Memorandum

25 AUG 1981

Subject	Date
Judge O'Connor	August 25, 1981

To: Richard A. Hauser
Deputy Counsel to
the President

From: Carolyn B. Kuhl
Special Assistant to
the Attorney General

A redrafted version of the letter to Senator Helms is enclosed. This draft incorporates the points you discussed with Judge O'Connor yesterday. You will note that we have eliminated the final quotation from Justice Rehnquist's confirmation hearings, on the view that Justice Rehnquist was quoted too frequently in the preceding draft. We also have eliminated the quotation of Senator Ervin. Further review of confirmation hearings in which Senator Ervin participated turned up several examples of his insistence that a nominee should comment on the correctness of past Supreme Court decisions. In light of this we felt it better not to mention Senator Ervin at all.

Also enclosed for your comment is a working draft of a proposed response to Section III of the Questionnaire for Judicial Nominees.

DRAFT 8-25-81

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 ~~is precluded from making~~ 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.

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.

In my judgment, Justice Rehnquist, as a nominee before the United States Senate, adhered to the line identified in his Laird opinion. While acknowledging the Senate's rightful role in determining a nominee's judicial philosophy, Justice Rehnquist stated:

> . . . [T]he nominee is in an extraordinarily difficult position. He cannot answer a question which would try to engage him in predictions as to what he would do on a specific fact situation or a particular doctrine after it reaches the Court. Hearings at 26.

Similarly, in response to questions from one Senator, Justice Rehnquist stated: "I know you realize, as well as I do, Senator Hart, my obligation to keep my response on the general level rather than trying to address specific questions. . . ." Id., at 30.

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 sound 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 tarnish the appearance of justice for me to state 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. ~~I must respectfully~~ decline to answer that question because in my view it crosses the line between a request for an expression of general judicial philosophy and a request for an opinion as to the proper outcome of a case which may come before me should my nomination be confirmed. 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

III. GENERAL (PUBLIC)

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

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

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

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

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

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

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

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

against all potential mischief in the complicated tasks of government."

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

The fact that federal judges are restricted to deciding only the particular case before them and are not given a broad license to reform society does not mean that general wrongs go unrighted. As Justice Holmes remarked, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a

degree as the courts." Missouri, Kansas & Texas Railway Co. v. May, 194 U.S. 267, 270 (1904). In the case just cited, Justice Holmes was referring to a state legislature, and our federal system requires the federal courts to avoid intrusion not only on the Congress and the Executive but the states as well.

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

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

In my judgment, the record of a judge will reflect a commitment to equal justice under the law if the judge applies the law even-handedly to those who come before the court. The essence of equal justice under the law, in my view, is that neutral laws be applied in a neutral fashion. In deciding the cases that have come before me as a trial judge and as an appellate judge, I have endeavored to put aside my personal views about the law I am called upon to interpret as well as about the litigants. I believe that my judicial record as a trial and appellate judge attests to this commitment.

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

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

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

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

8/26 R - Sandra O'Connor

STARR

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 my views on how the case of Roe v. Wade should have been decided two questions, one concerning specific constitutional issues raised by the Roe v. Wade decision, and the other concerning my views as to the applicability of the doctrine of stare decisis in constitutional law.

After careful reflection, I remain of the view that a prospective Supreme Court Justice cannot (appropriately) 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, 408 U.S. 1, 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 837 n. 5.

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.

In my judgment, Justice Rehnquist, as a nominee before the United States Senate, adhered to the line identified in his Laird opinion. While acknowledging the Senate's rightful role in determining a nominee's judicial philosophy, Justice Rehnquist stated:

> . . . [T]he nominee is in an extraordinarily difficult position. He cannot answer a question which would try to engage him in predictions as to what he would do on a specific fact situation or a particular doctrine after it reaches the Court. Hearings at 26.

Similarly, in response to questions from one Senator, Justice Rehnquist stated: "I know you realize, as well as I do, Senator Hart, my obligation to keep my response on the general level rather than trying to address specific questions. . . ." Id., at 30.

Other nominees to the Supreme Court have scrupulously drawn the same line as did Justice Rehnquist. (Citations) The traditions of the Judiciary Committee attest to the necessity for this standard of rectitude and propriety in a nominee's responses

to questions. Senator Ervin, one of the Senate Judiciary Committee's most respected members for many years, recognized that it is improper for a Supreme Court nominee to state how he or she would decide a case which might come to the Court. In the Hearings on the Nomination of Homer Thornberry to the Supreme Court, Senator Ervin stated:

> ". . . I can understand why it would be improper to ask a nominee for a judicial office how he is going to decide cases in the future. . . ." Hearings at 257.

OMIT

The duty of a nominee to refrain from making commitments to vote one side of a particular issue is not of recent origin. For example, in 1869, on the same day that Joseph Bradley was nominated for the Supreme Court, the Court in *Hepburn v. Griswold*, 75 U.S. 603, declared unconstitutional federal statutes making legal tender adequate payment for debts incurred under a contractual obligation to pay in gold. Chagrined by the invalidation of the legal tender statutes, members of Congress contemplated exacting a commitment from Mr. Bradley to vote to overrule *Hepburn v. Griswold*. It was reported, for instance, that Senator Cameron declared that he would vote against Mr. Bradley unless he signed a letter to the effect that his opinions would uphold the legal tender acts, as well as a congressional charter for a railroad from New Jersey to New York. However, Senator Chandler of Michigan remonstrated against exacting such a commitment and stated that Supreme Court candidates ought not to be required to give pledges. Justice Bradley was confirmed without offering any pledges on legal tender matters.

The first question set forth in your letter asks my opinion as to the propriety of Roe v. Wade and how I believe the case should have been decided. I must (respectfully) decline to answer that question because in my view it crosses the line between a request for an expression of general judicial philosophy and a request for an opinion as to the proper outcome of a case which may come before ~~me should my nomination be confirmed.~~ (the Court.) ~~I can tell you only that~~ I am, (however, fully) 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 concept of how the balance of federalism should be struck. ~~I expect that~~ These criticisms and (possibly) others will (likely) be presented to the Supreme Court as a basis for overruling Roe v. Wade should that decision be challenged. I ~~can promise~~ (assure) you that if I were on the Court at ~~that~~ (the) time (of any such challenge), I would carefully weigh these arguments (and any other) and (then) 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. ~~I cannot rightfully promise any more.~~

~~I can answer directly~~ Your second question concerning my view of the doctrine of stare decisis ~~since it~~ speaks to my judicial philosophy generally, not to a specific case or issue, (and I am therefore 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, distinguished 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 deemed wrong.

(In my view,) I ~~believe that~~ occasions may arise when a Justice ~~of the Supreme Court~~ should cast a vote contrary to precedent. When a Justice ~~holds an unshakable conviction~~ (firmly believes) that a ~~precedent~~ (decision) ~~was built~~ (rested) upon flawed understandings of basic constitutional provisions ~~or norms~~, (prior decisions) then a Justice should ~~cast a~~ vote ~~contrary~~ to (overrule the earlier) ~~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 (judicial) error by constitutional amendment, constitutional decisions should not, in my judgment, be wholly insulated from re-examination.

My view of the role of precedent in the area of constitutional interpretation is similar to that expressed by Justice Rehnquist in his confirmation hearings, when he was asked how he would justify the Court's departure from Plessy v. Ferguson when it was overruled by Brown v. Board of Education. Justice Rehnquist stated:

> I think I would justify it in this manner: that presumably the nine Justices sitting on the Court at the time that Brown v. Board of Education came before them canvassed, indeed they canvassed to such an extent that they set the case down for reargument on specific issues, deeply canvassed the historical intent of the 14th amendment's framers, the debates on the floors of Congress, and concluded that the Court in Plessy against Ferguson had not correctly interpreted that.
>
> Now, that seems to me a very proper role of the Court. Precedent is not sacrosanct in that sense. Due weight has to be given to the Justices of an earlier day who gave their conscientious interpretation, but if a recanvass of the historical intent of the framers indicates that that earlier Court was wrong, then the subsequent Court has no choice but to overrule the earlier decisions. Hearings at 167.

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

Also known as Rehnquist

First draft of Q-A to send to O'Connor 8/27/81

Possible Responses to Questions
About Meetings with the President

1. General Questions, e.g.,

"How often did you meet with the President?"

Q "What did you and the President discuss?"

"What did you tell the President about your judicial philosophy?", and can you tell us who was present at that meeting.

"Who was present at your meetings with the President?"

Possible Response

A "As has been reported, I met with the President both before and after his announcement of intention to nominate me; I have not met with him since formal submission of my nomination to the Senate. Some of the President's senior aides were present during portions of our meetings.

A. "I considered my conversations with the President to be private, much like the private meetings I was privileged to have with many Senators in the days following announcement of my nomination, and I think it would be inappropriate for me to testify about precisely what the President said to me or I to him. Generally, of course, I am sure the President's purpose in meeting with me was to assist in his evaluation both of my fitness and qualifications for this position and of my views on the role of the Judiciary in our Constitutional system. I can assure the Committee, however, that the President did not seek any 'commitments' or anything of the sort concerning how I might vote on particular cases that might be presented to the Supreme Court for decision.

"Beyond that, I can only reiterate that I believe it would be improper for me to discuss publicly the specifics of my conversations with the President, as he exercised his Constitutional responsibility to select a nominee to the Supreme Court. At this, the public stage of the Constitutional appointment process, I am of course happy to respond directly to the Committee's questions, as the Senate exercises its Constitutional responsibility to determine whether I should be confirmed."

2. Specific Questions, e.g.,

"The President said he was 'satisfied' with your views on abortion; what did you tell him on this subject?"

and "Did you tell the President whether you thought Roe v. Wade was a correct decision?"

[Similar questions on busing, affirmative action, death penalty, exclusionary rule and similar controversial topics, as well as past Supreme Court decisions in these areas]

Possible Response

"As I have stated, I believe it would be improper for me to testify concerning my private conversations with the President. However, I am happy to state directly to the Committee my view on this issue.

[Proceed to substantive statement, with appropriate qualifications about not expressing an opinion on which specific decisions might be overruled or on how specific future cases would be decided.]

3. Follow-up Questions, e.g.,

"Is that what you told the President?"

"Have your views changed since you met with the President"

"Did your views change because you were meeting with the President and you knew you were being considered for the Supreme Court?"

Possible Response

"Without commenting on specific matters that the President and I may have discussed, I can state that my views did not

change because I was being considered for nomination to the Supreme Court, and that I have not changed them since my meetings with the President."

THE WHITE HOUSE

WASHINGTON

August 28, 1981

Dear Judge O'Connor:

It was a pleasure to meet with you this past week, and I want to thank both you and John for your gracious hospitality.

As requested, I am enclosing suggested responses to questions which may arise during the course of your confirmation hearings regarding your meetings with the President.

Once again, I appreciate your kindness in Phoenix this week.

With best regards,

Sincerely,

Dick

Richard A. Hauser
Deputy Counsel
to the President

The Honorable Sandra D. O'Connor
Judge
Court of Appeals
State of Arizona
Division One
West Wing, State Capitol Building
1700 West Washington Street
Phoenix, Arizona 85007

Q: DURING YOUR MEETINGS WITH THE PRESIDENT, DID YOU DISCUSS YOUR JUDICIAL PHILOSOPHY?

A: I considered my conversations with the President to be private, much like the private meetings I was privileged to have with many Senators in the days following announcement of my nomination, and I think it would be inappropriate for me to testify about precisely what the President said to me or I to him. Generally, of course, I am sure the President's purpose in meeting with me was to assist in his evaluation both of my fitness and qualifications for this position and of my views on the role of the Judiciary in our Constitutional system. I can assure the Committee, however, that the President did not seek any 'commitments' or anything of the sort concerning how I might vote on particular cases that might be presented to the Supreme Court for decision.

Beyond that, I can only reiterate that I believe it would be improper for me to discuss publicly the specifics of my conversations with the President, as he exercised his Constitutional responsibility to select a nominee to the Supreme Court. At this, the public stage of the Constitutional appointment process, I am

of course happy to respond directly to the Committee's questions, as the Senate exercises its Constitutional responsibility to determine whether I should be confirmed.

Q: THE PRESIDENT SAID HE WAS 'SATISFIED' WITH YOUR VIEWS ON ABORTION; WHAT DID YOU TELL HIM ON THIS SUBJECT AND DID YOU TELL THE PRESIDENT WHETHER YOU THOUGHT ROE v. WADE WAS A CORRECT DECISION?

A: As I have stated, I believe it would be improper for me to testify concerning my private conversations with the President. However, I am happy to state directly to the Committee my view on this issue.

Q: HAVE YOUR VIEWS CHANGED SINCE YOU MET WITH THE PRESIDENT?

A: Without commenting on specific matters that the President and I may have discussed, I can state that my views did not change because I was being considered for nomination to the Supreme Court and that I have not changed them since my meetings with the President.