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Public Information Office
Supreme Court of the United States
Washington, D. C. 20543

October 14 1981

Mr. POWell A. Moore

Deputy Assistant to the President for Legislative Affairs (Senate)
The White House

Dear Mr. Moore,

Thank you for your letter of September 28 relaying from Paula Kassel of New Directions for Women a request for an interview with Justice O'Connor. I have written my regrets today to Ms. Kassel mentioning the immense pressures at this time on Justice O'Connor at the start of this Court's new Term. Sincerely

A handwritten signature in blue ink, appearing to be 'Barrett McGurn', with a stylized, looping initial 'B' and a trailing line.

Barrett McGurn

OCT 19 1981

447-3165 447-7895 9/9/81
Dick —

According to
Doug Bandow, OPD,
the NY Anti-Abort-
ion candidate
reported RR some-
how qualified his
stand on abortion.
But that was not
official. All official
docs. attached. MSD

RONALD REAGAN

July 27, 1979

The Honorable Henry J. Hyde
1203 Longworth House Office Building
House of Representatives
Washington, D.C. 20515

Dear Henry:

I want you to know that I have long admired your courage, determination and articulate championship of the vital cause of the unborn child in America today. I realize there is a great difference of opinion regarding the subject of abortion. People on both sides of this issue have very sincere, strongly held views.

I personally believe that interrupting a pregnancy is the taking of a human life and can only be justified in self-defense — that is, if the mother's own life is in danger.

In 1976 the Republican Party platform protested the January 22, 1973 Supreme Court decision which overruled the historic role of the states in legislating in the areas concerning abortion and took away virtually every protection previously accorded the unborn. Later decisions have intruded into the family structure through their denial of the parents' obligations and right to guide their minor children. The platform called for a continuance of the public dialogue on abortion, and expressed support of the efforts of those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children.

I fully concur with our platform.

But the process of amending the Constitution is lengthy and difficult. As in other cases where I favor additions to our Constitution — to limit federal spending, and to balance the federal budget -- my preference would be to first use the legislative process. If that fails, I would hope that Congress itself would propose the amendment and send it to the states for ratification. As a last resort I support the right of the people of the United States to call a constitutional convention for the specific purpose of proposing an amendment.

In the meantime, I am opposed to using federal tax money to pay for abortions in cases where the life of the mother is in no danger.

Sincerely,



RONALD REAGAN

BCC: MCA, EM, JS, PDH

10960 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA 90024

Pre 9/80



REAGAN for PRESIDENT

901 South Highland Street
Arlington, Virginia 22204-
(703) 685-3400

ABORTION

I personally believe that interrupting a pregnancy is the taking of a human life and can be justified only in self-defense -- that is, if the mother's own life is in danger.

The January 22, 1973 Supreme Court decision which overruled the historic role of the states in legislating in the areas concerning abortion took away virtually every protection previously accorded the unborn. Later decisions have intruded into the family structure through their denial of the parents' obligations and right to guide their minor children. I support enactment of a constitutional amendment to restore protection of the unborn child's right to life.

In the meantime, I am opposed to using federal tax money to pay for abortions in cases where the life of the mother is in no danger.

Reagan & Bush

Reagan Bush Committee

901 South Highland Street, Arlington, Virginia 22204 (703) 685-3400

9/80

- ABORTION -

Ronald Reagan believes that interrupting a pregnancy is the taking of a human life and can be justified only in self-defense-- that is, if the mother's own life is in danger.

The January 22, 1973 Supreme Court decision which overruled the historic role of the states in legislating in areas concerning abortion took away virtually every protection previously accorded the unborn. Later decisions have intruded into the family structure through their denial of parents' obligations and right to guide their minor children.

Ronald Reagan supports enactment of a constitutional amendment to restore protection of the unborn child's right to life.

In the meantime, Ronald Reagan opposes using federal tax monies to pay for abortions in cases where the life of the mother is in no danger.

*From Office
of Policy
Development*

SPECIAL GROUPS POLICY

*From
Meg*

I. Women

A. Correct federal statutes

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"I will ask the existing National Commission on the Status of Women to submit annually a list of federal laws which subvert women's equal rights. I will then work with Congress to revise or repeal those statutes, or to enact new equal rights legislation as required." (Equal Rights, 1/80)

B. Liaison with Governors

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"I will also appoint a special assistant to serve as liaison with the nation's 50 governors to deal solely with equal rights issues. This individual will help the governors establish a procedure similar to the one I will recommend for the federal government; that is, identification and correction of laws which discriminate on account of sex." (Statement, 7/15/80)

C. Appoint a woman to the Supreme Court

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"I am announcing today that one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can possibly find, one who meets the high standards I will demand for all court appointments. It is time for a woman to sit among our highest jurists." (Statement, 10/14/80)

D. Appoint women to other federal judgeships

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"I will also seek out women to appoint to other federal courts in an effort to bring about a better balance on the federal bench."

II. Abortion

A. Constitutional Amendment

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"Ronald Reagan supports enactment of a constitutional amendment to restore protection of the unborn child's right to life."
(Abortion Policy Paper, 9/80)

B. Funding

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"In the meantime, Ronald Reagan opposes using federal tax monies to pay for abortions in cases where the life of the mother is in no danger." (Abortion Policy Paper, 9/80)

III. Elderly

137

"Governor and Mrs. Reagan will encourage private groups to work with senior citizens, through programs such as the

From
Rep. Platform

Abortion

There can be no doubt that the question of abortion, despite the complex nature of its various issues, is ultimately concerned with equality of rights under the law. While we recognize differing views on this question among Americans in general — and in our own Party — we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children. We also support the Congressional efforts to restrict the use of taxpayers' dollars for abortion.

We protest the Supreme Court's intrusion into the family structure through its denial of the parent's obligation and right to guide their minor children.

share affirm that no individual because of race, sex, advanced origin or religion, or economic should not be jeopardized by rely on quotas, ratios, and numbers in favor of others, thereby rendering discriminatory.

to assure equal treatment in job mortgage access, and housing.

heritage to the nations of Eastern, long seen their values neglected. election year praise given to Ethnic part of government. We must make government policy. The Republic that these Americans, along with ability to share the power, as well as use of our Asian-American citizens

commitment to Native Americans. We relationship with them and we reaffirm support the assumption by Indians, plans and planning which will affect influence on those plans and deci-

United States since 1898. The Republic of the United States citizens of a fully sovereign state after they good alternative is the only logical United States citizens of Puerto constitution, with full recognition of the citizens' right to retain their we pledge to support the enactment of the people of Puerto Rico to exercise nation at the earliest possible date

the people of Puerto Rico will be mission bill. This bill will provide territorial fiscal system to that of a enable the new state of Puerto Rico with the rest of the states and to a state.

may be necessary to permit American territories of the Virgin Islands and in national elections.

WP

JUDY MANN 3/11/81

Abortion: Reagan Fails To Search for Balance

PRESIDENT RONALD Reagan has come out in support of the Human Life Bill, which is the latest ploy by the antiabortionists to get around the 1973 Supreme Court ruling legalizing abortions. In so doing, Reagan has aligned himself, not with a search for moderation and conciliation in a menacingly divisive national debate, but with a horde of biological storm troopers whose invasion of Americans' privacy should be of mounting concern to every reasonable citizen.

They are no longer satisfied with banning the use of federal funds for abortions, an area in which they have an arguable interest in that it involves taxpayers' money. The antiabortionists have gone far beyond that — to the point where they are actually debating with the fanatical zeal of true believers whether their "Human Life" legislation ought to contain language allowing an exception to the ban on abortions if the procedure is necessary to prevent the death of a woman.

The antiabortion bill is different from the anti-abortion constitutional amendment in that it requires only a majority of both houses to become law, as opposed to a two-thirds vote of both houses required to send an amendment to the states for ratification. The purpose of both is to ban abortions throughout the land. The bill would circumvent the Burger Supreme Court, which defined persons as those who have been born, by redefining "persons" to include fetuses and extending to them the right not to be deprived of life without due process of law contained in the 14th Amendment.

See MANN, C3, Col. 3

Abortion: Reagan Fails To Search for Balance

MANN, From C1

Hard-liners in the movement do not even want to legislate abortions to save the life of the mother if she has an ectopic pregnancy or a cancerous uterus, saying that to do so would open the door for other medical exceptions. Such procedures aren't actually abortions anyway, argues Notre Dame Law School professor Charles E. Rice, since the death of the fetus is an "unintended effect of an operation independently justified by the necessity of saving the mother's life." They are "moral even under Catholic teaching," he notes in a minority report on this controversy published in the *Right to Life News*. The majority report argues that stipulating the exceptions in the law is the best way of limiting abortions to those instances.

In case anyone is wondering what role religion plays in this debate, here is how Rice concludes his report: "The abortion rulings of the Supreme Court are not primarily wrong because they misinterpreted the Constitution. Rather, they are wrong in their essence because they deny the reality that innocent life is nonnegotiable simply because it comes from God."

"There can be," concludes Rice, "no compromise on abortion."

If the antiabortionists have a disagreement on one area, they are firmly in agreement on another, which is that these Human Life bills and amendments define life as beginning from the moment of fertilization and that all the constitutional protections that go to the mother, for example, extend to the fertilized egg. This means that something microscopic, something totally incapable of surviving on its own, would be entitled to all the protections that a woman is. Something not too far removed from the gleam in the father's eye would have the same rights as the father.

At last Friday's press conference, Reagan said he was not opposed to contraception. Asked to clarify his remarks, he merely elaborated on abortion to the extent that no one listening could figure out where he stands. His allies, however, are making it very clear that they oppose certain popular forms of contraception. In an "open letter" to members of Congress, Judie Brown, president of the American Life Lobby, argues that birth control pills that make the uterus "hostile to a fertilized egg" kill a "brand new human being." The intrauterine device, which prevents the egg from implanting in the uterus, "kills a brand new human being." "Chemicals and devices which kill are not contraceptives," she writes. "They perform abortions!"

A 1980 survey by the National Opinion Research Center at the University of Chicago shows that the vast majority of Americans believe abortions should be legal under certain circumstances. Eighty percent or more of those polled favor abortion if there is evidence of serious defect in the fetus, if the mother's health (not to mention her life) is endangered, or the mother becomes pregnant due to rape. More than 40 percent believe abortion should be legal if the woman simply doesn't want any more children,

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The overwhelming majority of Americans, according to that poll, have decided that there should be compromise in the area of abortion and that there is justification for striking a balance between the welfare of the mother and the continued existence of a fetus. Instead of leading a search for that balance, of helping the nation find a consensus, Reagan has lent the weight of the White House to a group of uncompromising fanatics who are seriously out of step with what the majority of Americans are thinking. Six weeks after swearing to "protect, preserve and defend the Constitution of the United States," Ronald Reagan has officially joined forces with those who are trying to subvert the constitutional amendment process and a Supreme Court ruling in order to get their way.

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

by William Bentley Ball^{*}

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

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

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

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

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

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

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

Comment: "Mrs. O'Connor is said to be pro-abortion."

Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

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

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

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

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

What are the candidate's views on

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

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

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

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

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

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

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

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

September 1, 1981

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? The only way for the Senate to learn of these [views] is to "inquire of men on their way to the Supreme Court something of their views on these questions." 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S Rep No 884, 75th Cong. 1st Sess (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, *United States v Darby*, 312 US 100, 35 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941), and in later cases construing it, including *Jewel Ridge Coal Corp. v Local 6167, UMW*, 325 US 161, 39 L Ed 1534, 65 S Ct 1063 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly crit-

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

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

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

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

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

Justice Jackson in *McGrath v Christensen*, 340 US 162, 95 L Ed

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

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

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

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

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

they are related to counsel and

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

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

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

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a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for

Christensen would have preferred not to argue before Mr. Justice Jackson;* that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

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

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

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

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

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

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

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, e.g., the opinion of Mr.

Justice Harlan, joining in *Lewis v Manufacturers National Bank*, 364 US 603, 610, 5 L Ed 2d 323, 81 S Ct 347 (1961). Indeed, there is weighty authority for this proposition even when the cases are

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

Mr. Frank sums the matter up this way:

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

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

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

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

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

409 U.S. at 838-39.

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

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

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

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

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

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

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

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

IV. An Illustrative History of Advice and Consent Hearings

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

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

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

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

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

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

Senator Ervin. . . . And if the Constitution means the things that were announced in the opinions handed down on May 20, 1968, why one of the smart judges who served on the Supreme Court during the preceding 178 years did not discover it?

Justice Fortas. Senator, again, much as I would like to discuss this, I am inhibited from doing it. I respectfully note, if I may, sir, that the granddaddy of all these cases, in my judgment . . . was the famous Scottsboro case. It was in that case that Mr. Justice Sutherland said that the critical period in a criminal prosecution was from arraignment to trial --- arraignment to trial. I think that can fairly be characterized as dictum. But it was that statement that I think has been sort of the granddaddy of all this.

Now here I have done something I should not have done. I am sorry, sir.¹⁷

Senator Mathias. . . . Now, I am wondering if, No. 1, you think these cases should be overruled?

Mr. Powell. I would think perhaps, Senator Mathias, it would be unwise for me to answer that question directly. . . . Indeed on the facts in Escobido, I think, the Court decided the case, plainly correctly, but our concern was with respect to the scope of the opinion rather than with the precise decision.¹⁸

Mr. Rehnquist. Well, I certainly understand your interest, Senator. The expression of a view of a nominee on the constitutionality of a measure pending in Congress, I feel the nominee simply cannot answer.

. . . .

Mr. Rehnquist. Let me answer it this way: To me, the question of Congress' authority to cut off the funds under the appropriation power of the first amendment is so clear that I have no hesitancy in saying so, because I do not regard that as a debatable constitutional question.

Mr. Rehnquist. Well, I suppose one is entitled to take into account the fact that public education in 1954 is a much more significant institution in our society than it was in 1896. That is not to say that that means that the framers of the 14th amendment may have meant one thing but now we change that, but just that the rather broad language they used now has a somewhat different application based on new development in our society.

Senator Bayh. . . . Let me ask you this: Do you feel that busing is a reasonable tool or a worthy tool or that it is a useful instrument in accomplishing equal educational opportunities, quality education for all citizens?

Mr. Rehnquist. I have felt obligated to respond with my personal views on busing because of the letter which I wrote and I have done so with a good deal of reluctance because of the fact that obviously busing has been and is still a question of constitutional dimension in view of some of the Supreme Court decisions, and I am loath to expand on what I have previously said.

My personal opinion is that I remain of the same view as to busing over long distances. The idea of transporting people by bus in the interest of quality education is certainly something I would feel I would want to consider all the factors involved in. I think that is a legislative, or at least a local school board, type of decision. 19

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

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

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

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

any use for the "living Constitution."²⁷

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

- ¹Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 657-58 (1970).
- ²Id. at 660.
- ³Id. at 663-64.
- ⁴Rehnquist, The Making of a Supreme Court Justice, Harvard Law Record, October 8, 1959, at 7,8.
- ⁵Id. at 10.
- ⁶See, e.g., J. Harris, The Advice and Consent of the Senate 303, 313 (1953); Kutner, Advice and Dissent: Due Process of the Senate, 23 DePaul L. Rev. 658 (1974); Note, 10 Stanford L. Rev. 124, 143, 147, (1957)
- ⁷Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, on S.158, The Human Life Bill, Thursday, May 21, 1981, at 111 (testimony of Professor Tribe).
- ⁸Id. at 114 (testimony of Professor Van Alstyne).
- ⁹Blackmun Hearings at 12.
- ¹⁰Fortas II Hearings at 105-06.
- ¹¹Powe, The Senate and the Court: Questioning a Nominee, 54 Tex. L. Rev. 891, 893, 895.
- ¹²Id. at 891-92, quoting Stewart Hearings at 43-44.
- ¹³Fortas II Hearings at 123.
- ¹⁴95 Cong. Rec. 13803 (1949).
- ¹⁵Blackmun Hearings at 60. Justice Blackmun was responding to a series of hypothetical questions posed by Senator Fong. In a separate statement in the committee report on the Blackmun nomination, Senator Robert Byrd (D., W.Va.) recounted in detail how Senator Fong "commendably continued to elicit" the nominee's views on specific questions, and endorsed Blackmun's nomination because of his "strict constructionist" views. Blackmun Report at 12-13.
- ¹⁶Stewart Hearings at 41-60.
- ¹⁷Fortas II Hearings at 173.
- ¹⁸Powell Hearings at 231-32.
- ¹⁹Rehnquist Hearings at 33, 168-69.
- ²⁰Marshall Hearings at 54-63.

- 21 Brennan Hearings at 17-18; Stewart Hearings at 63. Justice Stewart had commented extensively on a number of Supreme Court decisions prior to this assertion of his right not to comment on such decisions. Id. at 11-62.
- 22 Fortas II Hearings at 181.
- 23 Harlan Hearings at 139.
- 24 Frankfurter Hearings at 107-08.
- 25 Brennan Hearings at 39-40; Fortas II Hearings at 110-15; Marshall Hearings at 156-157; Rehnquist Hearings at 138.
- 26 Brennan Hearings at 40; Marshall Hearings at 54; Fortas II Hearings at 105-106; Blackmun Hearings at 74.
- 27 Haynsworth Hearings at 75; Carswell Hearings at 62 ("The law is a movement, not a monument.").
- 28 Stewart Hearings at 61-65; Haynsworth Hearings, passim; Carswell Hearings, passim; Rehnquist Hearings, passim.
- 29 Carswell Hearings, passim; Parker Hearings, passim; Rehnquist, supra note 4, at 8.
- 30 Carswell Hearings, passim.
- 31 Parker Hearings, passim; Rehnquist, supra note 4, at 8-9.
- 32 Rehnquist Hearings at 70-73.
- 33 See, e.g., sources cited in note 28 supra.
- 34 Black, supra note 1, at 657-58.