The Washington Post
9/30/81

Ellen Goodman

Justice First

BOSTON—Last Friday, Sandra O'Connor joined The Brethren. And an elite sisterhood. Last Friday, Sandra O'Connor became the 102nd Supreme Court justice. And the first woman justice. As all the speeches about barrier-breaking, history-making, inner-circle-integrating end, she is settling down to two of the hardest roles in the country: Supreme Court Justice and First Woman.

In some ways, this woman who won her robe with the unanimous consent of the Senate and the goodwill of the people, with the approval of conservatives and the best wishes of the women's rights activists, faces the issues shared by any woman who has ever been the first, the exception, the only, the other.

How do you deal with the extra burdens? How do you live with the attention and the expectations? With the demands of conscience and history?

She wants to be remembered as a good justice, but she will be judged, in large part, as a woman justice. Her opinions will be scrutinized for signs of her sex; her behavior will be analyzed for clues of her kind. Like every other first woman, she will be visible and vulnerable, the one justice in the photograph whom everyone can name.

She will be criticized if she doesn't "think like a male justice" and criticized if she does. Someone will surely want her to prove that a woman on the bench makes a difference, and someone else will want her to prove that women on the bench are no different.

It is, as Margaret Hennig, dean of the Graduate School of Business Management at Simmons College (and who has studied first women in business) describes it, "a godawful burden. She knows she is going to have to prove, prove, prove." To begin with, having run the gauntlet of confirmation hearings, O'Connor now will have to deal with a new set of all-male colleagues in the give-and-take of the Supreme Court chambers.

As Hennig says, "She will be walking into a male world, and she'll have to establish herself. Most women who successfully join a male task group try to establish themselves at the level of technical competence. And while they do that, they begin to build one-on-one relationships so that when they are in group settings, they have some alliances. That's real hard when you are on the Supreme Court and have to perform right away."

If the public expects first women to be either wonderful or terrible, says Hennig, that woman is inclined to respond by being safe and moderate.

But Sandra O'Connor is not Every First Woman. Nor is the Supreme Court every job. She comes to a post with lifetime tenure, and she comes to it with strengths. At 51, she has the maturity, the manners and mentors of success. Like any woman lawyer or judge of her age, she must by now have become accustomed to being the first, the only.

Like Frances Perkins, the first woman Cabinet member, appointed in 1933 by FDR, O'Connor has consciously chosen the risky rewards of a pioneer. As secretary of labor Perkins put it, "I had been taught long ago by my grandmother that if anybody opens a door, one should always go through."

The first woman justice didn't have to leave much behind as she went through the doors. Unlike others before her, she

and the best wishes of the women's rights activists, faces the issues shared by any woman who has ever been the first, the exception, the only, the other.

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The first woman justice didn't have to leave much behind as she went through the doors. Unlike others before her, she hasn't had to choose between love and work. Unlike others before her, she hasn't had to choose between being a woman and a success. She has been bolstered by both the support of family and the women filling up the ranks in the law behind her.

With all these strengths, she may hold the one quality that separates the First Woman who makes a difference: the quality of personal integrity. The successful First Woman has the ability to put aside all the ambivalent expectations of the world, the ability to put to rest all the over-attentive claims of co-workers, and be true to her own beliefs.

That, it seems to me, is a pretty good qualification for any justice—the 102nd or the first.

U.S. Department of Justice
Office of Legislative Affairs

Office of the
Assistant Attorney General

Washington, D.C. 20530

To: Powell Moore

Note end of article.

9-16-81
DATE

The New York Times

A26
PAGE

The Editorial Notebook

Senator Thurmond and the Witnesses

Back in 1968, when Associate Justice Abe Fortas was nominated as Chief Justice of the Supreme Court, Senator Strom Thurmond berated him for refusing to answer more than 50 questions about Court decisions: "Every American today who is going to see the paper tomorrow is going to see that you refused today, that you failed today, to answer questions of vital importance to them."

Last week the same Senator had much different advice for another nominee to the Court. Solicitous, he told Sandra Day O'Connor that she needn't answer any of his questions about past or pending decisions if she felt there was any danger of prejudicing future cases.

What had changed?

Not the basic rules. Some hostile senators still like to press their right to grill nominees to the limit. Some nominees have resisted some questions as threats to their fairness and independence.

The difference was political. Justice Fortas was the nominee of a lame-duck President; opponents were in a strong position to obstruct. Judge O'Connor is the choice of an aggressive, popular President pushing his nominee through a committee chaired by an ally.

Unlike Abe Fortas, Mrs. O'Connor Suits Him to a Tea

Thirteen years ago the South Carolina Republican was more raucous than last week's junior G.O.P. inquisitors, Senators East of North Carolina, Grassley of Iowa and Denton of Alabama. He demanded that Mr. Fortas comment on some 20 Court rulings, and not just those in which the Justice had participated.

The Senator was angriest at a 1957 case called *Mallory v. United States*, in which a Washington D.C. rape conviction and death sentence were reversed because of an illegally obtained confession.

"Mallory! Mallory!" the Senator said. "I want that name to ring in your ears. Mallory! A man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality .... Can you as a Justice of the Supreme Court condone such a decision as that? I ask you to answer that question."

Justice Fortas replied with care: "Senator, because of my respect for you and my respect for this body, and because of my respect for the Constitution of the United States, and my position as an Associate Justice of the Supreme Court of the United States, I will adhere to the limitation that I believe the Constitution of the United States places upon me and will not reply to your question as you phrased it."

"Can you suggest any other way in which I can phrase that question?"

"That would be presumptuous. I would not attempt to do so."

It was in the same Senate Caucus Room last week that the Thurmonds held a tea honoring Judge O'Connor. The Senator also held two luncheons for her and set aside large V.I.P. spectator sections. Power had turned the bloodhound into a lapdog.

Asked about the change, Chairman Thurmond said of the two nominees: "He didn't have to answer anything I asked him. If I could get him to answer it, I tried to get him to answer. She — somebody's coached her, I guess, and she knows what to answer."

JOHN P. MacKENZIE

Memo from . . .

SANDRA D. O'CONNOR, JUDGE

Dear Powell —

Thank you for sending the photos, and John Sfunis' letter. I am returning several photos which would be lovely to have inscribed by any who are handy.

On a matter of more concern, I have still not received a copy of any corrective

press release from
the office of Sen. Mathias.
Do you suppose
you could obtain
it + send it to me?

Thank you.

Sandra

A Judge Well Chosen

Sandra Day O'Connor's confirmation hearings for appointment to the Supreme Court were more of a challenge to her stamina than her intellect. She was, if anything, overprepared for the fumbling, tedious questions of the Senators on the Judiciary Committee, leaving single-issue inquisitors in utter disarray.

Senators East, Grassley and Denton did what they could to make the committee look silly with repeated, clumsy and ultimately futile inquiries into Judge O'Connor's views on pro-abortion court decisions and anti-abortion legislation. They affected surprise at her courteous but steady refusal to prejudge issues that still clamor for the Court's attention. They helped her look very good indeed.

•

Not all of her testimony was reassuring. In her desire to enhance the prestige of state courts, Judge O'Connor was disquietingly cool to arguments that citizens with disputes based on the Constitution and Federal law should have easy access to the Federal courts. She testified with refreshing candor that the 1966 decision on confessions, *Miranda v. Arizona*, which some cite as an example of coddling criminals, had done little harm to law enforcement in her home state. Yet she simplistically downgraded as "judge-made" the long-standing rule against courtroom use of illegally seized evidence.

She also dismissed so-called judicial "activism" too quickly. "I know the difference between judging and legislating," she said, the difference between "interpreting the law" and "making the law." Why couldn't she have said something like: "Look, Senators, you and I know there's a lot of baloney about that. Sure, judges have to be creative sometimes and maybe write something into law. The hope is that they know when to do it and can do it with fairness and vision."

But these quibbles hardly undermine the overall impression: Mrs. O'Connor is a quick study with an evident capacity to keep growing, a person of formidable intelligence, fully a match for the exclusive male club she will soon join. She demonstrated that she knows the law and the legal system and will approach her new job with energy. Nobody will dare to ask whether she's doing well for a woman.

Her political outlook is moderate to conservative — she doesn't frighten liberals, but she's apparently too mainstream for the radical right. On the Court, though, she is likely to be independent, often unpredictable, as any Justice should be.

After her hearing, she seems more than ever an excellent choice.

Topics

Reactions, Over and Under

Cairo Truth

Having arrested 1,600 people, closed seven publications, arbitrarily transferred journalists and professors, dissolved religious societies and removed Pope Shenuda III as head of the Coptic Church, President Anwar Sadat of Egypt last week also expelled a reporter, Chris Harper of ABC, for daring to film a critical interview with a previously expelled British correspondent — in Beirut. The film was stolen from an air package at Cairo airport a month ago in what must have been the result of an elaborate secret police operation.

The angry Egyptian leader waved the offending film during a news conference he had called, and warned all other foreign reporters "to tell the truth, the whole truth and nothing but the truth."

Very well: Mr. Sadat is biting the hand that's been feeding him. It is journalism that made him first famous and then admired and respected in the United States — attitudes that sustain an enormous foreign aid program for Egypt. Long recognized as a statesman of remarkable vision and poise, he is suddenly behaving like a nervous dictator. And though he claims to have things under control, conduct of this sort will only encourage the impression that his power is slipping. The truth about Egypt is becoming worrisome, and not only to President Sadat.

■

Less Wind

Will Rogers once said that when the legislature is in session, people feel the same "as when the baby gets hold of a hammer." He would have been amazed by the actions of Christopher Jackman, Speaker of New Jersey's Assembly.

Last week Mr. Jackman told colleagues: "The General Assembly will not meet, as scheduled, in September and October. Instead, the Assembly will return after the November election when any important issues which remain before the Legislature can be considered in a calmer atmosphere."

Not everyone is pleased. Everyone knows that Republicans had hoped to make some points by complaining about the way Democrats have "mismanaged" the state and that Democrats wanted a last opportunity to brag about their achievements in the past eight years.

But everyone also knows that preelection sessions are wind. As one legislator put it, "Right before an important election, bills will come up that will [only] produce demagoguery and more political speeches." Speaker Jackman is right; November will do fine.

Vest Race

It is known that police, secret servicemen, even Presidents gain some security by wearing bulletproof vests in dangerous places. Now that just about everywhere seems dangerous to many people, it's hardly surprising that a New York entrepreneur is trying to market a whole line of bulletproof clothing to the general public.

Send Body Armour International a swatch from your suit and they will make a bulletproof vest to match. Styles may be Korvettes, but prices are strictly Paul Stuart: A vest to stop a bullet from a formidable .44 Magnum costs $415. Raincoats and hats are also available.

The trouble, of course, is that this mass-market armor is available to the crook as well as his victims. And the determined crook, realizing that his quarry may now present a tougher target, is likely to resort to even greater firepower.

So just as crooks and potential victims now compete in arms, they may soon be competing in both armor and compensating super-arms. Don't buy just any gun to protect yourself; buy one heavier than a .44 Magnum. Make sure the police have more powerful guns, too. And then forget about that old $400 vest; you now need the $800 model. Could this be what the merchants of body armor have in mind?

O'Connor

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

Dear Senator Helms:

Thank you for your letter of September 4, 1981. In that letter you reiterate your inquiry concerning my views on the correctness of Roe v. Wade, both as an interpretation of the Constitution and as an exercise of judicial authority. I declined in my letter of August 28, 1981, to state my views on the correctness of Roe v. Wade, noting that were I to do so I might be disqualified in subsequent cases raising related issues.

In your most recent letter you state that you believe it is appropriate for me to respond to your questions concerning Roe v. Wade because they concern a past decision rather than a pending case. You indicate that even if it is inappropriate for me to state whether Roe v. Wade was a correct interpretation of the Constitution, you believe it would not be inappropriate for me to state whether it was a proper exercise of judicial authority.

With all respect I must adhere to the views expressed in my previous response. As I stated in that letter, a prospective Supreme Court Justice should not make public statements on issues which might later come before the Supreme Court. The citations from earlier confirmation hearings which I included in my earlier letter, illustrate that prior Supreme Court nominees have likewise declined to comment on past Supreme Court decisions, as well as pending cases. Cases involving the issues raised by Roe v. Wade, and interpreting that decision, continue to come before the Court. The question of whether Roe v. Wade should be overruled may also arise. Were I to comment on the correctness of that decision I might be disqualified from sitting in those cases.

Nor do I see any inconsistency between my responding to your question concerning stare decisis and my refusal to state whether Roe v. Wade was a proper exercise of judicial authority. This question is not severable from the question of the correctness of Roe v. Wade. If Roe v. Wade was not a proper exercise of judicial authority, it was not correctly decided. While I am happy to respond to questions concerning my general judicial philosophy, as illustrated by my response to your question concerning stare decisis, the question whether a particular case

was a proper exercise of judicial authority would require me to state whether or not I believe the case was correctly reasoned in accordance with the dictates of the Constitution. As I have explained, I must refrain from doing this.

Sincerely,

Sandra D. O'Connor

Sandra D. O'Connor

September 18, 1981

Dear Congressman Deckard:

Thank you for your letter of August 28th requesting an autographed photograph for the Homemaker Club of Pike County Indiana. I have enclosed the photograph you requested with my best wishes.

With cordial regards,

Sincerely,

Sandra Day O'Connor

The Honorable Joel Deckard
United States House of Representatives
Washington, D. C. 20515

JOEL DECKARD
8TH DISTRICT, INDIANA

COMMITTEES:
GOVERNMENT OPERATIONS
PUBLIC WORKS AND TRANSPORTATION

WASHINGTON, D.C. OFFICE:
125 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-4636
MONDAY-FRIDAY, 9-5

EVANSVILLE OFFICE:
210 S.E. SIXTH STREET
EVANSVILLE, INDIANA 47713
(812) 423-4279
MONDAY-FRIDAY, 8-5

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 28, 1981

BEDFORD OFFICE:
2809 WASHINGTON AVENUE
BEDFORD, INDIANA 47421
(812) 279-6852
MONDAY, TUESDAY, THURSDAY AND FRIDAY, 8 A.M.-12 NOON

PAOLI OFFICE:
BOYD BUILDING
WEST MAIN STREET
PAOLI, INDIANA 47454
WEDNESDAY, 8 A.M.-12 NOON

VINCENNES OFFICE:
28 NORTH FIFTH STREET
VINCENNES, INDIANA 47591
(812) 886-9326
MONDAY-FRIDAY, 8-4

WASHINGTON OFFICE:
DAVIESS COUNTY COURTHOUSE
COMMISSIONER'S ROOM
WASHINGTON, INDIANA 47501
(812) 254-4119
FRIDAY, 8-4

The Honorable Sandra Day O'Connor
101 West Jefferson Atreet
Phoenix, Arizona 85003

Dear Judge O'Connor:

The Homemaker Club of Pike County Indiana will be sponsoring an achievement day in early October. They have requested my assistance in obtaining an autographed photograph of you to be used in a display of politically active women.

Any consideration you could give to this request would be very much appreciated.

Sincerely,

Joel Deckard

Joel Deckard
Member of Congress

JD:if

"Copy"

July 20, 1981

Dear Don:

Your recent letter concerning the President's nomination of Judge Sandra O'Connor for the U. S. Supreme Court is certainly appreciated.

The President stands behind this nomination and is hopeful that early hearings can be held and her confirmation voted upon by the Senate as soon as possible.

With thanks and cordial regard, I am

Sincerely,

Max L. Friedersdorf
Assistant to the President

Honorable Don Nickles
United States Senate
Washington, D. C. 20510

MLF:alh

DON NICKLES
OKLAHOMA

COMMITTEES;
ENERGY AND NATURAL RESOURCES
LABOR AND HUMAN RESOURCES
SMALL BUSINESS

United States Senate

WASHINGTON, D.C. 20510

July 7, 1981

Mr. Max Friedersdorf
Assistant to the President
for Legislative Affairs
The White House Office
1600 Pennsylvania Avenue
Washington, D.C. 20500

7 JUL 198

Dear Max:

I appreciated your responsiveness to the concerns that I expressed during our phone conversation yesterday.

Pursuant to that conversation, I have enclosed a memo which lists some of the known stances and votes cast by Judge O'Connor when she was serving as a State Senator in Arizona.

As I state in the memo, documentation is due to arrive in Washington this morning and I will make certain that you receive the pertinent information.

Thanks again, for your assistance in this most crucial matter. I am certain that the President will want to review this new information and reconsider O'Connor as a potential Supreme Court Justice in light of this news on her past votes.

Sincerely,

Don

33.91

Don Nickles
U.S. Senator

DN/lck

215 Dean McGee Avenue
Room 820
Oklahoma City, OK 73102
(405) 231-4941

3003 Federal Bldg.
333 W. 4th
Tulsa, OK 74103
(918) 581-7651

1916 Lake Road
Ponca City, OK 74601
(405) 767-1270

MEMO

To: MAX FRIEDERSDORF, ASSISTANT TO THE PRESIDENT FOR LEGISLATIVE AFFAIRS

From: SENATOR DON NICKLES

Re: POTENTIAL SUPREME COURT NOMINEE, SANDRA D. O'CONNOR

Date: JULY 7, 1981

It has come to my attention that President Reagan is considering nominating Sandra D. O'Connor to fill the Supreme Court vacancy. The article in Thursday's Washington Post, July 2, 1981, highlighted O'Connor's past experience and the good standing that she has among her peers, both of which appear impecable.

However, I have received several phone calls from concerned individuals who provided me with information on O'Connor's votes as a State Senator in Arizona regarding abortion. As you are probably aware, the appointment of a Supreme Court Justice is the single most important issue to pro-life people because of the role that such a person who is well-versed in this issue could play on the Court.

The following information has been provided to me from Trudy Camp, a former Arizona State Senator and colleague of O'Connor's. Some of the votes can be documented and such records are on their way to your office. While other votes were not recorded, three former State Senators have volunteered to testify, in affidavit form, that such votes were cast by O'Connor.

1970 Voted for a bill that was before the State Judiciary Committee that provided for abortion on demand.

1973 Prime Sponsor of S. 1190, a bill that established a Family Planning Program with provisions for "surgical procedures" and the dissemination of contraceptives to minors without parental consent. "Surgical procedures", as used in the context of the bill can only mean either sterilization or abortion.

April 23, 1974 Voted against House Resolution #2002, a resolution memorializing Congress to pass a human life amendment, in the State Judiciary Committee. Vote: 4-2.

May 8, 1974 Voted against House Resolution #2002 in the Republican Caucus. Vote: 9-9. This caucus vote prevented the resolution from being considered by the full Senate.

Voted against a bill to prohibit the University of Arizona Medical Center from performing abortions, except when necessary to save the life of the mother. Passed: 21-9.

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

September 9, 1981

To Sandra Thomas
O'Connor file

TO : Sandra Day O'Connor

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

SUBJECT : Rees Memorandum

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

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

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

cc: Powell Moore
Assistant to the President

Powell Moore

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

September 9, 1981

TO : Sandra Day O'Connor

FROM : John Roberts
Special Assistant to the Attorney General

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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]

GENERAL VIEWS

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

FN 1 NOT DURING NOMINATION PROCESS

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

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

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

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

[~~309 US 332~~]

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

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

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

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

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

[~~409 US 333~~]

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

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

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

they are related to counsel and

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

[3] 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.

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

> "Judges are not fungible: they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this
>
> [409 US 335]
>
> 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.

[2] 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 Frankfurther happens to sit in a labor case or a Thurgood Marshall in a civil rights case. For the same reason, a hypothetical

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

IV. An Illustrative History of Advice and Consent Hearings

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

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

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

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

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

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

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

*****

> 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]

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

[2]Id. at 660.

[3]Id. at 663-64.

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

[5]Id. at 10.

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

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

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

[9]Blackmun Hearings at 12.

[10]Fortas II Hearings at 105-06.

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

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

[13]Fortas II Hearings at 123.

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

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

[16]Stewart Hearings at 41-60.

[17]Fortas II Hearings at 173.

[18]Powell Hearings at 231-32.

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

[20]Marshall Hearings at 54-63.

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

[22]Fortas II Hearings at 181.

[23]Harlan Hearings at 139.

[24]Frankfurter Hearings at 107-08.

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

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

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

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

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

[30]Carswell Hearings, passim.

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

[32]Rehnquist Hearings at 70-73.

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

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

O'Connor

THE WHITE HOUSE

WASHINGTON

RECOMMENDED TELEPHONE CALL

TO: Senator Jeremiah Denton (R-Alabama)

DATE: Wednesday, September 16, 1981

RECOMMENDED BY: Max L. Friedersdorf
Powell A. Moore

PURPOSE: To comply with Senator Denton's request that he discuss with you personally his concerns regarding the nomination of Judge Sandra O'Connor.

BACKGROUND: Senator Denton makes frequent requests to discuss with you issues which he considers to be of crucial importance. He had requested a phone call from you late Monday afternoon so that he could see his way to vote for Judge O'Connor in the Senate Judiciary Committee on Tuesday. He voted "present" in Committee on the nomination.

Denton is probably the one Senator standing in the way of a unanimous Senate confirmation of Judge O'Connor. He has stated that after a discussion of her views with you, he will be able to vote affirmatively for her nomination on the Senate floor.

The abortion issue was the one issue which Senator Denton repeatedly raised in the confirmation proceedings. He apparently has difficulty believing that nominees to the Supreme Court cannot express approval or disapproval of past Supreme Court decisions which may come before the Court again, 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 Senator Denton's repeated attempts to get Judge O'Connor to comment on the validity of the Court's decision in Roe v. Wade (the landmark abortion decision of 1973) and to state anything more than her personal views on abortion. (Judge O'Connor stated that she is personally opposed to abortion.)

When Senator Grassley made his statement prior to casting his vote in the Judiciary Committee, he referred to a conversation he had with you. This seemed to irritate Denton in view of his unsuccessful attempt to call you Monday night prior to the vote. Denton frequently cites his support for the air defense sale to Saudi Arabia and his general support for you on all issues.

The Senate is expected to vote on this nomination next Monday. A unanimous vote would be beneficial to you politically.

TOPICS OF DISCUSSION:

1. State that you understand that he would like to discuss with you his concerns over the nomination of Judge O'Connor to be an Associate Justice of the Supreme Court.

2. State that you understand his frustrations with the limits of the confirmation process but that you are comfortable with Judge O'Connor's position on abortion and you are confident that she will make an excellent nominee to the Supreme Court.

3. Urge that he support her nomination in the vote on the Senate Floor

4. Thank him for his support for the past eight months, especially his current support for the air defense sale to Saudi Arabia.

DATE OF SUBMISSION: September 16, 1981

ACTION _____

Date: .....

Issue: .....

O'Connor Lit

YEAS		NAYS	YEAS		NAYS	YEAS		NAYS
✓	Abdnor (Quayle)			Glenn			Moynihan	
	Andrews		✓	Goldwater			Murkowski	
	Armstrong			Gorton			Nickles	
✓	Baker		✓	Grassley			Nunn	
✓	Baucus			Hart		✓	Packwood	
	Bentsen		✓	Hatch			Pell	
✓	Biden			Hatfield			Percy	
	Boren		✓	Hawkins ?			Pressler	
✓	Boschwitz			Hayakawa			Proxmire	
	Bradley		✓	Heflin		✓	Pryor (Elevator)	
	Bumpers			Heinz			Quayle	
	Burdick		✓	Helms			Randolph	
	Byrd, Harry F			Hollings			Riegle	
✓	Byrd, Robert C			Huddleston			Roth	
	Cannon		✓	Humphrey			Rudman	
✓	Chafee (Hallway)			Inouye			Sarbanes	
	Chiles			Jackson			Sasser	
	Cochran		✓	Jepsen		✓	Schmitt (Elevator)	
	Cohen			Johnston		✓	Simpson	
	Cranston		✓	Kassebaum		✓	Specter	
	D'Amato			Kasten			Stafford	
	Danforth		✓	Kennedy		✓	Stennis	
✓	DeConcini		✓	Laxalt		✓	Stevens	
✓	Denton		✓	Leahy			Symms	
	Dixon		✓	Levin (Hallway)		✓	Thurmond	
	Dodd			Long		✓	Tower	
✓	Dole			Lugar			Tsongas	
✓	Domenici		✓	Mathias			Wallop	
	Durenberger		✓	Matsunaga (Elevator)		✓	Warner (Hallway)	
	Eagleton			Mattingly		✓	Weicker	
✓	East		✓	McClure			Williams	
	Exon			Melcher			Zorinsky	
	Ford		✓	Metzenbaum				
✓	Garn			Mitchell				

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O'Connor file

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

TO: Sherrie Cooksey

FM: Carolyn Kuhl

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

Dear Senator Helms:

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

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

> In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of

> his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge. 409 U.S. at 836 n. 5.

In my judgment, Justice Rehnquist, as a nominee before the United States Senate, adhered to the line identified in his Laird opinion. Hearings at 26, 30. As does Justice Rehnquist, I believe that judges must decide legal issues or questions within the judicial process, not outside of it and unconstrained by the oath of office.

Other nominees to the Supreme Court have scrupulously refrained from commenting on the merits of recent Court decisions or specific matters which may come before the Court. Justice Stewart, for example, declined at his confirmation hearings to answer questions concerning Brown v. Board of Education, noting that pending and future cases raised issues affected by that decision and that "a serious problem of simple judicial ethics" would arise if he were to commit himself as a nominee. Hearings at 62-63. The late Justice Harlan declined to respond to questions about the then-recent Steel Seizure cases, Hearings at 167, 174, and stated that if he were to comment upon cases which might come before him it would raise "the gravest kind of question as to whether I was qualified to sit on that Court." Hearings at 138. More recently the Chief Justice declined to comment on a Supreme Court redistricting decision which was criticized by a Senator, noting, "I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit." . Hearings at 18.

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

justice is the appearance of justice. It would clearly tarnish the appearance of justice for me to state in advance how I would decide a particular case or issue.

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

Your second question, concerning my view of the doctrine of stare decisis, speaks to my judicial philosophy generally, not to a specific case or issue, and therefore I am happy to answer it. Our system of justice requires a profound respect for precedent. As Justice Cardozo once observed, if every decision of a court were opened to re-examination in every case, the law would be hopelessly confused and virtually impossible to administer. I would, therefore, be exceedingly reluctant to discard precedent of the Supreme Court in approaching any case. However, I am also mindful that Justice Frankfurter, who spoke strongly of the importance of law as a force of coherence and continuity, distinquished between stare decisis in relation to constitutional issues, which he deemed to be open to re-examination because legislatures cannot displace a constitutional adjudication, and statutory issues, which he believed should not be re-examined merely because an earlier decision is later thought to be wrong.

In my judgment, occasions may arise when a Justice of the Supreme Court should cast a vote contrary to precedent. When a Justice believes that a precedent was built upon flawed understandings of basic constitutional provisions, then a Justice should cast a vote contrary to the prior decision of the Court. A well-known example is the Supreme Court's reversal of the doctrine of Swift v. Tyson, 16 Pet. 1 (1842), which held that federal courts possess general common law powers to make law in diversity cases, in the landmark opinion authored by Justice Brandeis in Erie Railroad

v. Tompkins, 304 U.S. 64 (1938). Because of the numerous legal and practical impediments to rectifying error by constitutional amendment, constitutional decisions should not, I believe, be wholly insulated from re-examination.

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

THE WHITE HOUSE
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