NARAL

MEMORANDUM

TO: Members of The United States Senate Judiciary Committee
FROM: Dawn Johnsen, Legal Director
DATE: September 21, 1990
RE: Judge David Souter's Testimony Regarding The Fundamental Right to Privacy

Introduction

Before the Senate Judiciary Committee began hearings on Judge David Souter's nomination to the U.S. Supreme Court, NARAL urged the Committee to question Judge Souter about his views on the level of constitutional protection afforded the right to privacy, including the right to choose abortion. Although his record contained no definitive indication of his views in this area, all of the available evidence suggested that Judge Souter was likely to refuse to protect the right to choose. We therefore felt that it was essential for the Committee to ascertain Judge Souter's general legal approach and reasoning in this critical area. We at no time, however, suggested that Judge Souter should be required to state how he would decide a specific fact-contingent case prior to reviewing the record or briefs, nor did we suggest that Judge Souter should be required to give the Committee an irrevocable commitment as to the legal approach he would use.

We felt it was necessary to consider Judge Souter's views on the right to choose due to the exceptional circumstances surrounding his nomination: For the past decade, our Presidents have made nominations to the federal judiciary after having pledged -- in three consecutive Republican Party Platforms -- to use the judicial appointment process to deprive women of their fundamental right to make their own decision whether or not to continue a pregnancy. With each Supreme Court nomination during that period, the Administrations made good on their promise. They have succeeded in diminishing the support for the right to choose from a strong 7-2 majority to the point where the Supreme Court is currently at best one vote away from overruling Roe v. Wade, 410 U.S. 113 (1973).

For the Senate to confirm Judge Souter without determining whether he recognizes the right to choose would be to acquiesce in this strategy to take away a fundamental constitutional right for the first time in our Nation's history. NARAL therefore urged the Senate to oppose Judge Souter's confirmation unless he openly recognized that the fundamental right to privacy extends to a woman's decision whether or not to have an abortion.

During the course of the hearings, several senators -- most notably Chairman Biden and Senators Simon, Metzenbaum and Leahy -- repeatedly asked questions of Judge Souter aimed at learning if he regards a woman's decision whether or not to continue a pregnancy as a constitutionally protected fundamental right. Despite his willingness to discuss his approach to reviewing a variety of important constitutional issues, Judge Souter chose to be silent on this vital issue. His cryptic comments revealed only that he recognizes a "marital right to privacy." This is precisely the narrow definition of the right to privacy offered by many who seek to overrule Roe v. Wade. Because Judge Souter refused to answer these questions and did not rebut the strong presumption that he does not support the fundamental right to choose, the Senate should refuse to consent to his nomination.

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The Fundamental Right to Choose

At no time during his testimony did Judge Souter give any indication that he views the right of a woman to decide whether or not to have an abortion as a fundamental right. He closed the door to this line of inquiry with his answer to the first question addressed to him, which was posed by Chairman Biden. Judge Souter could not have been more adamant in his refusal to respond to any question that might provide insight into his approach to this issue. For example, on this basis, Judge Souter refused to provide specific answers to questions about the outcomes in other privacy cases, such as Griswold v. Connecticut, 381 U.S. 479 (1965) and Moore v. East Cleveland, 431 U.S. 494 (1977), (9/13, pp. 104, 114), refused to answer certain questions regarding the factors he would use to determine if the right to choose is fundamental, (9/13, p. 120; 9/14, p. 138), and refused to discuss his personal views on the morality of abortion, (9/14, pp. 183-90).

> I would not think that it was appropriate to express a specific opinion on the exact result in Griswold, for the simple reason that as clearly as I will try to describe my views on the right of privacy, we know that the reasoning of the Court in Griswold, including opinions beyond those of Justice Harlan, are taken as obviously a predicate toward the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination -- Roe v. Wade, upon which the wisdom or the appropriate future of which it would be inappropriate for me to comment. (9/13, p. 104).

Although he scrupulously avoided revealing his views on the merits, Judge Souter did indicate that he views the existence of a fundamental right to choose as an open question that "is something which is going to have to be developed by the courts over the course of probably a great many years." (9/14, p. 59; 9/14, p. 108; 9/17, p. 111; 9/17, p. 133) He at no point acknowledged that it is well-established precedent that should be regarded as having been settled. Judge Souter also stated that he has not made up his mind as to whether or not he would vote to uphold Roe v. Wade. (9/14, p. 128)

As Chairman Biden persuasively demonstrated, Judge Souter answered questions on many other issues -- including those likely to come before the Court -- of precisely the type he refused to answer in the abortion context -- that is, concerning the level of constitutional protection he would afford an asserted right and the general legal analysis he would use to approach the issue. Without offering a convincing justification, Judge Souter singled this one issue out for silence. (9/14, pp. 146-48, 151-52; 9/18, pp. 70-72)

The Fundamental "Marital Right to Privacy"

Throughout his testimony, Judge Souter remained committed to the line he drew in his first exchange with Chairman Biden: he would say only that among the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment is the "marital right to privacy" which includes the right of a married couple to procreate. Judge Souter was extraordinarily careful always to use "marital" as a qualifier each and every time he described what he views as part of the fundamental right to privacy. (9/13, pp. 112-13, 114, 116; 9/14, p. 59; 9/17, pp. 23, 111, 112)

Although he clearly and repeatedly recognized "marital privacy" as a fundamental right, Judge Souter stated that he would not "endorse the specific holding of Griswold or its opinions," and that if Roe were overturned, the continued validity of the prior privacy cases would be called into question. (9/17, p. 111)

Significantly, Judge Souter would not say whether he views the right of unmarried individuals to use contraception as fundamental. In his first exchange with Chairman Biden about Eisenstadt v. Baird, 405 U.S. 438 (1972), Judge Souter avoided indicating whether the fundamental right to privacy extends to the right of unmarried women and men to use contraception. He focused on the technical fact that the case was decided on equal protection grounds and only stated the obvious and legally irrefutable point that "there is going to be an equal protection implication from whatever bedrock start privacy is derived under the concept of due process." (9/13, p. 112)

When later questioned by Senators Metzenbaum and Leahy, Judge Souter again gave an exceedingly narrow and uninformative answer, focusing on the equal protection analysis used in Eisenstadt. (9/14, pp. 25-26; 9/17, p. 25-26) Only when explicitly pushed by Senators Biden and Leahy would Judge Souter answer the question in terms of the fundamental right to privacy, and then his responses were profoundly disturbing. Judge Souter described the question whether unmarried individuals possess the fundamental right to use contraception as "an open question" and stated "I do not think that is a simple question to answer." (9/17, p. 28) Moreover, for the reasons described by Chairman Biden, Judge Souter's description of the approach he would take to determine whether unmarried individuals enjoy the fundamental right to use contraceptives, was -- in Chairman Biden's words -- "worrisome." (9/17, p. 27)

Discussion and Analysis

Clearly, Judge Souter did not state that he recognizes a woman's fundamental right to make her own decision whether or not to have an abortion. Nor do his repeated references to fundamental aspects of a "marital right to privacy" give any indication that he would recognize the right to choose as fundamental. In fact, these references are far more troubling than reassuring. His very deliberate use of "marital" to qualify the scope of the privacy right leaves wide open the possibility that he believes that the fundamental right to privacy does not extend to either the right choose abortion or the right of unmarried people to use contraception.

In fact, those who advocate overruling Roe typically purport to support Griswold. See, e.g., Brief for the United States as Amicus Curiae Supporting Appellants at 12 n.9, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (plurality); Webster, 109 S. Ct. at 3057-58 (Rehnquist, C.J., White, Kennedy, JJ.). One approach commonly used to attempt to distinguish the cases is to describe the fundamental right at stake in Griswold in the most limited terms possible: not as an individual right, but as a right that exists within some aspects of a marital relationship -- the precise characterization offered by Judge Souter.

Judge Souter's focus on the right as a "marital" right is at odds with the Supreme Court's view that the fundamental right to privacy is a right of the individual, and does not depend on the marital relationship. While Judge Souter was correct in saying that Eisenstadt was decided on equal protection grounds, he ignored that the

opinion also made clear that the fundamental privacy right recognized in Griswold is possessed by "the individual, married or single":

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (plurality) (emphasis in original).

Elsewhere, too, the Supreme Court describes the right recognized in Griswold in ways studiously avoided by Judge Souter, presumably because the Court's characterizations highlight the natural progression from Griswold to Eisenstadt to Roe and its progeny.

> The decision whether or not to bear or beget a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right to privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, Griswold v. Connecticut, ... and most prominently vindicated in recent years in the contexts of contraception, Griswold v. Connecticut, ...; Eisenstadt v. Baird, ...; and abortion, Roe v. Wade; Doe v. Bolton; Planned Parenthood of Central Missouri v. Danforth.

Carey v. Population Services International, 431 U.S. 678, 685 (1977) (citations omitted).

Defining the fundamental right to privacy as a marital, and not an individual, right -- as Judge Souter does -- has become a prime tactic for those who seek to justify overruling Roe while ostensibly allowing Griswold to stand. This approach is clearly illustrated by a recent debate in the academic literature. In an article published in the University of Pennsylvania Law Review, Walter Dellinger and Gene Sperling convincingly argue that there exists no principled basis on which the Supreme Court can continue to uphold Griswold but at the same time find that a woman's right to choose abortion is not fundamental -- with the possible exception of "reduc[ing] the case to a largely inconsequential decision." "Abortion and the Supreme Court: The Retreat from Roe v. Wade," 138 U. Pa. L. Rev. 83, 94 (1989). William Van Alstyne responded with an article in the Duke Law Journal which does just that, by limiting Griswold to a recognition of "marital privacy." "Closing the Circle of Constitutional Review From Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe," 1989 Duke Law Journal 1677, 1678. Van Alstyne distinguishes and dismisses the fundamental right claimed in Eisenstadt as "a right of fornication," and the fundamental right claimed in Roe as "a woman's right to kill the gestating life within her solely according to her own choice, with any willing physician's help," id. at 1678 n.5, 1679 (emphasis in original).