Phoenix draft

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

ABORTION:

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

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

GUN CONTROL:

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

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

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

BAR POLL RESULTS:

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

PORNOGRAPHY:

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

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

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

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

PROSTITUTION:

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

ERA:

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

If the ERA were to become a part of our Constitution, and were I to be sitting on the Supreme Court at the time, I would expect to be passing on any questions as to its effect only after very careful thought and study of the amendment. I would, however, venture some very general observations. I think it logical to assume that ratification of the ERA would lock into place the sometimes fluctuating level of scrutiny which the Supreme Court has applied to governmental classifications based on sex. Whether the new standard would more resemble the standard articulated by the Supreme Court under the Equal Protection Clause in Craig v. Boren, 429 U.S. 190 (1976), -- such classifications must be substantially related to an important government interest -- or the even higher standard applied by the Supreme Court in cases involving racial discrimination -- "strict scrutiny" -- is not a question I feel I can answer at this point in time.

STATEMENT OF SANDRA DAY O'CONNOR

SEPTEMBER 9, 1981

Mr. Chairman and Members of the Committee

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

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

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

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

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

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

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

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

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

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

(Introductions to follow)

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

I would now be happy to respond to your questions.

Draft

Mr. Chairman and Members of the Committee

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I suppose that few, if any, of those previously nominated to the Supreme Court ever realistically dreamed of ~~&~~ expected that they would ever sit as a member of our highest Court. ~~Rather, I imagine they found themselves, in the main, as I have in the case of my own nomination:~~

a ~~somewhat surprised beneficiary of a series of basically unrelated circumstances.~~ I expect those who have preceded me were awed and fascinated, as I am, by the unknown challenges that lie ahead. If ~~my nomination is~~ confirmed by the Senate, I will apply ~~whatever~~ all of my abilities ~~I may have~~ to insure that our government is preserved and that justice under our Constitution and the laws of this land, will always be the foundation of that government.

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

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

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

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

First, I would like to introduce my oldest son, Scott. Scott graduated from Stanford two years ago. He was our state swimming champion. He is now a pilot, a budding gourmet cook and a businessman.

My second son, Brian, is a senior at Colorado College. He is our adventurer. He is a sky-diver with some four hundred jumps, including

many team jumps and a sky-dive off of the top of El Capitan at Yosemite. I look forward to his retirement from that activity so he can spend more time enjoying his status as a pilot.

My youngest son, Jay, is a sophomore at Stanford. He is our writer. He acted as assistant press secretary and then press secretary for me for a few days after the news of the nomination surfaced.

Finally, I would like to introduce my husband, John. We met on a Law Review assignment at Stanford Law School and will celebrate our 29th wedding anniversary in December. He has been totally, unreservedly and enthusiastically supportive of this whole endeavor.

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

I would now be happy to respond to your questions.

D R A F T

~~CONFIDENTIAL~~ MEMORANDUM

TO: General Smith
Sandra O'Connor
Max Friedersdorf

FROM: Powell A. Moore

SUBJECT: Senate Confirmation

Before leaving for vacation, I want to provide a status report on the confirmation of the President's nominee to the Supreme Court. The situation remains in good shape. Although such Senators as Denton, East, Grassley, Helms, Humphrey and Jepsen should be watched closely, there are no Senators committed against the nominee and obviously indicating an intention to lead the opposition to this nomination.

An informal survey of several Senate offices indicated that the favorable reaction to the nomination far outweighs the negative reaction. Contrived mail campaigns are quickly recognized and the negative mail seems to fit this category having little or no impact.

In view of this favorable situation, a cautious strategy is dictated, and if any problems develop, they will develop as an outgrowth of the hearings.

The following are elements of the hearing strategy:

1. Introduction of the nominee -- It is customary for the Senators from the home state nominee to provide the introduction. In this case, since the Arizona delegation is small,

I suggest that with the Chairman's permission and Senator Goldwater's permission, we expand this to include the entire delegation. This would bring in a Democrat, who served with Judge O'Connor in the Arizona legislature; a liberal Democrat; and the Dean of the House Republicans. Each one could provide a five minute statement.

2. The Opening Statement -- Judge O'Connor is currently working on her opening statement. It would be helpful if she could get a first draft of her opening statement in the hands of each of us as soon as possible.

3. Questions and Answers -- Judge O'Connor will return to Washington on September the 2nd, a full week in advance of her hearings. During this time, she will finalize her preparation for the hearing with Bob McConnell and Ken Starr playing a primary role.

4. Outside Witnesses -- Attached is a handwritten list of individuals and organizations that have requested an opportunity to testify that has been provided to me by Linton Lyde, Chief Counsel of the Senate Judiciary Committee. Obviously, other requests can be expected such as one from the American Bar Association.

It seems to be the consensus among all of us that there is little to be gained from encouraging additional outside witnesses and no one, at this time, should make requests of anyone to testify. A number of people have indicated to Judge O'Connor that they

would like to testify in her behalf. In these cases, we should ask the Counsel for the Senate Judiciary Committee to provide them with letters saying that they should notify him if they would like to testify. The Mayor of Phoenix has indicated to Rich Williamson, the President's Assistant for Intergovernmental Affairs, that she would like to testify in Judge O'Connor's behalf. I intend to pass the word back through Rich Williamson that her testimony is welcomed and she her interest to Dee Lyde.

5. Response to Senator Helms' Letter -- One outstanding issue remains the response to a letter that was handed to Judge O'Connor to Senator Helms during the courtesy calls. An interim response has been provided and a complete response should be awaiting Senator Helms when he returns at the conclusion of the recess on September 9th. Ken Starr is working on this response.

6. Other Events -- Chairman Thurmond and Mrs. Thurmond intend to have several social events during the week of the hearing. They include the following:

A. Luncheon on September 9th with the following guests:

Chief Justice and Mrs. Burger

General and Mrs. Smith

Judge O'Connor and Mr. O'Connor

Senator and Mrs. Mathias

Senator and Mrs. Biden (?)

B. Luncheons on Thursday and Friday with half the Judiciary Committee on one day and the other half on the other day.

C. A tea at 4:00 p.m. on Friday inviting the wives of all Senators and of members of the Cabinet.

Memorandum

Subject	Date
Judge O'Connor's Questionnare for Judicial Nominees	August 28, 1981

To

Jonathan Rose
Assistant Attorney General
Office of Legal Policy

Sherrie Cooksey
Special Assistant for
Legislative Affairs
The White House

From

Carolyn B. Kuhl
Special Assistant to
the Attorney General

CBK

Attached is the corrected version of Section III of Judge O'Connor's Questionnaire for Judicial Nominees. It has been sent to the Senate as Sherrie directed.

Attachment

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The Constitution itself establishes the guiding principle of separation of powers in its assignment of legislative power to Congress in Article I, executive power to the President in Article II, and judicial power to the Supreme Court in Article III. This principle requires the federal courts scrupulously to avoid making law or engaging in general supervision of executive functions. As Justice Frankfurter wrote in FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940), "courts are not charged with general guardianship against all potential mischief in the complicated tasks of government."

The function of the federal courts is rather to resolve particular disputes properly presented to them for decision. In this regard, the jurisdictional requirements that a true "case or controversy" exist and that the plaintiff have "standing" help guarantee that the court does not transgress the limits of its authority. The separation of powers principle also requires judges to avoid substituting their own views of what is desirable in a particular case for those of the legislature, the branch of government appropriately charged with making decisions of public policy. To quote Justice Frankfurter again, Justices must have "due regard to the fact that [the] Court is not exercising a primary judgment but is sitting in Judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164 (1951) (concurring opinion).

The fact that federal judges are restricted to deciding only the particular case before them and are not given a broad license to reform society does not mean that general wrongs go unrighted. As Justice Holmes remarked, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, Kansas & Texas Railway Co. v. May, 194 U.S. 267, 270 (1904).

In the case just cited, Justice Holmes was referring to a state legislature, and our federal system requires the federal courts to avoid intrusion not only on the Congress and the Executive but the states as well.

Judges are not only not authorized to engage in executive or legislative functions, they are also ill-equipped to do so. Serious difficulties arise when a judge undertakes to act as an administrator or supervisor in an area requiring expertise, and judges who purport to decide matters of public policy are certainly not as attuned to the public will as are the members of the politically accountable branches. In sum, I am keenly aware of the problems associated with "judicial activism" as described in the preceding question, and believe that judges have an obligation to avoid these difficulties by recognizing and abiding by the limits of their judicial commissions.

2. What actions in your professional and personal life evidence your concern for equal justice under the law?

In my judgment, the record of a judge will reflect a commitment to equal justice under the law if the judge applies the law even-handedly to those who come before the court. The essence of equal justice under the law, in my view, is that neutral laws be applied in a neutral fashion. I believe that my judicial record as a trial of appellate judge attests to this commitment.

As a legislator I worked to equalize the treatment of women under state law by seeking repeal of a number of outmoded Arizona statutes. I developed model legislation to let women manage property they own in common with their husbands. I also successfully sought repeal of an Arizona statute that limited women to working eight hours per day and backed legislation equalizing treatment of men and women with regard to child custody.

As an attorney, I feel a professional obligation to help provide the poor with access to legal assistance and to the courts. I have worked toward this goal through my association with the Maricopa County Bar Association Lawyer Referral Service, of which I was Chairman from 1960 through 1962, and through service on the Arizona State Bar Association Committee on Legal Aid.

I have been concerned with the rights of those who are cared for by the state. From 1963 to 1964 I was Chairman of the Maricopa County Juvenile Detention Home Visiting Board and I have served as a member of the Maricopa County Juvenile Court Study Committee. I acted as a Juvenile Court Referee invarious cases between 1962 and 1964. I participated as a panel member in an Arizona Humanities Commission Seminar on law as it relates to mental health problems.

My concern for fostering understanding among disparate groups within my community led to work on the Advisory Board of the Arizona Chapter National Conference of Christians and Jews. In 1975 I received an award for services in human relations from the National Conference of Christians and Jews.

I have served on the Advisory Board of the Salvation Army in Maricopa County, and as chairman of its Senior Citizen's Council. The Senior Citizen's Council operates a very successful center for low income elderly persons, and provides meals as part of the program. It is also constructing a residential facility for the low income elderly.

Through the Heard Museum in Phoenix, as a Trustee and its President, I have worked to foster and encourage understanding and communi-

cation with the several Indian tribes and the native Americans in Arizona through various programs and projects.

As a legislator I helped develop amendments to the mental health committment laws designed to protect the rights of the mentally ill.

I also worked successfully to obtain state facilities for the mentally retarded in Maricopa County, and to improve Arizona's laws for the mentally retarded. I succeeded in obtaining legislation to convert a relatively unused state tuberculosis hospital to a hospital for crippled children.

FG 05
WE 00

August 3, 1981

Dear Mrs. Craven:

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

Pres

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

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

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

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

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

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

Thanks again.

Sincerely,

RONALD REAGAN

Mrs. Marie Craven
8026 South Francisco
Chicago, Illinois 60652

RR:mel

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

810806

PAM -- I thought you might want to see this before it goes into the O'Connor files.

fbf

In the Jewish tradition when a person dies we appoint him or her as our emissary in heaven to intercede in our behalf. Is it possible that they were our messengers?

But then whose messengers are we?

It is with a rare sense of personal honor and pride that I present to you the President of the United States.●

PRESIDENT REAGAN IS WRONG ON COURT NOMINEE O'CONNOR

HON. LARRY McDONALD

OF GEORGIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, August 4, 1981

● Mr. McDONALD. Mr. Speaker, an exchange of letters between President Reagan and Mrs. Marie Craven of Illinois was made public recently. The President is supposed to have personally composed his reply to Mrs. Marie Craven. It is sad to record that the President did not have his facts straight and that the tone of the letter was not very Presidential. In the interest of setting the record straight I am today inserting both letters in the CONGRESSIONAL RECORD, together with some comments and the facts as I understand them.

First of all, the person referred to in the second paragraph of the President's letter is Dr. Carolyn Gertser, a widely respected and admired member of the right-to-life movement, who is considered a moderate in her views. So, one can only wonder who characterizes her in the manner described by the President.

Second, the President's letter leaves a great deal unsaid. He discusses only one vote. On this one vote he is in error. The bill in question passed both bodies of the Arizona Legislature, was signed into law by the Governor and survived a challenge in the Arizona Supreme Court.

Third, the record shows that Mrs. O'Connor voted in 1970 for legislation that would legalize abortion on demand 3 years before the Supreme Court decided the issue. In 1973, she supported and cosponsored a family-planning bill that would allow abortions for minors without parental consent. In 1974 she voted against a bill that would memorialize the Congress to constitutionally protect the unborn.

So, as the noted Washington columnist John Lofton has said:

The President's letter has left the air even more polluted and raises more questions than it answers.

The exchange of letters follows:

JULY 7, 1981.

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

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

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

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

I am a Chicago resident of Irish Catholic heritage and up until my involvement in pro-life a committed democrat. I worked for your election, along with countless others, distributing your campaign literature, making phone calls organizing blitzes, etc. etc. I don't want credit for any of this. I just want you to know that at this precise moment, I know that the power of the office has taken precedence over your party platform and campaign promises. I feel I am a grassroots citizen—and I am sickened by witnessing once again the broken promises of the politician.

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

By this appointment, you have betrayed the pro-life position. Judge Sandra O'Connor has supported pro-abortion legislation when she was an Arizona legislator. How then can this appointment bring us closer to our goal of protecting the pro-born children of America?

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

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

Sincerely,

MRS. MARIE CRAVEN.

THE WHITE HOUSE,
Washington, August 3, 1981.

Mrs. MARIE CRAVEN,
Chicago, Ill.

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

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

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

Thanks again.

Sincerely,

RONALD REAGAN.●

SUPPORT FOR THE ARTS MUST CONTINUE

HON. MARIO BIAGGI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Tuesday, August 4, 1981

● Mr. BIAGGI. Mr. Speaker, despite the current national sentiment for reduced Government spending, there remains one area of Federal expenditures that continues to receive strong, bipartisan support from all sectors of our society—the arts.

As an original cosponsor last year of legislation to extend the National Endowments for the Arts and Humanities and the Institute of Museum Service, I remain actively involved in efforts to preserve these vital agencies. Last month, with my strong support, the House passed the 1982 appropriations bill for these agencies which included $157.5 million for the Arts Endowment, $144 for the Humanities Endowment and $14.4 million for the Museum Institute. Clearly, there remains a need for continued funding for these agencies which have provided museums, arts agencies, and institutions the ability to bring culture and enlightened learning to millions of Americans.

For the benefit of my colleagues, I would like to include in the RECORD a copy of an article written by Martin E. Segal, chairman of Lincoln Center for the Performing Arts in my own city of New York, for a recent edition of Newsweek. His comments on the importance of continued support for cre-

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 22, 1981

TO: MAX FRIEDERSDORF
POWELL MOORE

FROM: SHERRIE M. COOKSEY SMC

SUBJECT: Brief Analysis of Roe v. Wade 410 U.S. 113 (1973)

As you know Roe v. Wade is the landmark Supreme Court abortion decision. The validity, scope, and meaning of this decision will be a major topic of discussion in the O'Connor briefings and confirmation proceedings. Accordingly I have prepared, as background information for you, an outline of the facts, holding, and rationale of the Court in Roe v. Wade.

Facts:

A Texas statute making it a crime to procure or attempt to procure an abortion, except on medical advice to save the life of the mother, had been found unconstitutional under the 14th and 9th amendments by the lower federal court. The Texas statute made no reference to the stage of a pregnancy in which abortion was impermissable, but made all abortions criminal, except those necessary to save the life of the mother. The decision of the lower federal court was appealed to the Supreme Court.

Held:

State criminal abortion laws, like the Texas statute, that except from criminality only abortions which are necessary to preserve the life of the mother without regard to the stage of her pregnancy or other interests violate the Due Process clause of the 14th amendment.

Although the 14th Amendment protects the right to privacy, including a woman's qualified right to terminate her pregnancy, against State action, the State does have legitimate interests in protecting both the pregnant woman's health and the potentiality of human life. The State may regulate to protect these interests at various stages of the pregnancy in the following manner:

(a) for the stage prior to the first trimester an abortion is permissable upon medical advice;

(b) after the first trimester the State, in protecting its interest in the health of a mother, may regulate abortion procedures in ways that are reasonably related to maternal health;

(c) for the stage subsequent to "viability" the State, in promoting its interest in the potentiality of human life, may regulate and even proscribe abortion except where necessary to preserve the life of the mother. (The definition of viability was not part of the Court's holding.)

Rationale:

The Court determined that the constitutional right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (This conclusion was based on previous right to privacy decisions, particularly those dealing with family life and contraception. However it was reached with little explanation.) Under the Due Process clause of the 14th Amendment this right of privacy is protected unless there is a compelling State interest in regulating it.

The Court found that the State does have a compelling interest in protecting both the pregnant woman's health and the potentiality of human life at various stages of pregnancy. Thus the Court identified those stages where the State does have a legitimate interest in regulating abortions. (See parts 'b' and 'c' above.) In its discussion of these stages of pregnancy in which the State could regulate abortions the term "viability" was defined as the point at which the fetus presumably has the capability of meaningful life outside the womb. Additionally, the Court did state that the word "person" as used in the 14th Amendment does not include the "unborn"; thereby precluding fetuses from protection under the 14th Amendment other than that protection offered them by the State's interest in protecting the potentiality of human life.

The opinion of the Court was by a 7-2 vote with Blackman, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger in the majority and Justices White and Rehnquist dissenting. Concurring opinions were filed.

Saturday, Aug 15, 1981
A-2
The Washington Post

'Vindictive' Person Opposing O'Connor, President Asserts

By Fred Barbash
Washington Post Staff Writer

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

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

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

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

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

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

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

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

To Sherri for reading & file

M E M O R A N D U M

The following points with respect to Roe v. Wade are made by Professor Ely in his article, The Wages of Crying Wolf: A Comment on Roe v. Wade:

-- The Court could have decided the case on narrower constitutional grounds, such as vagueness.

-- On the merits, the Court failed to identify or explain why the "right of privacy" was "broad enough to encompass the abortion decison" since the Court was willing to uphold other statutes that affect individual privacy (such as anti-homosexual activities statutes). Indeed, society regulates many activities that are deemed to be immoral or revolting. The Court simply stated the conclusion, without thorough reasoning. The effect is that the Court simply seemed to be deciding for itself what the policy choices should be, rather than deferring to legislative judgments.

-- The Court summarily concluded that fetuses were not "persons" within the Fourteenth Amendment, even though the history of the Fourteenth Amendment indicates that all the Framers had in mind were adults, not children, yet children are obviously "persons." But even if the Court were right on that point, that does not mean that fetuses are automatically disentitled to protection if the legislature determines to provide protection. Animal cruelty statutes have universally been deemed to be valid, yet such laws limit the liberty of individual human beings and protect non-"persons."

-- The fundamental problem with Roe v. Wade is that the

Constitution nowhere speaks of abortion as a right, nor do any of the debates at the Constitutional Convention or the legislative history of the Fourteenth Amendment suggest that the right to abortion was constitutionally protected. In contrast, while Miranda v. Arizona has been criticized as representing judicial activism by the Warren Court, at least Miranda was tied to a specific constitutional provision, the Fifth Amendment privilege against compelled self-incrimination. There is no such constitutional provision to which Roe v. Wade can be tied.

-- As with the discredited decisions of the early Twentieth Century striking down economic legislation, such as minimum hours and minimum wage laws, the Court "manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures." 82 Yale L.J. 920, 937 (1973). Plus, by labeling the right "fundamental," the Court went even further than the discredited decisions of old, such as Lochner v. New York. The decision as constitutional law is thus more "dangerous" than Lochner ever was.

-- The Court did not deny that protecting fetuses is an "important and legitimate interest." But the Court simply announced, legislative-like, that that legitimate interest was not important enough to sustain the restriction upon women's liberty. Thus the Court was willing to answer a quintessentially legislative question -- it set for itself "a question that the Constitution has not made the Court's business." Id., at 943.

-- By entering the abortion arena in the way that it did, the Court in effect granted victory to those who had not been able to win in the political process (in the legislatures).

Note: Although not mentioned in Professor Ely's article, Justice Rehnquist in dissent in Roe v. Wade argued that the record in the case did not show that a plaintiff was actually in her first trimester of pregnancy, yet the Court rendered a sweeping constitutional holding. The holding therefore may not have even been necessary to decide the case before it.

On the merits, Justice Rehnquist concluded: (a) No right to privacy as fashioned by the Court's prior decisions justified this particular holding; (b) that the real question was, in light of the woman's liberty interest under the Fourteenth Amendment, whether the state statutes prohibiting or regulating abortion were valid. In his view, the statutes satisfied "the tests traditionally applied in the area of social and economic legislation," namely "whether or not a law . . . has a rational relation to a valid state objective." 410 U.S. 113, at 173.

POSSIBLE POINTS OF CONTENTION RE JUDGE O'CONNOR

OVERVIEW OF TOPICS:

Abortion
Equal Rights Amendment
Capital Punishment
Feminist
Pornography
Youth Drinking
Conflicts of Interest
Federalism Views
Exclusionary Rule
Poor Judicial Ratings

I. ABORTION

1970: Was member of the Arizona Senate Judiciary Committee considering a bill that would have repealed existing state statues prohibiting abortions. (Bill characterized by some as for "abortion on demand.") Phoenix Gazette reports that she was among 6 of 9 members who voted to approve.
-Starr memo reports she has no recollection of how she voted.
-Bill died in Rules Committee.

1973: Cosponsored a measure that would make "all medically acceptable family planning methods and information" available to anyone requesting it. Critics state that "methods" could include abortions.

1974: In Senate Judiciary Committee vote she opposed a resolution requesting Congress to support a "Human Life Amendment" that called upon Congress to extend constitutional protection to unborn babies, except where the life of a mother was endangered.

1974: Voted against a rider on the University of Arizona stadium bond issue that banned state abortion funding to the University hospital.

II. EQUAL RIGHTS AMENDMENT

-Introduced ERA ratification resolution in 1972
-Favored passage of ERA by Arizona state legislature in 1972; voting for it twice; once in Committee, once on Senate floor where it lost by one vote.
-1974, attempted to put ERA before the voters in a referendum (some say she sponsored referendum)

III. CAPITAL PUNISHMENT

-Soft on death penalty
-Opposes mandatory capital punishment (according to "Conservative coalition")
-Challenged several provisions of death penalty bill in 1973 in Senate Judiciary Committee

IV. FEMINIST

-She led fights to remove sex based references from state laws and to eliminate job restrictions on the basis of sex
-Friend of Mary Crisp who broke with GOP last summer over ERA
-Served as keynote speaker, upon request of Bella Abzug, at the Arizona state convention of United Nation's International Women's Year
-Praised by an article in Women Today which is reputedly a feminist mouthpiece

V. PORNOGRAPHY

-"Drastically amended" a bill that would have banned adult bookstores within a 1 mile radius of schools and parks. (altered the restriction to 4000 feet)

VI. YOUTH DRINKING

-1972, she challenged a Democratic Senator who sought to remove the right to drink alcoholic beverages from a bill granting 18 years olds adult rights. Apparent reason: amendment was too vague to be enforced.

VII. CONFLICTS OF INTEREST

-Voted in favor of at least 4 bills that would impact on her family cattle business
-Voted in favor of legislation containing provisions beneficial to existing auto dealerships while her husband was serving on the board of 2 auto dealerships

VIII. FEDERALISM

-Stated in recent law review article that she favors curtailing a Federal law that permits citizens to sue state officials in Federal courts for alleged civil rights violations
-Would allow the state courts to rule first on the constitutionality of state law and if state court gave a "full and fair review" to constitutional challenge, she would favor giving "finality" to the decision. (Comment states that this position could put her in middle of controversy over federal court jurisdiction to hear challenges to abortion, busing, and school prayer statutes.)

IX. EXCLUSIONARY RULE

Wall Street Journal states that she has been reluctant to exclude police evidence on grounds that it was obtained through unconstitutional means.

X. JUDICIAL RATINGS

-1976, as Superior Court Judge, was rated in bottom 3 of 5
-1980, as Appellate Court Judge, was rated 8th of 10

THE WHITE HOUSE
WASHINGTON

WH & Justice
memos concerning
Judge O'Connor

THE WHITE HOUSE

WASHINGTON

OConnorfile

RECOMMENDED TELEPHONE CALL

OK

TO: Senator Roger Jepsen (Iowa)

DATE: Thursday, July 16, 1981

RECOMMENDED BY: Max L. Friedersdorf MLF
Powell A. Moore PAM

PURPOSE: To dispel any misgivings which Senator Jepsen may have regarding Judge Sandra O'Connor in the wake of his visit with her Wednesday. To urge him to support her nomination.

BACKGROUND: Senator Jepsen, who was one of the 7 Senators to support your nomination before the New Hampshire primary, requested an opportunity to visit with Judge Sandra O'Connor. Although he is not a member of the Senate Judiciary Committee, we complied with his request.

During the course of that meeting, Senator Jepsen seemed to have difficulty comprehending that nominees to the Supreme Court cannot express approval or disapproval in connection with past Supreme Court decisions, and cannot express opinion on current public policy issues which they may be called to rule upon on the Court, if confirmed. This difficulty arose in connection with his concerns regarding the Supreme Court's decision in Roe v. Wade (the landmark abortion decision of 1973). As a result, Judge O'Connor's visit with Senator Jepsen was cool and not very satisfactory.

Senator Jepsen met with Judge O'Connor immediately following his luncheon with Mrs. Carolyn F. Gerster of Phoenix, Arizona. Mrs. Gerster is Vice President in charge of International Affairs of the National Right to Life Committee, Inc.

cc: Sherrie

TOPICS OF DISCUSSION:

1. State that you understand that he met with Judge O'Connor on Wednesday and ask for his feedback from that meeting.
2. Try to get him to express his satisfaction with the nominee.
3. Urge that he support her nomination.

DATE OF SUBMISSION: July 16, 1981

ACTION Good mtg — He was worried because she wouldn't answer any questions at all. I told him I was sure she had been told over & over again by the A. G.'s & our own people that she shouldn't.

I gave him information & had a rundown on Dr. Forsten which was news to him. I think he has a different picture now & he wants to help.

THE WHITE HOUSE

WASHINGTON

July 14, 1981

TO: Jim Baker
Ed Meese
Mike Deaver
Fred Fielding

FROM: Max Friedersdorf

SUBJECT: Supreme Court Nominee

The Attorney General, Powell Moore and myself accompanied Judge O'Connor on her initial series of courtesy calls today to Capitol Hill.

The first visit was with Senator Strom Thurmond (R-S.C.), Chairman of the Senate Judiciary Committee. This was the only visit of real substance, other than the Bob Byrd/Biden meeting.

Thurmond raised the issues of abortion, E.R.A., pornography, capital punishment, crime in general, and the drug problem.

Thurmond advised Judge O'Connor repeatedly not to let herself be "pinned down" on how she would rule as a Justice.

Thurmond seemed to be satisfied on the E.R.A. issue and indicated he himself had supported the measure in the early 70's.

With regard to pornography, Mrs. O'Connor told Senator Thurmond that she had supported legislation banning pornography sales 4,000 feet from a school, rather than a mile, because there was judicial precedent for 4,000 feet which she believed would be likely to stand up in Court.

O'Connor described herself to Senator Thurmond as "a conservative judge from a conservative state."

Thurmond raised the question of O'Connor being "alright as long as Reagan is in," implying she would vote liberal afterwards. Thurmond said this was a question he had received.

O'Connor responded that her record as both a legislator and judge will reflect her strong convictions and commitment on the issues.

cc: Arnold
Sherrie

Questioned by Thurmond about the death penalty, Judge O'Connor indicated she had authored the death penalty statute in Arizona, and has imposed the death penalty.

With regard to crime, Judge O'Connor cited her past record on combating crime in both her professional responsibilities and as a private citizen. "I am concerned about crime and my record in the area of criminal law will reflect that I have been tough in this area; and the lawyers of Phoenix will confirm."

We also discussed timing of the nomination with Senator Thurmond and he advised unless there was time before the recess for both hearings and confirmation, he would recommend the hearings be held up until September. Senator Baker concurs in this recommendation.

Thurmond also questioned Mrs. O'Connor about being a strict constructionalist and advised her job on the Court would be to interpret the law and not make law.

Judge O'Connor then called on Senators Goldwater and DeConcini who escorted her to the office of the Majority Leader, Howard Baker.

Judge O'Connor also visited Senator Ted Stevens, the Senate Majority Whip, in his Capitol Office.

Senator Baker then escorted Judge O'Connor to the office of the Senate Minority Leader, Robert Byrd (D-W.Va.), where she met with Byrd and Senator Joseph Biden (D-Del.), ranking minority member of the Senate Judiciary Committee.

Senator Byrd stated: "From all I have heard and read about you, I intend to support and vote for your confirmation."

Senator Biden commented: "We are investigating you thoroughly with the purpose of accomodating and expediting your confirmation. I do not know of anyone on the Democratic side (of the Judiciary Committee) who is opposed. I am enthusiastically supporting you, and there will be no litmus test problems as far as the Democrats are concerned. We will focus on your judicial record and temperament."

Senator Byrd was extremely cordial and asked Judge O'Connor to remain until Mrs. Byrd arrived, and a photo taken.

We then met in the Speaker's office with Speaker O'Neill, Jim Wright, Tom Foley and Jim Jones. There was no substance here; photos and handshakes only.

The final visit was with Rep. Bob Michel, Eldon Rudd, John Rhodes, Trent Lott, and surprisingly, Henry Hyde, who posed no questions and stayed out of the photographs.

Judge O'Connor was greeted by large crowds of well-wishers at each stop.

THE WHITE HOUSE

WASHINGTON

July 18, 1981

To Henri

MEMORANDUM FOR THE PRESIDENT

FROM: MAX L. FRIEDERSDORF M.L.F.

SUBJECT: JUDGE O'CONNOR

Judge O'Connor returned to Arizona this morning after a week's activity here in which she:

1) Visited personally 39 Senators.

2) Visited personally the House Republican and Democratic Leadership and jurisdictional chairmen and ranking members.

3) Met with the ABA.

4) Met with Rep. Henry Hyde (R-Ill.), Mr. Anti-abortion in the House.

At this juncture there is not a single vote committed or announced against Mrs. O'Connor.

Our interviews and courtesy calls turned up eight problem Senators: D'Amato, Denton, Grassley, Helms, Nickles, East, Jepsen and Humphrey.

The meeting with Hyde, held at Justice, was positive. Hyde indicated he believes the anti-O'Connor activities by the Right-to-Life groups are damaging to those groups; agreed to call on the eight "problem" Senators with the following line: Mrs. O'Connor is going on the Court, she cannot be defeated, so why make an enemy. Hyde also indicated he would make a supportive statement at the appropriate time.

Hearings are not likely to start until Wednesday, September 9.

Mrs. O'Connor will be sending personal thank you letters to all the Congressmen and Senators she visited, and preparing herself during the recess to be the best possible witness. She has received all pertinent briefing materials and transcripts and we will be in touch with her during the interim before her hearing.

cc: Powell

THE WHITE HOUSE

WASHINGTON

July 6, 1981

MEMORANDUM TO: Jim Baker
Ed Meese
Mike Deaver
Fred Fielding
Pen James

FROM: Max Friedersdorf M.F.

SUBJECT: Supreme Court/Hill Reaction

Add Senator Jesse Helms (R-N.C.) and Senator Steve Symms (R-Idaho) to the list of Senators calling in today in opposition to Sandra O'Connor for Supreme Court nomination. Both objections were based on the abortion issue.

Denton

cc: Sherrie

THE WHITE HOUSE
WASHINGTON

O'Connor

DATE 7-23-81

TO: Powell

FROM: MAX FRIEDERSDORF

For your information _____

See me _____

Call me _____

Please handle ✓

Please follow-up ✓

For your comments: I think this would be a good idea!

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 22, 1981

TO: MAX FRIEDERSDORF

FROM: RICHARD S. WILLIAMSON Rich

SUBJECT: SANDRA O'CONNOR -- CONFIRMATION HEARINGS

I have received a call from Margaret Hance, Mayor of Phoenix, Arizona. Margaret has been a strong supporter of ours. She is a two-term Mayor of Phoenix.

She "knows Sandra O'Connor well" and would be more than happy to testify in behalf of Sandra O'Connor if that would be helpful.

cc: James A. Baker III