# Memorandum

File of materials on O'Connor nomination

Subject
Judge O'Connor

Date
August 28, 1981

To

Jon Rose, Assistant Attorney
General, OLP (Rm. 4234)

Dick Hauser, Deputy Counsel
to the President, 2nd Flr. West Wing

Sherrie Cooksey, Special Assistant
for Legislative Affairs, Rm. 107, East Wing

From

Carolyn B. Kuhl
Special Assistant to
the Attorney General

CBK

Attached are copies of further materials on busing and on bail reform which we sent Judge O'Connor yesterday per the request she made at your meeting with her in Phoenix.

Attachment

# BUSING

Q. What remedies for segregated schooling are mandated by the Equal Protection Clause of the Fourteenth Amendment? In particular, does the Fourteenth Amendment require race-conscious assignment of pupils or busing in order to achieve racial balance in the schools?

A. Senator, at the outset I must state my personal view that the availability to all children of high quality education is a critically important social goal. The obligation and the authority to provide that education to all generally resides in the political branches of government. However, intentional official acts of segregation which deny persons access to equal educational opportunities raise constitutional matters for the courts. Supreme Court cases teach that the role of the Court is necessarily limited to ascertaining where a constitutional violation has occurred, and fashioning remedies tailored to that constitutional violation.

The landmark decision in this area is, of course, Brown v. Board of Education, 347 U.S. 483 (1954). There, the Court held that the Equal Protection Clause of the Fourteenth Amendment proscribes enforced racial segregation in public schools. In reaching that conclusion, the Court explained that the effect of segregation on contemporary public education must be examined in expounding the Constitution. The Court maintained that segregation with the sanction of law deprives black children of equal educational opportunities, notwithstanding equality of physical facilities and other tangible components of public school education.

In sum, the equal protection vice of enforced racial segregation was held to be inferior educational opportunities available to black students because they were branded with an official legal stigma which generates a feeling of inferiority. I do not believe that the Court has ever read Brown I to conclude that racial imbalance in classrooms without the sanction of law would inherently deny black children equal educational opportunities or equal protection of the laws.

Remedies for segregated schooling were first addressed in Brown II, 349 U.S. 294 (1955). The Court declared that the goal of a desegregation remedy was the admission of students on a racially nondiscriminatory basis undertaken with all deliberate speed. In fashioning equitable decrees toward this end, the judiciary was admonished to accommodate both public and private needs, and to employ practical flexibility.

Neither Brown I nor Brown II ordained that racial balance in the classroom was an ingredient of a proper desegregation remedy. In Brown II the Court stated that the goal of the remedy was to vindicate "the personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis." 349 U.S. at 300-301. The teaching of those cases is that racially neutral pupil assignment plans, coupled with equal educational opportunities, is the nature of the relief to be granted for the injuries caused to individual students by a segregated school system operating with the sanction of law.

The Court has been far from clear about the role of race-conscious assignment in the achievement of "admission to public

schools . . . on a nondiscriminatory basis." Brown II refers to revising school districts into compact units "to achieve a system of determining admission to the public schools on a nonracial basis . . . . " 349 U.S. at 300 (emphasis added).

In Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), the Court overturned an order that prohibited any school in the Pasadena school district from having a majority of minority students for an indefinite period. In Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971), the Court endorsed the use of racial quotas as a starting point, but even there acknowledged that the goal of a desegregation plan is not to eliminate all one-race schools.

The principal goal in fashioning appropriate remedies in this area is to ensure access by the disadvantaged students to the quality education denied as a result of unconstitutional official action. The focus of these remedies, as I understand it is not upon numerical racial balance as an end in itself. As three members of the Supreme Court recently complained:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one race schools, courts may produce one race systems. Parents with school age children are highly motivated to seek access to schools to obtain quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and judicial oversight, accelerates the exodus to the suburbs of families able to move. . . . (Justice Powell, joined by Stewart and Rehnquist in dissenting from a denial of certiorari in Estes v. Metropolitan Branches of the Dallas NAACP, 100 S. Ct. 716 (1980)).

In addition, I am aware of several studies showing that mandatory busing or student assignment schemes seeking racial balance is counterproductive because it precipitates an exodus from the public school system, and diverts time, attention, and resources of the community away from encouraging and supporting the educational development of pupils.

The Court has endorsed a number of acceptable devices other than busing for remedying unlawful segregation. The Court has indicated in dictum that in some circumstances realignment of school districts and some transportation of students may be the only effective remedy for unlawful segregation. North Carolina v. Swann, 402 U.S. 43 (1971). Even taking this dictum on its face, however, I question how often busing really is the only effective device for remedying unlawful segregation in light of Brown II's definition of an acceptable remedy. I have voiced concern in the Arizona legislature about the effectiveness and social costs of the mandatory busing remedy. Several other justices have expressed similar concerns in published opinions. Keyes v. School District No. 1, 413 U.S. 189, 217-253 (1973) (Powell, J.); Austin Independent School District v. United States, 429 U.S. 990 (1976) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring).

BAIL ISSUES

Under the Bail Reform Act of 1966, 18 U.S.C. § 3146 et seq., the only issues to be considered by a court making a pretrial release decision in a non-capital case are the likelihood that the defendant will appear for trial and what conditions will guarantee his appearance. The Act does not provide for denial of bail and pretrial detention on the ground that release of the defendant would present a threat to the community, nor does the Act even permit consideration of the defendant's dangerousness in setting the conditions of release. The obvious problem of defendants being released under the Bail Reform Act who are prone to, and in fact do commit violent crimes prior to trial has led to a persistent call for reform of the Reform Act.

There are generally two approaches to such reform. The first, embodied in the American Bar Association's Standards on Pretrial Release, permits the consideration of future dangerousness in setting the conditions of release. If a defendant violates a condition of release, he may then be detained pending trial. The second approach goes one step further and permits not only consideration of dangerousness in fixing conditions of release but also pretrial detention if no conditions of release could reasonably assure the safety of the community. Congress followed this approach when it enacted the pretrial release provisions of the District of Columbia Code in 1970, D.C. Code 23-1322. The Attorney General's Task Force on

Violent Crime has also recommended legislation permitting courts to deny bail to persons found, by clear and convincing evidence, to present a danger to the community.

The constitutionality of such pretrial detention is unsettled simply because the fairly recent District of Columbia statute is the only one presenting the issue. Two constitutional arguments are advanced against such statutes: an Eighth Amendment challenge and a Due Process challenge. Although the Bail Clause of the Eighth Amendment simply provides that "excessive bail shall not be required," it has been argued that implicit in this provision is a constitutional right to bail in non-capital cases. In Stack v. Boyle, 342 U.S. 1, 4 (1951), an excessive bail case, the Court stated that unless the "right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning." Later that same term, however, the Court stated in dicta that "The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." Carlson v. Landon, 342 U.S. 524, 545 (1952). The question whether pretrial detention may be justified on any basis other than guaranteeing an accused's presence at trial was left open in Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979).

The Due Process challenge focuses on the determination of dangerousness. The argument is that judges are not capable of predicting future dangerousness with any degree of accuracy. It is also contended that pretrial detention for dangerousness is punishment which cannot be imposed prior to a proper determination of guilt. The commentators are sharply divided. Compare,

e.g., Mitchell, Bail Reform and the Constitutionality of Preventive Detention, 55 Va. L. Rev. 1223 (1969) (upholding constitutionality) with Tribe, An Ounce of Detention, 56 Va. L. Rev. 371 (1970) (questioning constitutionality).

These issues are timely not only because of the Task Force's recommendations, but also because the District of Columbia Court of Appeals, the highest local court, upheld the D.C. statute in an opinion handed down on May 8, 1981. United States v. Edwards, No. 80-294. An appeal has been docketed in the Supreme Court. The majority, in an opinion by Chief Judge Newman, specifically rejected the Eighth Amendment argument, relying heavily on the history of the inclusion of the Bail Clause in the Bill of Rights. The majority also ruled that pretrial detention was not punishment under the test articulated in Bell v. Wolfish, supra, and that the procedural protections in the statute provided sufficient assurances of accuracy in the judge's prediction of future dangerousness. There was a dissent by Judge Mack on the pretrial detention point.

The personal views and philosophy of a Supreme Court justice should be set aside, insofar as it is possible to do so, and matters before the Court should be decided based on the record of facts before the Court and on the applicable constitutional and legal principles. If confirmed, I would strive to disregard my personal opinions and views in resolving matter before the Court. Having explained that, I will attempt to articulate my personal views on several issues, as you have requested.

ABORTION:

I am opposed to abortion as a means of birth control or otherwise. The subject of abortion is a valid one for legislative action, subject only to any constitutional limitations.

My opposition to abortion has strengthened with the increase in public knowledge and awareness concerning the improved medical ability to keep premature infants alive, and to transplant and implant embryos, and to treat successfully certain ailments and deficiencies of the fetus before birth.

Much has been written concerning my record as a state legislator on the subject of abortion. My review of the record indicates that in 1970, during my first session as a State senator, I had occasion to vote in the Judiciary Committee on House Bill 20, a bill which had been co-sponsored by two Republican members of the Arizona House of Representatives, and which had passed the Republican controlled House and been sent to the Senate. The bill, as it came to the Senate, would have repealed Arizona's felony statutes relating to abortion. The subject and the bill were not then the focus of public concern and awareness that would be the case today. The minutes of the Senate Judiciary Committee do not reflect the individual votes of committee members, and reflect only that the bill was returned to the full Senate with a "do pass" recommendation by a majority of the committee. I had no independent recollection of the vote, but have reviewed contemporary newspapers and have read an article in "The Arizona Republic" indicating I voted with the majority. The bill was subsequently held in the Republican caucus and Rules Committee and it never went to the full Senate for a vote on its merits.

Arizona's statutes made it a felony, punishable by from two to five year's in prison, for anyone providing any substance or means to procure a miscarriage unless it was necessary to save the life of the mother. No other exception was provided. At that time I believed some change in the statute was appropriate. Had a bill been presented which was less sweeping, I would have supported that. My own knowledge and awareness of the issues and concerns about the question of abortion have increased since those days. I would not have voted for a simple repealer thereafter.

In 1973 I requested the Legislative Council to prepare Senate Bill 1333, which gave hospitals the right not to admit patients for abortions, and gave physicians and hospital and clinic employees the right to refuse to participate in or contribute to an abortion if they stated in writing that they objected to the abortion on moral or religious grounds. I voted for the bill in the Senate, and it also was passed by the House and became law.

In the same year, 1973, I was one of ten senators who signed as co-sponsors Senate Bill 1190, a family planning bill. The bill did not refer to abortions and it was not my understanding or belief that the term "family planning methods and information" included abortions. Inasmuch as several other co-sponsors of the bill were publically opposed to abortions, I assume their understanding of the bill was the same as my own. It was my understanding and belief that the bill was intended to provide for availability of information and techniques for contraception and prevention of pregnancies. The bill did allow family planning information to be given to minors by physicians without parental consent. The only provision for surgical procedures contained

in the bill was the following:

> A physican may perform appropriate surgical procedures for the prevention of conception upon any adult who requests such procedure in writing. (emphasis added).

The bill was poorly drafted and I can appreciate that there could be some misunderstanding about it. It is not unusual in the Arizona Legislature for bills to be introduced in a form requiring substantial changes in committee hearings to improve the language. In this instance, the bill was held in the Republican caucus and Rules committee and I had no occasion to vote on the bill on the floor.

In 1974, after the Roe v. Wade decision by the United States Supreme Court in 1973, a House Concurrent Memorial 2002 was introduced in the House urging Congress to amend the Constitution to provide that the word "person" in the 5th and 14th Amendments applies to the unborn at every stage of development except in an emergency where there is a reasonable medical certainty that continuation of the pregnancy would cause the death of the mother. The memorial was amended in the Senate Judiciary Committee to exclude also pregnancies caused by rape, incest, or other criminal action.

I voted against the memorial in the Judiciary Committee, and in the caucus and Rules Committee. I believe that an amendment should be made to the Constitution only rarely and after sufficient study to determine the necessity for it and the form it should take. I was not persuaded in 1974 that a Constitutional amendment was necessary, or, if it was, what form it should take. Time has shown how difficult the question is because Congress is still wrestling with the question in 1981.

In 1974, I voted in the full Senate in favor of Senate Bill 1165, which provided for a medical assistance program for the medically needy. The bill contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of a mother or where pregnancy resulted from rape, incest or criminal action. The bill passed and became law.

Also in 1974, the senate originated a bill to authorize the University of Arizona to issue bonds to finance construction of an addition to its football stadium. I voted for the bill and it passed the Senate. It was amended in the house to add a non-germane rider prohibiting abortions to be performed at institutions under the jurisdiction of the Board of Regents except to save the mother's life. I voted against concurring in the amendment on its return to the Senate. As majority leader, I believed that Arizona's Constitution, Art. 4, pt.2, § 13 prohibited bills on more than one subject and I wanted to discourage the practice in the House of Representatives. The amended bill passed and became law. Although the amendment was upheld by the Arizona Supreme Court in Roe v. Arizona Board of Regents, 113 Ariz. 178, 549 P.2d 150 (1976), the briefs did not raise the question of the germaneness of the amendment under Art. 4, pt.2, § 13 and the opinion did not address the issue. The invalidity of non-germane amendments was subsequently addressed by the Arizona Court of Appeals in Litchfield Elementary School District No. 79 et al. v. Babbitt et al, 125 Ariz. 215, 608 P.2d 792 (1977) which held invalid a bill which contained non-germane amendments.

PORNOGRAPHY:

As a citizen and as a State legislator I have expressed concern with the extent of availability and distribution of pornographic material, especially that which is available to minors. Again, however, my personal views and opinions are not relevant to the process of reaching a decision as a judge in any particular case involving 1st Amendment protections for freedom of speech.

As a legislator I favored enactment of those measures designed to extend and provide appropriate curbs and restrictions on sale and distribution of pornographic material which I believed would withstand challenges in court if passed into law. I opposed certain measures which I believed were improperly or inadequately drafted or submitted.

As a legislator I voted in 1974 for Senate Bill 1227, which amended Arizona's obscenity laws in a manner consistent with the requirements set forth in Miller v. California, 413 U.S. 15 (1973). In 1972 I voted for Senate Bill 1320 which increased the penalty for certain obscenity related offenses where the defendant had previously been convicted of similar offenses. In 1971 I voted for House Bill 301 which made it unlawful to publicly display explicit sexual material. In 1970 I co-sponsored Senate Bill 42 which provided for restrictions on the sale and distribution of pornographic literature to minors. I also voted in 1970 for a virtually identical HAuse Bill 21.

As a judge, I am no longer in a position of deciding what is the best approach to regulating obscenity as a matter of public policy, but, rather, whether the approach taken by a state or locality complies with the Constitution's protection of free speech.

PROSTITUTION:

I am morally opposed to prostitution. It is a demeaning and immoral practice which is inconsistent with family values. It is in my view an appropriate subject for state regulations.

GUN CONTROL:

As a state legislator I did not suport measures to limit the right of law abiding citizens to acquire or to own guns for sport and self defense. I did support, however, laws to prevent the carrying of concealed weapons, and to define a concealed weapon, as well as laws increasing criminal penalties for criminal offenses committed with the use of a gun or deadly weapon.

In 1974 and 1973 I voted in the state legislature for memorials to Congress and the President asking that certain federal firearms control legislation be opposed. In 1971 I co-sponsored and voted for a bill, Senate Bill 7, to permit residents of Arizona to purchase firearms in other states in accordance with the Federal Gun Control Act of 1968

As a judge I have had occasion to preside over a number of criminal trials and cases involving offenses committed by the use of guns, and have imposed sentences on those found guilty of such offenses.

ERA:

When the Congress of the United States passed the ERA in 1972 and submitted it to the states for consideration, I was serving as an Arizona State Senator. I requested and obtained approval of the Judiciary Committee of the Arizona State Senate to introduce a resolution of ratification as a majority of the committee measure. The measure never passed out of the committee. Hearings on a ratification resolution were held each year thereafter while I served in the Legislature, with the same results. As time passed, public concern and opposition to the amendment increased. I co-sponsored in 1974 a measure to submit the question of ratification of the ERA to the voters of Arizona for an advisory opinion. I believe that legislators should be adequately informed about the views of their constituents on a constitutional amendment of such public controversy before taking legislative action on the issue. That measure was also held in Committee. Since going on the bench in 1975, I have taken no public position or action concerning the ERA.

I have always believed that if gender based discrimination had been subject to a standard of strict scrutiny, such as that applied to discrimination based on race, alienage and national origin, the ERA might well have been superfluous. However, the Supreme Court has applied a somewhat fluctuating standard of scrutiny of governmental classifications based on sex.

BAR POLL RESULTS:

In Arizona, a poll is taken by random selection among attorneys within the state for the purpose of rating judges prior to general elections. A copy of my rating on the 1980 bar poll is attached. The poll was taken in less than one year after I had become an appellate court judge. A total of twelve appellate court judges were rated. 90% of those polled believed I should be retained in office, which percentage ranked 8th among those rated. In the rankings of those judges who were rated "excellent" on the categories of knowledge of the law, quality of written opinions, and consideration of briefs and authorities, I ranked second.

SANDRA D. O'CONNOR
JUDGE

(602) 255-4828

# Court of Appeals

STATE OF ARIZONA
DIVISION ONE
WEST WING, STATE CAPITOL BUILDING
1700 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

August 26, 1981

The Honorable Jesse Helms
United States Senate
Washington, D.C. 20510

Dear Senator Helms:

Thank you again for your gracious courtesy and hospitality during our visit in your office on Thursday, July 16. At that time you furnished me with a letter asking me to address two questions, one concerning whether Roe v. Wade was a proper exercise of judicial authority, and the other concerning the proper application of the doctrine of stare decisis in constitutional law.

After careful reflection, I remain of the view that a prospective Supreme Court Justice should not make public statements on issues which might later come before the Supreme Court. Indeed, the very authority on which you rely, Justice Rehnquist's memorandum opinion in Laird v. Tatum, 409 U.S. 824 (1972), supports this position. In Laird v. Tatum, Justice Rehnquist drew a clear line between statements made by an individual prior to being named by the President for judicial appointment and statements made by a designee or nominee of the President. He recognized that statements about specific issues made by a nominee to the bench risk the

appearance of being an improper commitment to vote in a particular way. As Justice Rehnquist stated:

> 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.

In my judgment, Justice Rehnquist, as a nominee before the United States Senate, adhered to the line identified in his Laird opinion. Hearings at 23, 30. As does Justice Rehnquist, I believe that judges must decide legal issues or questions within the judicial process, not outside of it and unconstrained by the oath of office.

Other nominees to the Supreme Court have scrupulously refrained from commenting on the merits of recent Court decisions or specific matters which may come before the Court. Justice Stewart, for example, declined at his confirmation hearings to answer questions concerning Brown v. Board of Education, noting that pending and future cases raised issues affected by that decision and that "a serious problem of simple judicial ethics" would arise if he were to commit himself as a nominee. Hearings at 62-63. The late Justice Harlan declined to respond to questions about the then-recent Steel Seizure cases. Hearings at 167, 174, and stated that if he were to comment upon cases which might come before him it would raise "the gravest

kind of question as to whether I was qualified to sit on that Court. Hearings at 138. More recently, the Chief Justice declined to comment on a Supreme Court redistricting decision which was criticized by a Senator, noting, "I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit." Hearings at 18.

The duty of a nominee to refrain from making commitments to vote one side of a particular issue has a firm legal basis. A federal judge is required by law to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455; see Code of Judicial Conduct, Canon 3C. If a nominee to the Supreme Court were to state how he or she would rule in a particular case, it would suggest that, as a Justice, the nominee would not impartially consider the arguments presented by each litigant. If a nominee were to commit to a prospective ruling in response to a question from a Senator, there is an even more serious appearance of impropriety, because it may seem that the nominee has pledged to take a particular view of the law in return for the Senator's vote. In either circumstance, the nominee may be disqualified when the case or issue comes before the Court. As Justice Frankfurter stated in Offutt v. United States, 348 U.S. 11 (1954), a core component of justice is the appearance of justice. It would clearly tarnish the appearance of justice for me to state in advance how I would decide a particular case or issue.

The first question set forth in your letter asks my opinion of the correctness of Roe v. Wade and how I believe the case should have been decided. For the reasons stated above, it would be inappropriate for me to answer that question at this time. However, I can assure you that I am aware of the criticisms of Roe v. Wade with regard to its description of historical precedent and the conclusions to be drawn therefrom, with regard to the textual basis for the decision's interpretation of the Constitution, and with regard to the Court's apparent conception of its role in superintending the actions of state legislatures. These criticisms and possibly others may well be presented to the Court as a basis for overruling Roe v. Wade should that decision be challenged. If I were on the Court at that time, I would carefully weigh these arguments and interpret the Constitution to the best of my ability, with due consideration for the framers' intent, the appropriate role of the judicial branch, and principles of federalism.

Your second question, concerning my view of the doctrine of stare decisis, speaks to my judicial philosophy generally, not to a specific case or issue, and therefore I am happy to answer it. Our system of justice requires a profound respect for precedent. As Justice Cardozo once observed, if every decision of a court were opened to re-examination in every case, the law would be hopelessly confused and virtually impossible to administer. I would, therefore, be exceedingly reluctant to discard

precedent of the Supreme Court in approaching any case. However, I am also mindful that Justice Frankfurter, who spoke strongly of the importance of law as a force of coherence and continuity, distinquished between stare decisis in relation to constitutional issues, which he deemed to be open to re-examination because legislatures cannot displace a constitutional adjudication, and statutory issues, which he believed should not be re-examined merely because an earlier decision is later thought to be wrong.

In my judgment, occasions may arise when a Justice of the Supreme Court should cast a vote contrary to precedent. When a Justice believes that a precedent was built upon flawed understandings of basic constitutional provisions, then a Justice should cast a vote contrary to the prior decision of the Court. A well-known example is the Supreme Court's reversal of the doctrine of Swift v. Tyson, 16 Pet. 1 (1842), which held that federal courts possess general common law powers to make law in diversity cases, in the landmark opinion authorized by Justice Brandeis in Erie Railroad v. Tompkins, 304 U.S. 64 (1938). Because of the numerous legal and practical impediments to rectifying error by constitutional amendment, constitutional decisions should not, I believe, be wholly insulated from re-examination.

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

STATEMENT OF SANDRA DAY O'CONNOR

SEPTEMBER 9, 1981

Mr. Chairman and Members of the Committee

I would like to begin my brief opening remarks by expressing my gratitude to the President for nominating me to be an associate justice of the United States Supreme Court, and my appreciation and thanks to the members of this committee and its distinguished chairman for your courtesy and for the privilege of meeting with you.

As the first woman to be nominated as a Supreme Court Justice, I am particularly honored and hope and believe that honor is shared with all the women of this nation. As a citizen, as a lawyer and as a judge, I have, from afar, always regarded the Court with the reverence and the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines, such as separation of powers, will be continually honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the United States Supreme Court that we all turn when we seek that which we want most from our government: justice.

I suppose that few, if any, of those previously nominated to the Supreme Court ever realistically dreamed or expected that they would sit as a member of our highest Court. I expect those who have preceded

me were awed and fascinated, as I am, by the unknown challenges that lie ahead. If confirmed by the Senate, I will apply all my abilities to insure that our government is preserved and that justice under our Constitution and the laws of this land, will always be the foundation of that government.

Let me now say something about my views as to what I can and cannot properly discuss with you during the course of this hearing. I do not believe that, as a nominee, I should tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. I believe most people, and probably all lawyers and judges, would understand and agree with that position. The first problem with such a statement is that it would mean I have prejudged the matter or have morally commited myself to a certain position. This, of course, is precisely one hundred and eighty degrees from what the attitude of a judge should be; namely, to approach each problem and issue with an open mind. Moreover, such a statement by me as to what I might do in a future court action might make it necessary to disqualify myself on the matter. This would result in my inability to do that which would be my sworn duty, namely, to decide cases that come before the Court. Finally, neither you nor I know today the precise way in which any issue will present itself in the future or what the facts or arguments may be at that time or how the statute being interpreted may read. Until those crucial factors become known, I suggest none of us really know how we would resolve any issue.

At the very least, we would reserve judgment until that time.

The observations I have just made are consistent with the recurring statements and positions I have read in the transcripts of the hearings of the presently sitting members of the United States Supreme Court, men whose personal views and backgrounds are obviously quite diverse.

On a personal note, I would now like to say something to you about my family and to introduce them to you. By way of preamble, I would note that some of the media have reported, correctly, I might add, that I have performed some marriage ceremonies in my capacity as a judge. I would like to read to you an extract from a part of the form of marriage ceremony I prepared. "Marriage is far more than an exchange of vows. It is the foundation of the family, mankind's basic unit of society, the hope of the world and the strength of our country. It is the relationship between ourselves and the generations to follow."

That statement represents not only advice I give to the couples who have stood before me, but my view of all families and the importance of families in our lives and in our country.

My nomination to the Supreme Court has brought my own very close family even closer together.

(Introductions to follow)

Finally, I want to thank you, Mr. Chairman and Members of the Committee, for all the kindnesses and courtesies that you have extended to me.

I would now be happy to respond to your questions.

10 SEP 1981

American Bar Association
Governmental Relations Office
1800 M Street, N.W.
Washington, D.C. 20036
Phone: (202) 331-2213

**CRAIG H. BAAB**
Staff Director
for Bar Liaison

September 10,1981

Dear Dick:

I assume you have a copy of the ABA report on Judge O'Connor, but enclose one in case you haven't seen it.

Regards,

Craig.

Craig H. Baab

Re O'Connor materials

CHB:km

Encl.

EMBARGOED

AMERICAN BAR ASSOCIATION
DIVISION OF COMMUNICATIONS
77 S. WACKER DRIVE, CHICAGO, ILLINOIS 60606 - (312) 621-9230

RELEASE: EMBARGO FOR RELEASE UNTIL
12:00 midnight Eastern Day Light Time
Tuesday, September 8, 1981

CONTACT: Gail Alexander
PHONE: (202) 331-2293

ATTACHED IS THE REPORT OF THE AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON FEDERAL JUDICIARY TO THE SENATE JUDICIARY COMMITTEE ON THE FINDINGS OF IT'S INVESTIGATION OF THE PROFESSIONAL QUALIFICATIONS OF THE HONORABLE SANDRA DAY O'CONNOR OF ARIZONA TO BE AN ASSOCIATE JUSTICE TO THE SUPREME COURT.

# # # # #

09/08/81

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON FEDERAL JUDICIARY

1155 EAST 60TH ST., CHICAGO, ILLINOIS 60637 TELEPHONE (312) 947-4000

September 8, 1981



The Honorable Strom Thurmond
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is submitted in response to your invitation to the Standing Committee on Federal Judiciary of the American Bar Association ("the Committee") to submit its opinion regarding the nomination of the Honorable Sandra Day O'Connor of Arizona to be an Associate Justice of the Supreme Court of the United States.

The Committee has unanimously adopted the following evaluation of Judge O'Connor based upon the investigation described below.

The Committee is of the opinion that Judge O'Connor meets the highest standards of judicial temperament and integrity. Her professional experience to date has not been as extensive or challenging as that of some other persons who might be available for appointment to the Supreme Court of the United States. Nevertheless, after considering her outstanding academic record, her demonstrated intelligence and her service as a legislator, a lawyer and a trial and appellate judge, the Committee is of the opinion that she is qualified from the standpoint of professional competence for appointment to the Supreme Court of the United States.

The Committee's investigation of Judge O'Connor was limited to her professional qualifications -- her professional competence, judicial temperament and integrity. Consistent with the Committee's longstanding tradition, the Committee has not undertaken to make any determinations about Judge O'Connor's general political ideology or her views on any issues that she may face

should she be confirmed to serve on the Supreme Court of the United States. These issues are not matters properly of concern to the Committee. */

The Committee's investigation of Judge O'Connor included the following inquiries:

(1) Members of the Committee interviewed a large number of federal and state judges throughout the United States.

(2) Members of the Committee interviewed a cross section of practicing lawyers, including government lawyers, legal services and public interest lawyers and private practitioners, both in and outside of Arizona.

(3) Members of the Committee interviewed a number of deans and faculty members of law schools throughout the country.

(4) Members of the Committee interviewed a number of members of the Arizona State Senate.

(5) A group of practicing attorneys and two groups of law professors reviewed Judge O'Connor's judicial opinions.

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In 1975 Judge O'Connor was elected Superior Court Judge in Maricopa County, Arizona. She was elevated to the Arizona Court of Appeals, an intermediate state appellate court, by Governor Babbit in 1979 and has served as a judge of that court until the present.

Through interviews of those who worked with Judge O'Connor during various stages of her professional career, the Committee learned that she has performed her work very competently, has demonstrated a high degree of integrity and has displayed excellent judicial temperament.

1. Interviews With Judges

In its investigation the Committee interviewed more than three hundred persons of whom over a hundred and fifty are federal, state and local judges. A significant number of the judges interviewed are judges sitting in Arizona who are familiar with Judge O'Connor and her experience as a trial and appellate judge. Judge O'Connor received uniformly favorable reviews from these individuals. Her colleagues on the Arizona Court of Appeals referred to her as "a tremendous worker," "a careful and exacting lawyer" and "a person of superb quality and keen intelligence." In addition, judges from the U.S. Court of Appeals for the Ninth Circuit who are familiar with Judge O'Connor expressed their admiration for her performance on the bench, her integrity and her judicial temperament.

The Committee also interviewed federal and state judges outside Arizona. Although most of these judges have no firsthand knowledge of Judge O'Connor's performance, those who do described her in favorable terms. She was characterized as "intellectually well prepared," "very thoughtful" and "capable of mastering anything she puts her mind to master." Many judges who do not personally know Judge O'Connor have a favorable impression of her based on conversations they have had with their colleagues. On the whole, the Committee found that the judicial community -- both in and outside of Arizona -- supports Judge O'Connor's nomination.

2. Interviews With Lawyers

In our evaluation of Judge O'Connor, the Committee contacted about a hundred practicing lawyers throughout the United States. We talked with a broad cross section of the legal community, including lawyers

who represent women's groups, minority groups, labor unions, large corporations, individuals in civil litigations and defendants in criminal cases. Without exception the Arizona lawyers who were interviewed reported favorable impressions of Judge O'Connor, her abilities as a lawyer and her performance as a trial and appellate judge. They described her as "bright" and "objective" and as a "quick study." Lawyers who have tried cases before Judge O'Connor reported that she is always prepared and runs a "tight ship" in the courtroom. These interviews convinced the Committee that, although her experience as a trial and appellate judge has been limited, Judge O'Connor has demonstrated the necessary qualities of professional competence, judicial temperament and integrity.

Very few lawyers interviewed who practice outside of Arizona are personally familiar with Judge O'Connor. However, the uniform reaction of those who have a basis for opinion is favorable. One lawyer aptly summed up the comments received by saying that he would give Judge O'Connor "high marks in every department."

3. Interviews With Deans and Professors of Law

The Committee spoke to more than forty deans and faculty members of a number of law schools throughout the country. Only a few of those to whom we spoke know Judge O'Connor personally or are familiar with her work on the bench. However, those individuals spoke favorably of Judge O'Connor.

4. Interviews With State Senators

The Committee interviewed approximately a dozen Arizona State Senators -- both Democrats and Republicans -- who had served with Judge O'Connor. They were uniform in their praise of Judge O'Connor, describing her as "an excellent Senator," "an enormously intelligent person," "a woman of integrity" and a "very fair and open-minded" person. The Committee was assured that "she has no prejudices with respect to race, creed or color."

5. Survey of Judge O'Connor's Opinions

Judge O'Connor's opinions and other legal writings were examined for the Committee by a group of practicing attorneys and by two groups of law school professors. Those consulted expressed differing views concerning the strength of her opinion writing. Judge O'Connor has written relatively few published opinions -- approximately thirty -- since she became a judge in 1975. She has also written two published articles. Not surprisingly, Judge O'Connor's opinions deal almost exclusively with issues of state law. For the most part, the subject matter of her opinions is such that they do not involve the elaborate legal analysis or complex social issues often found in Supreme Court decisions. Nonetheless, the Committee concluded that the opinions are competently written and her writing style is clear and logical.

6. Interview With Judge O'Connor

Judge O'Connor was interviewed by three members of the Committee. Their impression of Judge O'Connor is that she is an intelligent, articulate person who is committed to the law and to equal justice and who is concerned about people and their problems. She will approach her new position, if confirmed, with enthusiasm, determination and dedication.

* * *

Based on the investigation described above and notwithstanding the fact that Judge O'Connor's professional experience has not been as extensive or challenging as that of others who might be available, the Committee has unanimously found that Judge O'Connor has the professional qualifications required of an Associate Justice of the Supreme Court of the United States.

Those who have worked with Judge O'Connor describe her as very intelligent, analytical, thorough and hard-working. The diversity of her experience as a practicing lawyer, legislator and judge provides a valuable background for a Supreme Court Justice. She is dedicated to the legal profession and has made significant contributions to her community.

Furthermore, the Committee's investigation has demonstrated that Judge O'Connor has an appropriate judicial temperament. Her judgment is sound, and she is well respected by her colleagues. Her integrity is above reproach.

This report is being filed at the commencement of the Senate Judiciary Committee's hearing. We will, as a matter of routine, review our report at the conclusion of the hearings and notify you if any circumstances have developed that may require modification of our views.

Respectfully submitted,

Brooksley E. Landau

Brooksley E. Landau
Chairperson

BEL:djr

EMBARGOED

AMERICAN BAR ASSOCIATION
DIVISION OF COMMUNICATIONS
77 S. WACKER DRIVE, CHICAGO, ILLINOIS 60606 - (312) 621-9230

RELEASE: EMBARGO FOR RELEASE UNTIL
12:00 midnight Eastern Day Light Time
Tuesday, September 8, 1981

CONTACT: Gail Alexander
PHONE: (202) 331-2293

ATTACHED IS THE REPORT OF THE AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE ON FEDERAL JUDICIARY TO THE SENATE JUDICIARY COMMITTEE ON THE FINDINGS OF IT'S INVESTIGATION OF THE PROFESSIONAL QUALIFICATIONS OF THE HONORABLE SANDRA DAY O'CONNOR OF ARIZONA TO BE AN ASSOCIATE JUSTICE TO THE SUPREME COURT.

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09/08/81

AMERICAN BAR ASSOCIATION

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September 8, 1981

The Honorable Strom Thurmond
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is submitted in response to your invitation to the Standing Committee on Federal Judiciary of the American Bar Association ("the Committee") to submit its opinion regarding the nomination of the Honorable Sandra Day O'Connor of Arizona to be an Associate Justice of the Supreme Court of the United States.

The Committee has unanimously adopted the following evaluation of Judge O'Connor based upon the investigation described below.

The Committee is of the opinion that Judge O'Connor meets the highest standards of judicial temperament and integrity. Her professional experience to date has not been as extensive or challenging as that of some other persons who might be available for appointment to the Supreme Court of the United States. Nevertheless, after considering her outstanding academic record, her demonstrated intelligence and her service as a legislator, a lawyer and a trial and appellate judge, the Committee is of the opinion that she is qualified from the standpoint of professional competence for appointment to the Supreme Court of the United States.

The Committee's investigation of Judge O'Connor was limited to her professional qualifications -- her professional competence, judicial temperament and integrity. Consistent with the Committee's longstanding tradition, the Committee has not undertaken to make any determinations about Judge O'Connor's general political ideology or her views on any issues that she may face

should she be confirmed to serve on the Supreme Court of the United States. These issues are not matters properly of concern to the Committee. */

The Committee's investigation of Judge O'Connor included the following inquiries:

(1) Members of the Committee interviewed a large number of federal and state judges throughout the United States.

(2) Members of the Committee interviewed a cross section of practicing lawyers, including government lawyers, legal services and public interest lawyers and private practitioners, both in and outside of Arizona.

(3) Members of the Committee interviewed a number of deans and faculty members of law schools throughout the country.

(4) Members of the Committee interviewed a number of members of the Arizona State Senate.

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