mr. Souter's activities against the peaceful environmentalists at Seabrook are especially frightening to women, who because we have not been included in political decision-making in this nation, are frequently forced to protest and petition the government for redress of grievances. Mr. Souter's Draconian methods to repress free speech and assembly, his use of the power of the government to prevent dissent, and his request for preventive detention of demonstrators are grave warnings of his willingness to gut the First Amendment.

Although the cases I have discussed are familiar to the members of this Committee, I reviewed them because the cumulative picture is deeply troubling. They show not a person who is a blank slate, but one where all the evidence points in one direction. It shows not a person who is warm and compassionate but an individual who does not understand or care about the real needs and rights of people. I ask members of this Committee, can you point to any evidence -- any speech, any article, any brief, any opinion -- where David Souter expressed a commitment to reproductive privacy or civil rights for women?

The rights and lives of millions of women -- and particularly young women -- rest on this nomination. The confirmation or rejection of David Souter will probably have more effect on their rights than all of the laws you will pass in all of your days in the United States Senate.

Please, I urge you, do not place women's rights and women's lives in jeopardy. David Souter is far too great a risk to civil rights, liberties and lives to have a place on the Supreme Court.