THE WHITE HOUSE
WASHINGTON

Don -

Prior to meeting on Monday on Burger matter, I would like to run an FBI name check on all candidates. This is routine prior to all announcements of "intention to appoint," and does not disclose anything, but takes up to 2 days.

OK?

Peter

OK per DAR
6-5-86

THE WHITE HOUSE
WASHINGTON

Peter Wallison

THE WHITE HOUSE
WASHINGTON

file

3/24/86

[redacted]

TO: David Chew

FROM: **PETER J. WALLISON**
Counsel to the President

FYI: _____

COMMENT: OK

ACTION: _____

[redacted]

[redacted]

JUSTICE WILLIAM REHNQUIST

Before and during his tenure on the Supreme Court, Justice Rehnquist has established himself as the paridagmatic example of a jurist committed to principles of judicial restraint in all of its contexts. In all areas of constitutional law -- e.g., criminal procedure, due process, civil rights, freedom of press and religion -- Rehnquist's jurisprudence has been scrupulously premised on the principles of federalism and separation of powers and he has resisted any attempt to engage in unwarranted judicial evisceration of traditional values or democratic choices through the invention of "rights" discerned in "penumbras" emanating from a "living" Constitution.

Most notably, Rehnquist pioneered the rehabilitation of federalism principles by his landmark decision in National League of Cities v. Usery, 426 U.S. 833 (1976), which revived, albeit temporarily, the presumed - dead Tenth Amendment as an affirmative safeguard against federal encroachment into the states' sovereign prerogatives. See also Rizzo v. Goode, 423 U.S. 362 (1976) (federal courts are prohibited from entering injunctions against local governments absent clear evidence of a continuing pattern or practice of unlawful activity); Pennhurst v. Halderman, 451 U.S. 1 (1981) (Pennhurst I) (congressional statutes imposed on states pursuant to the spending power must be narrowly construed to avoid infringement of state prerogatives); Pennhurst v. Halderman, 465 U.S. 89 (1984), (Pennhurst II) (Eleventh Amendment prohibits federal courts from requiring states to follow state law) (opinion joined, not authored, by Rehnquist). Indeed, in every important (and unimportant) decision during his time on the Court, Rehnquist has penned or joined the opinion which best reflects the intent of the legislative or constitutional authors, not his own personal policy preferences.

In Roe v. Wade, 410 U.S. 113 (1973), Rehnquist dissented from the Court's creation of a right to abortion on demand. In United Steelworkers v. Weber, 443 U.S. 193 (1979), and all the school desegregation cases, Rehnquist strongly resisted distorting legislative and constitutional principles of nondiscrimination into mandates for a particular degree of racial balance. See, e.g., Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976); Columbus Board of Education v. Penick, 439 U.S. 1348 (1978). His dissenting opinion in Wallace v. Jaffree, 105 S. Ct. 2479 (1985), masterfully demonstrated, through exploration of historical evidence revealing the Framers' intent, that the First Amendment's religion clauses were designed to prevent an establishment, not an acknowledgement or accommodation, of religion, a principle he has adhered to in all the religion cases. He also led the Court's effort to cut back significantly on New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Warren Court, notwithstanding 600 years of common law and the Framers' contrary intent, invented First Amendment immunity for false, libelous statements. See, e.g., Time Inc. v. Firestone, 424 U.S.

443 (1976). The same is true of the criminal and prison context, where he has pushed the Court to reverse the excesses of the Warren Court with respect to the exclusionary rule created by Miranda v. Arizona, 384 U.S. 436 (1966), the cases all but abolishing the death penalty and those outlawing legitimate penal practices that "shock the conscience" of liberal judges but not of the Framers. See, e.g., New York v. Quarles, 467 U.S. 649 (1984); Gregg v. Georgia, 428 U.S. 153 (1976); Bell v. Wolfish, 441 U.S. 520 (1979).

Perhaps more importantly, by dint of his personal qualities, intellect and sheer cleverness in reshaping erroneous precedent, Rehnquist has formed a consensus on a generally rudderless Court behind fundamental principles which might well have otherwise been rejected. His landmark desegregation opinion in Spangler, for example, established the fundamental principle that the Constitution does not require racial balance in government programs notwithstanding potentially contrary precedent. His accomplishments in the areas of of federalism, libel and criminal law listed above were similarly achieved in the face of inconsistent precedent. Moreover, virtually every beneficial decision listed above grew out of a small seed of legal principle that Rehnquist had planted in a prior, seemingly innocuous case, thus further demonstrating his mastery at looking beyond the facts of an individual case to gradually achieve fundamental reform in constitutional law. In General Electric Company v. v. Gilbert, 429 U.S. 125 (1976), for example, Rehnquist used a footnote buried in a prior decision, (Geduldig v. Aiello, 417 U.S. 484 (1974)) to establish the principle that pregnancy-based discrimination does not constitute impermissible discrimination on the basis of sex. In Lloyd Corportation v. Tanner, 407 U.S. 551 (1972), Rehnquist persuaded a majority of the Court to distinguish, on the thinnest of reeds, a very recent precedent (Logan Valley, 391 U.S. 308 (1968)), thus effectively reversing the holding that privately-owned shopping centers were state actors for purposes of the First Amendment. He built on this precedent, in turn, to effectively overrule Warren Court precedent that had converted a multitude of purely private activities into "state action" subject to constitutional constraints. See e.g, Moose Lodge v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

Further, Rehnquist possesses all the leadership qualities required to make a superb Chief Justice. No one can question the depth of his scholarship or intellect, the clarity of his philosophical vision or his ability to build a consensus to implant that vision in the Court's decisions. Moreover, he enjoys a warm collegial relationship with, and is genuinely respected by, all of his fellow justices, even those with whom he often disagrees. His fourteen year tenure on the Court has given him valuable insights into the predilections of these justices and the politics and machinations of the Court. Although he had significant problems with his back three years ago, this is no longer a real health problem. In sum, Justice Rehnquist would add immeasurably to the development of proper constitutional jurisprudence if appointed as Chief Justice.

ANTONIN SCALIA

Judge Scalia is also an articulate and devoted adherent to the interpretavist theory of adjudication described more extensively in the memorandum on Judge Bork. Scalia's primary focus has been on separation of powers, justiciability and administrative law questions. He has repeatedly emphasized that the judicial role is solely to decide the rights of individuals. Thus, absent an express statutory mandate, he denies standing to persons who seek to have courts resolve generalized grievances and otherwise assiduously ensures that cases are susceptible to judicial review, most notably in a number of ground-breaking opinions on congressional standing. Scalia couples his appreciation for the limited role of the courts with respect for coordinate branches and has written several very significant opinions dealing with the deference due to the Executive, particularly in foreign affairs and the enforcement of laws.

In short, Scalia's judicial philosophy almost precisely mirrors that of Bork, with the exception of one subtle difference in emphasis which may affect their decision-making in a quite narrow range of cases. In seeking to determine the breadth of rights contained in the constitutional text, Scalia would probably be more inclined than Bork to look at the language of the constitutional provision itself, as well as its history, to determine if it grants an affirmative mandate for the judiciary to inject itself into the legislative process. Absent such an affirmative signal, Scalia's natural belief in the majoritarian process and his innate distrust of the judiciary's ability to implement, or even to discern, public policy or popular will, would probably lead him to leave undisturbed the challenged activity. While Bork certainly shares these precepts of judicial restraint, he will be somewhat more inclined in certain circumstances to give broader effect to a "core" constitutional value. Bork would look less to history, and more to the general theory of government reflected by the Constitution's overall structure, to provide guidance on the limits of judicial action. In the broader scheme of things, this divergence is quite minor, but it is the reason that Scalia severely criticized Bork's "sociological jurisprudence" in the Ollman libel case.

Scalia is obviously a superb intellect and scholar who has produced an extraordinarily impressive body of academic writings on a broad range of issues, particularly administrative law. He has also written probably the most important opinions of any appellate court judge during the last 4 years, without a single mistake. While he has not focused on the "big picture" jurisprudential questions to quite the same extent as Bork, his writings on separation of powers and jurisdictional questions reflect a fundamental, well-developed theory of jurisprudence in an area that had received all too little attention. He also reasons and writes with great insight and flair,

which gives additional influence to his opinions and articles. He has been particularly diligent in ferreting out bad dicta in his colleagues' opinions and otherwise aggressively attempted to reshape the law through dissents and en banc review. Like Bork, he would not slavishly adhere to erroneous precedent. More so than Bork, he is generally respected as a superb technician on "nuts and bolts" legal questions.

Scalia is an extremely personable man, although potentially prone to an occasional outburst of temper, and is an extremely articulate and persuasive advocate, either in court or less formal fora. Unlike Bork, he would have to undergo a relatively brief "get-acquainted" period on the Supreme Court and it is conceivable that he might rub one of his colleagues the wrong way. Scalia's background as a private practitioner for six years, a law professor at the Unviersity of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications. While he received only a "qualified" rating from the American Bar Association for the D.C. Circuit, this can only be described as slanderous nonsense. Scalia just turned 50 years old and exercises regularly. Although he smokes heavily, and drinks, he should have a lengthy career on the Court.

THE WHITE HOUSE

WASHINGTON

August 29, 1986

MEMORANDUM FOR THE FILE

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

This memorandum will record the sequence of events leading up to the nomination of Justice William Rehnquist and Judge Antonin Scalia, respectively as Chief Justice and Associate Justice of the United States Supreme Court.

On Tuesday, May 27, Chief Justice Burger met with the President and Don Regan. He was accompanied to the meeting by Fred Fielding, formerly Counsel to the President, whom the Chief Justice invited to attend. I did not attend this meeting. According to Fielding and Regan, the Chief Justice spent most of the time at the meeting talking about the Commission on the Bicentennial of the U.S. Constitution, and the difficulties he was having in finding private sector financing for the Commission as well as handling the day-to-day affairs associated with his responsibilities as Chief Justice. Near the end of the conversation, the Chief Justice told the President that in order to devote the maximum amount of time to the Bicentennial Commission he would like to resign as Chief Justice effective as of the end of the Court's current term. He said that he had been thinking about possible replacements, and provided to the President a brief memorandum containing, as his recommendations, six names: Justice Rehnquist, Justice Byron White, Judge Robert Bork (D.C. Circuit), Judge Scalia, Judge Clifford Wallace (9th Circuit), and a Judge Re who I believe is on the International Court of Trade in New York.

At the end of the daily operations meeting on Wednesday, May 28, Don Regan asked me to stop in to see him. He told me of the meeting on May 27 and showed me the list of people suggested by the Chief Justice. We both agreed that we ought to conduct a complete search for an appropriate candidate, and that the Attorney General should be notified immediately. I said that I

was aware that the Justice Department had for several years been reviewing the opinions of sitting judges and Justices, in the event that another Supreme Court vacancy became available, and that we should have access to the Justice Department materials. Later in the day Regan advised me that the Attorney General was out of town and would not be back until the following afternoon.

On Thursday, May 29, Regan, the Attorney General, and I met for about an hour to discuss the process to be followed in the selection of a new Chief Justice, and, if necessary, an Associate Justice. The emphasis in the meeting was on finding candidates who would be certain followers of the President's philosophy of judicial restraint. Meese noted the Justice Department's work in reviewing the opinions of sitting judges and Justices and said that Bradford Reynolds (Assistant Attorney General, Civil Rights Division) was in charge of that project. He suggested that I meet with Reynolds some time during the following week. As to timing, we agreed that it was important to meet with the President promptly, so as to minimize the possibility of premature disclosure of the Chief Justice's intentions, and we decided that such a meeting should occur on Monday, June 9, at which time we should have available a list of recommended candidates for the President.

On Friday, May 30, I spoke to Brad Reynolds and asked him to send me the material that Justice had prepared on potential Supreme Court candidates. We scheduled a meeting for the following week.

The material arrived from Justice on Tuesday, June 3. This material, which is voluminous, has been retained in my files, but focused on six candidates: Justice Sandra O'Connor, Justice Rehnquist, Judge Bork, Judge Patrick Higginbotham, Judge Anthony Kennedy, Judge Scalia, Judge Wallace, and Judge Ralph Winter. Meanwhile I had asked two lawyers on my staff, Alan Raul and Chris Cox, to review the public records, other than the opinions, of Justices Rehnquist and O'Connor, and to review the opinions of the judges recommended by the Justice Department, as well as any other judges they thought might be suitable candidates for Chief Justice or Associate Justice. Over the weekend of May 30 and 31 I provided Don Regan with a compendium of magazine and law review articles concerning Justices Rehnquist and O'Connor, as well as articles on the performance of the Burger Court.

On Thursday, June 5, I met with Brad Reynolds at the Justice Department for approximately 2 hours. We discussed the views of the 4 leading candidates -- Justices Rehnquist and O'Connor and Judges Bork and Scalia -- and the effects of the nomination of one or more of them. Reynolds did not believe that it would be easy to get Justice Rehnquist to accept the position of Chief. He was of the view that Rehnquist was tired and probably would not

want the added administrative burdens of the Chief Justice position.

On Friday, June 6, I met again with Don Regan and advised him of Brad Reynolds views and the contents of the materials we had received from the Justice Department.

On Monday, June 9, at 1:30 in the afternoon, Regan, Meese and I met with the President for approximately 45 minutes. In that meeting we discussed generally the problem of finding candidates who were likely to adhere to the President's philosophy of judicial restraint after they had been appointed to the Supreme Court. We were all of the view that sitting judges or Justices who had clearly articulated philosophy were the most likely to remain steadfast in their views. In the discussion, the most promising candidates emerged as Justice Rehnquist, Judge Bork and Judge Scalia. The President said that he would like to start the process of making his selection by speaking to Justice Rehnquist. At the same time, he seemed intrigued by Judge Scalia, who was young enough to serve on the Court for an extended period of time, and be the first Italian-American appointee to the Supreme Court. Don Regan set up a meeting with Justice Rehnquist on Tuesday, June 12.

At the end of the daily operations meeting on June 12, I provided Regan with a memorandum for the President briefly describing the three leading candidates for Chief Justice -- Justice Rehnquist, Judge Bork and Judge Scalia -- including a brief summary of the backgrounds and views of each candidate. A copy of the memo is attached. Regan then went to his regular 9:00 a.m. meeting with the President.

In that meeting the President chatted briefly with Rehnquist at the outset and then said that he had been advised by Chief Justice Burger that the Chief Justice would be resigning as of the end of the Court's current term. This seemed to come as no surprise to Justice Rehnquist. The President then said that Justice Rehnquist was the "unanimous choice of all of us". He suggested that Justice Rehnquist might like to think about it, but the Justice immediately said that he would be honored and accepted. The President then noted that it would be necessary to appoint a new Associate Justice to take his place and mentioned Judge Scalia and Judge Bork as possible candidates. Justice Rehnquist said he had high regard for both of them. There was some further discussion, and the meeting ended.

The President, Regan, Meese and I then talked further about the next steps and the President said that he would like to set up a meeting as soon as possible with Judge Scalia. Regan went back to his office and called Judge Scalia, setting up the meeting for Monday, May 16.

On that day, at about 3:00 in the afternoon the President, Regan, Meese, and I met with Judge Scalia. The President again came right to the point describing the circumstances of the Chief Justice's resignation and the President's desire to appoint Justice Rehnquist as Chief Justice. He then noted that Judge Scalia was the choice of all of us as Justice Rehnquest's successor, and Judge Scalia expressed his gratitude. The President then asked him if he would like to serve if selected and he accepted, saying that he would be honored. There was some further discussion, especially concerning timing, and it was decided to make the announcement the following day, June 17.

POTENTIAL LIST

Robert H. Bork

Antonin Scalia

Ralph K. Winter

Edward R. Becker 1/

William L. Garwood 1/

Patrick E. Higginbotham 1/

Richard A. Posner

Pasco M. Bowmann, II

J. Clifford Wallace

Anthony M. Kennedy

William W. Wilkins 1/

QUICK LOOK

Philip Areeda

Cornelia Kennedy

Ellen Peters (Conn. Sup. Ct.)

Carol Dinkins

Judge Hamlin (Cal. S.Ct.) (?)

Rita Hauser

~~Charles Rice~~

1/ Move to Quick Look.

INFORMATION LIST

Orrin Hatch

Paul Laxalt

William Clark

William Webster

~~Wm. Bentley Ball~~

Richard Epstein

Sam Pierce

Elizabeth Dole

Carla Kearns ?

TENTATIVE SCHEDULE FOR SUPREME COURT NOMINATIONS

HEARINGS

- Mr. Justice Rehnquist to be Chief Justice
  week of July 20th
  Tuesday - July 22
  Wednesday - July 23

- Judge Antonin Scalia to be an Associate Justice
  week of July 27th
  Tuesday - July 29
  Wednesday - July 30

COMMITTEE MARKUP

- Will attempt to bring each up, one week later, respectively, expecting the Democrats to request they be laid over one week.

- Therefore:
  Rehnquist - August 7
  Scalia - August 14

Thurmond intends to ask the President to request Dole to keep the Senate in session beyond August 15 until the Justices are confirmed.

From Sen. Thurmond
to Pres. 7/8/86
File Sup. Court
nominations

1

QUESTIONS FOR JUSTICE REHNQUIST

It has been noted that you object to the exclusionary rule. Why? How will discipline be enforced against the police?

If Congress voted to deny tax exemption or Federal funding to any hospital that does not perform abortions, would you consider such a law constitutional?

You are quoted as saying in a memo to Justice Jackson that, "Let's face it white people in the South don't like colored people." Do you believe that is true today?

You were the lone dissenter in 47 cases on the Supreme Court, including the Bob Jones case. Doesn't this record define you as an extremist?

Is your Bob Jones dissent related to the statement that "white people in the South don't like colored people"?

In National League of Cities, you invalidated a Federal law. Since there is no provision of the Constitution which specifically forbids Congress to pass such a law, how is your opinion in this case consistent with your philosophy of judicial restraint?

The First Amendment says Congress shall make no law abridging freedom of speech. Your opinion in the recent Puerto Rico case indicates that you read into that language an exception for commercial speech. Is that strict constructionism?

THE WHITE HOUSE

WASHINGTON

June 11, 1986

MEMORANDUM FOR THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Questions for Prospective Supreme Court Nominees

To assist you in choosing among the candidates for possible nomination to the Supreme Court, I have set forth some brief background information together with a number of potential questions for Justice Rehnquist and Judge Scalia. The questions are designed to elicit answers revealing the candidate's philosophy, commitment to being a judge and other personal qualifications. Justice Rehnquist is a candidate for elevation to Chief Justice. Scalia is also a candidate for Chief Justice, or, if you name Justice Rehnquist as Chief Justice Burger's successor, as a candidate for Associate Justice to succeed Justice Rehnquist.

Background on Justice Rehnquist

Justice Rehnquist has been an Associate Justice of the U.S. Supreme Court since 1971, when he was appointed by President Nixon. He has been described as the intellectual leader of the conservative bloc on the Court and has consistently supported federalism and strong law enforcement positions. Justice Rehnquist is 61 years old and questions have been raised about his health and his continuing commitment to the Court's work. Even if his health is good, he may not be able to serve more than 10 to 15 more years. Justice Rehnquist has a proven track record, and observers of the Court believe that he can forge majorities for his positions. Some of Justice Rehnquist's statements when he was a clerk to Justice Jackson, particularly on race relations, could be controversial. (The Justice Department's summary on Justice Rehnquist is attached.)

You should stress to Justice Rehnquist his excellent contributions to the Court's opinions, and the high regard in which he is held by everyone in the Administration.

Questions

1. What are the critical issues that you t hink the Supreme Court will face over the next five to ten years?

2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?

3. In which direction do you see the Court moving on the issue of federalism?

4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?

5. How should judges interpret the Constitution and define rights?

6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?

7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?

8. Do you have any hesitancy taking on the additional administrative and other responsibilities of Chief Justice?

9. Would you remain on the Court if someone from outside the Court were nominated for Chief Justice?

10. Is there any reason why you might not want to go through a confirmation process at this time?

Background on Judge Scalia

You appointed Antonin Scalia to the U.S. Court of Appeals for the District of Columbia Circuit in 1982. If you nominated him to the Supreme Court, he would be the first Italian-American to receive that honor. Judge Scalia is regarded as one of the intellectual leaders, along with Judge Bork and Justice Rehnquist, of judicial conservatism. Judge Scalia served as Assistant Attorney General in the Ford Administration, and has been a professor of law at the University of Chicago, Stanford and other top schools. He is an expert in administrative law and has argued against excessive government regulation. His judicial decisions have strongly supported the principle of "separation of powers." He has thus recognized the importance of deference to the Executive Branch in matters involving the military and the conduct of foreign relations. Judge Scalia is regarded as a forceful individual capable of personal as well as intellectual leadership. He is 50 years old. (The Justice Department's summary on Judge Scalia is attached.)

You should stress to Judge Scalia your admiration for his work on the D.C. Court of Appeals.

Questions

1. What are the critical issues that you think the Supreme Court will face over the next five to ten years?

2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?

3. In which direction do you see the Court moving on the issue of federalism?

4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?

5. How should judges interpret the Constitution and define rights?

6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?

7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?

8. Do you have any hesitancy whatsoever taking on the great responsibility of work on the Supreme Court?

9. Is there any reason why you might not want to go through a confirmation process at this time?

File 7

The ideal candidate for this President to nominate to the Supreme Court would be:

1. Conservative;
2. Intelligent;
3. Likely to exercise strong leadership on the Court;
4. Have predictable, well-formed views;
5. Easily confirmable;
6. A politically popular choice;
7. A good speaker and leader outside the Court;
8. Young and in good health;
9. Unlikely to quit; and
10. A good administrator (especially for Chief Justice).

For the remainder of this memorandum, I will describe in greater detail these characteristics.

I. CONSERVATIVE

The first characteristic is the most important but also the hardest to define. In particular, a decision will have to be made at the outset whether, by "conservative," we mean those who eschew all judicial activism, or those who embrace activism for conservative ends, or whether either approach is acceptable. If we include conservative activists, then there is the additional question of what a conservative activist is: someone who favors libertarian principles? who favors the government in most cases? who is a member of the Chicago school? who shares the New Right's social agenda?

Of course, the only intellectually honest thing to do is to require that our candidate renounce judicial activism, period, no matter how laudable the ends sought.

II. INTELLIGENT

This quality overlaps with several others, but deserves separate mention. Without intelligence, a justice is necessarily less predictable (he can be lead astray), less likely to provide effective leadership, and harder to confirm. Most important, however, he is less likely to write good opinions and form the law the way it should be, the sine qua non of a great justice.

III. LEADERSHIP ON THE COURT

Voting the right way is not enough. The ideal justice must convince other justices to vote the right way, too, and he must work with them to build majorities and insert the best language possible in opinions. To do this he must be intelligent enough to be respected by the other justices; be willing to work harder than he would if he were doing just "his" work; be aggressive but congenial and diplomatic; and have a taste for Court politics and argument. He must know how to co-opt others, and when to compromise himself. Some judicial experience is probably useful for all this.

IV. PREDICTABLE, WELL-FORMED VIEWS

There are two parts to this characteristic: we must know what he thinks now, and he must have thought about issues enough that he will be unlikely to change his mind. For either, several years of federal judicial experience (since so many issues critical to us are dealt with little if at all by state courts), some time in academia, or a considerable body of written work introduced elsewhere is desirable. In particular, we should have a good idea of the candidate's views in the critical areas: criminal justice, civil rights, justiciability, and separation of powers, and the role of the courts generally.

Finally, and although I am somewhat uncomfortable with this notion, the justice should probably have some general ideas ahead of time of where he wants to take the law. Unfortuntaely, the Court does not merely decide cases: it also decides which cases to decide, and it writes opinions which govern the way future cases are decided in the Supreme Court and elsewhere. Thus, the ideal justice will have given some thought to which cases he will want the Court to pick and what language to include in opinions -- the better to shape the law.

V. EASILY CONFIRMABLE

This characteristic and the next one are intended to be mirror images of one another, though there is some overlap:

by "easily confirmable" I mean primarily that there is an absence of downsides; by "politically popular" I am referring to the presence of "upsides."

One perennial objection to candidates is that they lack "judicial temperament." I think this means essentially that the candidate is ill-tempered and speaks without thinking, so candidates with some reserve are to be preferred.

Other downsides that will make confirmation more difficult or even impossible include past personal scandals (particularly regarding finances, sex, and drinking); identification with racist or other unpopular groups (including clubs); a reputation as being stupid, a political hack, or a crony of some Administration official, especially the President; and a poor ABA rating.

In the long run, most of these don't matter once the candidate has been on the bench for awhile. However, if they prevent confirmation, they are bad not only for the candidate per se, but also because a defeated candidacy limits the choices available for the next nominee (Blackmun was an alternative choice). Even if ultimately confirmed, a stormy confirmation can embarrass the President and cost political capital that could be spent elsewhere, and may result in the new justice taking longer to gain acceptance from his peers and exercise his full power on the Court.

VI. POLITICALLY POPULAR

This should be the least important characteristic, since it is so hard to predict what will make a candidate popular, and because the good that such popularity can do the Administration is ephemeral compared to the bad an inferior justice can do on the Court.

That said, Sandra O'Connor is a happy example of how a good pick can pay political dividends. The candidate most likely to be politically popular would be photogenic; glib; female or a member of some racial or religious minority or ethnic group; respected by the press; or associated with a popular cause. Geography has been a factor in the past; the Court seems to have its share of westerners, now, but there are still no southerners.

VII. EFFECTIVENESS OUTSIDE THE COURT

Along with political popularity, this should be the least important consideration. Nonetheless, it is true that -- perhaps increasingly -- justices give influential speeches and interviews, ask for legislation from Congress, and make suggestions to the Executive Branch. So, it is a plus if a candidate can do this sort of thing effectively -- (though it may be an even bigger plus, on balance, if he refrained from doing it at all).

VIII. YOUNG AND IN GOOD HEALTH

This characteristic and the next are important since we would like our appointees to be around for as long as possible. At some point, extreme youth (less than 40) can become a liability, however, making confirmation more difficult and the press bad. But, a nominee 55 or younger and in good health is highly desirable.

IX. UNLIKELY TO QUIT

Besides dying, a justice can leave the bench by resigning. It is not impossible for these resignations to take place sooner (Goldberg) rather than later (Stewart), so some thought should be given to what sort of candidate is likely to leave prematurely. This may be another reason why extreme youth is not all to the good: after ten years on the Court a justice is more likely to look for new worlds to conquer if he is then forty-five, rather than sixty-five. The other reason for quitting would be, presumably, unhappiness with the job. For this reason, the candidate should be not only grudgingly willing, but positively enthusiastic about joining the Court; also, because the job is, or is to some, arduous, he should be under no illusions as to what work is required, and he should be able to do it. All of this argues again for someone who has some familiarity with what justices do or some experience doing it -- i.e., as a sitting judge or academic, and preferably as both.

X. A GOOD ADMINISTRATOR

All justices have some administrative responsibilities, so a reputation as an excellent administrator -- or as a terrible one -- is relevant. In the case of the Chief Justice, however, this characteristic is more than relevant: it may even be critical. Some experience in administration, preferably with the government, is definitely desirable.

CONCLUSION

Putting all of this together, the ideal candidate would be an intelligent conservative with a forceful but congenial personality and a vision of where the Court should go. He should have some federal judicial or academic experience (preferably both) so that his views are predictable and settled; some administrative experience in government is also desirable. He should be no younger than 40 but no older than 60 (and preferably 45-50), in good health, desirous of spending the rest of his life on the Supreme Court, and aware of what the job entails (here again, judicial or academic experience is useful). Obviously, he should be scandal-free and have judicial temperament. It would be nice if he was a telegenic one-armed Armenian who gave good speeches, but that is not essential.

Roger Clegg
633-3425

THE WHITE HOUSE

WASHINGTON

August 29, 1986

MEMORANDUM FOR THE FILE

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

This memorandum will record the sequence of events leading up to the nomination of Justice William Rehnquist and Judge Antonin Scalia, respectively as Chief Justice and Associate Justice of the United States Supreme Court.

On Tuesday, May 27, Chief Justice Burger met with the President and Don Regan. He was accompanied to the meeting by Fred Fielding, formerly Counsel to the President, whom the Chief Justice invited to attend. I did not attend this meeting. According to Fielding and Regan, the Chief Justice spent most of the time at the meeting talking about the Commission on the Bicentennial of the U.S. Constitution, and the difficulties he was having in finding private sector financing for the Commission as well as handling the day-to-day affairs associated with his responsibilities as Chief Justice. Near the end of the conversation, the Chief Justice told the President that in order to devote the maximum amount of time to the Bicentennial Commission he would like to resign as Chief Justice effective as of the end of the Court's current term. He said that he had been thinking about possible replacements, and provided to the President a brief memorandum containing, as his recommendations, six names: Justice Rehnquist, Justice Byron White, Judge Robert Bork (D.C. Circuit), Judge Scalia, Judge Clifford Wallace (9th Circuit), and a Judge Re who I believe is on the International Court of Trade in New York.

At the end of the daily operations meeting on Wednesday, May 28, Don Regan asked me to stop in to see him. He told me of the meeting on May 27 and showed me the list of people suggested by the Chief Justice. We both agreed that we ought to conduct a complete search for an appropriate candidate, and that the Attorney General should be notified immediately. I said that I

was aware that the Justice Department had for several years been reviewing the opinions of sitting judges and Justices, in the event that another Supreme Court vacancy became available, and that we should have access to the Justice Department materials. Later in the day Regan advised me that the Attorney General was out of town and would not be back until the following afternoon.

On Thursday, May 29, Regan, the Attorney General, and I met for about an hour to discuss the process to be followed in the selection of a new Chief Justice, and, if necessary, an Associate Justice. The emphasis in the meeting was on finding candidates who would be certain followers of the President's philosophy of judicial restraint. Meese noted the Justice Department's work in reviewing the opinions of sitting judges and Justices and said that Bradford Reynolds (Assistant Attorney General, Civil Rights Division) was in charge of that project. He suggested that I meet with Reynolds some time during the following week. As to timing, we agreed that it was important to meet with the President promptly, so as to minimize the possibility of premature disclosure of the Chief Justice's intentions, and we decided that such a meeting should occur on Monday, June 9, at which time we should have available a list of recommended candidates for the President.

On Friday, May 30, I spoke to Brad Reynolds and asked him to send me the material that Justice had prepared on potential Supreme Court candidates. We scheduled a meeting for the following week.

The material arrived from Justice on Tuesday, June 3. This material, which is voluminous, has been retained in my files, but focused on six candidates: Justice Sandra O'Connor, Justice Rehnquist, Judge Bork, Judge Patrick Higginbotham, Judge Anthony Kennedy, Judge Scalia, Judge Wallace, and Judge Ralph Winter. Meanwhile I had asked two lawyers on my staff, Alan Raul and Chris Cox, to review the public records, other than the opinions, of Justices Rehnquist and O'Connor, and to review the opinions of the judges recommended by the Justice Department, as well as any other judges they thought might be suitable candidates for Chief Justice or Associate Justice. Over the weekend of May 30 and 31 I provided Don Regan with a compendium of magazine and law review articles concerning Justices Rehnquist and O'Connor, as well as articles on the performance of the Burger Court.

On Thursday, June 5, I met with Brad Reynolds at the Justice Department for approximately 2 hours. We discussed the views of the 4 leading candidates -- Justices Rehnquist and O'Connor and Judges Bork and Scalia -- and the effects of the nomination of one or more of them. Reynolds did not believe that it would be easy to get Justice Rehnquist to accept the position of Chief. He was of the view that Rehnquist was tired and probably would not

want the added administrative burdens of the Chief Justice position.

On Friday, June 6, I met again with Don Regan and advised him of Brad Reynolds views and the contents of the materials we had received from the Justice Department.

On Monday, June 9, at 1:30 in the afternoon, Regan, Meese and I met with the President for approximately 45 minutes. In that meeting we discussed generally the problem of finding candidates who were likely to adhere to the President's philosophy of judicial restraint after they had been appointed to the Supreme Court. We were all of the view that sitting judges or Justices who had clearly articulated philosophy were the most likely to remain steadfast in their views. In the discussion, the most promising candidates emerged as Justice Rehnquist, Judge Bork and Judge Scalia. The President said that he would like to start the process of making his selection by speaking to Justice Rehnquist. At the same time, he seemed intrigued by Judge Scalia, who was young enough to serve on the Court for an extended period of time, and be the first Italian-American appointee to the Supreme Court. Don Regan set up a meeting with Justice Rehnquist on Tuesday, June 12.

At the end of the daily operations meeting on June 12, I provided Regan with a memorandum for the President briefly describing the three leading candidates for Chief Justice -- Justice Rehnquist, Judge Bork and Judge Scalia -- including a brief summary of the backgrounds and views of each candidate. A copy of the memo is attached. Regan then went to his regular 9:00 a.m. meeting with the President.

The meeting that afternoon with Justice Rehnquist included the President, Regan, Meese and myself. The President chatted briefly with Rehnquist at the outset and then said that he had been advised by Chief Justice Burger that the Chief Justice would be resigning as of the end of the Court's current term. This seemed to come as no surprise to Justice Rehnquist. The President then said that Justice Rehnquist was the "unanimous choice of all of us". He suggested that Justice Rehnquist might like to think about it, but the Justice immediately said that he would be honored and accepted. The President then noted that it would be necessary to appoint a new Associate Justice to take his place and mentioned Judge Scalia and Judge Bork as possible candidates. Justice Rehnquist said he had high regard for both of them. There was some further discussion, and the meeting ended.

The President, Regan, Meese and I then talked further about the next steps and the President said that he would like to set up a meeting as soon as possible with Judge Scalia. Regan went back to his office and called Judge Scalia, setting up the meeting for Monday, May 16.

On that day, at about 3:00 in the afternoon the President, Regan, Meese, and I met with Judge Scalia. The President again came right to the point describing the circumstances of the Chief Justice's resignation and the President's desire to appoint Justice Rehnquist as Chief Justice. He then noted that Judge Scalia was the choice of all of us as Justice Rehnquest's successor, and Judge Scalia expressed his gratitude. The President then asked him if he would like to serve if selected and he accepted, saying that he would be honored. There was some further discussion, especially concerning timing, and it was decided to make the announcement the following day, June 17.

THE WHITE HOUSE

WASHINGTON

June 11, 1986

MEMORANDUM FOR THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Questions for Prospective
Supreme Court Nominees

To assist you in choosing among the candidates for possible nomination to the Supreme Court, I have set forth some brief background information together with a number of potential questions for Justice Rehnquist and Judge Scalia. The questions are designed to elicit answers revealing the candidate's philosophy, commitment to being a judge and other personal qualifications. Justice Rehnquist is a candidate for elevation to Chief Justice. Scalia is also a candidate for Chief Justice, or, if you name Justice Rehnquist as Chief Justice Burger's successor, as a candidate for Associate Justice to succeed Justice Rehnquist.

Background on Justice Rehnquist

Justice Rehnquist has been an Associate Justice of the U.S. Supreme Court since 1971, when he was appointed by President Nixon. He has been described as the intellectual leader of the conservative bloc on the Court and has consistently supported federalism and strong law enforcement positions. Justice Rehnquist is 61 years old and questions have been raised about his health and his continuing commitment to the Court's work. Even if his health is good, he may not be able to serve more than 10 to 15 more years. Justice Rehnquist has a proven track record, and observers of the Court believe that he can forge majorities for his positions. Some of Justice Rehnquist's statements when he was a clerk to Justice Jackson, particularly on race relations, could be controversial. (The Justice Department's summary on Justice Rehnquist is attached.)

You should stress to Justice Rehnquist his excellent contributions to the Court's opinions, and the high regard in which he is held by everyone in the Administration.

Questions

1. What are the critical issues that you t hink the Supreme Court will face over the next five to ten years?

2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?

3. In which direction do you see the Court moving on the issue of federalism?

4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?

5. How should judges interpret the Constitution and define rights?

6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?

7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?

8. Do you have any hesitancy taking on the additional administrative and other responsibilities of Chief Justice?

9. Would you remain on the Court if someone from outside the Court were nominated for Chief Justice?

10. Is there any reason why you might not want to go through a confirmation process at this time?

Background on Judge Scalia

You appointed Antonin Scalia to the U.S. Court of Appeals for the District of Columbia Circuit in 1982. If you nominated him to the Supreme Court, he would be the first Italian-American to receive that honor. Judge Scalia is regarded as one of the intellectual leaders, along with Judge Bork and Justice Rehnquist, of judicial conservatism. Judge Scalia served as Assistant Attorney General in the Ford Administration, and has been a professor of law at the University of Chicago, Stanford and other top schools. He is an expert in administrative law and has argued against excessive government regulation. His judicial decisions have strongly supported the principle of "separation of powers." He has thus recognized the importance of deference to the Executive Branch in matters involving the military and the conduct of foreign relations. Judge Scalia is regarded as a forceful individual capable of personal as well as intellectual leadership. He is 50 years old. (The Justice Department's summary on Judge Scalia is attached.)

You should stress to Judge Scalia your admiration for his work on the D.C. Court of Appeals.

Questions

1. What are the critical issues that you think the Supreme Court will face over the next five to ten years?

2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?

3. In which direction do you see the Court moving on the issue of federalism?

4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?

5. How should judges interpret the Constitution and define rights?

6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?

7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?

8. Do you have any hesitancy whatsoever taking on the great responsibility of work on the Supreme Court?

9. Is there any reason why you might not want to go through a confirmation process at this time?

QUESTIONS FOR JUSTICE REHNQUIST

It has been noted that you object to the exclusionary rule. Why? How will discipline be enforced against the police?

If Congress voted to deny tax exemption or Federal funding to any hospital that does not perform abortions, would you consider such a law constitutional?

You are quoted as saying in a memo to Justice Jackson that, "Let's face it white people in the South don't like colored people." Do you believe that is true today?

You were the lone dissenter in 47 cases on the Supreme Court, including the Bob Jones case. Doesn't this record define you as an extremist?

Is your Bob Jones dissent related to the statement that "white people in the South don't like colored people"?

In National League of Cities, you invalidated a Federal law. Since there is no provision of the Constitution which specifically forbids Congress to pass such a law, how is your opinion in this case consistent with your philosophy of judicial restraint?

The First Amendment says Congress shall make no law abridging freedom of speech. Your opinion in the recent Puerto Rico case indicates that you read into that language an exception for commercial speech. Is that strict constructionism?

THE WHITE HOUSE

WASHINGTON

May 30, 1986

MEMORANDUM FOR DONALD T. REGAN
CHIEF OF STAFF TO THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Philosophical Directions of the Supreme Court Justices

This memorandum briefly outlines the current philosophical directions of the members at the Supreme Court. It is not a detailed exegesis of the Justices' opinions. Rather, I have reviewed and summarized some of the literature about the Justices and the Court. Attached is a selection of relevant law review, magazine and newspaper articles (Tab A). I have concentrated on the views of Justices Rehnquist and O'Connor.

Background

The following table provides some useful background information on the current Justices.

Justice	State	Nominating President	Confirmation Vote	Age When Nominated	Current Age
William J. Brennan	NJ	Eisenhower	voice	50	80
Byron R. White	CO	Kennedy	voice	44	68
Thurgood Marshall	NY	Johnson	69-11	59	77
Warren E. Burger	MN	Nixon	74-3	61	78
Harry A. Blackmun	MN	Nixon	94-0	61	77
Lewis F. Powell, Jr.	VA	Nixon	89-1	64	78
William H. Rehnquist	AZ	Nixon	68-26	47	61
John Paul Stevens	IL	Ford	98-0	55	65
Sandra Day O'Connor	AZ	Reagan	99-0	51	56

Conservative/Liberal Alignments

The Court is composed of three basic camps: (1) the "liberal" group, consisting of Justices Brennan and Marshall; (2) the "conservative" group, consisting of the Chief Justice and Justices Rehnquist and O'Connor; and (3) the "swing" votes, consisting of Justices White, Powell, Stevens and Blackmun.

Were President Nixon to evaluate his appointments it could be said that he would be disappointed by Justice Blackmun, satisfied with Powell, highly pleased with Chief Justice Burger, and wildly enthusiastic about Rehnquist. While Justice Blackmun and Justice Powell have moved to the left, Justice White has become more conservative. Justice Stevens may also have drifted somewhat to the left, but he remains something of a maverick whose votes are unpredictable.

Justice Rehnquist is universally considered to be the Court's most consistently conservative and ideological judge. The Chief Justice is viewed as the next most conservative member of the Court. Recently, for example, the Chief Justice and Justice Rehnquist dissented from the Court's decision restricting the right of prosecutors to exclude -- by "peremptory challenge" -- prospective black jurors from criminal trials involving black defendants.

Justice Rehnquist is frequently described as the leader of the Court's conservative wing. He holds particularly strong views on the establishment clause (freedom of religion), the Fourth Amendment (searches and seizures) and states' rights. One commentor said of Justice Rehnquist that he is the Court's most self-consciously literate opinion writer, but is too far to the right to dominate. Nevertheless, Justice Rehnquist has proven able to forge majorities on occasion on the strength of his legal acuity and personal amiability. Professor Laurence Tribe of Harvard Law School, a strong liberal, has suggested that Justice Rehnquist could have an "enormous impact" if elevated to Chief Justice.

Justice Rehnquist is sometimes said to be guided more by an "inner compass" than by established precedent, and is comfortable with a more creative approach to statutory interpretation than, say, Justice O'Connor.

In his own words, Justice Rehnquist "generally inclines against broad interpretations of constitutional provisions" and is a "strong believer in pluralism;" he does not want to "concentrate all the power in one place." This view is demonstrated in his opinions that grant power to the states at the expense of the

federal government, or free the states from undue federal regulation. Justice Rehnquist manifests a punctilious concern for separation of powers. He has stated:

> "I don't know that a court should really have a sense of mission. I think the sense of mission comes best from the President or the House of Representatives or the Senate. They're supposed to be the motive force of our Government. The Supreme Court and the Federal judiciary are more the brakes that say, 'You're trying to do this, but you can't do it that way . . . .'"

Justice O'Connor is usually described as a "pragmatic conservative." She is a former state court judge and majority leader of the Arizona State Senate. She also happens to have been Justice Rehnquist's friend and classmate at Stanford Law School. (He was graduated first in the class of 1952, while she was third.)

Justice O'Connor is considered to be a solid part of the conservative bloc, but somewhat closer to the center than Justice Rehnquist or the Chief Justice. (See Tabs B and C for statistics on the voting patterns of the three conservative Justices.) Voting with her conservative colleagues well over 80% of the time, Justice O'Connor is clearly not a "swing" vote.

During her 1981 confirmation hearings, even the Democrats could find little to cavil about, finding her capable, fair and openminded. (Congressman Udall said that, for a Reagan appointment, "It's almost inconceivable to me that ["my Democratic friends"] could do any better.") Justice Brennan singled out Justice O'Connor for special praise as a "most distinguished member of the Court" and as a "delightful lady" and "wonderful colleague."

Justice O'Connor's judicial philosophy is characterized as one of restraint on all levels. She is substantially guided by precedent and her statutory analysis is particularly careful and based on a genuine search for the original legislative interest. She does not reach out to decide questions unnecessary to the disposition of the case at hand. In these areas, she takes a narrower view of the Court's role than Justice Rehnquist.

Justice O'Connor has been strongly conservative on law and order and federalism issues, and has urged a more restrained role for the Court and the rest of the federal judiciary in interfering with the functioning of the executive and legislative branches of government. On states' rights, her efforts have been marked by the attempt to erect defensive protections for the operation of state governments. She has dissented strongly in favor of federalism:

> "State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes. The Constitution contemplates "an indestructible Union, composed of indestructible States," a system in which both the State and National Governments retain a "separate and independent existence."

To avoid trampling state authority, Justice O'Connor has indicated that its not enough that a conflicting Congressional purpose be legitimate, but also that the "end chosen by Congress must not contravene the spirit of the Constitution." In a dissent, Justice O'Connor has also articulated strong reasons why the 1973 pro-abortion decision, Roe v. Wade, was wrong.

The far right has had some problems with Justice O'Connor's past support of the Equal Rights Amendment and supposedly pro-abortion votes cast while she was in the Arizona State Legislature. Her opinions since joining the Court demonstrate that she does in fact have a special concern for equal protection arguments in gender-based discrimination cases. (She voted to require the Jaycees to admit women, for example.) She has also supported civil liberty and First Amendment claims often enough to refute the suggestion that she is a "knee jerk" conservative. For example, Justice O'Connor voted with the liberal majority in a recent press libel case.

Justice O'Connor recently also backed the liberal 5-4 majority that declined to find that school voluntary prayer groups were constitutionally permissible. She supported the liberals on the losing side of this Term's 5-4 decision upholding the power of the military to deny an Orthodox Jewish Air Force Captain's request to wear a yarmulke while in uniform.

Tab C

VOTING ON CERTAIN ISSUES -- 1981 TERM

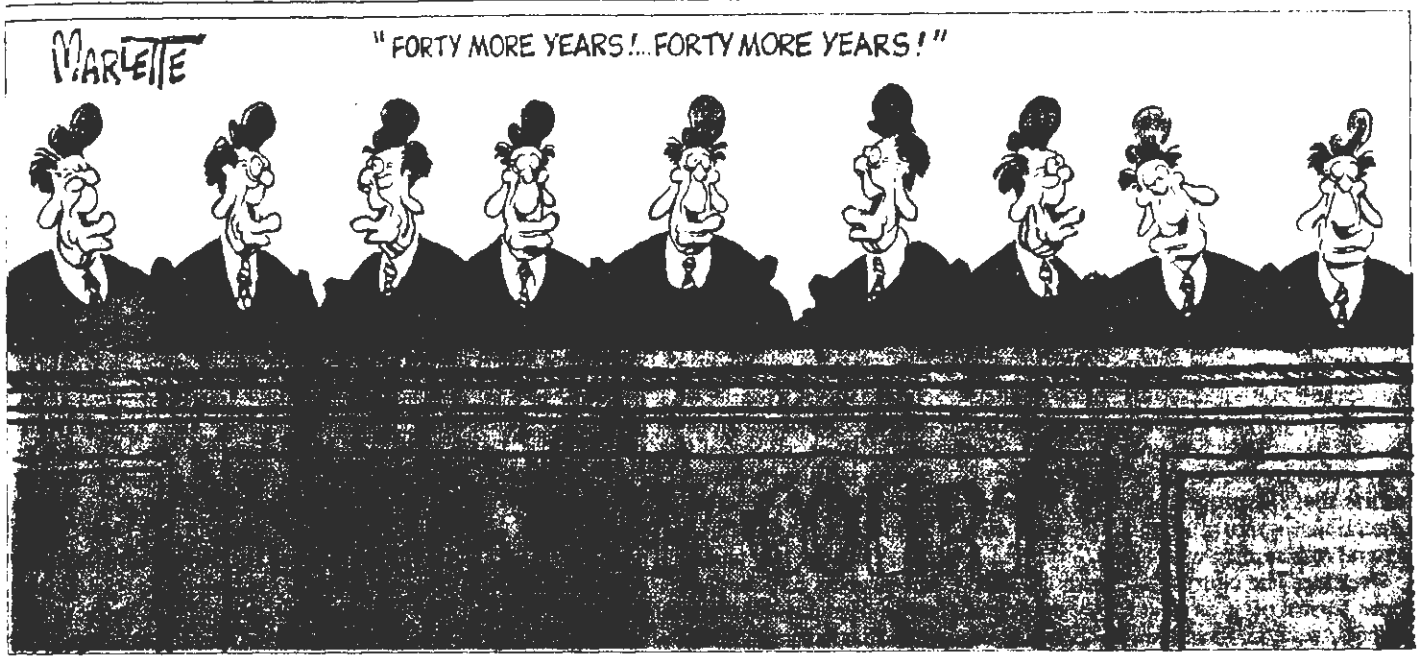
		Burger	Rehnquist	O'Connor
A.	Favored State over defendant in State criminal cases:	100%	100%	95.5%
B.	Favored State and local governments over private parties:	63.8%	70.7%	63.2%
C.	Favored federal government over defendants in criminal cases:	100%	90%	80%
D.	Favored extending federal court jurisdiction:	39.6%	36.7%	39.6%

(for comparison: Blackmun - 62.2%, Brennan - 57.1%)

Tab B

ALIGNMENT OF CONSERVATIVE JUSTICES
PERCENT OF CASES VOTING TOGETHER

	Burger	Rehnquist	O'Connor
Burger	------	89.3%-1984 term 87.5%-1983 term 82.1%-1982 term 80.1%-1981 term	88.6%-1984 term 91.9%-1983 term 80.7%-1982 term 77.2%-1981 term
Rehnquist	89.3%-1984 term 87.5%-1983 term 82.1%-1982 term 80.1%-1981 term	----------	90.5%-1984 term 91.9%-1983 term 85.7%-1982 term 81.6%-1981 term
O'Connor	88.6%-1984 term 91.9%-1983 term 80.7%-1982 term 77.2%-1981 term	90.5%-1984 term 91.9%-1983 term 85.7%-1982 term 81.6%-1981 term	----------



The Reagan court: With five of the current justices at least 75 years old, a long-term power shift is just around the corner

Open on Stage Right

An aging and quarrelsome Supreme Court reconvenes.

On the first Monday in October, the clerk of the U.S. Supreme Court opens the new term with the beseeching cry, "God Save This Honorable Court." This week he *really* means it, for awaiting the returning justices is the most difficult docket of religion-and-law cases in a decade. May school districts permit a moment of silence for prayer? Can public-school courses be taught on parochial-school grounds? May a state force a store to honor its employees' Sabbath? In various forms, each case presents the same question: is the government merely accommodating religion or is it helping to establish one? And these cases, which present the court with an opportunity to rewrite First Amendment doctrine, will be considered in the atmosphere of intense pressure stemming from recent clashes between religion and politics. The brethren themselves, moreover, are riven by dispute—and increasingly inclined to quarrel in public. God save the court, indeed.

Adding to the tension this term is the aggregate age of the justices. Five of them are at least 75 years old; several have had bouts of illness. At least two of the healthier ones, Lewis F. Powell Jr. and Harry Blackmun, have discussed retiring with friends. The aging of the court has become an election issue as well: whoever is elected president in November will, if the actuaries are right, get to appoint a working majority that could last into the next century. Walter Mondale has raised the specter of the Rev. Jerry Falwell screening the judicial nominees. Ronald Reagan, a spry 73 himself, simply points to his sole appointee thus far, the very conservative Sandra Day O'Connor, implicitly promising more of the same.

While the court's lineup remains temporarily intact, its clubhouse behavior grows more fractious. Thurgood Marshall, John Paul Stevens and Blackmun all took to the hustings this summer to criticize decisions from which they had dissented. Stevens and Blackmun both complained about conservative colleagues who broadly decided narrow cases, taking their decisions as opportunities for judicial activism. Stevens was particularly critical of a decision last term creating a "good faith" exception to the rule excluding illegally obtained evidence from trials. The irony is unavoidable: for years it was Tory critics who railed against liberal judges for behaving like legislators.

Yenta: Blackmun made his sharpest comments two weeks ago in a speech at a private Washington club. He needled his colleagues for their increasing "extremism" and unfortunate "lack of accommodation," and joked that he now finds himself "a flaming liberal" on a rightward-bound court. Worse, he said, the workload was exhausting, and the proceedings graced by "very little humor, which is disturbing to me." Lawyers familiar with Blackmun's penchant for talking out of court have given him the affectionate title of "court yenta," a Yiddish word meaning gossip.

Behind the complaints lies an apparent power shift on the high court. For a decade, outside commentators described the Burger court as a moderate institution consisting of two liberals, Marshall and William J. Brennan, two conservatives, Chief Justice Warren E. Burger and William Rehnquist, with the famous "Floating Five" in the middle. Last term, however, some discerned an important change: Byron White, Powell and an increasingly assertive O'Connor joined the two conservatives to form a consistent five-vote majority on controversial cases, leaving the others with little influence beyond leading Bronx cheers at bar meetings. "In some way the court is responding to the climate of the country," says University of Virginia law professor A. E. Dick Howard. "The Burger court has always had a curious way of serving as a mirror of the nation."

Under the new majority, the Reagan administration enjoyed unusual success in major cases last term. The sternest test of the Reagan administration's ideals this year will come in three religion cases. While their facts vary widely, at stake in each case is the court's previously announced view of the First Amendment. That article bars the official establishment of religion, and to enforce it the court has imposed numerous barriers between church and state. But the First Amendment also guarantees the right to free practice of religion, and the court has insisted that the government lift such barriers to "free exercise" as denying tax exemptions for religious institutions to nontheistic groups. In recent years the justices have broadened the "accommodation." Last term they refused to bar all publicly funded Christmas nativity scenes; the term before they upheld a tax credit for school expenses, which almost exclusively benefited the parents of students in private and religious institutions. This year's question: how much more accommodating will they be?

The most important test is a challenge to a $6 million program in Grand Rapids, Mich.,

JUSTICE

in which teachers from the local public schools offer "enrichment" courses in parochial schools in subjects like calculus and home economics. To maintain the semblance of separation between church and state, all religious paraphernalia is removed before the teacher arrives, and the schools disingenuously post signs reading: "public school classes."

Lower federal courts have rejected the scheme as unconstitutional state aid to religious institutions. A coalition of Baptist, liberal Protestant and Jewish groups have urged the high court to follow suit, arguing that Grand Rapids' circuit-riding teachers "advance" religion by freeing funds that then can be used for religious activities. The city, joined by the Reagan administration, retorts that the program merely "expands educational opportunities . . . as part of a general community-wide effort."

Overdue: The court has already allowed some forms of indirect aid to parochial schools, such as funds for textbooks, but, says Dean Jesse Choper of Berkeley's Boalt School of Law, "The Grand Rapids case goes much further. It deals with a direct grant to parochial schools. If the court upholds this program, it will signal a radical change." And a long overdue one, says James McClellan, director of the very conservative Center for Judicial Studies. "The framers never meant for the First Amendment to prohibit any activity short of the establishment of a national church."

The second religion case is the hottest politically: can Alabama allow public-school teachers to open each school day with a moment of silence for meditation or prayer? At least 23 other states have passed similar provisions. The Reagan administration has urged that the Alabama law be upheld. Silence, it argues in an amicus brief, "is perfectly neutral with respect to religious practice . . . What is done with it remains a mystery." That's true, of course, but it doesn't decide the issue. As Duke University law professor Walter Dellinger says, "critical to this case is that the legislature tells the students what they must do during the moment of silence. This statute forbids a student from respectfully reading a book; it requires that he meditate or pray." Moreover, argues the American Civil Liberties Union, the law was clearly designed to put religion into "public classrooms as a matter of official government policy." What all of this means is that the court can choose to have it both ways: it can strike down the Alabama law and in the process hint how to write moment-of-silence laws that will pass constitutional muster.

STEVE GROSS

Stevens on the stump: Tension

The third case may be the easiest to accommodate. A Connecticut law says that employees may refuse to work on their Sabbath days. When the Caldor department-store chain demoted Donald Thornton, a devout Presbyterian who refused to come in on Sundays, he complained to the state labor board. A lawsuit followed, and the state's highest court struck down the law. The issue for the court is whether the statute improperly supports religion. Is the state too entangled when it forces an employer to honor a religious claim? Or is it harmlessly helping a believer freely exercise his faith?

Though dominated by religion cases at the outset, this court term will face a mix of issues both vital and arcane. Twelve of the 14 criminal appeals the justices have agreed to hear were filed by prosecutors—a bad signal for criminal defendants. Among the more interesting issues: When may school officials search a student? Can a prosecutor use a defendant's second confession if the first one was obtained improperly? May a state order surgery on a defendant to extract a bullet it wants to use as incriminating evidence? And does it violate due process for police to shoot a fleeing, unarmed felony suspect?

Hair Splitting: The justices will also have to grapple with some interesting free-expression cases. Is the credit-reporting service of Dun & Bradstreet Inc. entitled to the same special libel protections as the press? (And if not, does that mean judges are competent to decide what is "press" and what isn't?) May Congress prohibit independent political-action committees from spending more than $1,000 on candidates they support? Finally, the court will have a bunch of cases that only lawyers can love: do federal minimum-wage laws apply to local transit authorities? And, in the hair-splitting issue of the year: should searches of mobile homes be governed by the rules for searching homes—or those for cars? Adding to this list, the court will accept about 60 more cases beginning this week to be decided by July. Is it any wonder that Harry Blackmun is tired?

ARIC PRESS with ANN McDANIEL in Washington

TRANSITION

SETTLED: A $10 million libel suit filed by **Howard Safir,** a Justice Department official, against ABC-TV and correspondent Geraldo Rivera; out of court for about $235,000, in Fairfax, Va. Rivera reported in a 1980 "20/20" segment that Safir, head of the Federal Witness Protection Program, was "badly misinformed or intentionally lying" about protected witnesses who might have been murdered. Safir said key statements of his had been edited out of comments taped for the show.

INJURED: Mass murderer **Charles Manson,** 49, with second- and third-degree burns after a fellow inmate at the California Medical Facility doused Manson's head and hands with paint thinner and set him afire; in Vacaville, Calif., Sept. 25. The assailant, a member of the Hare Krishna sect, claimed Manson had threatened him because of that affiliation. Manson was convicted of murdering Sharon Tate and eight others in 1969.

Bunker: Steadfast

DIED: Diplomat **Ellsworth Bunker,** 90, who served as ambassador to South Vietnam from 1967 to 1973, the most bloody and divisive period of American involvement there; of complications from a viral infection, in Vermont's Brattleboro Memorial Hospital, Sept. 27. Bunker spent 35 years in the sugar industry before turning to public service, heading the U.S. embassies in Argentina, India and Italy, and leading trouble-shooting trips to Indonesia and the Dominican Republic.

When Bunker was appointed to Saigon, his chief mission was to bring South Vietnamese President Nguyen Van Thieu into line with American efforts to negotiate peace with Hanoi. Critics charged that he was overly protective of Thieu, whose intransigence on the issue of negotiations with the communists was viewed as a prime obstacle to peace in the early 1970s. Later the diplomat brought his straightforward style to talks on the Panama Canal, getting top Panamanian officials alone on an isolated island to hammer out an agreement that allowed for Panamanian control after the year 2000—but reserved the U.S. right to defend the canal.

Walter Pidgeon, 87, whose tweedy manner and sober charm graced some 100 movies in a half century of acting; after a series of strokes, in Santa Monica, Calif., Sept. 25. A leading figure in 1940s Hollywood, he had major parts in "Man Hunt" and "How Green Was My Valley." His most memorable roles were opposite Greer Garson, particularly as the stalwart husband in "Mrs. Miniver" and as Pierre Curie in "Madame Curie," both of which earned him Academy Award nominations.

1983 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1 (1983)

Justice O'Connor: A First Term Appraisal

*Robert E. Riggs**

I. INTRODUCTION

The appointment of Judge Sandra Day O'Connor to the United States Supreme Court was one of the most widely-acclaimed acts of the new Reagan administration. Not yet six months into his term of office, the President fulfilled a campaign promise to nominate a woman to fill one of the first Supreme Court vacancies in his administration.[1] The nomination was praised by women's groups because she was a woman,[2] by Republicans because of her sterling political credentials,[3] by lawyers because of her solid legal background,[4] by Senators because of her alert, self-possessed responses at the nomination hearings,[5] and even by Democrats because, "If you have to have a Republican on the court . . . she's about the best we could hope for."[6] The only discordant notes came from the far right, where

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1. N.Y. Times, July 8, 1981, at A1, col. 4; N.Y. Times, Oct. 15, 1980, at A1, col. 1.

2. N.Y. Times, July 8, 1981, at A1, col. 4; *The Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 278-80 (1981) (statement of Kathy Wilson, National Women's Political Caucus); *id.* at 398-401 (testimony of Eleanor Smeal, President, National Organization for Women) [hereinafter cited as *Hearings*].

3. *Hearings, supra* note 2, at 7 (statement of Sen. Paul Laxalt, R-Nev.); *id.* at 32 (statement of Sen. Barry Goldwater, R-Ariz.).

4. *See, e.g., Hearings, supra* note 2, at 405-11 (testimony of Lynn Hecht Schafran, Esq., National Director of the Federation of Women Lawyers' Judicial Screening Panel).

5. Taylor, *Rather an Unknown*, N.Y. Times, July 8, 1981, at A13, col. 1.

6. Ayers, *A Reputation for Excelling*, N.Y. Times, July 8, 1981, at A1, col. 4. The statement was attributed to a "leading Democratic politician in Arizona." The unidentified Democrat may have been Arizona Congressman Morris K. Udall, who said essentially the same thing a few days later in a Washington Post newspaper column. He praised O'Connor as a "practical, conscientious, fair and open-minded judge" with a "reputation for treating the law in a businesslike way," and commented,

> My Democratic friends ought to be grateful for this appointment. It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats. He's going to appoint people to the right of center whenever he can.

the National Right to Life Committee, Moral Majority, and related groups denounced the nomination because of her past support of the Equal Rights Amendment and some allegedly pro-abortion votes during her tenure as a member of the Arizona State Senate.[7]

With such broad spectrum support the appointment process proceeded without a hitch. After two days of generally friendly questioning at a hearing before the Senate Judiciary Committee,[8] the appointment was confirmed by a Senate vote of 99-0.[9] On September 25, 1981, she took the oath of office as 102nd Justice and first woman to serve on the Supreme Court of the United States.

This Article will appraise Justice O'Connor's performance during her first term on the Supreme Court in light of expectations raised at the time of her appointment. The nature of the expectations will be established by a brief review of preappointment clues to her judicial competence, her concept of the judicial role, and her substantive biases. Her judicial performance will be examined by means of a statistical summary of her first term voting record, followed by a more detailed analysis of her decisions relating to criminal justice, the exercise of federal court jurisdiction, and civil liberties. A final section will discuss deference to state authority within the federal system as a persistent value running through her judicial decision making.

Udall, *A Master Stroke*, Washington Post, July 13, 1981, at A13, col. 2, *reprinted in Hearings*, *supra* note 2, at 38.

Other liberal Democrats were quick to join the chorus of approval. House Speaker Tip O'Neill called Reagan's choice "the best thing he's done since he was inaugurated." Senator Edward Kennedy was equally positive: "Every American can take pride in the President's commitment to select such a woman for this critical office." Magnusen, *The Brethren's First Sister*, TIME, July 20, 1981, at 8, 9.

7. N.Y. Times, July 8, 1981, at A1, col. 6; *Hearings*, *supra* note 2, at 280-82 (statement of Dr. Carolyn F. Gerster, Vice President in Charge of International Affairs, National Right to Life Committee, Inc.); *id.* at 282-83 (statement of Dr. John C. Willke, President, National Right to Life Committee, Inc.); *id.* at 342-48 (testimony of Dr. Carl McIntire, President, International Council of Christian Churches); *id.* at 385-87 (testimony of Anne Neamon, National Coordinator, Citizens for God and Country, and Trustee, Truth in Press, Inc.).

8. Detailed in *Hearings*, *supra* note 2.

9. 127 CONG. REC. S10188 (daily ed. Sept. 21, 1981) (Democratic Senator Max Baucus of Montana was out of town and did not vote on the nomination).

II. Preappointment Assessments

A. Estimates of Judicial Competence

The public scrutiny preceding Justice O'Connor's accession to office provided a number of clues to her probable performance on the High Court. The evidence suggested that she would be competent, if not brilliant. The unanimous American Bar Association Committee report, based on interviews with numerous lawyers, judges, law professors, and others familiar with her work, concluded that she met "the highest standards of judicial temperament and integrity" and was "qualified from the standpoint of professional competence for appointment to the Supreme Court of the United States."[10] The wording of the endorsement was chosen carefully: she received the "highest" endorsement with respect to "judicial temperament and integrity" but only a satisfactory report on her "professional competence."[11] The Committee's unwillingness to give her the highest rating on competence sprang from its conclusion that her "professional experience [had] not been as extensive or challenging as that of others who might be available."[12] Nevertheless, the Committee was satisfied that she was competent and qualified to fill the office because of "her outstanding academic record,[13] her demonstrated intelligence and her service as a legislator, a lawyer and a trial and appellate judge."[14] No one testified otherwise

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10. *Hearings, supra* note 2, at 272.

11. By contrast, Justices Stevens, Powell, and Rehnquist, the most recent appointees preceding O'Connor, received from the ABA Committee the "highest" rating on all three attributes—temperament, integrity, and competence. In the case of Justice Rehnquist, a dissenting minority of the ABA Committee would have withheld the "highest" rating. *See Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 17-18 (1975) (testimony of Warren Christopher, Chairman, ABA Standing Committee on the Federal Judiciary); *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1-2, 5 (letters to Hon. James O. Eastland from Lawrence E. Walsh, Chairman, ABA Standing Committee on the Federal Judiciary).

12. *Hearings, supra* note 2, at 277. In addition, the Committee concluded that her opinions in the Arizona appellate court were "competently written" with a "clear and logical" writing style, but were generally not of a subject matter calling for "the elaborate legal analysis of complex social issues often found in Supreme Court decisions." *Id.*

13. Stanford A.B., 1950, magna cum laude; Stanford LL.B., 1952, Law Review, Order of the Coif, third of 102 in the 1952 graduating class (Justice William H. Rehnquist graduated first in the same class). *Id.* at 47, 113, 274.

14. *Id.* at 272. Her experience included service as a deputy in the office of the San Mateo County District Attorney during 1952 and 1953 while her husband John was finishing law school; civilian attorney for the U.S. Army Quartermaster Corps in Frank-

at the Hearings, and no voice to the contrary was heard in any of the public comment on her nomination and appointment, except for the right-wing ideological objections.

B. Testimonials of Judicial Restraint

Aside from the issue of competence, the evidence suggested that her approach to the new task would emphasize judicial restraint—expressed through deference to legislatures as the policy-making branch of government, respect for precedent, avoidance of constitutional questions when narrower grounds for decision are available, and a determined effort to construe constitutional text in light of the framers' intent, as a basis for constitutional decisions. Her own testimony at the Hearings was unmistakably to that effect. In an opening statement to the Senate Judiciary Committee, the only specific reference to her personal view of the office was a pointed endorsement of judicial deference to legislative determinations. The three branches of government have "separate and distinct roles," she said, and "the proper role of the judiciary is one of interpreting and applying the law, not making it."[15] In subsequent questioning by members of the Committee she reiterated the same philosophy of deference to legislatures as the policy-making branch of government.[16] Her views on stare decisis were somewhat more equivocal since, historically, most courts have occasionally felt the need to overrule prior precedent. Under questioning she distinguished statutory interpretation by the judiciary, which Congress can change by subsequent enactment, from interpretation of the Constitution, which Congress cannot change. With constitutional precedents, the justices should be willing to reconsider prior rulings and might even have an "obligation . . . to overturn [a] previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation."[17] Nevertheless, constitutional precedent is not to be taken lightly.

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furt, West Germany, 1954-57, while her husband served in the Judge Advocate General's Corps; private practice in Maryvale, Arizona, 1958-60; assistant attorney general for the State of Arizona, 1965-69; member of the Arizona Senate, 1969-75, majority leader 1973-74 (appointed by a Republican governor in 1969 to fill a Senate vacancy, subsequently elected in 1970 and 1972); trial court judge, Maricopa County (Phoenix) Superior Court (elected in 1974, served 1975-79); and intermediate appellate court judge, Arizona Court of Appeals, 1979-81 (appointed by a Democratic governor). *Id.* at 47, 113.

15. *Hearings, supra* note 2, at 57.

16. *E.g., id.* at 60.

17. *Id.* at 83.

Although "not cast in stone, . . . it is still very important."[18]

In discussing the judicial role she specifically endorsed the principle of "judicial restraint,"[19] which she identified, at least by way of illustration, with the practice of deciding cases upon "appropriately narrow grounds"[20] and upon "grounds other than constitutional grounds where that is possible."[21] During the questioning she also espoused the interpretivist concept of judicial review[22] which denies the legitimacy of giving content to constitutional rules by reference to natural law, contemporary social values, or any other source external to the Constitution. This viewpoint was obvious in her response to Senator Biden's suggestion that significant changes in social mores might justify the Court in assuming, from time to time a posture of judicial activism: "Well, Senator, with all due respect I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed . . . ."[23] This did not rule out changing interpretations of a particular constitutional provision, but any change should be based on the Court's "research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision."[24] Taken in the aggregate, these comments placed the nominee squarely in the mold of the judicial conservative.

Such comments were consistent with the estimate of those familiar with her record as an Arizona judge. Although her daily grist on the Arizona intermediate appellate court consisted of appeals from criminal convictions, workmen's compensation awards, unemployment insurance disputes, divorce settlements, tort actions, and real property questions, rather than matters of broad social or constitutional import, her opinions did pay close attention to statutory text and legislative history. In the words

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18. *Id.*

19. *Id.* at 60, 108.

20. *Id.* at 108.

21. *Id.* at 60.

22. As John Hart Ely defines the term, "interpretivism" means that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," while "noninterpretivism" expresses "the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

23. *Hearings, supra* note 2, at 67.

24. *Id.*

of one fellow lawyer, she "tends to be a literalist with acute respect for statutes."[25] O'Connor's experience as a former state legislator was also seen as inclining her toward judicial self-restraint, particularly in considering the constitutionality of state legislation.[26]

Perhaps even more to the point, Judge O'Connor was firmly on record in support of restraint by federal judges in matters falling within the jurisdiction of state courts. In an article appearing in the *William and Mary Law Review*[27] just weeks before her nomination, she had lauded recent Supreme Court decisions limiting federal habeas corpus review of state criminal convictions,[28] while decrying the countertendency to enlarge federal jurisdiction at the expense of state courts through vastly expanded litigation under 42 U.S.C. § 1983.[29] To reverse this trend she suggested that Congress eliminate or restrict federal court diversity jurisdiction, require exhaustion of state remedies as a prerequisite to section 1983 actions, and limit or disallow recovery of attorneys' fees under section 1983.[30] Ideally, she indicated, state courts should be allowed "to rule first on the constitutionality of state statutes,"[31] and state judgments on federal constitutional matters should be safe from collateral attack in federal courts "where a *full* and *fair* adjudication has been given in the state court."[32]

Such a view obviously reflects "the perspective of a state court judge,"[33] but that perspective, and the impact of her experience in state government as a legislator and assistant attorney general, would not necessarily be abandoned after elevation to the federal bench.[34] As the first appointee in twenty-four years

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25. Magnusen, *supra* note 6, at 10 (quoting Phoenix lawyer John Frank).

26. Footlick & Friendly, *A Woman for the Court*, NEWSWEEK, July 20, 1981, at 18.

27. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

28. *Id.* at 803-04. She cited Sumner v. Mata, 446 U.S. 1302 (1980); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); and Wainwright v. Sykes, 433 U.S. 72 (1977).

29. O'Connor, *supra* note 27, at 808-10. She also expressed misgivings about the enlarged jurisdiction conferred on bankruptcy courts by the Bankruptcy Reform Act of 1978. *Id.* at 810-11.

30. *Id.* at 810, 815.

31. *Id.* at 815.

32. *Id.* (emphasis in original).

33. She identified her bias in the title of her article. *Id.* at 801.

34. But then it might. The only other sitting justice with previous experience as a state court judge is William J. Brennan, Jr., who was a member of the New Jersey Supreme Court prior to his appointment to the United States Supreme Court. Of justices

with prior state court service, and the first in thirty-two years who had served in a legislative body,[35] she might be expected to have a sympathetic appreciation of the role of state courts and of state governments in the federal system, and nothing in her published comments or her responses at the Hearings dispelled that impression.

When the O'Connor nomination was first announced, Attorney-General William French Smith emphasized to the press that she "shared the President's 'overall judicial philosophy' of 'restraint' and deference to the legislative branch in making law",[36] and the President subsequently praised her judicial philosophy as "one of restraint."[37] As journalist Anthony Lewis pointed out at the time, such expressions may be little more than the "pieties" that any Supreme Court appointment, at least in a conservative administration, is likely to evoke.[38] But when the nominee herself says it, the politicians say it, and those familiar with her record also say it (even though they may not all mean the same thing when they say it), the label of "judicial restraint" begins to acquire some credibility.

C. *Clues to Substantive Bias*

If one could expect the new justice to adopt a posture of judicial restraint, guidelines to her probable response on particular substantive issues were less well marked. On the liberal-conservative spectrum she was generally regarded as conservative but no ideologue—indeed, a moderate rather than an extreme conservative.[39] Vociferous opposition to the appointment by the far right indicated unmistakably that she was not "one of them." Her political opponents on the Democratic side of the aisle recognized her political conservatism but regarded her as a worthy

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presently sitting, he is among those most prone to overturn state court decisions and preempt state judicial processes.

35. Sherman Minton, appointed by President Truman in 1949, had served as U.S. Senator to Indiana from 1935 to 1941. 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 2699-700 (1969). Justice Potter Stewart, whose resignation created the vacancy filled by Justice O'Connor, had served two terms on the Cincinnati City Council. *Id.* at 2923.

36. Taylor, *supra* note 5.

37. Lewis, *Judicial Restraint: No Fixed Principle*, N.Y. Times, Sept. 27, 1981, at E20.

38. *Id.*

39. Footlick & Friendly, *supra* note 26, at 16; Magnusen, *supra* note 6, at 8-9; Taylor, *supra* note 5. N.Y. Times, Sept. 13, at E20, col. 1.

foe—capable, fair, and openminded.[40] On issues likely to come before the High Court she had few statements on the public record.

During the Hearings on her nomination she prudently refused to be very specific on matters she might later be called upon to adjudicate. Various Senators tried to draw her out on such issues as abortion, the death penalty, the exclusionary rule, school busing, television in courtrooms, women's rights, and racial discrimination.[41] While she sometimes hinted at her personal views—for example, she expressed doubts about the efficacy of court-ordered school busing to achieve integration, and had reservations about the exclusionary rule[42]—she was careful to distinguish her own preferences as an individual from conclusions she might reach as a judge. A careful reading of her responses to questions on criminal justice suggested that she would be inclined to strike the balance in favor of society rather than the criminal defendant.[43] In other matters, however, her responses were appropriately guarded to avoid any improper commitment on matters that might come before the Court. Thus the Hearings provided little specific guidance to her likely judicial posture on particular substantive issues.

Her decisions on the Arizona appellate bench are scarcely more helpful in pointing specific directions because they touch on few constitutional issues and federal law questions.[44] For the most part they suggest an approach oriented toward careful analysis of facts and law rather than a preference for any particular substantive outcomes. A recent study by Schenker has carefully classified by subject matter the eighty-two state court appellate decisions in which she participated and identified only

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40. *See* comments of Democratic Congressman Morris K. Udall, *Hearings*, *supra* note 2, at 37; Arizona Governor Bruce Babbitt, *id.* at 255-61. Alfredo Gutierrez, Democratic leader in the Arizona State Senate during O'Connor's tenure there, spoke of her "sincerity," "ability," and "great fairness," and called the appointment "an excellent sign for the minority communities of the United States." *Id.* at 230.

41. *See, e.g.*, *Hearings*, *supra* note 2, at 78-79, 98, 126-27 (abortion); 128-29 (death penalty); 79-81, 93-96, 146-47 (exclusionary rule); 78-79, 119 (school busing); 141-42 (television in courtrooms); 76-78, 127-28 (women's rights); 148-49 (racial discrimination).

42. *See, e.g.*, *id.* at 119 (school busing); 79-81 (exlcusionary rule).

43. *Hearings*, *supra* note 2, at 73, 80, 166.

44. Magnusen, *supra* note 6, at 10; Taylor, *supra* note 5. Yale law professor Paul Gewirtz, quoted in Footlick & Friendly, *supra* note 26, at 18, probably touched the heart of the matter: "It's not only that *we* don't know what her views are on some issues, *she* probably doesn't know what her views are either . . . . She hasn't been put to the test of figuring them out." (Emphasis in the original).

three outside the criminal law area that raised federal constitutional questions.[45] The others dealt with criminal appeals (17), workmen's compensation (22), unemployment insurance (10), and a variety of other civil cases.[46]

Besides classifying the O'Connor decisions, Schenker proceeds from the thesis that O'Connor's background as an assistant state attorney general, a state legislator, and a state trial and appellate court judge, taken together with the views expressed in her William and Mary lecture, might presage a sympathetic receptiveness to state and local government interests asserted before the United States Supreme Court.[47] Schenker's examination of the relevant cases does not point unequivocally in that direction, however. Of four cases raising a challenge to the taxing power of state and local governments, Justice O'Connor voted twice to sustain the tax[48] and twice to invalidate it.[49] In two cases arising from disciplinary actions against teachers in state school systems, Justice O'Connor held once for the teacher[50] and once for the school governing board.[51] In two tort actions against local government units she held once for the local government[52] and once for the plaintiff.[53] In three equal protection challenges to state law, Justice O'Connor twice upheld

45. Schenker, *"Reading" Justice Sandra Day O'Connor*, 31 CATH. U.L. REV. 487, 492 (1982). Schenker does not identify these three cases in his Table at 492, but presumably they are J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. 469, 610 P.2d 471 (Ct. App. 1980); Blair v. Stump, 127 Ariz. 7, 617 P.2d 791 (Ct. App. 1980); and Pastore v. Arizona Dep't of Economic Sec., 126 Ariz. 337, 625 P.2d 926 (Ct. App. 1981). She wrote the opinion in both *J.C. Penney Co.* and *Blair*.

46. Schenker, *supra* note 45, at 492.

47. *Id.* at 487-89.

48. J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. 469, 610 P.2d 471 (Ct. App. 1980); Univar Corp. v. City of Phoenix, 122 Ariz. 220, 594 P.2d 86 (1979). The *Univar* citation is to the Arizona Supreme Court opinion affirming Judge O'Connor's decision as a trial judge. The trial court opinion is not published.

49. State v. Central Mach. Co., 121 Ariz. 183, 589 P.2d 426 (1978), *rev'd sub nom.* Central Mach. Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) (citations are to the Arizona Supreme Court, which reversed her unreported trial decision, and to the United States Supreme Court, which ultimately vindicated her decision); Salt River Project Agricultural Improvement and Power Dist. v. City of Phoenix, 129 Ariz. 398, 631 P.2d 553 (Ct. App. 1981).

50. Orth v. Phoenix Union High School Sys., 126 Ariz. 151, 613 P.2d 311 (Ct. App. 1980).

51. Cooper v. Arizona W. College Dist. Governing Bd., 125 Ariz. 463, 610 P.2d 465 (Ct. App. 1980). O'Connor wrote the opinion for the unanimous court.

52. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017 (Ct. App. 1979). Citation is to appellate court case affirming decision of Justice O'Connor sitting as trial judge.

53. Lowman v. City of Mesa, 125 Ariz. 590, 611 P.2d 943 (Ct. App. 1980).

the challenged statute[54] and once held against the state.[55] From a detailed analysis of these cases, Schenker concludes that Justice O'Connor would "fully appreciate the interests of state and local governments advanced before the Supreme Court," but that "her voting record on the state bench suggests that appreciation will not necessarily translate into votes."[56] Certainly her performance on the state bench indicates little of ideological bias for or against local government interests, but rather a discriminating concern with facts and careful attention to relevant statutory and case law.

The same posture seems apparent in the criminal appeals in which she participated. Although nine were decided for the state[57] and five for the defendant,[58] no obvious anti-defendant bias is apparent. As in the civil cases, the outcomes appear to reflect careful factual analysis and conscientious application of relevant statutes and rules of criminal procedure.[59]

Predicting a person's future behavior as a justice of the United States Supreme Court is always risky, as a number of U.S. Presidents could testify. President Dwight D. Eisenhower, for example, allegedly referred to his appointment of Earl Warren as "[t]he worst damn fool mistake I ever made."[60] More recently Justice Harry Blackmun also has proved at least a mild disappointment to the President who appointed him. At first

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54. Pastore v. Arizona Dep't of Economic Sec., 128 Ariz. 337, 625 P.2d 926 (Ct. App. 1981); J.C. Penney Co. v. Arizona Dep't of Revenue, 125 Ariz. 469, 610 P.2d 471 (Ct. App. 1980).

55. Blair v. Stump, 127 Ariz. 7, 617 P.2d 791 (Ct. App. 1980).

56. Schenker, *supra* note 45, at 503.

57. State v. Schoonover, 128 Ariz. 411, 626 P.2d 141 (Ct. App. 1981); State v. Morgan, 128 Ariz. 362, 625 P.2d 951 (Ct. App. 1981); State v. Gessner, 128 Ariz. 487, 626 P.2d 1119 (Ct. App. 1981); State v. Wilson, 126 Ariz. 348, 615 P.2d 645 (Ct. App. 1980); State v. Byers, 126 Ariz. 139, 613 P.2d 299 (Ct. App. 1980); Juvenile Action No. J-87631, 125 Ariz. 532, 611 P.2d 119 (Ct. App. 1980); State v. Ramirez, 126 Ariz. 464, 616 P.2d 924 (Ct. App. 1980); State v. Marquez, 127 Ariz. 3, 617 P.2d 787 (Ct. App. 1980).

58. State v. Miguel, 125 Ariz. 538, 611 P.2d 125 (Ct. App. 1980); State v. Blevins, 128 Ariz. 64, 623 P.2d 853 (Ct. App. 1981); State v. Rodriguez, 126 Ariz. 104, 612 P.2d 1067 (Ct. App. 1980); State v. Reuben, 126 Ariz. 108, 612 P.2d 1071 (Ct. App. 1980); State v. Fridley, 126 Ariz. 419, 616 P.2d 94 (Ct. App. 1980). The Schenker article, *supra* note 45, lists 17 criminal cases in which Judge O'Connor participated. A Lexis search produced only 14; I am unable to account for the discrepancy.

59. The same is true of the workmen's compensation and unemployment insurance cases. About 40% of the decisions were in favor of the employee claimant, with 60% against, but the disparity in outcome seemed to hinge on the nature of the law and the facts, not on bias in favor of the state or of employers generally.

60. Magnusen, *supra* note 6, at 18. *See also* J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 200 (1979).

paired with Chief Justice Burger as one of the "Minnesota Twins" on the right wing of the Court, Justice Blackmun dispelled that image for all time with his opinion in *Roe v. Wade*,[61] the landmark abortion decision. He has since become one of the "swing" votes on the Court with a stronger affinity for the left than for the right.[62] Nevertheless the record necessarily creates expectations, and more often than not it provides some guide to subsequent judicial decision making. If President Nixon miscalculated in his appointment of Justice Blackmun, his other three Supreme Court appointees (Burger, Powell, Rehnquist) have performed much more in line with expectations.[63]

It seems legitimate, therefore, this early in Justice O'Connor's career on the Supreme Court, to identify the expectations raised by her record at the time of her appointment and to use them as a benchmark for comparison with her subsequent performance. As distilled from the foregoing discussion of her background and public statements, those expectations may be briefly summarized:

1. As a judicial craftsman she should be technically competent, with opinions directed more to careful analysis of facts and articulation of relevant rules than to sweeping policy pronouncements.

2. In judicial review and construction of statutes, we would expect a meticulous examination of statutory wording and legislative history in the search for legislative intent, and a reluctance to invalidate legislation without clear constitutional warrant. This expectation is underpinned by her expressed leaning toward judicial restraint and her articulated concern for the preservation of a vigorous federalism.

3. Her strong verbal commitment to judicial restraint should also foreshadow a restrictive approach to the exercise of federal court jurisdiction, particularly where federal courts would encroach upon the jurisdiction of state courts or undermine by collateral attack the finality of state court decisions reached through "full and fair adjudication."

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61. 410 U.S. 113 (1973).

62. During the 1981 term he voted more often with Justice Brennan than with any other member of the Court. He voted least often with Justice Rehnquist. *See infra* Table 2.

63. Without fear of serious contradiction, one might say that the former President has reason to be satisfied, ideologically, with the performance of Justice Powell, highly pleased with Chief Justice Burger, and wildly enthusiastic about Justice Rehnquist.

4. Substantively, her decisions should have an ideologically conservative cast, as a by-product of her deference to elected policy makers, respect for federalism, and political conservatism. Nevertheless, the conservative tone could be moderated by an approach to substantive questions that is primarily pragmatic rather than ideological.

The discussion that follows will examine the record of Justice O'Connor during her first term on the Supreme Court. At the end of that discussion the first term record will be briefly appraised to determine how closely it conforms to the preceding summary of expectations.

III. The First Term Record

A. *A Statistical Summary*

A statistical analysis may be a useful starting point.[64] Of 166 cases decided by written opinion during the term, Justice O'Connor participated in 162. She wrote thirteen opinions for the Court, twelve concurring opinions, and ten dissenting opinions. As the figures in Table 1 indicate, she wrote fewer dissents and court opinions than any other justice but was more prolific in producing concurring opinions.

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64. Except as indicated in note 65, *infra*, Tables 1 and 2 follow the system for compiling statistics used by the *Harvard Law Review* for its annual review of the Surpeme Court term. See explanation at *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 93, 301-02 (1968). The figure of 166 thus includes both signed and per curiam opinions. In conformity with the Harvard practice, I omitted per curiam decisions which merely state the decision without setting forth reasons. Cases affirmed by an evenly divided court are necessarily excluded because they are not accompanied by a written opinion. One case fell in that category this term: American Medical Ass'n v. FTC, 102 S. Ct. 1744 (1982).

The *Harvard Law Review* report on the 1981 Term presents figures on the number of opinions written by each justice, similar to the information in Table 1 of this study. *See The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 4, 304 (1982). Unhappily, there are a number of discrepancies between their figures and ours. For example, I found 13 dissenting opinions written by Justice Marshall while they tabulated only 4. After comparing the two sets of figures, I decided to rely upon my own count which is based on opinions published in Volume 50 of *U.S. Law Week*.

Table 1
Authorship of Written Opinions
U.S. Supreme Court, 1981 Term

	Opinion of Court	Concurrences	Dissents	Total
Blackmun	15	16	12	43
Brennan	15	11	19	45
Burger	16	6	12	34
Marshall	15	5	13	33
O'Connor	13	12	10	35
Powell	16	13	21	50
Rehnquist	17	6	16	39
Stevens	15	16	25	56
White	19	8	17	44
Per Curiam	25	—	—	25