TIME/JULY 20, 1981

COVER STORY

The Brethren's First Sister

A Supreme Court nominee—and a triumph for common sense

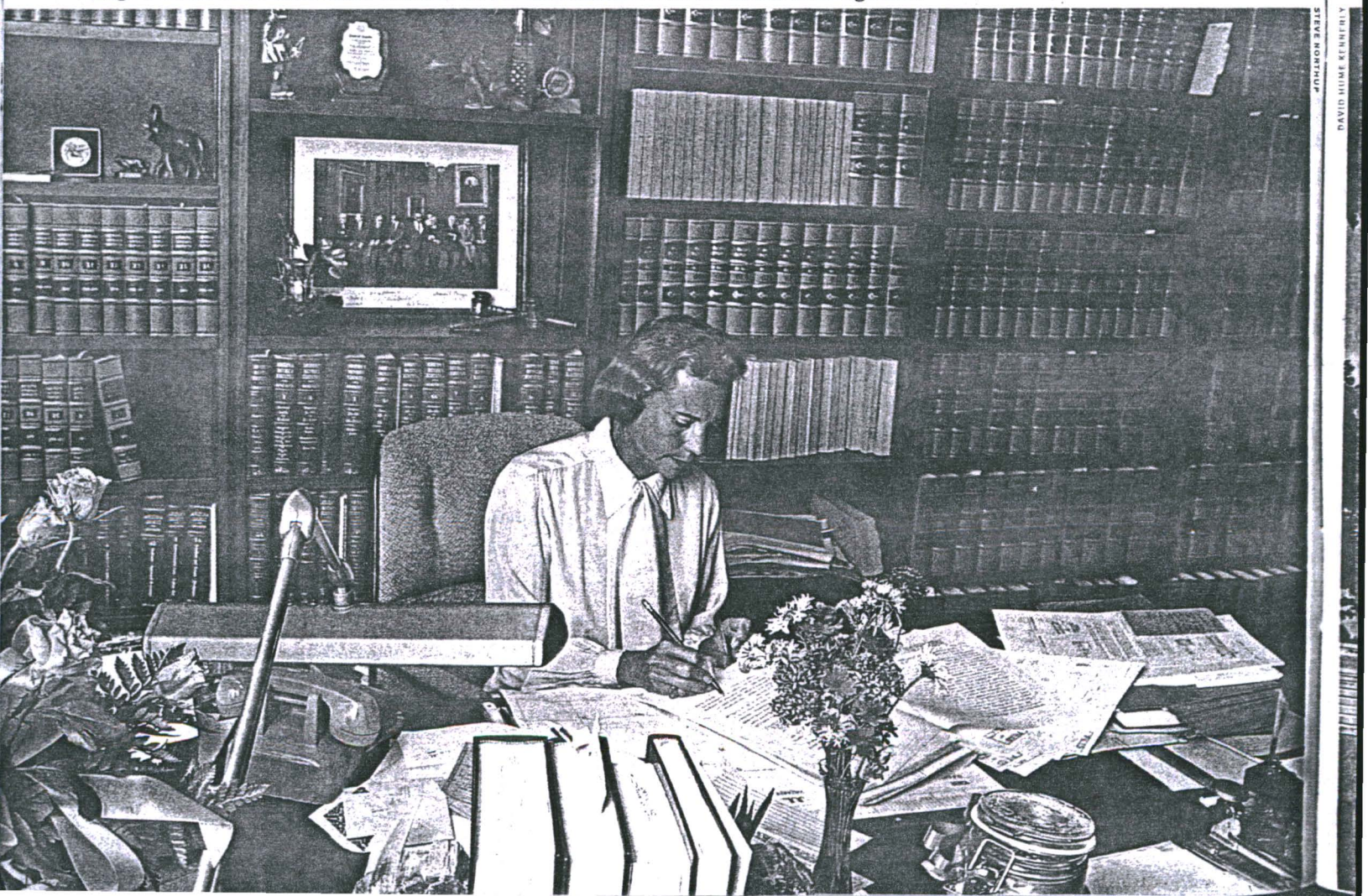
Ronald Reagan lived up to a campaign pledge last week, and the nation cheered. At a hastily arranged television appearance in the White House press room, the President referred to his promise as a candidate that he would name a woman to the Supreme Court, explaining: "That is not to say I would appoint a woman merely to do so. That would not be fair to women, nor to future generations of all Americans whose lives are so deeply affected by decisions of the court. Rather, I pledged to appoint a woman who meets the very high standards I demand of all court appointees." So saying, he introduced his nominee to succeed retiring Associate Justice Potter Stewart as "a person for all seasons," with "unique qualities of temperament, fairness, intellectual capacity." She was Sandra Day O'Connor, 51, the first woman to serve as majority leader of a U.S. state legislature and, since 1979, a judge in the Arizona State Court of Appeals.

O'Connor's name had been floated about in rumors ever since Stewart, 66, announced his intention to retire last month, but her nomination, which must be approved by the Senate in September, was a stunning break with tradition. In its 191-year history, 101 judges have served on the nation's highest court, and all have been men. By giving the brethren their first sister, Reagan provided not only a breakthrough on the bench but a powerful push forward in the shamefully long and needlessly tortuous march of women toward full equality in American society.

To be sure, Reagan's announcement that he intended to elevate O'Connor to the highest U.S. Government post ever held by a woman had its roots in partisan politics. Mainly because he had been portrayed by Jimmy Carter as a man who might blunder the nation into war, Reagan had lacked strong support among women in last year's campaign. Moreover, his Administration's record of appointing women to office is very poor: only one highly visible Cabinet-level post (Ambassador to the United Nations Jeane Kirkpatrick); only 45 women among the 450 highest positions.

There were also ironies aplenty in Reagan's choice of O'Connor. As a true-blue conservative, he had been widely expected to select a rigidly doctrinaire jurist in order to stamp his own political ideology on the court. Instead, he picked a meticulous legal thinker whose devotion to precedent and legal process holds clear priority over her personal politics,

Judge O'Connor in her Phoenix chambers after the President announced her nomination to the high court



STEVE NORTHUP

DAVID HUME KENNERLY

which are Republican conservative.

Whether Reagan was playing shrewd politics, or merely following his own best instincts, almost did not matter. After naming O'Connor, the President suddenly found himself awash in praise from a wide range of political liberals, moderates and old-guard conservatives. At the same time, he was under harsh assault from the moral-issue zealots in the New Right who helped him reach the Oval Office. Although they had little chance of blocking the nomination, they charged that O'Connor was a closet supporter of the ERA and favored abortion.

Other than on the far right, reaction to the nomination ranged from warm to ecstatic. Feminists generally were pleased. Eleanor Smeal, president of the National Organization for Women, termed the choice "a major victory for women's rights." Patricia Ireland, a Miami attorney and a regional director of NOW, said she was "thrilled and excited" by the selection, adding: "Nine older men do not have the same perspective on issues like sex discrimination, reproductive rights or the issues that affect women's rights directly." Declared former Texas Congresswoman Barbara Jordan, a black lawyer: "I congratulate the President. The Supreme Court was the last bastion of the male: a stale dark room that needed to be cracked open. I don't know the lady, but if she's a good lawyer and believes in the Constitution, she'll be all right."

RODDEY E. MIMS

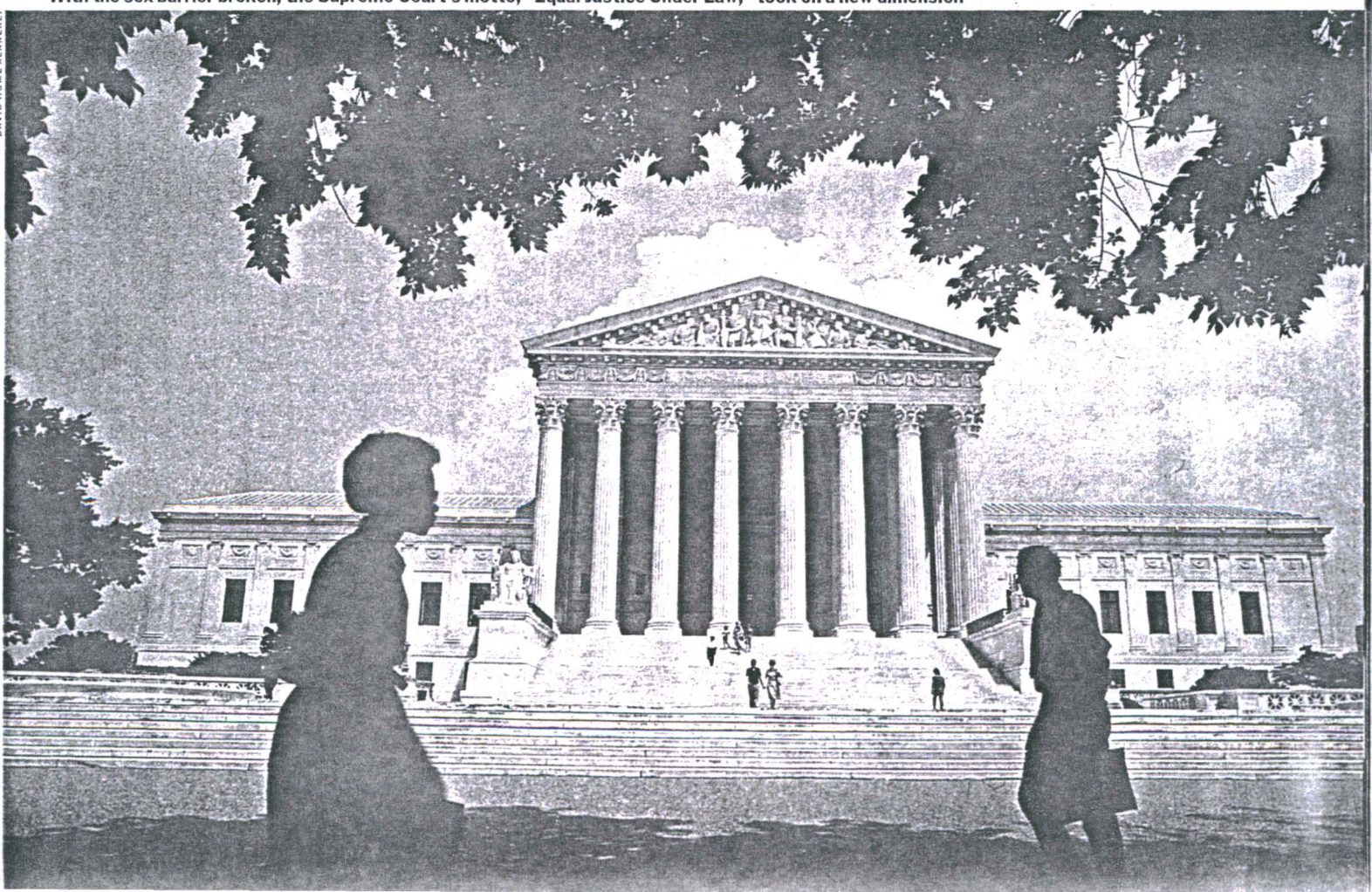
"Unique qualities of temperament, fairness, intellectual capacity."

Liberal politicians joined the praise. House Speaker Tip O'Neill, who has been feuding with Reagan over his budget cuts and tax policies, termed the choice "the best thing he's done since he was inaugurated." Said Democratic Senator Edward Kennedy, who sits on the Judiciary Committee that will hold hearings on O'Connor's nomination: "Every American can take pride in the President's commitment to select such a woman for this critical office."

Many conservative Republican Senators added their endorsement. Utah's Orrin Hatch called it "a fine choice." Reagan's close friend, Nevada Senator Paul Laxalt, was enthusiastic, and Senate Majority Leader Howard Baker said he was "delighted by the nomination." But South Carolina's Strom Thurmond, chairman of the Judiciary Committee, was a bit more restrained. "I intend to support her," he said, "unless something comes up."

No one championed O'Connor more forcefully than her longtime Arizona friend, Senator Barry Goldwater, whose early urging had helped her gain White House support. Noting the opposition to O'Connor from the far-right groups, Goldwater declared: "I don't like getting kicked around by people who call themselves conservatives on a nonconservative matter. It is a question of who is best for the court. If there is going to be a fight in

With the sex barrier broken, the Supreme Court's motto, "Equal Justice Under Law," took on a new dimension



DAVID HUME KENNERLY

the Senate, you are going to find 'Old Goldy' fighting like hell." Goldwater attacked directly a claim by the Rev. Jerry Falwell, head of the fundamentalist Moral Majority, that all "good Christians" should be concerned about the appointment. Scoffed Old Goldy: "Every good Christian ought to kick Falwell right in the ass."

But the protests from the New Right were blistering. "We feel we've been betrayed," charged Paul Brown, head of the antiabortion Life Amendment Political Action Committee. Brown claimed that Reagan had violated a Republican Party platform plank, which declared that only people who believe in "traditional family values and the sanctity of the innocent human life" should be made judges. "We took the G.O.P. platform to be the Bible," he said. Carolyn Gerster, former president of the National Right to Life Committee and a physician from Scottsdale, Ariz., who knows O'Connor well, argued that the judge "is unqualified because she's proabortion. We're going to fight this one on the beaches." Also leading the charge from the right were Howard Phillips, head of the Conservative Caucus, and Richard Viguerie, publisher of *Conservative Digest*. Declared Viguerie: "We've been challenged. The White House has said we're a paper tiger. They've left us no choice but to fight."

Despite the outcry, the rightists had no effective leader in the Senate who could influence the outcome of O'Connor's confirmation hearings and floor vote. North Carolina Republican Jesse Helms was urged to take up the cause, but remained aloof last week. Trying to stamp out the brushfire, Reagan met with Helms to assure him that O'Connor's legislative record was not clearly pro-ERA and prochoice on abortion, as her opponents had charged. Reagan declared that "I am completely satisfied" with O'Connor's attitude. In a 45-minute meeting with the President at the White House on July 1, O'Connor had told Reagan that she found abortion "personally repugnant," and that she considered abortion "an appropriate subject for state regulation."

Much of the furor was based on O'Connor's votes in the Arizona senate. Far more important than her stand on abortion—an issue on which virtually no current woman jurist could fully satisfy the New Right—was whether she was qualified to serve on the Supreme Court. On that point, legal scholars acquainted with her past and lawyers who had worked with her in Arizona were in wide agreement: while she had much to learn about federal judicial issues, she was a brilliant lawyer with a capacity to learn quickly. Indeed, her legislative background gives her a working knowledge of the lawmaking process that none of the current Justices can match.

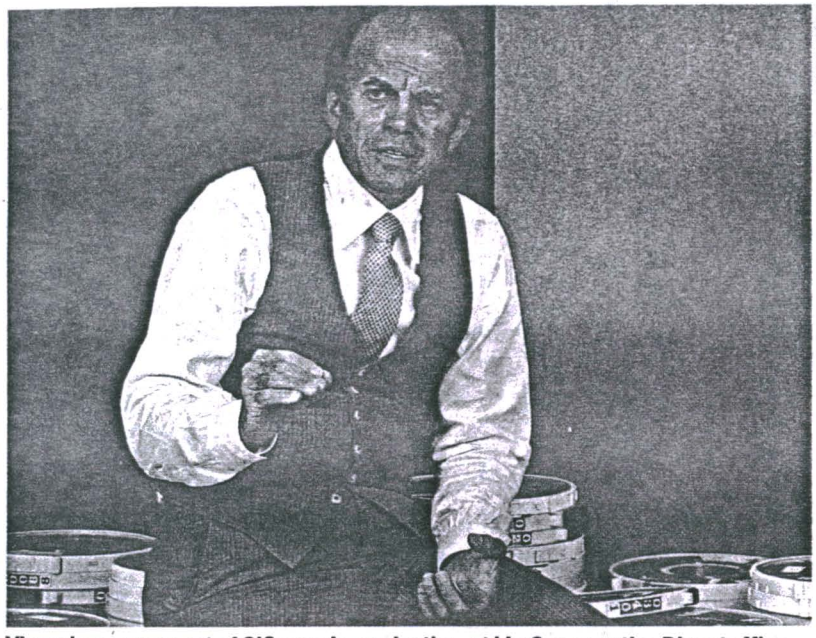
"She's entirely competent, a nominee of potentially great distinction," said Harvard Law Professor Laurence Tribe. Yale Law Professor Paul Gewirtz termed O'Connor "smart, fair, self-confident and altogether at home with technical legal issues." Michigan Law's Yale Kamisar, a judicial liberal, said of Reagan: "Give the devil his due; it was a pretty good appointment."

In Arizona, lawyers described her as a painstakingly careful attorney and a judge who ran her courtroom with taut discipline and a clear disdain for lawyers who had not done their homework. "She handled her work with a certain meticulousness, an eye for legal detail," recalled Phoenix Lawyer John Frank. Added John McGowan, another Phoenix attorney: "She's a very conscientious, very careful lawyer." Some defense lawyers, however, found O'Connor's strict demeanor on the bench so intimidating that they dubbed her "the bitch queen."

Those who have read her 125 decisions on the Arizona appeals court, which deal with such routine legal issues as workmen's compensation, divorce settlements and tort actions, see her in the mold of judges who exercise "judicial restraint." "She tends to be a literalist with acute respect for statutes," said Frank. O'Connor's colleagues consider her decisions crisp and well written. "Mercifully brief and cogent," said McGowan. "Clear, lucid and orderly," said Frank. But one Supreme Court clerk finds her writing "perfectly ordinary—no different from any other 2,000 judges around the country."

How did Reagan happen to pluck O'Connor out of the relative obscurity of a state court? For one thing, he had plenty of time to order a thorough search for prospects. Reagan learned of Stewart's intention to resign on April 21, as he recuperated from the assassination attempt. When Attorney General William French Smith and Presidential Counsellor Edwin Meese gave Reagan the news, he promptly reminded them of his promise to appoint a woman.

O'Connor's name had initially surfaced early at Justice as a possible choice to head the department's civil division. The old-boy network of Stanford had brought her to Smith's attention. Among those who recommended O'Connor, as the search for a new Justice intensified: Stanford Law Dean Charles Myers, former Stanford Professor William Baxter, who now heads the Justice Department's antitrust division, and one of Stanford Law's most eminent alumni, Justice Wil-



DIANA WALKER

Viguerie, an opponent of O'Connor's nomination, at his *Conservative Digest* office

ARTHUR—CAMERA 5

Phillips of the Conservative Caucus at press conference

The outrage on the far right was over abortion; her qualifications to sit on the high court did not really matter.

liam Rehnquist. He is clearly the court's most consistent and activist conservative, so his advice that O'Connor was the best woman for the court carried clout. When Goldwater weighed in, too, O'Connor's cause flourished.

At a White House meeting on June 23, Smith handed the President a list of roughly 25 candidates; about half of them were women. Some White House aides, in the words of a female Reagan admirer, "have a big problem in coping with professional women," and were neither enthusiastic nor optimistic about finding a qualified woman judge. The President, however, again conveyed his "clear preference" for a woman. By then, speculation about his possible choice of a woman was spreading. The nomination of a doctrinaire male conservative, which might have been his inclination, would have brought sharp criticism. Beyond that, passing over a qualified female candidate now would put even more pressure on Reagan to find one for the next vacancy —and he would get much less credit by doing it later rather than earlier.

Another factor seemed significant: one member of the Supreme Court quietly passed word to the Justice Department that some of his aging colleagues were watching the selection carefully. If it was a reasonable choice, someone they could respect, they might decide there was little to fear from Reagan's attitude toward the court and follow Stewart into retirement. Otherwise they might hang on as long as they were physically able. Two of the Justices, William Brennan, 75, and Thurgood Marshall, 73, are liberals Reagan might like to replace.

Regardless of the motives, Reagan's men moved expeditiously to seek out a woman who met the President's main criteria. She had to be both a political conservative, meaning that she had a record of support for the kinds of issues Reagan favors, and a judicial conservative, meaning that she had a strong sense of the court's institutional limitations and would not read her own views into the law. The President even cautioned his search team that he did not want any single-issue litmus test, such as a prospect's views on abortion or ERA, to exclude her automatically from further consideration. That, of course, is precisely what critics of the O'Connor nomination wished the President had done.

By late June the list of women candidates had dwindled to four: O'Connor; Michigan's Cornelia Kennedy, 57, a Carter-appointed judge on the Sixth U.S. Circuit Court of Appeals; Mary Coleman, 66, chief justice of the Michigan Supreme Court; and Amalya L. Kearse, 44, a black who sits on New York's Second Circuit Court of Appeals. At this point none of the men was still in serious contention.

Smith sent his chief counselor, Kenneth Starr, and Jonathan Rose, an Assistant Attorney General, to Phoenix on June 27 to interview O'Connor and Ar-

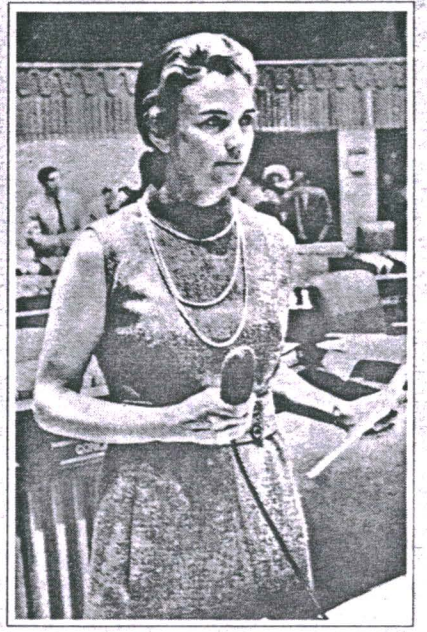
Answers to Some Accusations

"With this nomination, the Administration has effectively said, 'Goodbye, we don't need you.' " That was the angry complaint of Mrs. Connaught Marshner, head of the National Pro-Family Coalition, at a Washington press conference, where luminaries of the New Right launched an all-out attack on Ronald Reagan's first nominee to the Supreme Court. Armed with accusations against Sandra O'Connor's record in the Arizona state senate—some of them gleaned from records, others based on insinuation and surmise—the critics charged that she is soft on touchstone social problems like abortion.

None of the charges have anything to do with O'Connor's suitability for a seat on the Supreme Court; by the standards of the New Right the seven Justices who recognized the constitutional right to an abortion in the 1973 *Roe* vs. *Wade* case would be disqualified for their decision. Moreover, it is unlikely that the New Right accusations will influence many Senators.

The New Right's complaints against O'Connor center on four issues:

Abortion. Right-to-lifers have attacked O'Connor for votes she cast as a state legislator on several separate bills. In 1973 she co-sponsored a measure that would make "all medically acceptable family-planning methods and information" available to anyone who wanted it. These "methods," her critics contend, might be interpreted to include abortion. In a vote of the Arizona senate's judiciary committee the following year, O'Connor reportedly opposed a "right-to-life memorial" that called upon Congress to extend constitutional protection to unborn babies, except where the pregnant mother's life was at stake. Also in 1974, she opposed a University of Arizona stadium bond issue after a rider had been attached banning state abortion funding to the university hospital.



O'Connor as Arizona senator

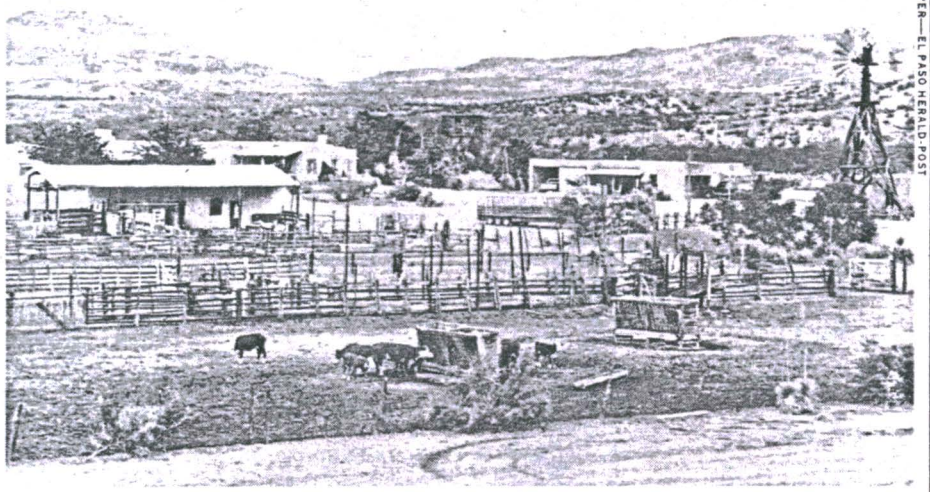
O'Connor does not recall her vote on the pro-life memorial (it was not officially recorded). She has solid, if legalistic, explanations for her other two votes. A strict constructionist, she does not believe that her family-planning measure could be interpreted to include abortion. The bond-issue rider, she believed, was not germane to the bill and therefore violated the state constitution.

Equal Rights Amendment. O'Connor, as her critics accurately charge, favored passage of the amendment by the state legislature in 1972, and two years later attempted to put ERA before the voters in a referendum. But she did not subsequently press for its passage. Her critics fail to note that other conservatives favored ERA at first and later changed their minds. In any case, Arizona is one of the states least likely to ratify ERA.

Pornography. Charges that O'Connor is soft on pornography are soft indeed. Principally, they stem from what New Rightists call her "drastic amending" of a bill that would have banned adult bookstores within a one-mile radius of schools and parks. O'Connor altered the restriction to 4,000 feet, but she clearly had no desire to corrupt youth. One possible motive: getting state law to conform with federal statutes, thus reducing the possibility of court challenges.

Drinking. In 1972, according to O'Connor's critics, she challenged a Democratic Senator who sought to remove the right to drink alcoholic beverages from a bill that would grant 18-year-olds all the rights of adulthood. The implication of the criticism is that O'Connor was soft on booze. The implication is wrong. O'Connor's point was that the proposed amendment was far too vague and a bill that included it might not withstand a challenge from the courts.

Apart from the disclosure by the White House that she described abortion as "personally repugnant," O'Connor remained silent last week about all of the New Right charges. Her suitable explanation: she would reserve her statements for the Senate confirmation hearings.



HOPPER—EL PASO HERALD-POST

The Lazy B Ranch on New Mexico–Arizona border, where O'Connor grew up

"We played with dolls, but we knew what to do with screwdrivers and nails."

izonans who knew her well. Reporting back, Starr and Rose cited her experience as a legislator, a state government lawyer, and a trial and appellate judge, which made her aware of the practicalities of each branch of government. Smith liked her judicial inclination to defer to the legislative and executive branches. She was also seen as tough on law-and-order and reluctant to rule against police on technicalities. "She really made it easy," recalled one participant in the search. "She was the right age, had the right philosophy, the right combination of experience, the right political affiliation, the right backing. She just stood out among the women."

O'Connor flew to Washington on June 29 for a breakfast the next morning with Smith in a secret hotel hideaway. That same day she met with Reagan's senior staff, including the troika of Meese, James Baker and Michael Deaver. On July 1 she was invited to the Oval Office by Reagan. The 10 a.m. meeting was unannounced and, like countless other private presidential meetings, went unnoticed by reporters. She moved quickly to break any tension in the talks by reminding the President that they had met a decade ago, when he was Governor of California and she was in the Arizona senate. They had talked about the kinds of limitations on spending being considered in both states, she recalled. Quipped Reagan with a smile: "Yours passed, but mine didn't." Then Reagan and O'Connor settled into two wing-back armchairs and chatted for 45 minutes. "She puts you at ease," observed one admiring participant in the meeting. "She's a real charmer."

Like Reagan, Sandra O'Connor has spent many of her happiest days on a Western ranch, riding horses and even roping steers. Her parents, Harry and Ada Mae Day, operated a 260-sq.-mi. cattle spread straddling the New Mexico–Arizona border. Called the Lazy B, it had been in the Day family since 1881—three decades before Arizona became a state. Her grandfather had traveled from Vermont to found it. Sandra, first of the Days' three children, was born in an El Paso hospital because the remote area in which they lived had no medical facilities; their ranch house had neither electricity nor running water. Greenlee County also had no schools that met her parents' standards, so Sandra spent much of her youth with a grandmother in El Paso, attending the private Radford School and later a public high school there.

"I was always homesick," O'Connor told TIME last week. But she loved her summers on the ranch, where she had plenty of time to read. A dog-eared *Book of Knowledge* encyclopedia, copies of the *National Geographic Magazine* and her father's assorted volumes from the Book-of-the-Month Club fed her curiosity. By the age of ten, she could drive both a truck and a tractor. "I didn't do all the things boys did, but I fixed windmills and repaired fences." Recalls her girlhood friend and cousin, Flournoy Manzo: "We played with dolls, but we knew what to do with screwdrivers and nails too. Living on a ranch made us very self-sufficient."

Sandra (right) with mother, brother and sister in 1940

Sandra finished high school at the age of 16 and did something her father had always longed to do: attend Stanford. He had been forced to give up his college plans and take over the family ranch when Sandra's grandfather died. "I only applied to Stanford and no place else," said Sandra. She rushed through her undergraduate work and law studies in just five years, graduating *magna cum laude* and joining the honorary Society of the Coif, which accepts only the best law students. She won a post on the *Stanford Law Review*, where she met her future husband John, who was one class behind her. She ranked in the top ten in her class scholastically. So too did Rehnquist, who had graduated six months earlier.

Degree in hand, O'Connor collided head-on with the legal profession's prejudice against women: "I interviewed with law firms in Los Angeles and San Francisco, but none had ever hired a woman before as a lawyer, and they were not prepared to do so." Among the firms to which she applied was Los Angeles' Gibson, Dunn & Crutcher. One of its partners was William French Smith. The firm offered to hire her—as a legal secretary.

O'Connor took a job as a deputy county attorney in San Mateo, Calif., while John, whom she had married in 1952, finished law school. When he joined the Army's Judge Advocate General's Corps, the two lived in Frankfurt, West Germany, for three years, where she worked as a civilian lawyer for the Quartermaster Corps. They returned to the U.S., moving to Phoenix in 1957, when the first of their three sons was born. All the children attended a Jesuit-run high school in Phoenix (Sandra O'Connor is an Episcopalian, her husband a former Roman Catholic). Scott, 23, graduated from Stanford last year; Brian, 21, attends Colorado College; and Jay, 19, is a sophomore at Stanford. After a brief fling at running her own law firm in a Phoenix suburb, where she handled everything from leases to drunken driving cases, she spent five years as a full-time housewife. She was a typical joiner: president of the Junior League, adviser to the Salvation Army, auxiliary volunteer at a school for blacks and Hispanics, member of both town and country private clubs. "Finally," she recalled, "I decided I needed a paid job so that my life would be more orderly."

HOPPER—EL PASO HERALD-POST

O'Connor's parents: Harry and Ada Mae Day

That was in 1965. She spent four years as an assistant attorney general in Arizona. Appointed by the Maricopa County Board of Supervisors to fill a vacancy as a state senator in 1969, she ran successfully for the senate in 1970 and 1972. Her 17 admiring Republican colleagues (all but two were men) elected her majority leader in 1972.

O'Connor's devotion to detail soon became legendary. She once offered an amendment to a bill merely to insert a missing, but important, comma. As majority leader, she learned to use both tact and toughness to cajole colleagues into achieving consensus on divisive issues. When the usual flurry of eleventh-hour legislation delayed adjournment of the Arizona legislature in 1974, one committee chairman was furious at what he considered O'Connor's failure to finish up the senate's business. Said he to O'Connor: "If you were a man, I'd punch you in the mouth." Snapped the lady right back: "If you were a man, you could."

While critics focus on her ERA and abortion votes, O'Connor notes that her legislative achievements ranged from tax relief to flood-control funding to restoring the death penalty. "She worked interminable hours and read everything there was," says Democratic State Senator Alfredo Gutierrez. "It was impossible to win a debate with her. We'd go on the floor with a few facts and let rhetoric do the rest. Not Sandy. She would overwhelm you with her knowledge."

Although highly successful in the senate, O'Connor grew restless and decided to return to law. She ran and won a spot on the Maricopa County Superior Court bench in 1974. Explained her senate colleague Anne Lindeman: "At the end of her term she was at a crossroads. She had to choose between politics and the law. She was more comfortable with the law." Said O'Connor about the law: "It is marvelous because it is always changing."

As a trial judge, O'Connor was stern but fair. At least twice, colleagues recall, she advised defendants to get new attorneys because their lawyers had been unprepared. After a Scottsdale mother of two infants pleaded guilty to passing four bad checks totaling $3,500, she begged for mercy from O'Connor, claiming the children would become wards of the state. The father had abandoned the family. O'Connor calmly sentenced the middle-class woman to five to ten years in prison, saying, "You should have known better."

Foot Soldiers of the Law

The paramount mission and destiny of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

It was also the doctrine of the Supreme Court in 1873, when Justice Joseph Bradley wrote those words in a decision upholding the right of Illinois to deny a license to practice law to the first woman applicant, Myra Bradwell. Women, the court in effect ruled, could be barred from becoming lawyers.

Nothing dramatizes the changes that have taken place in the past 108 years more than the nomination of Sandra O'Connor to the bench where Bradley once sat. Today some 50,000 women are going beyond their "paramount mission and destiny" by pursuing careers as lawyers. They represent about 10% of the profession, and the proportion is growing: one out of three students now graduating from law school is a woman. Female attorneys are no longer considered "a bizarre thing," as Shirley Hufstedler, Secretary of Education under Jimmy Carter, recalls they were when she was one of two women graduating from Stanford University's law school in 1949 ("It was a bumper crop that year"). Nor do law firms now tell female applicants that "we just don't hire women; the secretaries might resent it," as one informed Orinda Evans, 38, now a federal district judge in Georgia, as recently as 1968. In addition, women no longer restrict themselves to the genteel specializations of real estate and probate law, as they did when former Watergate Prosecutor Jill Wine Banks finished Columbia Law School in 1968.

Eleanor Holmes Norton

Yet women are still "the foot soldiers of the profession," says Eleanor Holmes Norton, former chairman of the Equal Employment Opportunity Commission. "You don't find many in the upper reaches of bench or bar." Recent studies have shown that women account for only 2% of the partners in the 50 largest U.S. law firms, 5% of the nation's full professors of law, and about 5% of all judges. Nor has a woman ever served as president of a state bar association or on the powerful 23-member board of governors of the American Bar Association, though one is expected to be elected next month.

Carla Hills

The main difficulty, most female attorneys agree, is that the boom in women law graduates has essentially come about since 1970, when women accounted for only 2.8% of the profession. Thus there has not been enough time to yield a sufficient pool of experienced practitioners. "You can't appoint women judges if you don't have a large number of women lawyers who are trained," says Carla Hills, Secretary of Housing and Urban Development under President Ford. Until 1977, only ten women had been named to the federal bench. During the Carter Administration, partly because of the establishment of 152 new judgeships, 41 women were named. "That," says Brooksley Landau, chairman of the A.B.A. federal judiciary committee, "was a real revolution."

A key step in women's progress toward top legal posts is attaining partnership in the large, traditional law firms that dominate lucrative corporate practice and carry considerable prestige within the profession. Susan Getzendanner, 42, a former partner in the Chicago firm of Mayer, Brown & Platt, who last December became the first woman U.S. district court judge in Illinois, notes that some major law firms are currently hiring 40% to 50% women. But, she cautions, "their clients haven't changed. The business world is still male-dominated. It will be very interesting to see when women in law firms become the client controllers."

Women lawyers and judges greeted the O'Connor nomination last week with a mixture of enthusiasm and skepticism. "If she is superior, she will help the next generation of women," says Banks, "but she will be judged more harshly than men." As Hufstedler sees it, having a woman on the highest court has "significant symbolic importance." But she too is wary: "There can be such a thing as a token woman on the Supreme Court to avoid addressing women's issues." For most observers, the real test is whether Ronald Reagan is about to depart from his early appointments pattern by naming women to a number of other important posts. On that point, the jury is awaiting the evidence.

Shirley Hufstedler

But when she got back to her chambers she broke into tears.

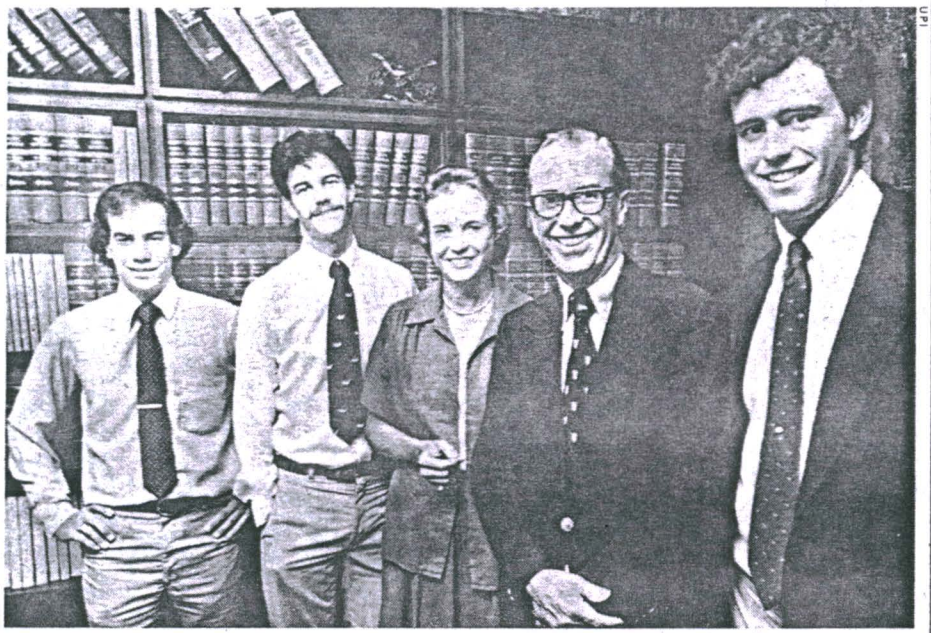
Judge O'Connor did not hesitate to order the death penalty for Mark Koch, then 23, who had been found guilty of murder for agreeing to knife another man in return for a $3,300 fee. The contract killing stemmed from a dispute over drugs. (Koch has since appealed the verdict and been granted a new trial.)

When state Republican leaders urged her to run against Democratic Governor Bruce Babbitt in 1978, she declined. Instead, she was retained as a judge in Maricopa County and, after only eleven months, was nominated to the Arizona Court of Appeals by Babbitt, who denies trying to sidetrack a potentially dangerous opponent. Says Babbitt: "I had to find the finest talent available to create confidence in our new merit system. Her intellectual ability and her judgment are astonishing."

On the appeals court, O'Connor faced no landmark cases. But she did manage to cut the court's case load by persuading her former colleagues in the senate to modify laws involving workmen's compensation and unemployment insurance. Generally, she upheld trial judges, dismissing appeals from defendants who claimed they had been denied a speedy trial, refused transcripts, and other technicalities. In an article for the current issue of the *William and Mary Law Review*, she urged federal judges to give greater weight to the factual findings of state courts, contending that when a state judge moves up to the federal bench, "he or she does not become immediately better equipped intellectually to do the job."

But if O'Connor's own intellectual gifts are widely praised, the self-assured woman, who is of medium height and wears such sensible clothes as suits with silk blouses and matching ascots, is neither dull company nor dour. "She never forgets she's a lady—and she'll never let you forget," says Attorney McGowan. Yet Stanford Vice President Joel P. Smith recalls her as "the best dancer I've ever danced with" when he knew her as a member of the Stanford Board of Trustees. She does a nifty two-step and enjoys country music. A superb cook specializing in Mexican dishes, she, along with her husband, is a popular partygiver and -goer. While the prosperous Phoenix lawyer regales guests with Irish jokes told in a brogue, she jumps in to lift stories along, without ever stepping on the punch lines. She golfs weekly (her handicap is 18), plays an average game of tennis and, typically, works intensely at both.

It is that striving for perfection that most impresses acquaintances. When she and John helped complete their lavish home in suburban Paradise Valley, where houses cost $500,000 or more, one friend was amazed to find them both soaking adobe bricks in coat after coat of milk. "It's an old technique," O'Connor explained. "But I don't know why you use skim and not homogenized milk." Her father, who is 83, jokes about her diligence. "She's so damned conscientious," he says, "she wouldn't even give me a legal opinion. As a judge she can't, so she refers me to her husband." Still, her mother sees a humility in Sandra, despite her accomplishments, explaining, "She isn't the type who would try to high-hat anyone." A friend recalls an example. When O'Connor was president of Heard Indian Museum, which holds an annual and overcrowded handcraft sale, her son Scott wanted one item badly but had broken his leg in a skiing accident. Instead of using her clout to bypass a long line of buyers, his mother spent several hours sitting on a camp stool to await her turn.



UPI

Sandra and John O'Connor (center) with sons Jay, Brian and Scott

Could she possibly be a foe of "traditional family values?"

How will O'Connor's appointment, assuming she is confirmed, affect the decisions of the high court? The security of lifetime tenure can liberate Justices to see themselves in a new perspective, unencumbered by the pressures of climbing toward the top. They are there. Justices have often confounded the Presidents who appointed them with unpredictable decisions. After Oliver Wendell Holmes ruled against Teddy Roosevelt in a key antitrust case, the President, who had appointed Holmes, fumed: "I could carve out of a banana a judge with more backbone than that." Said Dwight Eisenhower about his selection of Earl Warren: "The worst damn fool mistake I ever made." Harry Blackmun stunned Richard Nixon by writing the court's majority opinion in *Roe* vs. *Wade* (1973), the decision that legalized abortion.

Based on what little they know about O'Connor, legal scholars expect her to fit in neatly with a court that is sharply split in philosophy, tends to analyze each case on strictly legal merits, and has pioneered only in selected areas of the law. A Justice Department official says approvingly of O'Connor: "She is not leaping out to overrule trial court judges or state lawyers or to craft novel theories. Her opinions are sensible and scholarly."

O'Connor shares with Rehnquist more than a Stanford background; both are Republicans from Arizona who have Barry Goldwater's favor. Nonetheless, legal scholars doubt that O'Connor will become a clone of the court's leading conservative. They do not expect a pair of "Arizona twins" to develop and to hang together any more consistently than have the now-splintered "Minnesota twins," Burger and Blackmun. Broadly speaking, the court now has two liberals, Brennan and Marshall, in a standoff facing two conservatives, Rehnquist and Burger. The decisions thus often depend on how the other so-called fluid five divide on a given case. And that rarely can be foreseen.

Blackmun, who has moved increasingly to the left, probably works harder than the other judges on his decisions, which often reflect his *ad hoc*, personal sense of right and wrong. The courtly Virginian, Lewis Powell, is regarded as the great balancer, in the middle on almost every case. John Paul Stevens, the most original thinker on the court, is an iconoclastic loner who likes to file separate opinions that challenge old assumptions even when his conclusions coincide with those of his brothers. Byron White, the best pure lawyer on the court, is unpredictably liberal and unpredictably conservative, but meticulously careful about facts and precedent. O'Connor is generally expected to fit into that shifting middle, as her predecessor Stewart did; thus her appointment, at least initially, is likely to be less decisive a factor than if she had replaced one of the men on either the left or the right.

At the very least, some court observers hope that her consensus-building experience as a legislator, with its premium on dealing with personalities, as well as the fact that she is a woman, will dissolve some of the aloofness among the brethren. There is little personal rapport and togetherness on the current court —and the Justices tend to communicate with one another only in writing. The result is often a series of individual opinions based on conflicting rationales that confuse the impact of a majority decision. Powell has called the court "nine one-man law firms." A touch of warmth and sociability could improve the court's effectiveness, no matter what direction it takes.

Some experts see the current court as a transitional tribunal poised between the social activism of the distinctly liberal Warren court and whatever might lie ahead. Despite four appointments made by Richard Nixon and one by Gerald Ford, the Burger bench has retreated surprisingly little from the pioneering decisions on school integration, procedural rights for criminal defendants, and the "one man, one vote" principle of legislative apportionment. Moreover, the Burger court has broken some new ground. It was unanimous in restricting Nixon's Watergate-era claims of Executive privilege. It has upheld affirmative action to correct past racial inequities in a moderate way. It has advanced women's rights against discrimination in employment to a notable degree.

Former Deputy Solicitor General Frank Easterbrook, professor of law at the University of Chicago, cites some less familiar areas where the Justices put their stamp. "They have completely overhauled antitrust law, by unanimous votes in many cases," he says. "They have turned securities law upside down. They have greatly clarified the law of private rights of action—who can sue whom. They have done wonders at rationalizing the law on double jeopardy." Easterbrook, however, is less happy with court rulings on Fourth Amendment questions dealing with search and seizure: "They're all over the lot. They haven't the foggiest notion of what they're doing."

In presenting Sandra O'Connor to the press, Reagan described his right to nominate Supreme Court Justices as the presidency's "most awesome appointment" power. True enough, and chances are that he will have the opportunity to exercise that power again. Whether or not Reagan is able to shape "his" court is as problematical as it was for most of his predecessors. What is important is that he had the imagination and good sense to break down a useless discriminatory barrier by naming a woman to the nation's Supreme Court—at last. America waits to see what place in legal history will be carved out by this daunting daughter of Arizona pioneers. *—By Ed Magnuson. Reported by Joseph J. Kane/Phoenix and Evan Thomas/Washington*

The Presidency/Hugh Sidey

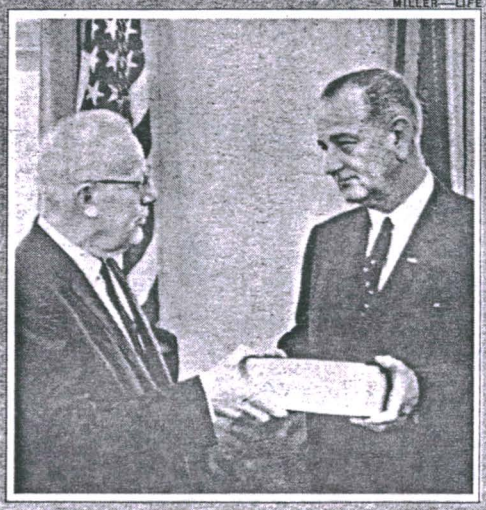
Citadel on a Hill

When the antiabortion shouting is finally muffled, as it will be, the nomination of Sandra O'Connor to the Supreme Court will emerge as the balanced and responsible presidential action it was intended to be. Dozens of Ronald Reagan's aides, acting more like clinical psychologists than bureaucrats, probed her shadings of emotion, her intellect, her theology. O'Connor's background and that of her family were searched by computer. She was, to a remarkable degree, judged by a man who sees more and more each day that he must be President to a nation and not to a single-interest group.

One might expect that Reagan's first nominee to the Supreme Court would have had a certain intimacy with the White House or some special link to the Oval Office. But that is not the case. O'Connor is as independent and self-contained as any court nominee of the past two decades. She may reflect the White House philosophy, but she is not beholden to it, not bound to any mission or personal power adventure. Her nomination may be certification of a fact that has been dawning: the court is truly a citadel on the Hill—a part of Government but removed from it, as powerful as ever but beyond the reach of partisanship.

It was not so long ago that the man in the Oval Office considered the court either an adversary to be intimidated or a part of his private preserve, peopled with enough Justices from the political system to allow room for discreet wheeling and dealing behind the scenes.

MILLER—LIFE



L.B.J. gets Warren Report from its author

Lyndon Johnson leaps to mind. He was a product of the tumultuous Roosevelt years, when the court was more enemy than friend. The goal was to get enough of the old gang aboard to have the court with you instead of against you. A molder of men, Johnson knew how to get along with his court. Tom Clark and William Douglas were longtime New Deal buddies, and he kept the friendships going over lunch and on the phone. Hugo Black was out of the Senate tradition, and Earl Warren was a former Governor, the ultimate breed of political survivor. When L.B.J. wanted to clear the air about the Kennedy assassination, he never worried more than a second or two about the sanctity of the court. He went after Warren with his full guile and authority, rejecting Warren's first shocked refusals to head a special commission and simply wearing the man down with the old Johnson "treatment." Deciding that he wanted Justice Arthur J. Goldberg to be his U.N. Ambassador, Johnson reckoned that since he had pushed Goldberg's appointment (by Kennedy) to the court, he had a right to take him off. Using his powerful personality, L.B.J. persuaded Goldberg to take the lesser job. Johnson was still working the old game when he named his longtime crony and lawyer, Abe Fortas, to succeed Warren as Chief Justice. That one fell through because of Fortas' conflict-of-interest problems and Johnson's unhappy departure from the White House.

Richard Nixon harbored some of Johnson's political sentiments about the purposes and authority of the court. The Senate rejection of his nominees, Clement Haynsworth and G. Harrold Carswell, is now history. Nixon was in utter despair when he learned that his own appointee, Chief Justice Warren Burger, had ruled that Nixon had to surrender the White House tapes. That was a pivotal drama in the Watergate scandal. Things were changing.

Modern media had discovered the power of the court, the entertainment value of the obscure doings in the shadowy marble chambers at the far end of Pennsylvania Avenue. The Justices became good television; the collection of gossip in the book *The Brethren* was worth big money on the publishing market. In singular fashion, the court was raised still higher on its public pedestal.

In an extraordinary way, this deeper awareness and understanding of the court have been focused in Reagan's time to produce the nomination of O'Connor. She seems to be a person in harmony with the White House. But she also gains credence as a potential Justice by her distance from the White House that proposed her.

The Gender of Justice

GEORGE F. WILL

Sen. Howell Heflin is a Democrat from Alabama, land of magnolias and crinolines. The nomination of Sandra O'Connor moved him to announce that women are "more motherly" and "sweeter" than men. I don't think that is the consciousness-raising message this episode is supposed to transmit. But at least Heflin took a manly stab at the impossible task of explaining why sex should be considered in selecting judges.

Sen. Howard Baker says Ronald Reagan showed "courage." (Was Orwell's book titled "1981"? Will there be anything left of the language by 1984?) Actually, Reagan would have needed reckless courage to nominate a man after his embrace, during the campaign, of the doctrine of sexual entitlements in the judiciary. But he was bold in one particular. He dug about as deep as any President ever has into the state judiciary for a nominee. But, then, his sexual criterion excluded about 95 per cent of the law-school graduates in the relevant age group (45-60).

Some persons will call it courageous, others will call it reckless to pick a nominee who has only a thin record of rulings and published reflections on the crucial questions that have divided the Court and the country, questions concerning the allocation of powers in the Federal system. That she supported Reagan against Gerald Ford in 1976 may prove to Reagan her civic virtue, but it reveals little about how she will handle the "equal protection" clause. Having shown little inclination toward jurisprudential theory, she is unlikely to supply what this Court most needs. It needs coherence, grounded in a theory of judicial review strictly related to the text and structure of the Constitution and to the philosophy of representative government. Certainly Reagan is taking a lot on faith regarding this person who will be shaping constitutional law long after his Administration is over.

Campaign Problem: Recent Republican presidents have been notably incompetent at selecting Justices faithful to the presidents' professed judicial values. Justices Warren, Brennan, Blackmun and Stevens have been among the, well, surprises. Discerning the significance of the rulings and other writings of a prospective nominee is a skill that few presidents have had occasion to acquire. And Republicans are apt to think of themselves as too robustly "practical" to worry about ideas. Furthermore, presidents and their advisers often cannot suppress their inclination to use even judicial appointments to solve political problems. In the current case, the selection began as a problem left over from a political campaign, and ended with a nominee whose record allows remarkably few inferences about her likely rulings.

Most presidents make only about a dozen really crucial decisions in a term. Any choice of a Supreme Court nominee is such a decision. It is a choice that tests whether a President's understanding of government is as deep as his determination to change government. Time will tell Reagan's grade on this test.

Meanwhile, theologians may ponder Barry Goldwater's analysis of Christian duty ("I think every good Christian ought to kick Falwell right in the ass"). Certainly the Moral Majority, of which the Rev. Jerry Falwell is leader, has shattered the Olympic record for impudence. It wants O'Connor to meet with right-to-life groups to "reassure" them. Are judicial nominees to be screened by interest groups, as Congressional candidates are? Perhaps that makes sense if you accept the notion (encouraged by Reagan's behavior) that the Court is a representative institution. But about what would O'Connor "reassure" the groups? They probably have in mind her personal opposition to abortion. The White House has mischievously made much of this personal opposition. But surely the point of the search for a truly judicial temperament is to find someone whose personal views will not intrude upon Constitutional deliberations.

Reagan's chosen nominee will enhance the Court. His method of choosing did not.

Reagan could not responsibly nominate anyone who would please right-to-life extremists. They want to counter judicial excesses of the 1970s with excesses of the 1980s. They want to undo the 1973 "discovery" of a "privacy right" to abortion, which is a laudable aim. But they want to do so by "discovering" that the framers of the Fourteenth Amendment intended to extend its protection to fetuses. And what are right-to-lifers revealing about their understanding of the judicial function when they assess O'Connor's qualification for the bench by citing positions she took while a legislator? Again, they seem to expect and want a legislating Justice.

Judicial Review: The Court, more than any other American institution, depends for its authority on the perception of it as a place where principle reigns. Judicial review is somewhat anomalous in a system of popular government, and its legitimacy depends on the belief that those who exercise it do so only as construers of the text and structure of a document that allocates powers primarily to other institutions. That belief cannot withstand a selection process that suggests that Justices somehow represent this or that group or interest.

Women are generally more interesting and valuable members of society than men, and America would be improved by more representation of women's experiences and values in representative institutions. But Reagan, by making gender so important in such an important judicial selection, encouraged the pernicious tendency to regard the Court as such an institution. Presidents whose actions encourage such thinking cannot complain when the Court acts like a little legislature. Surely the idea of "women's view of constitutional law" is as confused as the idea of "women's mathematics."

Reagan's chosen nominee will enhance the Court. His method of choosing did not. Next Monday Reagan reaches the six-month mark. In just one-eighth of his term he has fulfilled his two most indefensible campaign promises. He has lifted the grain embargo, at a cost to the public's understanding of his foreign policy. And he has used a sexual criterion in selecting a Justice, at a cost to the public's understanding of the Court. Those campaign promises, rashly made and improvidently kept, were monkeys on his back. Such monkeys are disagreeable appendages, and are distractions. With them gone, he should find it easier to sit back and think.

0 *The Weekly Newspaper for the Profession* National Law Journal MONDAY, JULY 20, 1981

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Mulls Family Fate

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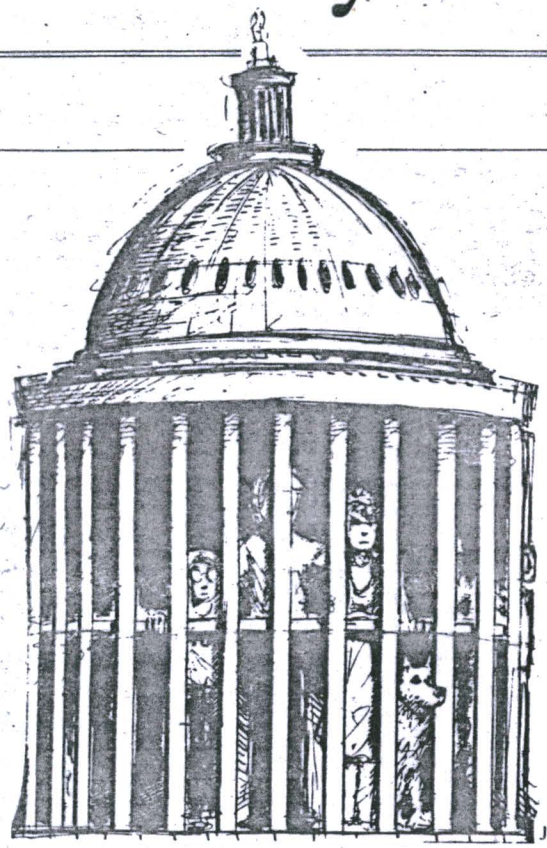


JAMES KIMAK

Chuck Manatt's California Synergy

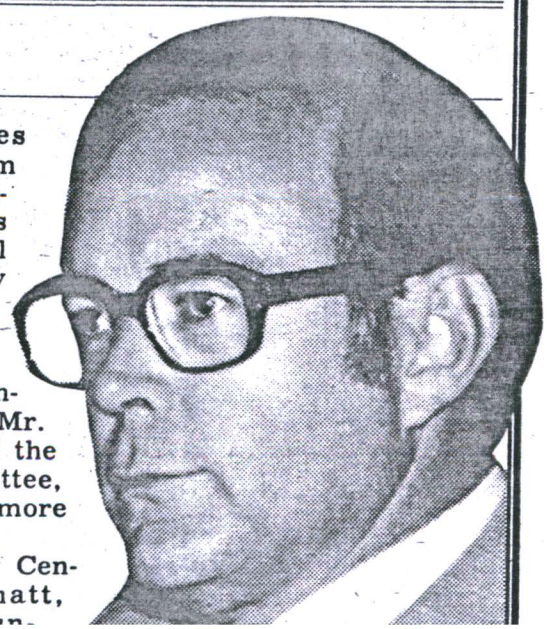
Banking on Politics

Y MARLENE ADLER MARKS
ecial to The National Law Journal

OS ANGELES — Charles aylor Manatt is no Iowa farm oy anymore. Instead, the mil-onaire lawyer-banker has ecome the stuff of local ythology: his career, his law rm and his bank have lately ken spectacular leaps rward.

In February, after two un-ccessful shots at the job, Mr. anatt became chairman of the emocratic National Committee, post he has coveted for more an a decade.

Last month, his 90-lawyer Cen-ry City law firm, Manatt, elps Rothenberg & Tun-



O'Connor: Flexible . . . And Tough

Right Promises Fight, But 'Nobody's Going To Push Her Around'

BY RUTH MARCUS
AND DAVID F. PIKE
National Law Journal Staff Reporters

WASHINGTON — The first woman nominated to the U.S. Supreme Court is likely to be tough on criminal defendants, deferential to legislators and lower court judges, but not rigidly bound by a conservative philosophy.

That is the portrait of Arizona Court of Appeals Judge Sandra Day O'Connor that emerged last week from a study of her writings and from interviews with lawyers familiar with her work on both the trial and appellate benches.

President Reagan broke 191 years of all-male tradition when he announced last week that he would nominate Judge O'Connor to replace Justice Potter Stewart, who retired earlier this month.

THE PUBLISHED OPINIONS of Judge O'Connor on such issues as criminal and family law are summarized on page 10 — and an Arizona bar poll of lawyers who appeared before her, reprinted on page 11, raises some questions about her judicial temperament while giving her generally high marks.

But as opposition to the 51-year-old Phoenix Republican intensified from conservative groups concerned about her stance on abortion and the Equal Rights Amendment, it looked increasingly uncertain whether Judge O'Connor would be able to join her brethren by the time the 1981-82 term begins Oct. 5.

Though Judge O'Connor's eventual

Continued on page 10

50+ Lawyers?

O'Connor's Flexibility v. the Right's Wrath

Continued from page 1

confirmation seems assured, there are also a number of procedural hurdles to overcome before she becomes the 102d Supreme Court justice. The Federal Bureau of Investigation's background investigation, which takes several weeks, got into full swing only last week. An aide to the Senate Judiciary Committee said panel action on the nomination would not begin until at least seven days after formal word of the nomination is received, and not before the committee staff completes its own investigation.

In addition, because the Reagan administration — in an effort to keep the news quiet — did not consult with the American Bar Association Standing Committee on the Federal Judiciary before announcing the nomination, the committee had a late start on its evaluation of Judge O'Connor's professional competence, judicial temperament and integrity. The ABA's report, which is to be sent to the attorney general, is expected to take at least two weeks to compile.

Because of these delays, it is unlikely that the Senate committee will be able to clear the nomination before the traditional August congressional recess, several sources said.

A major focus of the committee hearings is expected to involve positions Judge O'Connor reportedly took as a state senator, backing the ERA and opposing restrictions on abortion. The Moral Majority, the National Right to Life Committee and other conservative groups have asked Judge O'Connor to recant such positions, and Sen. Jesse Helms, R-N.C., who will be meeting with the judge this week, says he is "skeptical" about the nomination.

But Judge O'Connor's home senators, Republican Barry Goldwater and conservative Democrat Dennis DeConcini are strongly behind the nomination, along with other powerful senators.

In nominating Judge O'Connor, President Reagan praised her as "a person for all seasons," and the diversity of her experience seems to have been a big plus in the eyes of the White House.

Judge O'Connor, who graduated third in her Stanford Law School class in 1952 behind Justice William H. Rehnquist, spent four years as an assistant Arizona attorney general and five years in the state senate, where she became the first woman majority leader. In 1974 she was elected a judge on the trial-level Superior Court and in 1979 appointed to the appellate

and not to enact new law by judicial fiat."

Judge O'Connor seems to fit that bill. Her opinions — dry expositions on such mundane subjects as workers' compensation and landlord-tenant disputes — nearly always defer to determinations by the legislature, agency or lower court, noting that it is not for appellate judges to make factual or policy decisions.

But Judge O'Connor has never written on the more lofty, broad constitutional questions that confront the Supreme Court, and her views on such matters are less known than those of a more experienced jurist or academic.

No Controversial Cases?

"You can't judge her philosophy because most cases on the appellate bench were industrial accidents and similar cases," said Dean Alan A. Matheson of the Arizona State University College of Law. "I don't recall any controversial cases."

The cases Judge O'Connor has decided, however, do seem to indicate a conservative judicial philosophy.

"It can be argued as a matter of public policy [that state regulations] should be amended to provide that absence from employment due to *any* lawful period of incarceration in connection with a criminal charge is grounds for a discharge of the employee for misconduct," Judge O'Connor wrote in an unemployment compensation case.

"Nevertheless, we are required to view the evidence in light of the statutes and administrative regulations which have been adopted," she added. "It is a matter for the legislature and department of economic security to review and make any changes in the existing statutes

How She's Ruled in the Past

IN HER 18 months on the appellate bench, Judge Sandra O'Connor authored 29 opinions, many of them in such areas as workers' compensation, unemployment compensation and landlord-tenant relations, which rarely come before the Supreme Court. Here are her decisions in those areas that the high court frequently deals with:

• *Arizona v. Morgan*, 625 P.2d 951, Feb. 10, 1981.

Judge O'Connor refused to overturn a conviction for assault with a deadly weapon on any of the grounds the defendant cited, including introduction of "fruits of the poisonous tree," speedy trial violations, failure to produce a witness, failure to instruct the jury on lesser included offenses, and prosecutorial misconduct in the closing argument.

The defendant had argued that the prosecutor's allusion to her failure to testify violated her Fifth Amendment rights. Judge O'Connor disagreed, saying that, taken in context, the remark, which did not directly note the defendant's silence, didn't raise any unfavorable inference; in any case, she noted, the defendant's own lawyer had highlighted her lack of testimony.

In addition, she said, the argument that the gun and bullets introduced in the case should be suppressed as "fruit of the poisonous tree" — certain statements to police had been suppressed — wasn't made at trial and therefore wasn't a proper issue for appeal.

• *Arizona v. Schoonover*, 626 P.2d 141, Jan. 29, 1981.

Judge O'Connor refused to overturn the conviction of a man who pleaded guilty to sexual assault of his 15-year-old daughter and then appealed his seven-year sentence on the grounds that the trial court had refused to allow him to depose his wife and other daughter prior to his sentencing hearing.

Though she disagreed with the state's view that the trial court had no discretion to grant presentencing discovery, Judge O'Connor said the defendant had shown no prejudice in this case.

• *Arizona v. Blevins*, 623 P.2d 853, Jan. 27, 1981.

Judge O'Connor overturned a conviction for leaving the scene of an accident because the trial judge failed to instruct the jury whether to consider the driver's knowledge of the accident — he said he hadn't known anyone was hurt — in deciding the verdict.

• *Arizona v. Brooks*, 618, P.2d 624, Sept. 9, 1980.

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• *Arizona v. Brooks*, 618, P.2d 624, Sept. 9, 1980.

Saying the trial court had based its ruling on "substantial evidence," Judge O'Connor upheld the armed robbery conviction of a man who appealed a lower court's refusal to suppress his confession and various physical evidence.

• *Arizona v. Miguel*, 611 P.2d 125, May 8, 1980.

A man sentenced to seven years on four counts of armed robbery was entitled to a jury of 12, not just eight persons, Judge O'Connor said in overturning his conviction. Juries of 12 are required in any case where the potential sentence for all crimes exceeds 30 years, even if the individual sentences are less than that, she said.

• *In re the Marriage of Priscilla Andrews*, 612 P.2d 511, May 29, 1980.

A trial judge exceeded his authority in ordering a wife to repay her husband $2,115.67 in mortgage and tax payments on the mobile home she had been awarded in a divorce settlement, Judge O'Connor said.

• *In re the Marriage of Patricia Marie Bugh*, 608 P.2d 329, March 11, 1980.

A wife isn't entitled to have her husband's post-divorce workers' compensation payments considered in the divorce settlement because such payments are like post-divorce earnings.

• *Blair v. Stump*, 617 P.2d 791, Sept. 16, 1980.

Judge O'Connor struck down Arizona's requirement that tenants post bond for twice their annual rent in order to appeal judgments to regain possession for non-payment of rent. Such a requirement violates the rights of both indigent and non-indigent defendants, she said.

• *Lewis v. Swenson*, 617 P.2d 69, June 3, 1980.

An attorney who asks a question of an expert witness that results in a mistrial can't be sued for damages by the opposing litigant, whatever his motive, Judge O'Connor said in a medical malpractice case declared a mistrial after an expert witness discussed soaring insurance premiums. "To hold otherwise would have a chilling effect on the ability of counsel to vigorously represent the client," she said.

• *Terry v. Lincscott Hotel Corp.*, 617 P.2d 56, July 24, 1980.

The Scottsdale Hilton posted the proper notice about a safe and wasn't negligent in failing to warn guests whose jewelry was stolen from their rooms about recent thefts in the hotel, Judge O'Connor ruled.

• *Helena Chemical Co. v. Coury Bros. Ranches Inc.*, 616 P.2d 908, June 5, 1980.

A trial judge who granted a new trial in a suit for payment was right the first time. Any complaints about lack of time to cross-examine a key witness must be on the record to be appealed, Judge O'Connor said.

• *J.C. Penney Co. v. Arizona Department of Revenue*, 610 P.2d 471, April 10, 1980.

The state's rental occupancy and education excise tax is constitutional, Judge O'Connor said. "If a rational basis for the rental occupancy tax can be conceived, the classification is not in violation of the equal protection clause . . . The fact that the legislature might have chosen to equalize the economic burden by different and simpler methods does not require a finding that the method chosen by the legislature is arbitrary and invalid," she wrote.

• *Cooper v. Arizona Western College District Governing Board*, 610 P.2d 465, March 4, 1980.

The actions of a college board were void because it didn't open certain meetings or give adequate notice of them. But the actions taken in secret and reaffirmed at an open meeting were valid, Judge Connor said.

• *Fernandez v. United Acceptance Corp.*, 610 P.2d 461, Jan. 24, 1980.

A collection agency that repeatedly called a debtor, her neighbors and her employer, and threatened to repossess her car was guilty of invasion of privacy, Judge O'Connor said.

• *Ott v. Samaritan Health Service*, 622 P.2d 44, Oct. 9, 1980.

A trial judge should have allowed plaintiffs in a medical malpractice case to introduce the cross-examination part of the deposition of a dead witness and erred in failing to respond to the jury's request for clarification, Judge O'Connor said in granting a new trial.

in 1952 behind Justice William H. Rehnquist, spent four years as an assistant Arizona attorney general and five years in the state senate, where she became the first woman majority leader. In 1974 she was elected a judge on the trial-level Superior Court and in 1979 appointed to the appellate court, the state's second highest.

Observers expect Judge O'Connor's legislative experience to stand her in good stead at the court, both because of her training in compromise and because the court spends so much of its time reviewing legislative actions. She will be the first justice with such expertise since former Alabama Sen. Hugo L. Black sat on the court.

"We were intrigued by her legislative experience," said Kenneth Starr, counselor to Attorney General William French Smith. "It's a very important quality, one that set her apart from others who were also well qualified."

When President Reagan announced Justice Stewart's retirement last month, Deputy White House Press Secretary Larry Speakes said the administration was looking for candidates who "share one key view: the role of the court is to interpret the law

"Nevertheless, we are required to view the evidence in light of the statutes and administrative regulations which have been adopted," she added. "It is a matter for the legislature and department of economic security to review and make any changes in the existing statutes and regulations." *Magma Copper Co. v. Arizona Dept. of Economic Security*, 626 P.2d 602.

Likewise, in a workers' compensation case, Judge O'Connor refused to overturn an administrative law judge's dismissal of a claim because the petitioner hadn't appeared at the deposition, saying, "We cannot find that the hearing judge abused his discretion." *Nolden v. Industrial Commission of Arizona*, 622 P.2d 60.

But she condemned as a "clear abuse of discretion" a lower court judge's ruling in a child-support case that the wife should reimburse her husband for the mortgage and tax payments he made on her mobile home. "There is no statutory authority giving the trial court jurisdiction to enter judgment for a civil contract claim" in such a case,

Continued on following page

Arizona Bar 'Scorecard'

JUDGE Sandra Day O'Connor placed "in the upper middle" of the 12 Arizona Court of Appeals judges rated by lawyers in a statewide poll last summer, according to the State Bar of Arizona.

The poll, conducted every other year since 1976 by the state bar and the Maricopa County (Phoenix) Bar Association, solicits the views of lawyers on those judges facing a retention election "as a public service," and on those judges half-way through their four-year terms as a 'scorecard' on performance" to aid them in evaluating their conduct.

In order to participate in the poll, lawyers must sign an affidavit stating that they have practiced before the judge during the previous two years. The 368 attorneys who rated Judge O'Connor gave these responses to the poll's 10 questions:

1. Is the judge's age and health such that the judge can effectively discharge the duties of judicial office?
96 percent said Yes.

2. Does the judge have sufficient integrity to carry out the duties of judicial office?
97 percent said Yes.

3. Should this judge be retained in office?
90 percent answered Yes.

The remaining seven questions dealt with these "evaluation criteria":

4. Attentiveness to the arguments of counsel.
Excellent-Good — 86%.
Satisfactory — 14%.
Poor-Very Poor — 1%.

5. Fair toward all litigants.
Excellent-Good — 71%.
Satisfactory — 28%.
Poor-Very Poor — 1%.

6. Courteous to litigants and lawyers.
Excellent-Good — 53%.
Satisfactory — 41%.
Poor-Very Poor — 7%.

7. Knowledge of the law.
Excellent-Good — 78%.
Satisfactory — 22%.
Poor-Very Poor — 1%.

8. Consideration of briefs and authorities.
Excellent-Good — 81%.
Satisfactory — 17%.
Poor-Very Poor — 1%.

9. Quality of written opinions.
Excellent-Very Good — 81%.
Satisfactory — 19%.
Poor-Very Poor — 0%.

10. Judicial temperament and demeanor.
Excellent-Good — 55%.
Satisfactory — 41%.
Poor-Very Poor — 5%.

(Note: Some of the percentages do not equal 100 because figures were rounded off to the nearest number.)

— David F. Pike

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he wrote. *In re the Marriage of riscilla Andrews*, 612 P.2d 511.

In the criminal law area, while not lways on the side of the prosecution, udge O'Connor has seemed generally eluctant to overturn cases based on laims of Fourth Amendment violaons. And in a case involving a motion o suppress a confession — the defenant said he was drunk and denied

findings of the trier of fact in both criminal and civil cases. She has a very strong sense of the need for stability in the law."

Arizona lawyers familiar with Judge O'Connor's work, however, noted that her judicial conservatism still allows her to be flexible and fair.

"I think it's an excellent choice and I say so as a Democrat, a liberal and a criminal defense attorney," said former Maricopa County Public

in the criminal law area, while not always on the side of the prosecution, Judge O'Connor has seemed generally reluctant to overturn cases based on claims of Fourth Amendment violations. And in a case involving a motion to suppress a confession — the defendant said he was drunk and denied making the statement; the policeman testified to the opposite effect — Judge O'Connor sided with the policeman and refused to overturn the conviction. *Arizona v. Brooks*, 618 P.2d 614.

"She's not quick to strike down the conduct of the police," Mr. Starr noted. "The language in her opinions showed a presumption of the validity of proper police conduct."

Judge O'Connor expanded on the deference theme and gave a hint of how she would perform as a federal judge in a recent William and Mary Law Review article on state and federal court jurisdiction.

'State Judges Rise to the Occasion'

Federal courts ought to defer to state courts when that is possible, she suggested, citing with approval a recent decision by her former classmate, Justice Rehnquist, that federal courts should ordinarily presume state courts' factual findings are correct in constitutional challenges to state criminal convictions. *Sumner v. Mata*, 101 S. Ct. 761 (1981).

"State judges do in fact rise to the occasion when given the responsibility and opportunity to do so," Judge O'Connor wrote.

"It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court . . . We should allow the state courts to rule first on the constitutionality of state statutes."

Justice Department officials "read all her appellate court decisions and we were impressed by her deep-seated sense of judicial restraint," Mr. Starr said. "She is willing to defer to the expertise of administrative agencies and not to substitute her own judgment. And she is willing to abide by the stability in the law."

Arizona lawyers familiar with Judge O'Connor's work, however, noted that her judicial conservatism still allows her to be flexible and fair.

"I think it's an excellent choice and I say so as a Democrat, a liberal and a criminal defense attorney," said former Maricopa County Public Defender John Foreman, who practiced before Judge O'Connor on both the trial and appellate levels.

"I've seen her reverse herself in cases where she saw evidence that changed her mind further down the line," Mr. Foreman said. For example, he said, in one case Judge O'Connor imposed the death penalty, then granted the defendant a new trial when she learned the prosecution had withheld evidence.

The new candidate for the Supreme Court is not a hard-line judge who consistently imposed long jail terms, Mr. Foreman said. "I've seen her dish out some really stiff sentences," but in once case of his, he noted, "she took a chance on" a defendant convicted of eight sales of heroin and possession and sale of stolen property and put him on probation for five years instead of in jail. (The client, Mr. Foreman said, is now in college, on the dean's list and holding a steady job.)

"She is not an ideologue," said

Continued on page 34

tion of the decision.

ADMINISTRATIVE LAW. Newsweek v.

damages awarded in housing discrimination suit ruled proper and inexcessive.

evidence under plain view doctrine.

Continued on following page

FOIA REQUESTS

SELECTED INFORMATION ACT REQUESTS

■ **SECURITIES AND EXCHANGE COMMISSION**

FOI Office: (202) 523-5530

Data re: Sidney Gurtov, former registered representative with the Hallandale, Fla., office of Loeb, Rhoades, Hornblower & Co. 4-3. **Req. by:** Lewis S. Fischbein Esq., Krauer & Martin, of New York City. No information on file. 4-20.

Data re: investigation of Intercontinental Diversified Corp., others. 3-30. **Req. by:** Paul G. Mahon Esq., Intertel, of New York City. Will be made public after processing. 4-20.

Data re: Boeing Corp., International Controls Corp., others. 3-17. **Req. by:** Margaret K. Pfeiffer Esq., Sullivan & Cromwell, of Wash., D.C. Partially granted. 4-20. Exemption: 7A.

Data re: investigation file concerning International Television Film Productions Inc., others. 3-11. **Req. by:** Jean Harvey Pope Esq., Law Office of Jerold W. Heller, of Woodland, Wash. Unable to retrieve records from Federal Records Center. 4-20.

Data re: 1978 acquisition of Bertea Corp. by Parker-Hennifin Corp. 3-17. **Req. by:** Thomas J. Madden Esq., Kaye, Scholer, Fierman, Hays & Handler, of Wash., D.C. Partially granted. 4-20. Exemption: 5.

Data re: investigation of Peabody International Corp. 3-11. **Req. by:** John L. Grandsaert Esq., Hunt & Hunt, of San Francisco. Partially granted. 4-20. Exemption: 5.

Data re: investigation of Commonwealth Western Corp. 3-27. **Req. by:** Robert D. Levy Esq., Conway & Levy, P.A., of Albuquerque, N.M. 4-17. Exemption: 7A.

Data re: investigation of American Institute Counselors Inc. 3-24. **Req. by:** Joseph H. Walsh Esq., White, Inker, Aronson, Connelly & Norton, P.C., of Boston. Partially granted. 4-20. Exemption: 7C.

Data re: investigation of Coastal States Gas Corp. 4-9. **Req. by:** John E. Evans Esq., Barnett & Alagia, of Louisville, Ky. Partially granted. 5-1. Exemption: 7A.

HERE ARE the nine exemptions to the government's duty to disclose information under the Freedom of Information Act, 5 U.S.C. Sec. 552: *(1) National security; (2) Agency personnel practices; (3) Special statute; (4) Trade secrets; (5) Inter-intra agency memoranda; (6) Personnel files; (7) Law enforcement investagatory records: (A) enforcement proceeding interference, (B) fair trial bar, (C) privacy invasion, (D) confidential source protection, (E) investigation disclosure, (F) risk to law official; (8) Financial institution date; (9) Gas and oil wells.*

Data re: Florida Power Corp. 4-10. **Req. by:** Frederic J. Milberg Esq., Milberg Weiss, Bershad & Specthrie, of San Diego. Partially granted. 5-1. Exemption: 5.

Data re: American Bakeries Co., others. 4-9. **Req. by:** John D. Seiver Esq., Cole, Raywid & Braverman, of Wash., D.C. Granted; request still being processed. 5-1.

Data re: Conny E. Trangas. 3-30. **Req. by:** Daniel C. Brown Esq., of Tallahassee, Fla. No information on file. 5-1.

Data re: investigation of Samuel A. Harwell. 4-8. **Req. by:** David M. Brodsky Esq., Schutte, Roth & Zabel, of New York City. Denied. 5-1. Exemption: 7A.

Data re: Cantor, Fitzgerald Securities Corp., others. 4-6. **Req. by:** John M. Sikes Jr. Esq., Macey & Zusmann, of Atlanta. Granted; request still being processed. 5-1.

Data re: FOIA requests concerning Saxon Industries Inc. 4-17. **Req. by:** Michael E. Goldberg Esq., Skadden, Arps, Slate, Meagher & Flom, of New York City. Granted. 5-7.

Data re: Maurice W. Furlong, Wesley Sanborn and Koala Record Co. 4-21. **Req. by:** Thomas W. Van Dyke Esq., Linde, Thomson, Fairchild, Langworthy, Kohn & Van Dyke, of Kansas City, Mo. No information on file. 5-8.

Data re: investigation of Paine Webber Inc. and Paine Webber, Jackson & Curtis Inc. 4-16. **Req. by:** Burton L. Knapp Esq., Lowey, Dannenberg & Knapp, P.C., of New York City. Denied. 5-7. Exemption: 7A.

Data re: First Multi Fund of America Inc., others. 4-16. **Req. by:** Milton Mound Esq., of New York City. Granted; request still being processed. 5-8.

Data re: depositions regarding Fuqua Industries Inc. 4-11. **Req. by:** Robert H. Friou Esq., Wisehart, Friou & Koch, of New York City. No information on file. 5-8.

Data re: illegal payment investigation file concerning General Tire and Rubber Co. 4-20. **Req. by:** Robert Bender Esq., Shearman & Sterling, of New York City. Will be made available at a later date. 5-8.

O'Connor Faces a Fight

Continued from page 11

Mark Harrison, a Phoenix lawyer and former president of the Arizona bar who has known Judge O'Connor for several years. "I have appeared before her in a Senate committee, a trial court and the appellate court and I found her very intellectually independent, fiercely independent."

Added Mary Schroeder, a 9th U.S. Circuit Court of Appeals judge and a Democrat whose place Judge O'Connor took on the Arizona appeals court: "She was respected as a good trial judge who followed the law."

Judge O'Connor was also known as a well-prepared and tough judge with a serious demeanor on the bench and little tolerance for attorneys who made mistakes or appeared before her unprepared.

"I've seen her really roast some lawyers' backsides," Mr. Foreman said.

Judge O'Connor's exceedingly businesslike attitude seems to be the major grounds for complaint about her. "Some people criticize her as too businesslike, too serious, that she lacks a sense of humor, Mr. Harrison noted.

This impression was fortified in a statewide poll last summer of lawyers who had practiced before Judge O'Connor. While rating her high in every other area, the lawyers gave Judge O'Connor a bare majority in the "excellent" and "good" categories for her courteousness to litigants and lawyers and her judicial temperament and demeanor. (See accompanying story.)

But Judge O'Connor's tough and forceful personality could serve her well during the heated in-fighting that sometimes marks the justices' conferences.

'Sexist Boors'

"Nobody's going to push her around," Mr. Foreman predicted. Though Judge O'Connor may face especially rough sledding at the court because she will be the first woman there, she's already had to deal in Arizona with "some of the biggest, gaping, most sexist boors on earth," he noted.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 19, 1981

NOMINATIONS SENT TO THE SECRETARY OF THE SENATE:

Sandra Day O'Connor, of Arizona, to be an Associate Justice of the Supreme Court of the United States, vice Potter Stewart, retired.

Michael H. Newlin, of Maryland, a Foreign Service Officer of Class one, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Democratic and Popular Republic of Algeria.

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 21, 1981

STATEMENT BY THE PRESIDENT

I want to express my gratitude to the Senate for unanimously approving today the nomination of Judge Sandra Day O'Connor as an Associate Justice of the United States Supreme Court.

Judge O'Connor is, as I have come to know personally, a very warm and brilliant woman who has had an outstanding career in Arizona. I know the Court and the Nation will benefit both from her lifetime of work, service and experience in the legal profession, and from her solid grasp of our Constitution, which she reveres. This truly is a happy and historic day for America.

Judge O'Connor's judicial philosophy is one of restraint. She believes, as she said in her Senate testimony, that a judge is on the bench to interpret the law, not to make it. This philosophy of judicial restraint needs representation in our courtrooms and especially on the highest court in our land.

Let me also say that Judge O'Connor's confirmation symbolizes the richness of opportunity that still abides in America -- opportunity that permits persons of any sex, age or race, from every section and every walk of life to aspire and achieve in a manner never before even dreamed about in human history.

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