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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

September 19, 1990

The Honorable David Souter
 Noble Drive
 Concord, New Hampshire 03301

Dear Judge Souter:

As I stated at the close of hearings on your nomination, the committee's practice in the past has been to allow Senators who are not members of the Judiciary Committee to submit written questions to Supreme Court nominees. Accordingly, I am enclosing several questions, on behalf of Senator Levin.

1. You testified that the Fourteenth Amendment protects a right to privacy. Aside from the issue of reproductive rights, do you believe that the privacy right of an individual, as protected by the Fourteenth Amendment, is affected by his or her marital status?

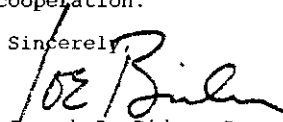
2. It's my understanding that you are an admirer of Justice Holmes. Would you give your comments on the aphorism from Holmes' Common Law: "the life of the law has not been logic; it has been experience"?

3. Which two U.S. presidents and which two Supreme Court justices of the last fifty years do you most admire, and why?

4. Senator Biden asked you whether you agreed that procreation is a fundamental right, as the Supreme Court decided in Skinner in the 1940's. You replied that the right to procreate would be at the heart of any core concept of marital privacy. Putting marital status aside, do you believe that procreation is a fundamental right?

I would appreciate receiving your answers as soon as possible. Thank you for your cooperation.

Sincerely,


 Joseph R. Biden, Jr.
 Chairman

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUITCHAMBERS OF
DAVID H SOUTER

September 24, 1990

FEDERAL BUILDING
35 PLEASANT STREET
P.O. BOX 2319
CONCORD, NH 03302-2319

Dear Mr. Chairman:

Thank you for your letter of September 19 with four questions from Senator Levin. My responses follow.

1. I testified that the liberty protected by the Fourteenth Amendment includes a right of privacy, and I spoke of a concept of marital privacy as clearly falling within the protected right. Because the concern for privacy has thus far focused so significantly on reproductive choice, and because cases implicating such choice by married and by unmarried individuals will probably come before the Supreme Court in the near future, I respectfully declined to speak on the likely weighting of privacy interests in such a matter. I believe that I must continue to take this position, lest I comment inappropriately on an issue that could call for my ruling if my nomination is confirmed.

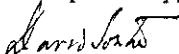
2. Holmes's aphorism speaks to a central truth about our law: it is not a closed system of neatly consistent rules, but a set of principles derived from human experience, with claims to legitimacy that may come into conflict with each other. What a theorist might criticize as an objectionable untidiness is in fact the law's reflection of the divergent human needs and aspirations that call it into being.

3. As for the two most admirable justices of the past fifty years, I will exclude anyone living from consideration. Of those who are now gone, I most admire Justices Harlan and Frankfurter. Neither was without a flawed decision, but each has taught us lessons about the proper scope of the judicial function within the tripartite division of governmental power in a constitutional democracy. Justice Harlan repeatedly spoke to the need for a disciplined search for constitutional values independent of our merely personal preferences, and Justice Frankfurter's concurrence in the Court's unanimous opinion in Brown v. Board of Education reminded us that a proper sense of judicial restraint should be no counsel against the forthright enforcement of clear constitutional principle. As to admirable presidents of the past half-century, a response would take me into a sphere of political comment that I think would be inappropriate for me to make, given that I am a member of the judiciary.

4. I think this question about the significance of the procreative choice outside the marital context arguably might raise some of the same issues raised by question one. The same concern that led me to believe that I must decline to respond

further to that first question applies here as well, and I ask to be excused from speaking to this question beyond the analysis that I gave to the Committee in my earlier testimony. Let me mention again, Mr. Chairman, my appreciation of the many kindnesses that you and your colleagues have shown to me. Thank you.

Yours respectfully,



David H. Souter

The Honorable Joseph R. Biden, Jr.
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510