national RIGHT TO LIFE committee, inc.

Suite 341, National Press Bldg — 529 14th Street, N.W. — Washington, D.C. 20045 — (202) 638-4396

September 9, 1981

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On my return August 19 from East Africa I was informed of the enclosed letter, which received extensive media exposure through Patrick Buchanan's syndicated column. The letter, allegedly written by you to Mrs. Marie Craven of Chicago, Ill., states in part "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."

The media has assumed that I am that "vindictive" person and this widely publicized assumption has not been denied by the White House.

In my July 15 letter to Attorney General William French Smith, regarding the Kenneth Starr memorandum, I have described Mrs. O'Connor as "dedicated, highly intelligent, capable, and a very likeable person."

In the Senate Steering Committee I stated that Judge O'Connor was "a gracious and a gifted lady." My criticism deals with Judge O'Connor's 1970-1974 voting record on abortion-related issues and not with the individual.

As President of the National Right to Life Committee in 1980, I had the privilege of meeting with you on two occasions, in January in Rye, New York, and in June in Los Angeles.

I had faith then, as I do now, in your integrity and pro-life commitment.

I do not believe that you wrote the letter to Mrs. Craven, but if so, it was because you were given seriously misleading information.

My family and friends, however, are understandably distressed.

The hurt and bewilderment of the pro-life movement will, I believe, only be dispelled by open and honest communication.

I would like to meet with you while I am in Washington for the confirmation hearings, September 9th through 11th.

Thank you for your consideration of this request.

Cordially,

Carolyn Gerster, M.D.

Carolyn Gerster, M.D.
Vice-President in Charge of International Affairs
National Right to Life Committee

CG:sb
Enclosures

Text of Reagan's, Craven's Letters

On the day that President Reagan announced the nomination of Sandra O'Connor, Chicago prolifer Marie Craven wrote to him expressing her opposition. Her letter sparked a revealing response several weeks later. The texts of Mrs. Craven's and President Reagan's letters follow.

July 7, 1981

Dear President Reagan,

A number of prolife people are planning on picketing you at your departure point tonight to protest your 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 prolifer since April of 1973. I have served and am serving on boards of directors of local prolife groups, have served as chairman of Illinois 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 anger, resentment and frustration pent up in me at this moment, because I sincerely feel you have betrayed me and millions of Americans I include over eight million preborn babies, as well as those who will continue to be aborted simply because they are an inconvenience to so many of our nation's women.

I am a Chicago resident of Irish Catholic heritage, and up until my involvement in prolife 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 grass-roots 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 judgments will be wise ones. Today I am having difficulty believing that you meant the words of the letter that you sent to the National Right to Life Convention on June 18, 1981.

"I share your hope that some day soon our laws will re-affirm 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 prolife position. Judge Sandra O'Connor supported pro-abortion legislation when she was an Arizona legislator. How can, then, this appointment bring us closer to our goal of protecting the preborn children of America?

I only hope that the United States 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 nation's most vital resource, our children, I am right.

Sincerely,
Mrs. Marie Craven

(This is the rough draft of Mrs. Marie Craven's letter to the President. The final

THE WHITE HOUSE

WASHINGTON

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.

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,

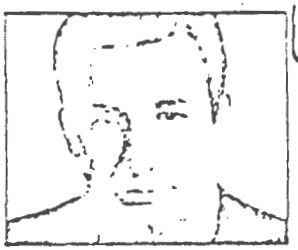
Ronald Reagan

Mrs. Marie Craven
Chicago, Illinois

N.Y. Daily News, Tuesday, August 11, 1981

Reagan's run-in with the Right-to-Lifers

WASHINGTON—In an angry defense of his Supreme Court nomination of Judge Sandra Day O'Connor, President Reagan has charged the past president of the National Right-to-Life Committee with having "something of a record of being vindictive." The unusual personal attack came in response to an impassioned letter from Marie Craven of Chicago, an Irish Catholic mother of five and a Reagan Democrat in 1980.



Patrick Buchanan

"I believe that most of the talk about my appointment was stirred up principally by one person in Arizona," the President replied. "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."

The "attacker," Dr. Caroline F. Gerster, an Arizona physician and for 10 years a leader in the Right-to-Life movement, is a longtime acquaintance of Judge O'Connor's and claims to have been in an "adversary position" while the latter was Republican leader in the Arizona Senate in the mid-'70s. Dr. Gerster is a prime mover in the campaign to effect withdrawal of the O'Connor nomination.

WHAT TRIGGERED the attack, unprecedented for the President, was a six-page letter from Mrs. Craven, asserting that Mr. Reagan—with the O'Connor nomination—had broken his platform pledge to nominate pro-life judges and justices.

On Saturday afternoon, when she received the Reagan letter, Mrs. Craven was "terribly upset." "His blanket statement astonishes me . . . He's trying to blame the whole thing on one person . . . She [Dr. Gerster] is not alone in her objection."

(Ironically, Carolyn Gerster was the movement leader to whom Candidate Reagan made his personal commitments in a meeting in Rye, N.Y., Jan. 17, 1980. From that meeting, there issued almost universal support from the Right-to-Lifers for Reagan's nomination and election.)

While the President's letter detailed Judge O'Connor's reasons for voting against an amendment to a football stadium bill to outlaw abortions in Arizona university hospitals—she said it was non-germane, therefore, unconstitutional—it did not mention the three O'Connor Senate votes that have caused the Right-to-Lifers the greatest anguish.

The first was a vote that "would remove all legal sanctions against abortions performed by licensed physicians." The second, her co-sponsorship of the Family Planning Act which would have furnished "all medically acceptable family planning methods and information" including "surgical procedures" to anyone regardless of age. The third, her vote against—it carried four-to-two—a memorial to Congress to extend constitutional protections to the unborn—i.e., a Human Life Amendment. According to Mrs. Craven, the President's failure to mention these raises the question as to whether he is fully informed on the O'Connor record.

THE WHITE HOUSE
WASHINGTON

Thurs - 9 AM — Morning or late Wed -
— Pro-~~Family~~ Women
— Mrs. Reid — Minnesota
— 612-484-1746 —

Women's appointments
& specifically Sandra O'Connor

---

about 12 -

Terry Olson Nancy Mac Gibbon
Mary Prior
Grace Becker
Sharon Mueller
Millie Yost
Lorraine Brackett
Myrna Petersen

Morton

REQUEST FOR APPOINTMENTS

9AM Thursday
Pro Family Group

To: Officer-in-charge
Appointments Center
Room 060, OEOB

Please admit the following appointments on September 10, 1981

for Morton C. Blackwell (NAME OF PERSON TO BE VISITED) of Public Liaison (AGENCY):

MAC GIBBON, Nancy
PRIOR, Mary
BECKER, Grace
MUELLER, Sharon
YOST, Millie
BRASKET, Lorraine
PETERSEN, Myrna
OLSON, Terry

Cancelled
women had
to leave for
St Paul -

MEETING LOCATION

Building OEOB

Room No. 191

Time of Meeting 9 A.M.

Requested by Shortley

Room No. 191 Telephone 2657

Date of request Sept. 9, 1981

Additions and/or changes made by telephone should be limited to three (3) names or less.

APPOINTMENTS CENTER: SIG/OEOB – 395-6046 or WHITE HOUSE – 456-6742

UNITED STATES SECRET SERVICE

SSF 2037 (05-78)

Exhibit Supreme Court

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

September 10, 1981

TO: Gregg Newell

FROM: Morton C. Blackwell MCB

RE: President's meeting with Carolyn Gerster

I strongly endorse the suggestion that the President meet with Dr. Carolyn Gerster during her current visit to D. C.

This is the time to rebuild bridges to the right to life community, and Dr. Gerster is the ideal person for this purpose.

Contrary to the presumed suggestion in the President's letter to Mrs. Craven on August 3, Dr. Gerster is not fairly characterized as "vindictive". To the contrary, she is held in extraordinarily high regard by virtually every leader in the extraordinarily diverse coalition of right to life groups. There are many strong personalities among the right to life leaders. There are many personality conflicts and disputes over policy and methods of proceedure in the right to life movement. Dr. Gerster has been remarkable in her ability to get along with virtually all the other leaders. That is why the presumed Presidential attack on her personally was the source of so much shock and unrest in the right to life community.

I have seen Dr. Gerster interviewed on national television this week. Her posture toward the President was consistently respectful.

I suggest that the President invite only Dr. Gerster to meet with him. I am confident that it would be a cordial meeting. We do have the change of position stated yesterday by Judge O'Connor in which she said she had changed her position on the abortion legislation vote she cast many years ago in the Arizona legislature.

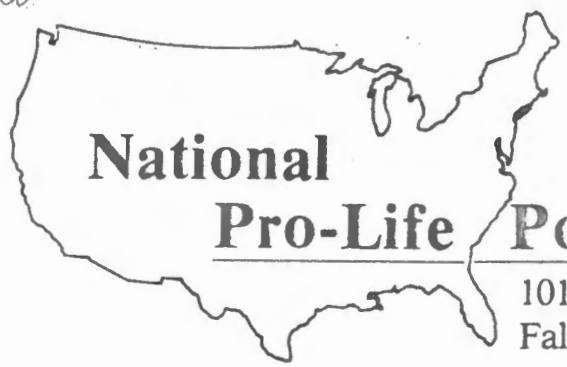
If, as I believe, Dr. Gerster leaves the meeting with the President convinced that he is still basically supportive of the right to life position and that his consciousness has to some extent been raised on this issue by the controversy surrounding Judge O'Connor's appointment, she will quickly pass the word in the right to life community. Short of an immediate filling of another Supreme Court vacancy with a known right to life activist, a renewed rapprochement between Dr. Gerster and the President would do more to deflate the current political unrest with the right to life community than any other action the Administration can take. It might be suggested

that such a meeting be postponed until after Senate confirmation of Judge O'Connor, but taking this initiative now would have a much greater effect. Better to prevent to the extent possible the solidification of anger and despair which will build in the right to life community if the President appears unsympathetic up through the time of the final Senate vote.

cc: Elizabeth H. Dole

Sent to Powell 9/8

File - Supreme Court



National Pro-Life Political Action Committee

101 Park Washington Court
Falls Church, VA 22046 (703) 536-7650

A copy of our report is on file and may be purchased from The Federal Election Commission, Washington, D.C

† Deceased

T E S T I M O N Y
of the
Rev. Charles Fiore, O.P.,
Chairman,
National Pro-Life Political Action Committee,
Falls Church, Virginia
before the
Judiciary Committee
of the
United States Senate,
September 11, 1981

Mr. Chairman and Members of the Committee:

I thank you for this opportunity to appear before you as founder and Chairman of the National Pro-Life Political Action Committee, and on behalf of tens of thousands of our supporters in all states and right-to-lifers everywhere, who oppose the nomination of Judge Sandra Day O'Connor to the U.S. Supreme Court.

Mrs. O'Connor's nomination by President Reagan has been the occasion of virtually unanimous disappointment on the part of rank-and-file pro-lifers, because it represents a breach of the 1980 Republican Platform on which he ran (and which he more than once privately and publicly affirmed as a candidate), and on the basis of which he convinced millions of blue-collar, traditionally Democratic voters --

ethnic Catholics and fundamentalist-evangelical Protestants -- to switch parties and vote for him.

As a result, in the first six months of his incumbency, President Reagan may have seriously alienated major portions of the "social issues conservatives" who comprised the pro-life/pro-family coalition that helped elect him last November. Those same voters are intently watching these hearings, and will long remember and note well the final "ayes" and "nays" as the full Senate determines Judge O'Connor's qualifications to sit with the Court. As voters they perceive the members of the House and Senate not as party functionaries, but as their representatives first of all; just as they also perceive party platforms and election pledges not as "litmus tests," but as implied contracts to be fulfilled by those elected.

I say these things at the outset, not because they have bearing on Mrs. O'Connor's qualifications, but because they have very much to do with the larger processes of representative government, which are also at stake in these hearings.

The facts of Judge O'Connor's legislative and judicial careers are matters of public record, even though it appears that the Administration paid scant attention to them when evaluating her qualifications for the Supreme Court, even as late as the now-infamous Starr Justice Department memorandum hurriedly compiled a day or so before the nomination was made.

Briefly, as they pertain to the abortion issue, the facts are:

1. As a State Senator in 1970, Mrs. O'Connor twice voted for HB 20, to repeal Arizona's existing abortion statutes -- three years before the U.S. Supreme Court legalized abortion-on-demand, throughout the nine months of pregnancy, in all 50 states.

2. In 1973, Senator O'Connor co-sponsored a so-called "family planning" Act (SB 1190) which would have allowed abortions for minors without the consent of parents or guardians. The bill was considered by all observers in Arizona to be an abortion measure, and the Arizona Republic (3/5/73) editorialized, "The bill appears gratuitous -- unless energetic promotion of abortion is the eventual goal."

3. In 1974, Senator O'Connor voted against a bill (HCM 2002) to "memorialize" Congress on behalf of passage of a Human Life Amendment to the Constitution protecting the unborn.

4. In 1974, she voted against an amendment to a University of Arizona funding bill that prohibited use of tax-funds for abortions at University hospital, because Mrs. O'Connor claimed it was "non germane" and thus violated the state constitution. However, the bill passed with the amendment, and its constitutionality was upheld by the State Supreme Court.

It seems rather peculiar to us that Mrs. O'Connor, in discussing her legislative record on abortion with Mr. Starr of the Justice Department, could not remember her position on the first three votes, since they all represented dramatic departures from the existing laws and aroused national media attention. Yet she was apparently able to recall

the far less significant fourth vote and her percise reason for it. Stranger still, was her attempt in the Starr memorandum to portrat herself as a friend and intimate of Dr. Carolyn Gerster, M.D., Phoenix, titular head of the state right-to-life organization, when Dr. Gerster says it was well-known that she and Mrs. O'Connor had long been in heated opposition on these very votes.

The question looms large over Mrs. O'Connor's qualifications to sit as a member of the Supreme Court: Did she deliberately seek to mislead investigators for the Justice Department and/or the President as to the facts of her legislative record on this vital issue; did she give false or selective information in an attempt to portray her clearly pro-abortion legislative record as something else?

And if she did, what does that say about her ambition to accede to the high Court...and her moral strengths once part of it?

What price glory?

I raise these blunt and impolite questions because the matter of the right to life of the unborn is fundamental and critical to the health of our society. "The right to life," as also the rights to "liberty and the pursuit of happiness" are not "minor" or peripheral issues in our political process. Nor are they "private" any more than homicide is a "private" act, if the unborn are human, as indeed every medico-scientific test affirms.

Because of the complicated and sensitive issues involved, at the very least we expect you to fully explore her philosophies and feelings on this issue of life versus death. If this judge be not guilty of the pro-abortion charge, let her proclaim her innocence loudly and clearly. Indeed, if she has changed her views, National Pro-Life PAC would be first in line to reconsider our opposition to this nomination.

As Professor William Bentley Ball, former Chairman of the Federal Bar Association's Committee on Constitutional Law, and one who has argued a number of religious liberty cases before the U.S. Supreme Court, recently wrote apropos of Mrs. O'Connor's nomination:

"Some zealous supporters of the O'Connor nomination...have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say...that it would be of no significance that a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recital that the candidate is 'personally' opposed to such a point of view. Why the qualifying accrb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to forgo support of those practices?

"Philosophy is everything in dealing with the spacious provisions of the First Amendment, the due process clauses, equal protection, and much else in the Constitution. It is perfect nonsense to praise a candidate as a 'strict constructionist' when, in these vital areas of the Constitution, there is really very little language to 'strictly' construe...

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

"Comment: 'Mrs. O'Connor is said to be pro-abortion.'
Response: 'Really? But she is a staunch conservative.'

"Just as meaningful would be:

"Comment: 'John Smith is said to be a mathematician.'
Response: 'Really? But he is from Chicago.'

"Whether Mrs. O'Connor is labeled a 'conservative' is irrelevant to the question respecting her views on abortion. So would it be on any other subject." (Emphasis added. Cf. Appendix for complete text, "The O'Connor Supreme Court Nomination: A Constitutional Lawyer Comments," from THE WANDERER, St. Paul, MN, Vol. 114, No. 31; July 30, 1981).

"Philosophy is everything..." says Professor Ball. And we concur. With these facts of her record in mind, and in the light of President Reagan's pro-life promises before, during and after the campaign, logically only three conclusions can be drawn:

1. Either Sandra Day O'Connor has changed her views, and is no longer a pro-abortion advocate ("personal opposition" does not necessarily translate into "public" opposition to abortion), or

2. President Reagan appointed Mrs. O'Connor without full knowledge about her public record, or

3. President Reagan was fully informed about Mrs. O'Connor's public record as pro-abortion, but chose to disregard it and the solemn pro-life promises he had made.

If, as it appears, Judge O'Connor and some of her supporters have attempted to cloud over or to minimize the importance of her pro-abortion record for the sake of these hearings, what does that say about her record? More, what does it say about her probity and candor?

Far from being unimportant, these questions are absolutely essential in judging the qualifications of one nominated to the Supreme Court of our land.

Mrs. O'Connor, although she has already testified and submitted herself to your queries, technically is still before this Committee, and may be recalled for further questioning by yourselves or other Senators.

She must be asked directly if she has changed her views on abortion since her votes in the Arizona State Senate. She must be asked specifically about each of those votes. She must be asked about Roe vs. Wade and Doe vs. Bolton, about parental consent to medical procedures on minors, and the other excellent questions Professor Ball raises in his article (op. cit.).

Should this Committee and the Senate fail to raise these questions with Judge O'Connor now, as previous Judiciary Committees did not hesitate to question Judges Haynesworth and Carswell on their records and philosophies, her nomination if confirmed will always be tainted, and history will record that the Senate rushed to confirm her for specious reasons and not her legitimate qualifications for the job.

Mr. Chairman and Members of the Committee, we see no evidence of a change of heart or mind on the part of Judge O'Connor from the pro-abortion stance that dominates her public record. We do not know what questions President Reagan asked Mrs. O'Connor in his private meeting with her, and so we do not know the practical value, if any, of her newfound "personal opposition" to abortion. On the contrary, we find evidence that one week after her conversation with the President (and before her nomination) she gave partial and misleading information on these very issues as they arise in her record, to an investigator for the Attorney General of the United States, at a time when she knew full well that she was being considered among the finalists for this nomination.

I understand Mrs. O'Connor's ambition and desire to become the first woman Justice of the Supreme Court of the United States.

I find her philosophy as exemplified in her record as a legislator and leader in the State Senate of Arizona clearly pro-abortion and so, on the basis of criteria set forth by the Platform of the majority party in the Senate, and by the President who nominated her, she is unqualified.

But all of us in public life must realize at times like these that our judgments are subject to re-examination, first of all by the public record which follows, and ultimately by the one Judge Who alone is Just, and to whom all of us must finally submit our thoughts, hopes, our words, our deeds, our very lives--all of which and each part of which will be "germane."

Quite simply, gentlemen, abortion goes beyond partisan platforms and political promises -- it is morally unjustifiable. For that fundamental reason, we urge all of you -- Democrats and Republicans alike -- to vote against the nomination of Sandra Day O'Connor to the U.S. Supreme Court.

The Wanderer

VOLUME 114, NO. 31 Editor: A. J. Matt Jr. JULY 30, 1981

The O'Connor Supreme Court Nomination: A Constitutional Lawyer Comments

By WILLIAM BENTLEY BALL

(*Editor's Note:* Mr. Ball is the former chairman, Federal Bar Association Committee on Constitutional Law, and has successfully argued a number of important cases involving religious liberty before the Supreme Court.)

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

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

My second relates indeed to the matter of "philosophy." Some zealous supporters of the O'Connor nomination (who themselves have notoriety as ideologues) have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say, in other words, that it would be of no significance that a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recita that the candidate is "personally" [illegible] while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

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

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

> Comment: "Mrs. O'Connor is said to be pro-abortion."
> Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

> Comment: "John Smith is said to be a mathematician."
> Response: "Really? But he is from Chicago."

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

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

What are the candidate's views on:

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

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too — and important — would be questions to the candidate calling for agreement with, disagreement with, and discussion of, major prior decisions of the Supreme Court. Not the slightest impropriety would be involved in, and much could be gained by, public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made.

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

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

Responses of Mrs. O'Connor to questions posed to her very recently give rise to additional concerns: (a) re Mrs. O'Connor's views concerning overruling of prior decisions, (b) her candor.

As to (a): She takes what appears like a "conservative" position of saying that she would not vote to disturb prior decisions of the court (including the abortion decisions). If it is a fixed principle with her, that prior decisions may not be overruled, then she should be asked whether she would have voted in *Brown v. Board of Education*, to overturn the "separate but equal" doctrine of *Plessy v. Ferguson* (or, as far as that goes, the *Dred Scott* decision). If her answer is "yes," then she does not have the above fixed principle. Then she should be asked, "Since you do *not*, after all, have any real principle against overruling prior decisions, then would you not vote to overrule *Roe v. Wade* (the abortion decision) since you say you are opposed to abortion?"

If her answer is "no," she is plainly not qualified to go on the court because no one should be a Justice of the *Supreme* Court (as contrasted with lower courts) who would declare himself absolutely bound to follow old prior Supreme Court decisions however bad they may have been.

As to (b): Mrs. O'Connor has seemed to perform, in her Washington interviews, with somewhat less than the candor which the public deserves when it is choosing a Supreme Court Justice. Understandably she should not be asked to commit, in advance, her vote on a particular hypothetical or actual case. But where a candidate for the bench has *already* taken a public position on an issue of great significance nationally, it is plainly the public's right to know whether the candidate continues to hold that view. If, for example, Mrs. O'Connor had several times voted, in Arizona, in favor of racial segregation, would it be deemed improper to require her to say whether she does, or does not, today repudiate that position? (Not with quibbling about "personally" being opposed to segregation.)

There should be no sense of inevitability about the O'Connor nomination. The nation is not bankrupt in men — or women — of qualifications for the Supreme Court. There are *many* candidates with unimpeachable qualifications in the United States — with better legal experience, far superior judicial qualifications, and with no blemish on their records of having even remotely supported violations of rights to liberty or to life. This is especially the case when we consider that the lifetime appointment may mean that the appointee will be on the bench for *decades*.

Finally, a note of mystery on the O'Connor matter. Let us suppose that President Reagan had nominated a person who had had relatively limited law practice experience, had never argued a case before the Supreme Court of the United States, had not in fact ever handled a case of significance, had no heavy trial experience, had no high scholarly qualifications, had had a few years as one of a multitude of politicians holding a seat in a state senate, and a few years as a judge (not even on a state supreme court but in a state intermediate appellate court, where political hacks abound) and had never written a noteworthy opinion as such. Would anyone venture to say that here was Supreme Court material? In this case, the media have acclaimed just such a candidate — and one must wonder why. Suppose that, instead of having had a record indicating acceptance of abortion, such a candidate had a record the other way around — was known as a Moral Majority type? Would the mediocrity — indeed the poverty — of legal background then have been supported by the media?

The Wanderer

VOLUME 114, NO. 31 Editor: A. J. Matt Jr. JULY 30, 1981

The O'Connor Supreme Court Nomination: A Constitutional Lawyer Comments

By WILLIAM BENTLEY BALL

(*Editor's Note:* Mr. Ball is the former chairman, Federal Bar Association Committee on Constitutional Law, and has successfully argued a number of important cases involving religious liberty before the Supreme Court.)

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

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

My second relates indeed to the matter of "philosophy." Some zealous supporters of the O'Connor nomination (who themselves have notoriety as ideologues) have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say, in other words, that it would be of no significance that a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recita that the candidate is "personally" while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

Philosophy is everything in dealing with the spacious provisions of the First Amendment, the due process clauses, equal protection, and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when, in these vital areas of the Constitution, there is really very little language to "strictly" construe. As to other areas of the Constitution (e.g., Article 1, Sect. 4 — "The Congress shall assemble at least once in every year . . ."), to speak of "strict construction" is also absurd, since everything is already "constructed."

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

> Comment: "Mrs. O'Connor is said to be pro-abortion."
> Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

> Comment: "John Smith is said to be a mathematician."
> Response: "Really? But he is from Chicago."

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

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

Supreme Ct.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 21, 1981

STATEMENT BY THE PRESIDENT

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

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

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

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

# # #

File Supreme Court

THE WHITE HOUSE

WASHINGTON

September 22, 1981

Mr. Randall P. Myers
1197- 22nd Avenue N.
Naples, Florida 33940

Dear Mr. Myers:

Thank you for your recent letter concerning the President's nomination of Judge Sandra O'Connor to the United States Supreme Court.

In your letter, you expressed your concern that some of the facts regarding Mrs. O'Connor's record in the Arizona State Senate have been kept from the President. Information which has emerged from research by the media, Right-to-Life groups and other concerned organizations has quickly been reported not only to the President and his senior staff but also through all sorts of news media, which has insured that such information is widespread.

The President had a personal interview with the nominee before the nomination was made. He is satisfied that her views are consistant with his philosophy and that of the Republican platform. As you probably already know, not a single pro-life Senator opposed this appointment.

I hope that you will come to agree during her tenure on the Supreme Court, that the esteem Judge O'Connor enjoys from the President is well-founded.

Sincerely,

Morton C. Blackwell
Special Assistant
to the President

August 23, 1981

Morton Blackwell
Special Assistant for Public Liaison
The White House
Washington, D.C. 20000

Dear Mr. Blackwell:

As you may well know, President Reagan's nomination of Sandra O'Connor as a Supreme Court justice has shocked the Right-To-Life groups as well as most conservative groups. These same organizations worked so hard to get Mr. Reagan nominated and elected in 1980, that we are hard pressed by the nomination, in spite of Mrs. O'Connor's record in the Arizona senate. That record as repeatedly shown Mrs. O'Connor has voted for pro-abortion issues and for ERA in Arizona and has voted against anti-abortion legislations.

The reason that I am writing to you, Mr. Blackwell, of because of you past association with the Conservative Digest, and the conservative movement. It has been stated that certain negative information about Mrs. O'Connor stance in the Arizona senate have been kept from Mr. Reagan during the investigation of Mrs. O'Connor for the nomination. I feel, as well as others in the conversative ranks, that certain top White House aides deliberatly have misinformed the President and are working against every principle certaining the Right-To-Life and ERA measures.

I certainly do hope that this letter will reach you, and that you can be of assistance as far as informing the President of our fears.

Sincerely,

Randall P. Myers

Randall P. Myers
1197-22nd Avenue N.
Naples, Fla. 33940

Supreme Court

DENTON TALK OUTRAGES REAGAN

Before he was willing to cast his vote in favor of Supreme Court nominee Sandra O'Connor, Sen. Jerry Denton insisted on talking with President Reagan. Denton had abstained in the Judiciary Committee, and Committee Chairman Sen. Strom Thurmond wanted a unanimous vote on the Senate floor so he strongly urged the White House to place the call to Denton.

A couple of days before the vote on the Senate floor, Reagan did call the freshman Alabama Republican. It was a long phone call, with Denton insisting that the President give him personal assurances that O'Connor would vote right once on the court. At one point Denton told the President that if O'Connor didn't perform well on the social issues "it will drive you right out of office." Denton also plugged for a number of his pet projects. Reagan was polite and give Denton the assuring words he wanted to hear.

However, the phone call made Reagan unusually angry, so much so that several senior staff members were given tounge lashings and instructed not to push for Reagan to call Denton again.

Senate staffers who were told of Reagan's anger were led to believe that the President felt Denton had no leverage in his situation and was not in a position to make demands on the Administration.

Denton did end up making the O'Connor vote unanimous and told the Washington Post that he voted that way in part because he worried what Reagan would think of him if he didn't.

WHITE HOUSE SEES BIG BUSINESS HELPING THE POOR

The White House has put one of its most liberal staffers, Jim Rosebush, in charge of a project designed to motivate the private sector to help the poor.

ADD ONE TK

ADD ONE

Rosebush has now prepared a list of potential Presidential advisors who he thinks should be appointed to work on the task of providing more in social services and private volunteer activity for the needy since the federal government is retrenching in a number of these areas.

The list is topheavy with corporate chief executives such as Don Kendall of Pepsico, a close friend of former President Carter. Many of the nation's most liberal chief executives would be involved in this project.

Except for evangelist Billy Graham, none of the major conservative Protestant leaders would be involved, and the only prominent Catholic cleargyman would be Terrance Cardinal Cooke of New York. However, former liberal Republican Governor of Michigan George Romney would be among the advisors if Rosebush has his way.

A group called the "Foundation for the Poor", headed by conservative Black evangelist E.V. Hill of Los Angeles has been pushing for White House action in this area since Reagan was elected, but Hill is not on the Rosebush list of those to be appointed advisors. When told of the names on the proposed list, Hill said "They lack poverty credentials."

Some conservative supporters of the Reagan Administration have warned the President that his Presidency is already being perceived as far too sympathetic to big business. The Rosebush project would help lock in that perception. MOreover, the Commission is unlikely to produce recommendations which will benefit the truly needy since so few of those to be appointed have any understanding of the nature of the problems of the poor.

REAGAN CONSIDERS APPOINTMENT OF ULTRA LIBERAL

A strong feminist who supported Ronald Reagan for President with reservations and headed up his Women's Policy Advisory Board, appointed during the campaign to appease growing opposition from women's libbers, is likely to be appointed to the International Trade Commission, White House sources revealed.

Supreme Court

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

September 25, 1981

Mr. Peter MacDonald
Chairman
Navajo Tribal Council
Window Rock, Arizona 86515

Dear Mr. MacDonald:

The President has asked this office to extend to you his and our sincere gratitude for your message in support of Judge Sandra O'Connor's nomination to be an Associate Justice of the United States Supreme Court.

You might be interested to know that in response to a written question posed by the Senate Judiciary Committee regarding her commitment to equal justice under the law, Judge O'Connor mentioned her personal concern for the traditions of native Americans. She stated:

> Through the Heard Museum in Phoenix, as a Trustee and its President, I have worked to foster and encourage understanding and communication with the several Indian tribes and the native Americans in Arizona through various programs and projects.

I have forwarded a copy of your telegram to Justice O'Connor. I am certain she will be pleased to know of the endorsement of the Navajo Tribal Council.

Again, thank you for your message of support.

Very truly yours,

Carolyn B. Kuhl

Carolyn B. Kuhl
Special Assistant to
the Attorney General

cc: Judge S. O'Connor

Supreme Court

Office of the Attorney General

Washington, D. C. 20530

September 25, 1981

Dr. B. Robert Biscoe
Executive Secretary
American Council of Christian
Churches
P.O. Box 816
Valley Forge, Pennsylvania 19482

Dear Dr. Biscoe:

The President has asked this office to respond to your letter of September 8, 1981 regarding the nomination of Judge Sandra O'Connor to be an Associate Justice of the Supreme Court.

As you know, Judge O'Connor's nomination has by now been confirmed by the Senate. At the time your letter was written, the President already had nominated Judge O'Connor.

The President is aware of the concern voiced by some with regard to Judge O'Connor's legislative record in the Arizona Senate. At the Senate Judiciary Committee Hearings on her nomination, Judge O'Connor explained in detail her legislative record in the area of abortion. She also stated unequivocally that she is personally opposed to abortion and finds it abhorrent .

As you may be aware, Judge O'Connor was confirmed by a unanimous vote of the Senate. Senators who have very strong pro-life records voted for Judge O'Connor's confirmation both in the Judiciary Committee and in the Senate.

Thank you for your expression of concern about this very important issue. If we can provide any additional information, please do not hesitate to contact us.

Very truly yours,

Carolyn B. Kuhl

Carolyn B. Kuhl
Special Assistant to
the Attorney General

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Supreme Court

MORTON BLACKWELL
SPECIAL ASST TO THE PRESIDENT
WASHINGTON DC 20500

THIS IS COPY OF MAILGRAM SENT TO PRESIDENT RONALD REAGAN WHITE HOUSE DC

DEAR MR PRESIDENT ON BEHALF OF OVER 100 PRO-LIFE PRO-FAMILY ORGANIZATION THE LARGEST REPRESENTATION OF PROLIFE PEOPLE EVER, JOI NED TOGETHER UNDER THE BANTER OF THE HUMAN LIFE STATUTE COALITION, WE SEEK YOUR IMMEDIATE ASSISTANCE IN PASSING SENATE BILL NO. 158 CURRENTLY IN THE SENATE JUDICIARY COMMITTEE.

PRESIDENT REAGAN, SO FAR AS WE ARE CONCERNED THE O'CONNOR APPOINTMENT IS NOW HISTORY AND THE BURDEN OF PROOF NOW REST UPON HER.

WE ARE CONFIDENT OF YOUR PRO-LIFE COMMITTMENT, AND APPRECIATE YOUR PAST PUBLIC ENDORSEMENT OF S.158. WE HOPE AND PRAY YOU WILL NOW JOING WITH REPRESENTATIVE HYDE AND SENATOR HELMS AND OUR COALITION IN PRESSING FOR IMMEDIATE PASSAGE OF S.158.

IF THE COALITION CAN HELP IN ANYWAY, PLEASE LET US KNOW.

ON BEHALF OF THE HUMAN LIFE STATUTE COALITION, SINCERELY,
PAUL A BROWN 6 LIBRARY CT SE WASHINGTON DC 20003

15:14 EST

MGMCOMP

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FROM TELEX 6161

FROM TWX 910 420 1212

Mary V. Nelson
8045 Davis Drive
St. Louis
Mo. 63105
November 3, 1981

f/c
Judicial
Selection

Mr. Morton Blackwell
The White House
Washington
D. C. 20500

Dear Mr. Blackwell:

I enjoyed visiting with you in your office recently with Donna Hearne. Since that meeting I have been doing some homework.

Enclosed please find a copy of a letter that I and other concerned Missourians wrote to Judith Whittaker, who apparently is being considered for a seat on the 8th District Circuit Court of Appeals which encompasses our area.

We thought you might like to have a copy of our letter to do with as you see fit.

Thanks for giving us your time while we were in Washington.

Very sincerely,

Mary Nelson

Mary V. Nelson

Mary V. Nelson
8045 Davis Drive
St. Louis
Mo. 63105
November 3, 1981

Ms. Judith Whittaker
Halmark
25th & McGee Trafficway
Kansas City, Mo. 64108

Dear Ms. Whittaker:

It has come to our attention that you are seeking a seat on the 8th district court of appeals. We believe this is a very important position and would, therefore, like to check with you regarding information about your background that has come into our hands. We believe that your answers to the following questions will be helpful:

1. Are you affiliated with a political party? I. e. did the Blackwood Sanders law firm promote you for the position of federal court of appeals judge under President Carter, saying that you were a liberal Democrat? And did Senator Tom Eagleton submit your name?

2. You were recently endorsed by the Women's Political Caucus. Do you go along with their pro-abortion and pro-ERA stands?

3. Were you president of the Legal Aid Society (now called the Legal Services Corporation) in 1971, and did the LAS differ in philosophy from the LSC or are they the same?

4. Were you a member of an ad hoc committee of women at Halmark that is pro-abortion and pro-ERA?

5. Is it true that your chief backer and lobbyist in Washington is Charles Egan, chief general counsel at Halmark? If so, is he a Democrat who has contributed liberally to both the Ted Kennedy and Culver campaigns? Would you please define your political views for us?

6. Were you on the Reagan team and removed because of your support for the Legal Services Corporation?

7. What is your position on court ordered bussing to achieve racial balance?

We appreciate your taking the time to answer our questions, and thank you for replying as soon as possible.

Very sincerely,

Mary V. Nelson
The Conservative Caucus, 2nd dist. dir.

Ann O'Donnell
Mo. Dir. Natl. Right to Life Comm.

The Cardinal Mindszenty Foundation, exec. dir. and sec. respectively
Eleanor Schlafly
Carol Martens

Elaine Middendorf
State Dir. Eagle Forum

Lois Linton
Dir., Mo. Conservative Union

cc: President Ronald Reagan
Mr. Ed Meese
Mr. Jim Baker
Atty. Gen. William French Smith
Sen. Jack Danforth

Supreme Court

SANDRA O'CONNOR CASTS CRUCIAL VOTE IN FAVOR OF OBSCENITY

Justice Sandra O'Connor has cast a critical vote to overturn a state law against pornography, even before state courts could hear the case. O'Connor refused to join Warren Burger, Lewis Powell and William Rehnquist who dissented, and this refusal means that a U.S. appeals court decision will become precedent for the entire nation even though the Supreme Court never heard the case.

This decision can result in almost any meaningful state laws being declared unconstitutional before they are ever enforced. The suit was filed before the state of Washington statute was even certified by the Secretary of State.

O'Connor's action is directly contrary to her sworn testimony indicating opposition to pornography and especially her statements that federal courts should allow state courts to hear such cases first. Burger's dissent reads almost as if it were plagiarized from O'Connor's celebrated William and Mary Law Review article which stressed the importance of state courts hearing cases before they go to federal courts.

O'Connor's action means that the Supreme Court now has a solid six vote pro-pornography majority. O'Connor can now be expected to thumb her nose at pro-family forces and show her true colors as radical anti-family feminist siding with the far left of the Supreme Court.

Retained

SUPREME COURT OF THE UNITED STATES

DONALD C. BROCKETT ETC., APPELLANT *v.* SPOKANE ARCADES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–1604. Decided November 9, 1981

The judgment is affirmed.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

The Court today affirms a decision of the Court of Appeals holding unconstitutional a Washington statute which has yet either to be enforced in or construed by a Washington state court. I would abstain from decision until the Washington courts are given an opportunity to interpret the law which has been thus invalidated. This Court—and all federal courts—have enough to do without "preempting" state courts on matters initially of state concern.

The Washington "moral nuisance" law, Wash. Rev. Code §7.48.050 *et seq.*—a comprehensive statute directed at prohibiting the public sale and exhibition of obscene materials—was adopted as an initiative by the voters in the November 8, 1977 election. Before the statute was even certified by the Secretary of State, appellees, several corporations engaged in the exhibition, distribution, and sale of movies, books, and magazines, filed this action in the federal District Court. On February 6, 1978, less than three months after the initiative's adoption, and apparently before it had ever been applied, the District Court declared the law unconstitutional.

I have previously outlined the concerns that should lead a federal court to stay its hand in cases such as this, when litigants have deliberately avoided resort to the courts of the state whose statute is being challenged. *Vance* v. *Universal*

Amusement Co., 445 U. S. 308, 317–320 (1980) (BURGER, C. J., dissenting); cf. *Moore* v. *City of East Cleveland*, 431 U. S. 494, 521–531 (1977) (BURGER, C. J., dissenting); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439–443 (1971) (BURGER, C. J., dissenting). The policies of federalism and comity militate in favor of affording state judges—who are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so—the initial opportunity to consider the scope and validity of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal constitutional issues, or the state court may resolve those issues as we would. *Harrison* v. *NAACP*, 360 U. S. 167 (1959); *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959); *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941).

Here, the Court of Appeals invalidated portions of the nuisance law dealing with the issuance of temporary and permanent injunctions against establishments exhibiting "lewd" or "obscene" matter, on the grounds that, *inter alia*, 1) "[n]o limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction," App. to Jurisdictional Statement, at 44; 2) "there is no assurance that there will occur the required prompt final judicial determination on the merits," *id.*; and 3) "a defense of nonobscenity *presumably* is unavailable at a trial for violation of an injunction" (emphasis added), *id.*, at 45. Even a cursory examination of the lengthy statute—which contains detailed definitions of "lewd" or "obscene" matter incorporating the standards of *Miller* v. *California*, 413 U. S. 15 (1973), which provides for consolidation of the trial on the merits with the hearing on the temporary injunction and grants scheduling priority to cases brought under the statute, and which does not specify the defenses available in contempt proceedings—discloses that the state courts might well have construed the law so as to avoid each of these perceived defi-

ciencies. It is ironic that, having exhibited no hesitation to construe the many provisions of this complex statute without guidance from the state courts, the Court of Appeals wholly ignored an explicit severability clause and "declined" to preserve those parts of the statute *not* found unconstitutional, demurring that the reconstruction required to salvage the statute would be better handled by "the legislature of the State of Washington." App. to Jurisdictional Statement, at 47.

In sum, both the District Court and the Court of Appeals should have declined to act until the parties had exhausted available state remedies, at least absent a showing that resort to the state courts would have been futile. There was no need whatever for federal courts to render a declaratory judgment as to the validity of a state law on which the state courts have not yet had an opportunity to speak and on behalf of parties against whom the law has not yet been applied. I would reverse and remand with directions to do now what should have been done initially.

Supreme Court

Wash. Post January 20, 1982

Independent Groups Upheld on Private Spending in Presidential Contests

By Fred Barbash
Washington Post Staff Writer

The Supreme Court yesterday upheld the legality of independent expenditures for presidential campaigns, a practice that allows the spending of millions of private dollars in what are supposed to be totally federally financed campaigns.

But the court's action yesterday does not resolve the controversy because it was accomplished by a 4-to-4 vote. Justice Sandra Day O'Connor produced the equally divided court when she disqualified herself from the case without explanation.

The tie vote affirms a lower court ruling striking down a $1,000 ceiling on expenditures by organizations not affiliated with a regular campaign. A three-judge U.S. District Court panel said the limitation violated the free speech rights of the independent organizations. Those independent groups spent $13.7 million in the 1980 elections touting their favorite candidates. About $11 million (mostly for Ronald Reagan) was spent in the general election, where private funds may not be spent by the candidates.

The practice was challenged by the Federal Elections Commission and by Common Cause, which sought enforcement of the $1,000 cap against several conservative organizations, including the Fund for a Conservative Majority and Americans for Change, which is headed by Sen. Harrison H. Schmitt (R-N.M.). Instead of enforcing the law, however, the panel struck it down.

A candidate's decision to forgo private funding, the panel said, "cannot bind his or her supporters outside the official campaign," whose own rights of expression are at stake.

As a result of the ruling, the groups were free to spend whatever they pleased in the 1980 elections. As a result of yesterday's court action, they may also be free to do the same in the 1984 elections because there are no cases currently on the horizon that might produce a clear Supreme Court opinion.

Common Cause yesterday expressed the hope that the $1,000 limit would be enforced by the FEC anyway. "The statute still forbids" the expenditures, Common Cause Chairman Archibald Cox said in a statement. "Common Cause will continue to press for enforcement of the statute and we assume the FEC will do the same."

An FEC spokesman said, however, that the agency was still assessing the Supreme Court action.

The conservatives, meanwhile, were delighted. "We are pleased that the Supreme Court has upheld the ability of individual Americans to participate in campaigns and the ability of all of us to run independent efforts on behalf of candidates," said Robert Heckman, chairman of the Fund for a Conservative Majority.

SUPREME COURT CALENDAR

The Supreme Court will hear oral argument from 10 a.m. to 3 p.m. today on the following cases.

Case No. 80-1285. Brown vs. Hartlage. First Amendment. Is it violated by Kentucky court's voiding of an election? (1 hr.)

Case No. 80-1348. Florida Dept. of State vs. Treasure Salvors. Eleventh Amendment. Does it bar *in rem* admiralty action seeking to recover property owned by state? (1 hr.)

Case No. 80-1925. United Transportation Union vs. Long Island R.R. Co. Railway Labor Act. Does it secure right to strike for employes of state owned railway? (1 hr. 30 min.)