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Aspen Institute for Humanistic Studies
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July 31, 1981

Honorable Edwin Meese III
Counselor to the President
Honorable James A. Baker III
Chief of Staff
Honorable Michael K. Deaver
Deputy Chief of Staff
The White House
Washington, D.C. 20500

Dear Ed, Jim and Mike:

I have waited to write to you about Sandra O'Connor until the initial response had subsided and her nomination could be placed in thoughtful perspective. I was very pleased with President Reagan's nomination of Judge O'Connor and believe she has the potential to be an uniquely outstanding member of the Supreme Court.

I think it is important that Judge O'Connor's selection be considered in light of the basic principles that are central to American pluralism and democracy. Her respect for the constitutional division of authority and responsibility among the branches and levels of government is key. Her commitment to due process, fairness and equality is fundamental. My belief in Judge O'Connor's legal attributes is based both on her public record and on discussions with a number of my law school classmates and colleagues who know her professionally and personally. Their comments and judgments about her were all strikingly similar and favorable.

The personal characteristics of tolerance and sensitivity to the beliefs and opinions of others are very important to me. Judge O'Connor seems to possess those qualities. As a member of a religious minority, I become concerned with any indication of political intolerance. Thus the virulence of those who had a negative reaction to her nomination deeply disturbed me. I think the White House response to that opposition was appropriate and prudent. In addition, I am obviously delighted that Judge O'Connor is a woman. Both the equity of the appointment and the political common sense that it showed were magnificent.

I am attaching a column by Judy Mann because it emphasizes what I firmly believe: that President Reagan is a pragmatic conservative; that he is not an ideologue and will not be dominated by narrow viewpoints; and, of most significance, that he will act in the best interest of the people as a whole. President Reagan's appointment of Sandra O'Connor reached out to me and a lot of other individuals, male as well as female, in a very personal way.

Please thank the President for me.

Sincerely,

Bobbie

Bobbie Greene Kilberg

Enclosure

THE WASHINGTON POST, 7/10/81, C1-4

JUDY MANN

SMART

THE NOMINATION of Sandra Day O'Connor to the Supreme Court has much more to do with the Reagan administration's continuing commitment to smart politics than it has to do with any commitment to equal rights for women. As historic and symbolic as it might be to finally have a woman on the Supreme Court, the most immediate impact of the nomination is that it will diffuse for some time the criticism that the Reagan administration is insensitive to the interests of women.

For a president who has consistently fared worse with women in polls, who has been repeatedly criticized by women leaders throughout his party for his failure to appoint women, and who is backpedaling on affirmative action, this was a splashy move that cannot help but boost his popularity among women — at least for a while. That he has gotten more mileage out of this one appointment than President Carter got out of more than 40 appointments of women to the federal bench is but one measure of the political brilliance of the nomination.

Another — and the assumption has to be that it was by design — is that the appointment has created a breach between the president and the coalition of antiabortionists and right-wing fundamentalists whose influence on the administration has been of growing concern to moderate Republican women. That breach, created by the coalition's shrill overreactions to O'Connor's abortion record, will help dissipate the perception that the president is unduly beholden to a group of people who traditionally have been quarantined on the fringes of American politics.

Bobbie Greene Kilberg, a former associate legal counsel to President Ford and the vice chairman of the Reagan-Bush women's policy advisory board during the campaign, is a moderate who believes the nomination of a political moderate to the Supreme Court is a major statement of the administration's intentions.

"They're making a statement to the American people that Ronald Reagan is not going to be an ideologue in his nominations to the court, that he's going to look at the broad record of an individual when he appoints someone, that he's going to appoint a solid person in every sense of the word," she said. "That's key to the future of the Supreme Court . . . .

"To me," said Kilberg, "one of her additional assets is the nature of her opposition. It is inconceivable to me that they wouldn't know they'd get this reaction from the New Right. I think it's a move toward the political center . . . and a statement that goes way beyond the court . . . I think Ronald Reagan is going to continue to surprise us during his presidency."

See MANN, C4, Col. 1

It is clear from the reaction of the New Right leaders that they wanted to subvert the mission of the Supreme Court of the United States to one narrow cause. They jumped on the fact that O'Connor, while in the Arizona state legislature, cast several votes that they considered "pro-abortion." That she also voted for a measure that would allow hospital employes the right to refuse to perform abortions did not matter. That she assured the president that she is personally opposed to abortion was not enough for them. For all their talk of God, motherhood and country, the New Right leaders have made it clear that in the land of their dreams no one is eligible for the Supreme Court who is not as fanatically opposed to abortion as they are.

How much they were willing to compromise the Supreme Court for the sake of a single issue is even more striking if you think how few abortion questions will be coming to the court. Out of 4,000 petitions for review of cases given the court each term, only a handful deal with abortion. Of the 300 or so cases the court agreed to review during the past two terms, it issued decisions in only two cases that involved abortion.

Far more important than the judge's position on abortion ought to be what kind of a judge she is and what she will bring to the court. At 51, she brings youth. She brings the experience of having excelled in situations in which she was in a minority. She brings the experience of having worked in and led a state legislature — an experience that gives her a unique perspective on a court that examines state legislation but whose justices have no experience as state legislators. And, having served on a state court, she brings still more experience to a court that has not had an appointee with that background since Justice William Brennan.

President Reagan had a lot to lose by appointing an ideologue and he had a lot to lose by appointing a woman who, regardless of her abortion views, could have been found judicially less than competent. From everything we know so far about Judge O'Connor, Reagan did well by himself and well by the American people.

U.S. Department of Justice
Office of the Deputy
Attorney General

Diana

Original 2
documents
sent to
Tom Jones,
Records Office
Rm 5,0205

Sheila

Office of the Attorney General
Washington, D. C. 20530

July 31, 1981

Dear Mr. President:

I have the honor to enclose a nomination in favor of Sandra Day O'Connor, of Arizona, to be an Associate Justice of the Supreme Court of the United States vice Potter Stewart, retired.

Judge O'Connor was born March 26, 1930 in El Paso, Texas, and was raised on a ranch in Eastern Arizona. She is married and has three children. She was graduated from Stanford University with Great Distinction in 1950, where she majored in economics. She then entered Stanford Law School, from which she graduated in 1952 as a member of the legal honorary society, the Order of the Coif. She also served as a member of the Board of Editors of the Stanford Law Review. She was admitted to the Bar for the State of California in 1952 and to the Bar for the State of Arizona in 1957.

She served as Deputy County Attorney for San Mateo County, California from 1952 to 1953; as a Civilian Attorney, Quartermaster Market Center, Frankfurt/Main, W. Germany from 1954 to 1957; was in the private practice of law in Maryvale, Arizona from 1958 to 1960; was an Assistant Attorney General, State of Arizona from 1965 to 1969; and was a State Senator, Arizona State Senate, from 1969 to 1975, where she served in 1973 and 1974 as Senate Majority Leader. She then served as a Judge on the Maricopa County Superior Court from 1975 to 1979. Since 1979, she has served as a Judge on the Arizona Court of Appeals. She has served in each of the foregoing capacities with great distinction.

Judge O'Connor bears an excellent reputation as to character and integrity, possesses judicial temperament, and is well qualified, I believe, to be an Associate Justice of the Supreme Court of the United States.

I recommend the nomination.

Respectfully,

William French Smith

The President
The White House

SANDRA DAY O'CONNOR

Birth:	March 26, 1930	El Paso, Texas
Legal Residence:	Arizona	
Marital Status:	Married	John Jay O'Connor, III 3 children
Education:		Stanford University
	1950	A.B. degree
	1952	LL.B. degree
Bar:	1952	California
	1957	Arizona
Experience:	1952 - 1953	Deputy County Attorney San Mateo County, Ca.
	1954 - 1957	Civilian Attorney Quartermaster Market Center Frankfurt/Main, W. Germany
	1958 - 1960	Private practice Maryvale, Arizona
	1961 - 1964	Homemaker & Childcare
	1965 - 1969	Assistant Attorney General State of Arizona
	1969 - 1975	State Senator Arizona State Senate
	1975 - 1979	Judge Maricopa County Superior Court
	1979 - present	Judge Arizona Court of Appeals
Office:	101 W. Jefferson Phoenix, Arizona 85003 602 255-4828	
Home:	3651 E. Denton Lane Paradise Valley, Arizona 85253 602 955-6653	
Ethnic Group:	Caucasian	
Salary:	$88,700	

The White House,

19

To the

Senate of the United States.

I nominate Sandra Day O'Connor, of Arizona,

to be an Associate Justice of the Supreme Court of the

United States vice Potter Stewart, retired.

Washington Post
Saturday, August 15, 1981

'Vindictive' Person Opposing O'Connor, President Asserts

By Fred Barbash
Washington Post Staff Writer

President Reagan, in a letter to an Illinois anti-abortion leader, has said that opposition to Supreme Court nominee Sandra Day O'Connor is being "stirred up" principally by one "vindictive" person in Arizona.

The letter itself is stirring up more anger among conservatives. Reagan did not name the "vindictive" person, but conservatives think he is referring to one of their most prominent anti-abortion activists, Arizona Dr. Carolyn Gersters.

In addition, data on O'Connor's voting record contained in the letter appears inaccurate, and conservatives again are charging Reagan with being uninformed on the history of his nominee.

Gersters reportedly started the criticism of O'Connor's abortion voting record in the Arizona legislature, and that led to an outcry from anti-abortionists following the O'Connor nomination.

Reagan's Aug. 3 letter, verified by the White House yesterday, was in response to a letter of protest sent to him by Marie Craven, secretary of the Illinois Pro-Life Coalition.

"I believe that most of the talk about the appointment was stirred up principally by one person in Arizona," Craven quoted Reagan's letter as saying. "I have done a great deal of checking on this and have found this person has something of a record of being vindictive," the president added without elaborating.

Reagan went on to describe, inaccurately, O'Connor's legislative vote in 1974 on a rider prohibiting abortions at the University of Arizona hospital. Reagan wrote Craven that the Arizona Senate "turned that down" because its members, including O'Connor, thought it was unconstitutional.

Legislative records indicate that the rider became law with Senate approval. O'Connor voted against it, according to legislative records.

Attached is the President's letter, which was prepared by Dodie Livingston and edited by Helene.

"Copy"

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WE 003

August 3, 1981

Dear Mrs. Craven:

I'm sorry to be so long in responding to your letter, but I've found in all the channels of government, it often takes a while for letters such as yours to get through the mail department and over to my desk. So forgive me for that. I thank you for writing and appreciate the opportunity to comment with regard to my Supreme Court appointment and my position on abortion.

I believe that most of the talk about my appointment was stirred up principally by one person in Arizona. I have done a great deal of checking on this and have found this person has something of a record of being vindictive. I have not changed my position; I do not think I have broken my pledge. Mrs. O'Connor has assured me of her personal abhorrence for abortion. She has explained, as her attacker did not explain, the so-called vote against preventing university hospitals in Arizona from performing abortions.

What actually happened occurred back when she was a Senator in the state government. A bill had been passed by the Senate and sent over to the House calling for some rebuilding of the football stadium at the university. The House added an amendment which would have prevented the university hospitals from performing abortions. But the constitution of Arizona makes it plain that any amendment must deal with the subject in the original bill or it is illegal. For this reason the Senate, including Mrs. O'Connor, turned that down.

Much is being made now of her not coming out with flat declarations regarding what she might do in the future. But let me point out it is impossible for her to do this because such statements could then be used to disqualify her in future

cases coming before the Supreme Court. She is simply observing a legal protocol that is imposed on anyone who is in the process of a judicial appointment. I have every confidence in her and now want you to know my own position.

I still believe that an unborn child is a human being and that the only way that unborn child's life can be taken is in the context of our long tradition of self-defense, meaning that, yes, an expectant mother can protect her own life against even her own unborn child, but we cannot have abortion on demand or whim or because we think the child is going to be less than perfect.

I thank you for your prayers in my behalf and for your support. I hope that I have cleared the air on this subject now because I would like to feel that I did have your continued approval.

Thanks again.

Sincerely,

RONALD REAGAN

Mrs. Marie Craven
8026 South Francisco
Chicago, Illinois 60652

RR:mel

cc:RR:H. vonDamm:D. Livingston:CF

To: Mrs. Marie Craven

Dear Mrs. Craven:

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I thank you for your prayers in my behalf and for your support. I hope that I have cleared the air on this subject now because I would like to feel that I did have your continued approval.

Thanks again.

Sincerely,

/s/ Ronald Reagan

July 7, 1981

Dear President Reagan:

A number of pro-life people are planning on picketing you at your departure point tonight to protest your confirmed appointment of Judge O'Connor from Arizona to the office of Supreme Court Justice.

Instead of participating in this protest, I have decided to write this letter.

I have been an active pro-lifer since April of 1973. I have served and am serving on Boards of Directors of local pro-life groups, have served as Chairman of Illinois Citizens Concerned for life and have contributed too many valuable hours away from home and family (including 5 small children) to let what you have done today go unnoticed.

I have both anger, resentment and frustration pent up in me at this moment because I sincerely feel you have betrayed me and millions of Americans including over 8 million pre-born babies. They will continue to be aborted every 30 seconds simply because they are a simple inconvenience to so many of our countries women.

I am a Chicago resident, of Irish Catholic heritage and up until my involvement in pro-life, a committed Democrat. I worked for your election, along with countless others, distributing your campaign literature, making phone calls, coordinating blitz's etc. I don't want any credit for any of this. I just want you to know that at this precise moment I know that the power of your office has taken precidence over your party platform and your campaign promises.

I feel I am a grass roots citizen -- and I am sickened by witnessing once again the broken promises of the politician.

When you were shot, I prayed for your swift recovery. I continue to pray for you daily that your judgements will be wise ones.

Today I am having difficulty believing that you meant the words of a letter you sent to National Right to Life Convention on June 18, 1981... "I share your hope that someday soon our laws will reaffirm this principle. (that abortion is the taking of human life) We've worked together for a long time now, and like you, I am hopeful that we will soon see a solution to this difficult problem."

By this appointment, you have betrayed pro-life. Judge Sandra O'Connor is a known advocate of pro-abortion legislation. How, then, can this appointment bring us closer to our goal of protecting the preborn children of America?

I only hope that the U.S. Senate rejects your appointment. Maybe this is your ultimate goal - your appointment of a woman to satisfy the pro choice feminists -- followed by rejection of her appointment by the Senate and an alternative candidate appointed to satisfy all factions.

I hope for the sake of our nations' most vital resource, our children, I am right.

Sincerely,

Mrs. Marie Craven

8026 S. Francisco

Chicago, Illinois 60652

July 7, 1981

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I hope for the sake of our Nations most vital resource - our Children, I am right.

Sincerely
Mrs. Marie Craven
826 S. Francisco
Chicago, Ill. 60652

THE WHITE HOUSE

WASHINGTON

August 13, 1981

MEMORANDUM FOR THE PRESIDENT

FROM: FRED F. FIELDING

SUBJECT: Nomination of Sandra Day O'Connor to be an Associate Justice of the United States Supreme Court

The Department of Justice and the Counsel's Office have completed their respective reviews of the Federal Bureau of Investigation's full field investigation and other data pertinent to the clearance of Judge O'Connor. Accordingly, I recommend that you sign the attached nomination.

The Senate Judiciary Committee has scheduled confirmation hearings commencing September 9, 1981.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 14, 1981

FOR: FRED F. FIELDING

FROM: J. MICHAEL LUTTIG

SUBJECT: Thoughts

1. In a couple of conversations, Judge O'Connor has mentioned in passing that she wished she had more of an idea of specific questions that are likely to be directed to her at the hearings. I am confident that someone is helping her anticipate questions, and that someone is gathering an assortment of materials that might be of help, but I thought I should mention it. Presently she plans to leave Arizona on August 28 to drive to Washington.

2. Should there be a suggestion that selected members of Congress be included at the proposed reception September 23 for the Judiciary, perhaps we should talk. (Nothing indicates, however, a need to include any Congressmen at this particular reception.)

(1)

THE O'CONNOR SUPREME COURT NOMINATION: A CONSTITUTIONAL LAWYER COMMENTS

by William Bentley Ball*

As one whose practice is in the field of constitutional law, one thing stands out supremely when a vacancy on the Supreme Court occurs: the replacement should be deliberate, not impulsive. The public interest is not served by a fait accompli, however politically brilliant. The most careful probing and the most measured deliberation are what are called for. Confirm in haste, and we may repent at leisure.

Unhappily, the atmosphere surrounding the nomination of Sandra Day O'Connor to the Supreme Court is one almost of panic. Considering that the liberties of the American people can ride on a single vote in the Supreme Court, any politically or ideologically motivated impatience should be thrust aside and time taken to do the job right. Plainly, there is no need for instanteous confirmation hearings, and the most painstaking effort should be made to fully know the qualifications - including philosophy - of the candidate. My first plea would be, therefore: Don't rush this nomination through.

My second relates indeed to the matter of "philosophy". Some zealous supporters of the O'Connor nomination (who themselves have notoriety as ideologues) have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say, in other words, that it should be of no significance that

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* Former Chairman, Federal Bar Association Committee on Constitutional Law.

a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recital that the candidate is "personally" opposed to such a point of view. Why the qualifying adverb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

Philosophy is everything in dealing with the spacious provisions of the First Amendment, the Due Process Clauses, equal protection and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when, in these vital areas of the Constitution, there is really very little language to "strictly" construe. As to other areas of the Constitution (e.g., Article I, Sect. 4 - "The Congress shall assemble at least once in every year. . ."), to speak of "strict construction" is also absurd, since everything is already "constructed".

It is likewise meaningless to advance a given candidate as a "conservative" (or as a "liberal"). In the matter of Mrs. O'Connor, the label "conservative" has unfortunately been so employed as to obfuscate a very real issue. The scenario goes like this:

> Comment: "Mrs. O'Connor is said to be pro-abortion."
>
> Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

Comment: "John Smith is said to be a mathematician."

Response: "Really? But he is from Chicago."

Whether Mrs. O'Connor is labeled a "conservative" is irrelevant to the question respecting her views on abortion. So would it be on many another subject.

The New York Times editorialized July 12 on "What To Ask Judge O'Connor". The four questions it posed (all "philosophical", by the way) were good. To these many another question need be added. For example:

What are the candidate's views on

- the proper role of administrative agencies and the assumption by them of powers not clearly delegated?
- the use by IRS of the tax power in order to mold social views and practices?
- the allowable reach of governmental control respecting family life?
- busing for desegregation?
- the proper role of government with respect to non-tax-supported, private religious schools?
- sex differentiation in private employments?
- freedom of religion and church-state separation?

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too -

and important - would be questions to the candidate calling for agreement with, disagreement with, and discussion of, major prior decisions of the Supreme Court. Not the slighest impropriety would be involved in, and much could be gained by, public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made.

Even these few considerations make it clear that the Senate's next job is not to confirm Mrs. O'Connor but instead to find out who she really is - that is, what convictions she possesses on great issues. I thus return to my theme that deliberativeness, not haste, should be the watchword respecting the confirmation inquiry. The fact that a woman is the present candidate must not (as Justice Stewart indicated) be dispositive of choice. It should certainly not jackknife basic and normal processes of selection. At this point, no prejudgment - either way - is thinkable.

Other vacancies may soon arise. The precedent of lighting-fast decisions in the matter of choosing our Supreme Court Justices would be a bad precedent indeed.

Fred -
FYI
Pass

08 SEP 1981

THE SUN. Sunday, September 6, 1981

'Symbols' believed at stake

New Right keeping O'Connor under fire

By Lyle Denniston
Washington Bureau of The Sun

Washington—In an old-fashioned way, the radio announcement begins: "Should a gentleman ask a lady an embarrassing question?"

But that is as far as chivalry goes.

The announcer goes on immediately to suggest that members of the Senate ask Sandra Day O'Connor some very tough questions, about abortion and teenage sex.

That 60-second message is being broadcast in several states this weekend, and will be heard even more widely before Wednesday, the day the Senate Judiciary Committee starts questioning Judge O'Connor, the first woman ever to be nominated to the Supreme Court.

Richard A. Viguerie, leader of the New Right coalition that is fighting Judge O'Connor's nomination, is the man behind the radio spot. One of the purposes, he says, is to make sure that the Senate—and especially the White House—realizes that the New Right has not given up.

Against strong indications that the Arizona judge will win Senate approval as a justice without any notable difficulty, her challengers say they are persisting.

"We are not discouraged because of anticipated losing the vote," Mr. Viguerie said. "We're not under illusions about our chances of winning, but the only time you lose is when you fail to fight."

Inside the Senate hearing room, "the right kind of questions are going to be asked," if Mr. Viguerie's grass-roots radio campaign gets the results it seeks.

Outside the Dirksen Senate Office Building, Nellie Gray, who leads each January's "March for Life" to protest the Supreme Court's 1973 decision on abortions, will be leading anti-O'Connor rallies.

The Senate is the immediate target of those efforts, but it is not the most important one. Mr. Viguerie and his coalition followers want President Reagan to notice that New Right conservatives are still unhappy about the choice of Mrs. O'Connor.

"For the first time," Mr. Viguerie says, "a president is receiving significant pressure from the right. We're going to keep it up, on this issue and others."

Without pressure from what he calls "the Reagan coalition," the coalition leader fears that the president may forget who his truest political friends are.

"We want to show Republicans how very important it is to work with that coalition," he says. "We're going to allow Reagan to stay right where he'd like to be."

The "message" Mr. Viguerie wants most to be heard in the White House is that the New Right positions Mr. Reagan embraced in the 1980 campaign are not to be forgotten in 1981.

The nomination of Judge O'Connor, as the coalition sees it, is the president's "first broken promise." Mr. Viguerie's magazine, *Conservative Digest*, uses that phrase with a cover picture of Judge O'Connor. The cover also shows the 1980 Republican platform—which included a promise to pick federal judges who oppose abortions—with the word "VOID" stamped on it. The New Right believes Judge O'Connor has actively promoted abortion rights.

"We just don't know which straw will break the back of the coalition," Mr. Viguerie comments. "Will it be this one, or the next one?"

If the pressure is kept up against Judge O'Connor, he suggests, "you're going to see a different kind of judge" named to future vacancies on the Supreme Court and lower federal courts.

At the White House, aides are aware of the coalition's aims, realizing, they say, that the anti-O'Connor effort is more a symbol than a threat to her nomination.

One presidential lobbyist working to keep Judge O'Connor's path smooth remarked: "They [the New Right] feel they must make a point for the future: to be consulted about their issues."

That aide, who asked not to be identified, indicated, though, that the White House does not view the opposition as only part of a larger strategy. Her position on abortion, which at this point remains somewhat clouded, makes some of the opposition genuine, the lobbyist conceded.

"Individual people in the [New Right] movement are adamantly opposed to her because of her position on some issues," the aide commented.

For that reason, the nominee will go to hearings ready to give a full explanation of her positions, according to the presidential aide. "She's her own best witness, and she hasn't been a witness yet."

One of the points the New Right has been making against her, in Mr. Viguerie's magazine, on the radio spots and elsewhere, is that she has not answered questions about what she really thinks and has done on abortion.

That undoubtedly will be the dominant issue at this week's hearings, according to the coalition leader. Other points that will be pressed, he said, are her views on tax credits for private school tuition and tax-exempt status for private Christian schools that are racially segregated.

In past hearings on Supreme Court nominees, future justices have begged off answering questions that seemed designed to test how they would vote on legal or constitutional issues.

Anticipating that Judge O'Connor might do that, aides to some senators are preparing to circulate a memo arguing that the nominee has an obligation to answer all questions bearing on judicial philosophy, and should go unquestioned only on a narrow range of matters directly before the court.

Most of the questions that her challengers want answered have to do with her voting record as a member of the Arizona state Senate. According to the White House aide, Judge O'Connor is prepared to give a very full account of "why she voted as she did, at the time that she did."

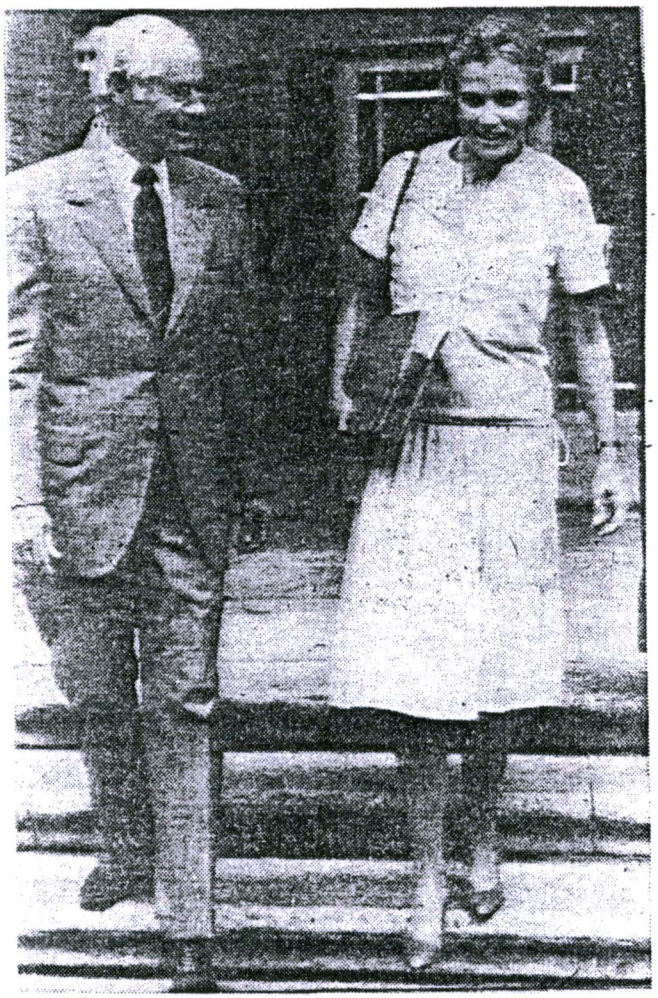
There is nothing in that record, the aide contended, that will be a source of serious difficulty for the nominee.

Last week, Judge O'Connor seemed to have removed the chance that her financial status would cause problems as it has for some court nominees. She and her husband disclosed their investments and assets, and none appeared controversial.

Her challengers, even while conceding that there may not be a single vote cast against her in the final Senate tally, do insist that it is premature to say there will be no problems at all for her.

An aide to Senator John P. East (R, N.C.), one of the Senate's strongest foes of abortion, said: "It is hard to say what might come up at the hearings." He did not say he knew of any specific problem, however.

The hearings are scheduled to continue through Friday. Judge O'Connor herself is expected to be on the witness stand at least one day and perhaps two.



AP

Attorney General William French Smith and Supreme Court Justice-designate Sandra Day O'Connor leave the Justice Department Friday.

Office of the Attorney General
Washington, D. C. 20530

10 SEP 1981

September 9, 1981

TO : Sandra Day O'Connor

FROM : John Roberts John Roberts
Special Assistant to the Attorney General

SUBJECT : Rees Memorandum

The attached memorandum from Professor Rees to the Subcommittee on Separation of Powers on the proper scope of questioning Supreme Court nominees does not require any modification of the views expressed in your August 28 letter to Senator Helms. Professor Rees argues that the only practical manner in which Senators can discharge their responsibility to ascertain the views of a nominee is to ask specific questions on actual (though nonpending) or hypothetical cases. He stresses that questions on general judicial philosophy are too indeterminate and notes that nominees have often decided cases in a manner inconsistent with the views they expressed on judicial philosophy at their confirmation hearings.

Professor Rees argues that if a nominee stated her views on a specific question it would not be grounds for later disqualification. He relies on Justice Rehnquist's opinion in Laird v. Tatum, dismissing Justice Rehnquist's distinction between statements prior to nomination and those after nomination. According to Rees, statements after nomination would not be disqualifying if the nominee and Senators understood that no promises on future votes were intended. Professor Rees concludes by citing past confirmation hearing practice which he contends supports his view.

The proposition that the only way Senators can ascertain a nominee's views is through questions on specific cases should be rejected. If nominees will lie concerning their philosophy they will lie in response to specific questions as well. The suggestion that a simple understanding that no promise is intended when a nominee answers a specific question will completely remove the disqualification problem is absurd. The appearance of impropriety remains. Professor Rees' citations to past practice do reveal some possible indiscretions, but the generally established practice is as indicated in your letter to Senator Helms, which contains supporting citations.

cc: Fred Fielding
Counsel to the President

file

Memorandum on the Proper Scope of Questioning of Supreme Court Nominees at Senate Advice and Consent Hearings

To: Subcommittee on Separation of Powers
Senator John East, Chairman

From: Grover Rees III
Assistant Professor of Law, The University of Texas (on leave 1981-82)
Counsel, Subcommittee on Separation of Powers

September 1, 1981

I. Introduction

In a few days the Senate Judiciary Committee will hold public hearings on the nomination of Sandra O'Connor to serve as a Justice of the United States Supreme Court. There is currently a great deal of interest in what questions Senators will ask Judge O'Connor at the hearings, and in whether she ought to answer specific questions about her views on constitutional questions. This interest has been generated partly because of the controversy over Judge O'Connor's public record on the abortion issue, but also because of a relative uncertainty, among Senators and the interested public, about her general constitutional philosophy. In her public career as a legislator and as a state court judge, Judge O'Connor had few occasions on which to express her opinions on constitutional questions. The Senate advice and consent hearings, therefore, will constitute an unusually large part of the public record when the Senate votes on her nomination. It is thus especially important that Senators be informed on the proper scope of questioning at advice and consent hearings on Supreme Court nominees.

Understandably but unfortunately, most of what has been said and written on this question has been in the context of specific questions to specific nominees. The Senators and the nominees concerned tend not to have given the question much advance consideration, and they tend to divide up according to their relative enthusiasm for the nomination at hand, with the strongest opponents favoring the broadest scope for questioning and some of the nominees themselves taking the narrowest view. Before turning to the record of prior confirmation hearings, therefore, it will be helpful to consider whether any rules for questioning can be deduced from generally accepted propositions about the role of a Supreme Court Justice and the role of the Senate in advising and consenting to Court nominations.

The controversy over questioning at confirmation hearings stems from a tension between two incontrovertible propositions: First, the Senate has a duty to exercise its advice and consent function with the most careful consideration and the greatest possible knowledge of all factors that might bear on whether the nominee will be a good or a bad Supreme Court Justice. Second, a Justice of the Supreme Court owes the litigants in each case his honest judgment on what the law is, and such judgment would be compromised if a nominee were to promise his vote on a particular case or class of cases in an effort to facilitate his confirmation.

These two duties are in tension but not necessarily in contradiction. They suggest a series of standards by

which to judge the propriety of a question put to a Supreme Court nominee at advice and consent hearings:

1) Does the question seek information that it would be proper for a Senator to consider in deciding whether to vote for or against a nominee's confirmation?

2) Can the nominee answer the question without violating his obligation to decide honestly and impartially all the cases that will come before him as a Justice?

3) If there is a possibility that by answering the question the nominee might risk a violation of his future obligations as a Justice, but the information is relevant to the decision the Senator must make, can the information be obtained in some other way than by asking the nominee?

4) If relevant information cannot be obtained otherwise than by asking the nominee, can the question be asked and answered in such a way as to minimize the risk of compromising the nominee's future obligation as a Justice?

It is the purpose of this memorandum to inquire whether, according to these standards, it would be proper for Senators to expect Judge O'Connor to answer specific questions about her views on constitutional law. The memorandum will also deal with the propriety of questions and answers about the nominee's views on social, economic and political matters. Precisely because these two classes of questions are closely related, it is important to bear in mind that they present different problems. For instance, the question whether a nominee personally favors abortion (or the death penalty, or pornography) may be asked and answered with little risk

of compromising a future case, since a judge's personal views on the merits of an issue are supposed to be irrelevant to his judgment on whether the Constitution requires or prohibits a certain result; yet exactly insofar as the nominee's personal views are irrelevant to future cases, it may be improper for a Senator to cast his confirmation vote on the basis of what those personal views are. A nominee's views on whether laws against abortion are constitutional, however --- or on any other constitutional question --- are highly relevant to the nominee's future performance as a Supreme Court Justice, and may therefore be a proper reason for a Senator to vote for or against confirmation; yet it has been suggested that a nominee may not share these highly relevant views with Senators, lest their expression be construed as a promise to vote a certain way in a future case.

With regard to the nominee's views on questions of constitutional law, therefore, and also with regard to political, social and economic views, this memorandum will consider first whether such views may properly be considered by Senators in casting their confirmation votes. The next inquiry will be whether expression of such views at confirmation hearings could be a basis for disqualifying a Justice from participating in the Court's consideration of a case, or might otherwise be regarded as tainting the Justice's participation in such a case. Finally, illustrative questions, answers and approaches to the problem taken by Senators and nominees at past confirmation hearings will be discussed.

II. The Scope of the Duty to Advise and Consent to Supreme Court Nominations.

Article II, section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ." There is broad agreement among constitutional scholars that the Senate's duty to "advise and consent" to Supreme Court nominations is at the very least an obligation to be more than a rubber stamp for the President's choices. The most widely cited modern discussion of the question is by Professor Charles Black of the Yale Law School, who wrote in 1970 that "a judge's judicial work is . . . influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time."[1] Professor Black argued that in voting on whether to confirm judges --- who, unlike officials of the executive branch, "are not the President's people. God forbid!"[2] --- Senators have a duty to consider the judge's views on such questions, just as the President considers their views in deciding whether to nominate them. "In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in a man's fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."[3]

Charles Black is a great and honest scholar whose work has long been admired by students of the Constitution of all political and philosophical views, but it is not inappropriate to note that he is a liberal Democrat who was writing in an age when the President was a conservative Republican and the Senate was controlled by liberal Democrats. It is interesting to observe the similarity of Black's views to those expressed in 1959 by William Rehnquist, a conservative Republican who had then recently served as a Supreme Court clerk. Discussing the Senate debate on the nomination of Justice Charles Whittaker, Rehnquist complained that the discussion had

> succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two states.[4]

Rehnquist distinguished the Senate's duty in voting on the nomination of a judge of a lower federal court --- whose principal duty is to apply rules laid down by the Supreme Court, and whose integrity, education and legal ability are the paramount factors in his qualification --- from the confirmation of a Supreme Court Justice:

> The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making --- the "due process of law" and "equal protection of the

> laws" clauses --- are about the vaguest and most general of any in the instrument. The Court in Brown v. Board of Education, [347 U.S. 483 (1954)], held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.
>
> 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 [views] is to "inquire of men on their way to the Supreme Court something of their views on these questions."[5]

Both the Black and the Rehnquist articles take the position that it is proper for Senators to vote for or against Supreme Court nominees on the basis of social, economic and political views. It is important to note that the basis for this position is the suggestion that, rightly or wrongly, such views are likely to affect the future Justice's positions on questions of constitutional law. Therefore it is at least as proper for Senators to vote on the basis of nominees' views about the meaning of the Constitution per se --- the text and history of the document itself --- as on the basis of views that are relevant only insofar as they will indirectly affect the Justice's constitutional philosophy.

It is also important to note that some students of the Constitution believe that at least some parts of the Constitution really are "there," with clear meanings and leaving little room for injection of the judge's own views. If a Senator believed that a certain constitutional question had a right answer and a wrong answer, then it

would be at least as proper for the Senator to vote against a Court nominee who disagreed with him on this question as it would be for the Senator to vote against a nominee whose social or political philosophy made it likely that he would disagree with the Senator in an area where the text of the Constitution was less clear. This is especially true today, when disagreements over constitutional law are often framed in terms of whether the Court ought to "make law" or "interpret the Constitution." To the extent that a Senator believed that a judge could reach a certain result only by "making law," that Senator would be justified in voting against a nominee who reached that result. The difference in result would be evidence of a difference in constitutional philosophy.

Other scholars have generally agreed that social and economic philosophy, insofar as they reflect on a judge's likely position on constitutional issues, are legitimate bases on which Senators might vote to confirm or reject Supreme Court nominees.[6] As recently as last May two prominent constitutional law professors, testifying before the Subcommittee on the Separation of Powers in opposition to the proposed Human Life Bill, suggested that the advice and consent power may legitimately be used to influence the Supreme Court's decisions on constitutional questions. Professor Laurence Tribe of the Harvard Law School testified that "Congress has not been without

important devices for making its will felt and known through amending the Constitution . . . . However, apart from amendment, there are other measures. . . . There are a great many things that can be done legislatively, not the least of which is expressed through the power of advice and consent in the Senate when appointments are made to the United States Supreme Court."[7] Professor William Van Alstyne of Duke University Law School agreed with Professor Tribe that "[i]t is not illicit of Congress to make its displeasure [with a Supreme Court decision or a pattern of such decisions] felt incidental to the appointment process."[8] These remarks were made in response to a question by Senator East asking what actions Congress might take to effect a reversal of Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court decision holding that the Constitution contains a right to abortion.

If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy --- and especially if, as Black and Rehnquist suggest, a Senator may have a duty to base his vote at least partly on the nominee's views --- then the Senator ought to have some way of ascertaining what these views are. Before turning to whether a nominee's future obligations as a Justice may bar him from answering questions which the Senator otherwise seems to have a duty to ask, one should observe that the nominee's views, unlike his other qualifications, will often be

difficult for the Senator to ascertain except by directly asking the nominee. Education and experience can be reduced to lines on a resume. Integrity can be attested to by witnesses other than the nominee. Even the presence or absence of a "judicial temperament" might be deduced by observation of a nominee testifying on subjects that are general and in no way sensitive. Yet unless the nominee has a long prior record of writings, speeches, and/or lower court opinions on constitutional issues --- a condition met by many Supreme Court nominees, but not by Judge O'Connor --- the advice and consent hearings constitute the only forum in which Senators can learn of the nominee's philosophy.

It should also be observed that useful knowledge about questions of constitutional law will rarely be gained except through specific answers to specific questions, usually about actual or hypothetical cases. Almost all Supreme Court nominees have testified that they are "strict constructionists" who believe courts should always "interpret the Constitution" and never "make law." Justice Blackmun, for instance, testified at his confirmation hearings that

> I personally feel that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideas and philosophy, but would attempt to construe that instrument in the light of what I feel is its definite and determined meaning.[9]

Several years later Justice Blackmun wrote the Court's opinion in Roe v. Wade, supra, which is generally regarded as among the most extreme examples of judicial preference for "personal ideas and philosophy" over textual and historical sources of constitutional law. Justice Fortas,

a Warren Court member generally regarded as a "liberal," was asked to what extent he believed "the Court should attempt to bring about social and economic changes," to which he responded, "Zero, absolutely zero."[10] Professor L.A. Powe of the University of Texas Law School concludes that "Senate questioning has proved astonishingly ineffective in eliciting the desired information. Questions can always be answered less specifically than desired. . . . If the questions were inartfully drawn and left room for maneuvering, one can fault the senators, but the nominees understood the purposes of the questions --- their responses simply were not designed to assist the Senate."[11]

Labels can be misleading. A judicial nominee might sincerely consider himself a "strict constructionist" and yet believe that the Constitution guarantees rights to abortion, racial balance in the public schools by means of mandatory busing, and other things that an equally conscientious Senator might regard as evidence that the nominee is reading his own social, political and economic views into the Constitution. By the same token, a self-styled "progressive" nominee might believe in a "living Constitution" yet be convinced that the Constitution does not forbid the states from operating segregated schools. If the nominee has a duty not to discuss specific doctrines --- and specific past Supreme Court cases, which are the building blocks of doctrines --- then he has a duty not to provide the Senate with more than labels and slogans. These will not help, and may actually obstruct, Senators in performance of their duty to advise and consent only to nominees whose views they believe to be

III. Statements at Confirmation Hearings as Bases for Disqualification or as Evidence of Prejudice

A nominee's discussion of questions of constitutional law at confirmation hearings, outside the context of specific pending cases, is not a proper basis for his disqualification from cases involving these questions that come before the Court after his confirmation. Nor should such discussion be viewed as evidence that the nominee will not honestly and impartially decide future cases.

The statute governing disqualification of Supreme Court Justices is 28 USC § 455, which provides:

> Any Justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, or appeal, or other proceeding therein.

In the case of Laird v. Tatum, 409 U.S. 824 (1972), respondents had urged Justice Rehnquist to disqualify himself. One ground for the proposed disqualification was that prior to his nomination as a Supreme Court Justice he had publicly spoken about the constitutional issues that were raised in the case. After noting that the statute did not seem to require disqualification on the ground that the Justice had made public statements, Justice Rehnquist stated that public statements about the case itself might constitute a discretionary ground for disqualification, but he sharply distinguished public statements about what the Constitution provides, outside the context of the specific case on which disqualification is demanded. Rehnquist's history

of the modern Court's attitude toward public statements by Justices disposes of the argument that such statements are grounds for disqualification:

> My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.
>
> Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S Rep No 884, 75th Cong. 1st Sess (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, United States v Darby, 312 US 100, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941), and in later cases construing it, including Jewel Ridge Coal Corp. v Local 6167, UMW, 325 US 161, 89 L Ed 1534, 65 S Ct 1063 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly crit-

icized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. "The Labor Injunction" which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal

[~~309 US 332~~]

courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat 70, 29 USC §§ 101–115 [29 USCS §§ 101–115]. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, United States v Hutcheson, 312 US 219, 85 L Ed 788, 61 S Ct 463 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in McGrath v Christensen, 340 US 162, 95 L Ed 173, 71 S Ct 224 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it), 340 US, at 176, 95 L Ed 173. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length the doctrine expounded in the case of Adkins v Children's Hospital, 261 US 525, 67 L Ed 785, 43 S Ct 394, 24 ALR 1238 (1923). I think that one

[~~409 US 333~~]

would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Chief Justice Hughes authored the Court's opinion in West Coast Hotel Co. v Parrish, 300 US 379, 81 L Ed 703, 57 S Ct 578, 108 ALR 1330 (1937), in which a closely divided Court overruled Adkins. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when

they are related to counsel and

when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." Frank, supra, 35 Law & Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before

[409 US 834]

a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Christensen would have preferred not to argue before Mr. Justice Jackson;* that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v Judicial Council, 398 US 74, 137, 26 L Ed 2d 100, 90 S Ct 1648 (1970), strikes me as being equally true of the Justices of this Court:

"Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this

[409 US 835]

when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle

years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

[24] Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, e.g., the opinion of Mr. Justice Harlan, joining in Lewis v Manufacturers National Bank, 364 US 603, 610, 5 L Ed 2d 323, 81 S Ct 347 (1961). Indeed, there is weighty authority for this proposition even when the cases are

the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See Worcester v Street R. Co. 196 US 539, 49 L Ed 591, 25 S Ct 327 (1905), reviewing, 182 Mass 49 (1902); Dunbar v Dunbar, 190 US 340, 47 L Ed 1084, 23 S Ct 757 (1903), reviewing, 180 Mass 170 (1901); Glidden v Harrington, 189 US 255, 47 L Ed 798, 23 S Ct 574 (1903), reviewing, 179 Mass 486 (1901); and Williams v Parker, 188 US 491, 47 L Ed 559, 23 S Ct 440 (1903), reviewing, 174 Mass 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, supra, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.[5]

409 U.S. at 831-36 (footnotes omitted.)

Since a Justice has discretion to disqualify himself whenever his past association with a case would make it improper for him to sit on the case, the consistent refusal of Justices to disqualify themselves in areas where they had previously expressed their views on the law strongly suggests that these Justices did not regard such statements as evidence of prejudice. If a statement prior to nomination would not constitute prejudice, then neither would the same statement made after nomination but before confirmation -- nor, for that matter, a statement about an abstract question of constitutional law or about a past Supreme Court case by a sitting Justice. As Justice Rehnquist concluded in Laird, supra:

> The oath . . . taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.

409 U.S. at 838-39.

The most persuasive argument against discussion of specific questions of constitutional law by nominees at confirmation hearings is not that this will prejudice their decisions in future cases, but that they will be tempted

to alter their positions in order to facilitate confirmation, or that the public will perceive such trimming even if it does not actually occur. Indeed, Justice Rehnquist added a footnote in his Laird opinion expressing this concern:

> In terms of propriety rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

409 U.S. at 836 n.5. This statement is in direct conflict with the sentiments expressed in Rehnquist's 1959 article on the need to "inquire of men on their way to the Supreme Court something of their views on these questions," but it is not unpersuasive. Indeed, if it were not so important that Senators have the necessary information with which to comply fully with their duty to advise and consent to Supreme Court nominations, Rehnquist's concern about the appearance of impropriety might be dispositive. If, however, a way can be found for the nominee to share relevant information with the Senate without giving rise to a suspicion of bribery or blackmail, then the duty to cast an intelligent vote on the nomination --- and the nominee's duty to assist Senators in casting such votes by answering candidly all relevant and proper questions --- become paramount.

The tension between the Senators' and the nominee's respective duties can be resolved, first, by a good faith effort to understand each other's problems. Such understanding

would entail a mutual recognition that a candid discussion of a question of constitutional law at a confirmation hearing is not a promise to vote a certain way. This is true precisely because of the judicial oath cited by Justice Rehnquist in his Laird opinion. A Supreme Court Justice promises to consider all arguments raised by counsel in briefs and oral arguments in all the cases that will come before him. There is also the prospect of collegial decision-making, and of the changes that time, experience and study can effect in any person's attitudes and beliefs. Insofar as a statement that Roe v. Wade was wrongly decided or Brown v. Board of Education rightly decided is not given or taken as a promise of a vote in all future cases on abortion or civil rights, the spectres of bribery and blackmail are banished. Nor is it too much to expect of our Supreme Court nominees enough integrity to resist the temptation actually to change their views, or to pretend such a change, in order to secure confirmation.

Even with the best of faith, some questions will go too far. It is improper for a nominee to comment on a specific pending case, because here the appearance of impropriety --- the possibility that expectations will be raised which the Justice will be reluctant to disappoint, and consequently the Justice's unwillingness to give full consideration to a specific set of briefs and oral arguments --- is far greater than in a case where a Felix Frankfurther happens to sit in a labor case or a Thurgood Marshall in a civil rights case. For the same reason, a hypothetical

question that is too similar to a case now pending before the Court, or likely to come before it soon, would be unacceptable. Insofar as actual prejudice can be avoided, however, the prospect of improper appearances must be balanced against the need of the Senate for information on which to base the exercise of its constitutional duty. The balance must be struck in such a way as to leave the nominee free to discuss leading Supreme Court cases such as Brown and Roe, without which an intelligent discussion of the fundamental problems of constitutional law is impossible; in such a way as to leave Senators with something more than resumes and slogans as a basis for their decision.

IV. An Illustrative History of Advice and Consent Hearings

> For the last two decades the confirmation hearings have evinced persistent Senate questioning of witnesses about their beliefs on stare decisis, specific past decisions of the Court, and their probable votes in certain types of potential cases. The senators who ask such questions have a simple position --- given the importance of the Supreme Court and a nominee's lifetime appointment, the Senate needs all relevant facts in order to make informed decisions. As Senator Ervin has stated, if the Senate "ought not to be permitted to find out what his attitude is toward the Constitution, or what his philosophy is," then "I don't see why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate. Just give them [the Executive] absolute power in the first place."[12]

The history of Senate confirmation hearings reveals a wide range of attitudes toward the proper scope of questioning, with the attitudes of Senators ranging from Senator Ervin's view to that expressed by Senator Hart, who in Justice Fortas's nomination to the Chief Justiceship urged his colleagues not to ask questions that went beyond the past

written statements of the nominee.[13] Likewise the nominees have varied in their attitudes: Justice Minton refused to appear before the committee on the ground that "I might be required to express my views on highly controversial and litigious issues affecting the Court,"[14] whereas Justice Blackmun predicted that he would vote to uphold the death penalty except in cases where a state imposed it for a pedestrian crossing against a red light.[15]

The closest thing to an "official" position that has emerged from the hearings was a ruling made by Chairman Eastland during the Stewart hearings. Senator Hennings raised a point of order suggesting that it was improper to question the nominee on his "opinion as to any of the decisions or the reasoning upon decisions . . . heretofore . . . handed down by that court." Senator Eastland ruled that Senators could ask any questions they liked, but that the nominee was free to decline to answer any questions he thought improper. Senator Hennings withdrew his point of order after several Senators had indicated their support for the Eastland ruling.[16] Since the Eastland ruling seems only to state the obvious --- that no Senator will be prevented from asking any question he likes, and no attempt will be made to force a nominee to answer a question if he prefers not to --- it is of little value as authority on what questions and answers are <u>proper</u>.

The most common pattern in confirmation hearings at which nominees appeared personally was for the nominee to express reservations about discussing specific past Supreme

Court cases, and to decline to answer some questions on this basis, but subsequently to answer others. The following exchanges are typical:

> Senator Ervin. . . . And if the Constitution means the things that were announced in the opinions handed down on May 20, 1968, why one of the smart judges who served on the Supreme Court during the preceding 178 years did not discover it?
>
> Justice Fortas. Senator, again, much as I would like to discuss this, I am inhibited from doing it. I respectfully note, if I may, sir, that the granddaddy of all these cases, in my judgment . . . was the famous Scottsboro case. It was in that case that Mr. Justice Sutherland said that the critical period in a criminal prosecution was from arraignment to trial --- arraignment to trial. I think that can fairly be characterized as dictum. But it was that statement that I think has been sort of the granddaddy of all this.
>
> Now here I have done something I should not have done. I am sorry, sir.[17]

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> Senator Mathias. . . . Now, I am wondering if, No. 1, you think these cases should be overruled?
>
> Mr. Powell. I would think perhaps, Senator Mathias, it would be unwise for me to answer that question directly. . . . Indeed on the facts in Escobido, I think, the Court decided the case, plainly correctly, but our concern was with respect to the scope of the opinion rather than with the precise decision.[18]

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> Mr. Rehnquist. Well, I certainly understand your interest, Senator. The expression of a view of a nominee on the constitutionality of a measure pending in Congress, I feel the nominee simply cannot answer.
>
> . . . .
>
> Mr. Rehnquist. Let me answer it this way: To me, the question of Congress' authority to cut off the funds under the appropriation power of the first amendment is so clear that I have no hesitancy in saying so, because I do not regard that as a debatable constitutional question.
>
> . . .

> Mr. Rehnquist. Well, I suppose one is entitled to take into account the fact that public education in 1954 is a much more significant institution in our society than it was in 1896. That is not to say that that means that the framers of the 14th amendment may have meant one thing but now we change that, but just that the rather broad language they used now has a somewhat different application based on new development in our society.
>
> Senator Bayh. . . . Let me ask you this: Do you feel that busing is a reasonable tool or a worthy tool or that it is a useful instrument in accomplishing equal educational opportunities, quality education for all citizens?
>
> Mr. Rehnquist. I have felt obligated to respond with my personal views on busing because of the letter which I wrote and I have done so with a good deal of reluctance because of the fact that obviously busing has been and is still a question of constitutional dimension in view of some of the Supreme Court decisions, and I am loath to expand on what I have previously said.
>
> My personal opinion is that I remain of the same view as to busing over long distances. The idea of transporting people by bus in the interest of quality education is certainly something I would feel I would want to consider all the factors involved in. I think that is a legislative, or at least a local school board, type of decision. [19]

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Just as some nominees expressed a narrow view of what questions they could properly answer and then tended to answer rather more questions than they had intended, others stated a relatively broad view and then answered fewer questions than their general statement seemed to justify. For instance, Justice Marshall repeatedly said that he was refusing to answer only those questions that he <u>actually expected</u> to come before the Court soon, not just those that might conceivably come before the Court, and he indicated his willingness "to discuss the fifth amendment and to look it up against the recent decisions of the Supreme Court," but he found reason to object to most specific questions.[20]

It should also be noted that some judges who refused to answer questions did so on a narrow ground. Brennan and Stewart had both received recess appointments, and declined to comment on cases on the grounds that they were sitting Justices.[21] Fortas, a sitting Justice during the hearings on his nomination to be Chief Justice, also declined on this ground.[22] Harlan observed that he realized the Senators had a problem, but that his record was well known and that the Senators should vote on the basis of what they knew about him.[23] Frankfurter, who also declined to answer specific questions,[24] also had a voluminous public record on a wide range of constitutional issues.

One issue that almost all nominees felt comfortable discussing was the doctrine of stare decisis. Although a nominee's views on stare decisis are at least as valuable an indicator of his votes on future cases as are his views on specific past Court decisions, no nominee objected to discussing the doctrine on the ground that it might prejudice his decision in some future case, and nominees including Brennan, Fortas, Marshall and Rehnquist discussed the doctrine and its application to constitutional law.[25]

Most of the questions and answers in confirmation hearings, however, have been in the unhelpful rhetorical mode. Nominees have assured the committee that they are strict constructionists who believe that the Court must "interpret the Constitution" and never "make law" or "amend the Constitution." Brennan, Marshall, Fortas and Blackmun are among these adherents of the intentions of the Framers.[26] Only Haynsworth and Carswell seemed to have

any use for the "living Constitution."[27]

Finally, it is worth noting that at least one "single issue" dominated a number of the confirmation hearings. Race --- as a social and political issue and also as a constitutional matter --- was prominent in the Stewart, Haynsworth, Carswell and Rehnquist hearings.[28] Indeed, two of the three nominees rejected during this century, Carswell and John J. Parker, were defeated partly because of racist campaign speeches made during pre-judicial political careers.[29] The other issue on which Carswell was attacked was mediocrity,[30] while Parker, an outstanding judge, was attacked for the constitutional and political dimensions of a decision he had written upholding an injunction against violating a "yellow dog" anti-union contract.[31] Rehnquist was asked about his personal opposition some years earlier to a local open-housing ordinance and about his activities as a pollwatcher allegedly discouraging black persons from voting;[32] he and almost all nominees after 1954 were asked numerous questions about Brown and its progeny.[33] Thus if Judge O'Connor were asked about her voting record in the state legislature on abortion and related issues, about her position on Roe v. Wade, and about the relationship between her personal, political and constitutional views on the abortion issue, it would hardly be an unprecedented attempt to ferret out discrete elements of a nominee's "whole lifeview" and "sense, sharp or vague, of where justice lies in respect of the great questions of his time."[34]

[1]Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 657-58 (1970).

[2]Id. at 660.

[3]Id. at 663-64.

[4]Rehnquist, The Making of a Supreme Court Justice, Harvard Law Record, October 8, 1959, at 7,8.

[5]Id. at 10.

[6]See, e.g., J. Harris, The Advice and Consent of the Senate 303, 313 (1953); Kutner, Advice and Dissent: Due Process of the Senate, 23 DePaul L. Rev. 658 (1974); Note, 10 Stanford L. Rev. 124, 143, 147, (1957)

[7]Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, on S.158, The Human Life Bill, Thursday, May 21, 1981, at 111 (testimony of Professor Tribe).

[8]Id. at 114 (testimony of Professor Van Alstyne).

[9]Blackmun Hearings at 12.

[10]Fortas II Hearings at 105-06.

[11]Powe, The Senate and the Court: Questioning a Nominee, 54 Tex. L. Rev. 891, 893, 895.

[12]Id. at 891-92, quoting Stewart Hearings at 43-44.

[13]Fortas II Hearings at 123.

[14]95 Cong. Rec. 13803 (1949).

[15]Blackmun Hearings at 60. Justice Blackmun was responding to a series of hypothetical questions posed by Senator Fong. In a separate statement in the committe report on the Blackmun nomination, Senator Robert Byrd (D.,W.Va.) recounted in detail how Senator Fong "commendably continued to elicit" the nominee's views on specific questions, and endorsed Blackmun's nomination because of his "strict constructionist" views. Blackmun Report at 12-13.

[16]Stewart Hearings at 41-60.

[17]Fortas II Hearings at 173.

[18]Powell Hearings at 231-32.

[19]Rehnquist Hearings at 33, 168-69.

[20]Marshall Hearings at 54-63.

[21]Brennan Hearings at 17-18; Stewart Hearings at 63. Justice Stewart had commented extensively on a number of Supreme Court decisions prior to this assertion of his right not to comment on such decisions. Id. at 11-62.

[22]Fortas II Hearings at 181.

[23]Harlan Hearings at 139.

[24]Frankfurter Hearings at 107-08.

[25]Brennan Hearings at 39-40; Fortas II Hearings at 110-15; Marshall Hearings at 156-157; Rehnquist Hearings at 138.

[26]Brennan Hearings at 40; Marshall Hearings at 54; Fortas II Hearings at 105-106; Blackmun Hearings at 74.

[27]Haynsworth Hearings at 75; Carswell Hearings at 62 ("The law is a movement, not a monument.").

[28]Stewart Hearings at 61-65; Haynsworth Hearings, passim; Carswell Hearings, passim; Rehnquist Hearings, passim.

[29]Carswell Hearings, passim; Parker Hearings, passim; Rehnquist, supra note 4, at 8.

[30]Carswell Hearings, passim.

[31]Parker Hearings, passim; Rehnquist, supra note 4, at 8-9.

[32]Rehnquist Hearings at 70-73.

[33]See, e.g., sources cited in note 28 supra.

[34]Black, supra note 1, at 657-58.