PANEL APPROVES JUDGE O'CONNOR

Senate's Approval Is Expected for First Woman Nominee to the Supreme Court

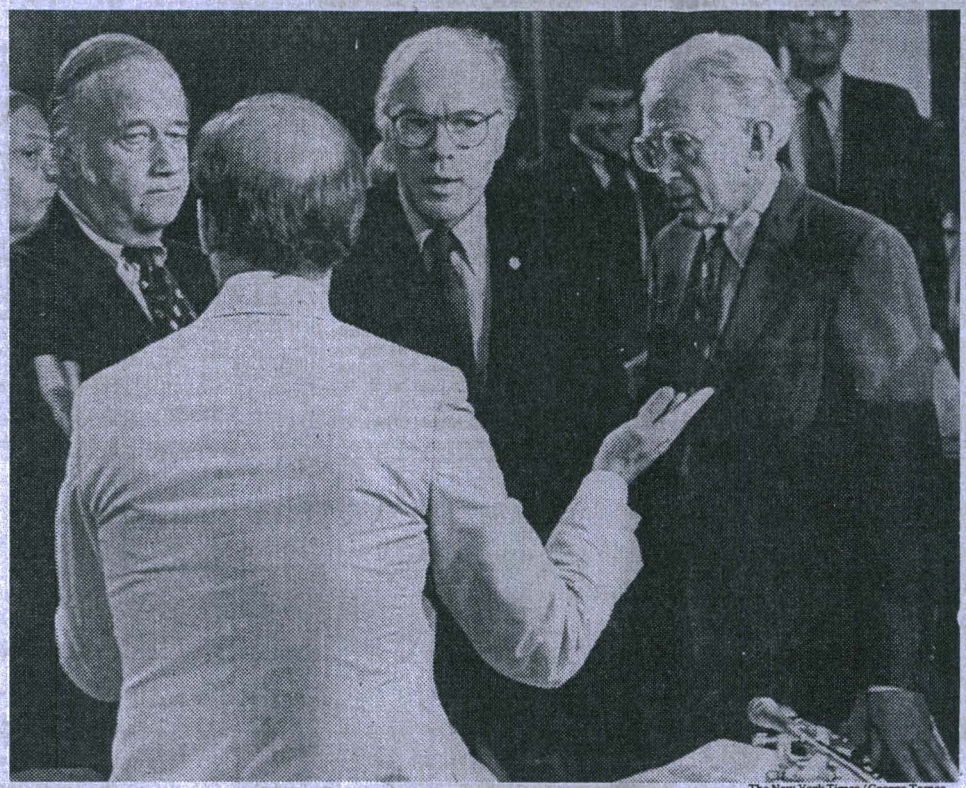
By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Sept. 15 — The Senate Judiciary Committee today approved the nomination of Sandra Day O'Connor as an Associate Justice of the Supreme Court. Confirmation by the full Senate could come as soon as Friday.

Seventeen of the 18 Judiciary Committee members voted in favor of the nomination. The eighteenth, Senator Jeremiah Denton, Republican of Alabama, voted "present." Senator Denton said that while he regarded Judge O'Connor as a "superior candidate," a "fine lady," and a "distinguished jurist," he could not vote to confirm her because she had refused to criticize the 1973 Supreme Court decision that legalized abortion.

The abortion issue dominated the three days of confirmation hearings last week. Questioned closely about her voting record on abortion when she served in the Arizona State Senate, Judge O'Connor repeatedly answered that she was personally opposed to abortion but did not want to express her legal opinion on a matter that was likely to come before the Supreme Court again in her tenure.

Senator Denton was joined in questioning Judge O'Connor on abortion by two other Republicans, Senators John East of North Carolina and Charles E. Grassley of Iowa. The three placed into the committee record today a joint statement expressing their "dissatisfaction" with Judge O'Connor's "vague and general answers."



The New York Times/George Tames

Members of the Senate Judiciary Committee talk before the vote on Judge O'Connor. Joseph R. Biden Jr., Delaware Democrat, sits with his back to the camera; others are, from left, Charles McC. Mathias Jr., Republican of Maryland; Patrick J. Leahy, Vermont Democrat; Howard M. Metzembaum, Ohio Democrat.

publican of South Carolina, called Judge O'Connor "one of the choice nominations" for the Supreme Court in his 27 years in the Senate.

Senator Thurmond said that Judge O'Connor had "all the good qualities that a judge needs," which he defined as "integrity, ability, courage and compassion."

"Looking at the whole record," Senator East said, "this is a conservative woman of conservative instincts." He said that he admired and trusted President Reagan, who made the appointment, adding, "I suspect he knows some things I don't know."

But for Senator Denton, nothing could compensate for what he perceived as Judge O'Connor's failure on the abor-

what they called single-issue politics in judicial confirmation proceedings.

"An agreement to vote a certain way can never be the price to be paid for confirmation by the United States Senate," Senator Leahy said. To require such a commitment from a judicial nominee he said, would "destroy the independence and integrity of the Federal court system."

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Others Vote for Nominee

But since Senators East and Grassley d not follow Senator Denton's lead by thholding their votes, it left the Ala- ma Republican, and by implication e antiabortion leadership whose views had championed in the hearings, sub- erged in the waves of praise that ued from the committee for the nomi- e.

The chairman, Strom Thurmond, Republican of South Carolina, called Judge O'Connor "one of the choice nominations" for the Supreme Court in his 27 years in the Senate.

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Looked 'at the Whole Record'

In the 45 minutes of discussion by the panel this morning, Senator East and Senator Grassley explained their favorable votes by saying that, despite their displeasure with Judge O'Connor's answers on abortion, they were generally satisfied with her answers to other questions and with her overall judicial approach.

"Looking at the whole record," Senator East said, "this is a conservative woman of conservative instincts." He said that he admired and trusted President Reagan, who made the appointment, adding, "I suspect he knows some things I don't know."

But for Senator Denton, nothing could compensate for what he perceived as Judge O'Connor's failure on the abortion issue. "Where any issue is so broad in its implications," he said, "threatening the very basis of our society, as is the case with our policy respecting the rights of the unborn, the effect is to overshadow virtually all other considerations."

Two Democratic Senators, Howard M. Metzenbaum of Ohio and Patrick J. Leahy of Vermont, criticized the role of what they called single-issue politics judicial confirmation proceedings.

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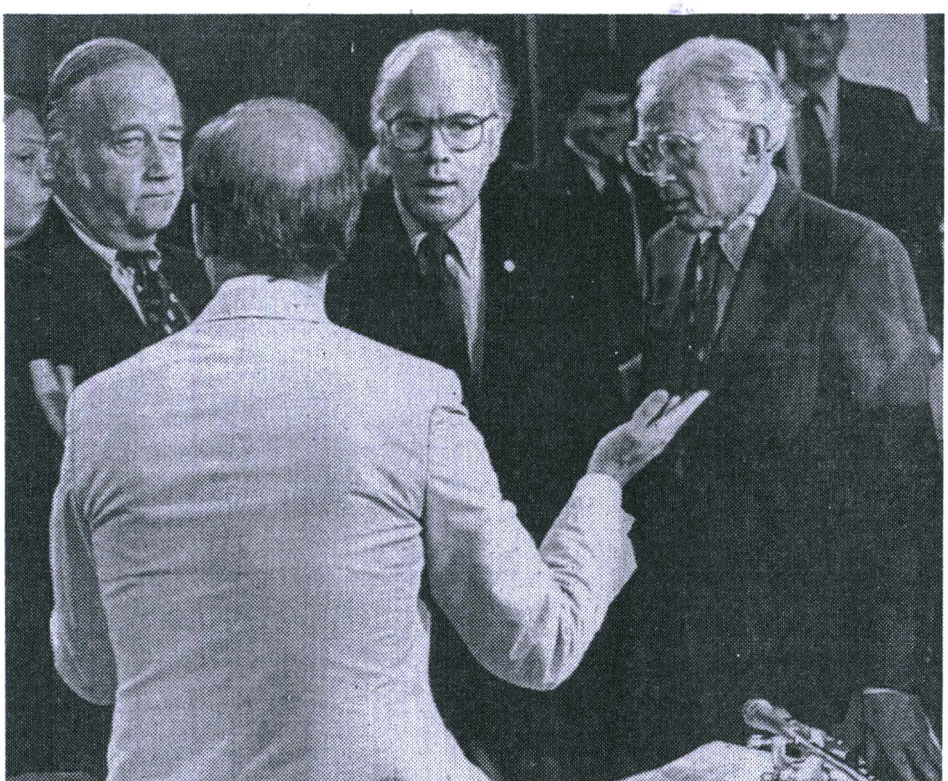
Judge O'Connor, who now serves the Arizona Court of Appeals, was nom nated to replace Justice Potter Stewa who retired from the Court in July. now appears that Judge O'Connor, w would be the first woman Justice, w be confirmed and sworn in in time participate in the Justices' week-lo conference that precedes the opening the new term on Oct. 5.



The New York Times/George Tames

Members of the Senate Judiciary Committee talk before the vote on Judge O'Connor. Joseph R. Biden Jr., Delaware Democrat, sits with his back to the camera; others are, from left, Charles McC. Mathias Jr., Republican of Maryland; Patrick J. Leahy, Vermont Democrat; Howard M. Metzembaum, Ohio Democrat.

The Editorial Notebook

Senator Thurmond and the Witnesses

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

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

What had changed?

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

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

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

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

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

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

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

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

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

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

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

JOHN P. MacKENZIE

The New York Times
9/26 A-26

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

O'Connor file

August 27, 1981

TO: POWELL MOORE

FROM: SHERRIE M. COOKSEY SMC

SUBJECT: O'Connor Nomination

Attached are drafts of the proposed response to Senator Helms and O'Connor's proposed opening statement. De Lide will be discussing the Helms letter with Senator Thurmond on Tuesday. However the Chairman does not mind if O'Connor mails the letter to Helms prior to that time.

Outlined below is the tentative format for the nomination hearings. The question of how to handle the pro and anti O'Connor witnesses has not been finalized. The Committee has received requests to testify from 24 individuals: 9 against, 15 for; and plans to afford all but one the opportunity to testify.

Thurmond plans to have a Committee vote on O'Connor on September 15. However, any Committee member may postpone such vote without reasons for one week. It is expected that the Committee report will be filed by the 18th-21st with floor action 3 days later. De Lide believes the 3 day rule will be observed.

FORMAT OF HEARINGS:

I. Committee Member Opening Remarks

Chairman opening statement; 5 minutes
Biden opening statement; 5 minutes
Alternating majority and minority Members opening remarks; 3 minutes each

II. Introduction Of O'Connor By Entire Arizona Delegation

Each Senator has 5 minutes
Each Member has 3 minutes

III. O'Connor Opening Statement

IV. Questions By Committee

Chairman leads off with 10 minutes
Each Member, alternately majority and minority, has 10 minutes

V. Witnesses: unclear as to how these will be handled

VI. Final questions for O'Connor

O Connor file

STATEMENT OF
SENATORS EAST, DENTON AND GRASSLEY

It is the solemn duty of this Committee to assist the Senate in its obligation to determine whether to consent to judicial nominations put forward by the President. Never is this duty more solemn than when the nomination is to a seat on the Supreme Court, for the decisions of that Court are among the most binding and far-reaching of all the decisions made by the federal government.

If this Committee is to perform its duty to assist the Senate in passing its judgment upon a nomination to the Supreme Court, its must be fully informed on the question of whether the nominee would prove to be a good Justice or not. The Committee must know the judicial philosophy of the nominee. It must know the nominee's stand on important constitutional issues, including how the nominee would interpret specific provisions of the Constitution. It must know the nominee's fundamental social and economic philosophy insofar as that philosophy would guide the nominee in interpreting the Constitution. For this knowledge to be valuable, it must extend beyond general assurances and vague discussions.

Last week, the Committee on the Judiciary held three days of hearings on the nomination of Sandra O'Connor to serve as Assiciate Justice of the Supreme Court. The Chairman is to be commended for his masterful leadership during those hearings, and for their extent and breadth. But while the hearings granted

the Committee every opportunity to inquire about Judge O'Connor's judicial philosophy, Judge O'Connor's vague and general answers to the questions posed prevented the Senators from learning much about her judicial philosophy. Many of the questions asked the nominee to provide the same degree of illumination on her constitutional views as has been available on the constitutional views of previous nominees who have had more experience with these issues. These questions would not have impaired the nominee's ability to decide future cases, but Judge O'Connor nevertheless refused to provide responses to many of the questions.

Judge O'Connor's judicial record and published work on constitutional questions is limited. The Senate has no guidance on how she will interpret the Constitution other than the guidance she offered during the three days she appeared before the Committee. Unfortunately, however, she failed to answer those questions which are most valuable in determining how she will perform as an Associate Justice of the Supreme Court. This failure makes it extremely difficult for this Committee to discharge its duty faithfully with respect to her nomination.

Perhaps more important, this failure may set a dangerous precedent for future nominations to the Supreme Court. It is necessary, therefore, that the record show the dissatisfaction of some members of this Committee with the nature of the statements offered by Judge O'Connor in response to questioning by members of this Committee. The Senate cannot well perform its advice and consent function under such circumstances.

THE O'CONNOR SUPREME COURT NOMINATION: A CONSTITUTIONAL LAWYER COMMENTS

by William Bentley Ball*

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

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

My second relates indeed to the matter of "philosophy". Some zealous supporters of the O'Connor nomination (who themselves have notoriety as ideologues) have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say, in other words, that it should be of no significance that

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* Former Chairman, Federal Bar Association Committee on Constitutional Law.

a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recital that the candidate is "personally" opposed to such a point of view. Why the qualifying adverb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

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

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

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

Just as meaningful would be:

Comment: "John Smith is said to be a mathematician."

Response: "Really? But he is from Chicago."

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

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

What are the candidate's views on

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

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too -

and important - would be questions to the candidate calling for agreement with, disagreement with, and discussion of, major prior decisions of the Supreme Court. Not the slighest impropriety would be involved in, and much could be gained by, public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made.

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

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

September 8, 1981

JUDGE SANDRA O'CONNOR -- Update

1) Hearings: Hearings on her nomination before the Senate Judiciary Committee will begin Wednesday morning at 10:00 a.m. They will continue on Thursday with anticipated conclusion on Friday.

2) Prior to start of the hearings, she will meet at 9:00 a.m. with Senator Thurmond in his office.

3) Following introductions by members of the Arizona Congressional delegation, Governor Babbitt and the Attorney General, she will open the hearings with a prepared statement of 5-7 minutes. This will be followed by three rounds of questions, 10 minutes each, by Committee members.

4) The hearings are scheduled for Wednesday, Thursday and Friday. Thus far, 26 groups or individuals have signed up to testify for/against the nomination. A list of these can be obtained from the Committee press officer, Bill Kenyon, 224-5225.

5) She will be accompanied to the hearings by her husband, John, and sons, Scott (23), Brian (21) and Jay (19). Requests for interviews for the period between conclusion of the hearings and the swearing-in should be made through Pete Roussel.

6) She has no meetings scheduled this week with the President.

7) Outlook: Very positive. We anticipate confirmation with minimal opposition. No Senator has yet expressed opposition.

8) Not for Announcement: The swearing-in is tentatively set for Friday, September 25, at the Supreme Court. It is anticipated the President would attend but this should not be announced yet -- nor this date.

THE SUN, Sunday, September 6, 1981

'Symbols' believed at stake

New Right keeping O'Connor under fire

By Lyle Denniston
Washington Bureau of The Sun

Washington—In an old-fashioned way, the radio announcement begins: "Should a gentleman ask a lady an embarrassing question?"

But that is as far as chivalry goes.

The announcer goes on immediately to suggest that members of the Senate ask Sandra Day O'Connor some very tough questions, about abortion and teenage sex.

That 60-second message is being broadcast in several states this weekend, and will be heard even more widely before Wednesday, the day the Senate Judiciary Committee starts questioning Judge O'Connor, the first woman ever to be nominated to the Supreme Court.

Richard A. Viguerie, leader of the New Right coalition that is fighting Judge O'Connor's nomination, is the man behind the radio spot. One of the purposes, he says, is to make sure that the Senate—and especially the White House—realizes that the New Right has not given up.

Against strong indications that the Arizona judge will win Senate approval as a justice without any notable difficulty, her challengers say they are persisting.

"We are not discouraged because of anticipated losing the vote," Mr. Viguerie said. "We're not under illusions about our chances of winning, but the only time you lose is when you fail to fight."

Inside the Senate hearing room, "the right kind of questions are going to be asked," if Mr. Viguerie's grass-roots radio campaign gets the results it seeks.

Outside the Dirksen Senate Office Building, Nellie Gray, who leads each January's "March for Life" to protest the Supreme Court's 1973 decision on abortions, will be leading anti-O'Connor rallies.

The Senate is the immediate target of those efforts, but it is not the most important one. Mr. Viguerie and his coalition followers want President Reagan to notice that New Right conservatives are still unhappy about the choice of Mrs. O'Connor.

"For the first time," Mr. Viguerie says, "a president is receiving significant pressure from the right. We're going to keep it up, on this issue and others."

Without pressure from what he calls "the Reagan coalition," the coalition leader fears that the president may forget who his truest political friends are.

"We want to show Republicans how very important it is to work with that coalition," he says. "We're going to allow Reagan to stay right where he'd like to be."

The "message" Mr. Viguerie wants most to be heard in the White House is that the New Right positions Mr. Reagan embraced in the 1980 campaign are not to be forgotten in 1981.

The nomination of Judge O'Connor, as the coalition sees it, is the president's "first broken promise." Mr. Viguerie's magazine, *Conservative Digest*, uses that phrase with a cover picture of Judge O'Connor. The cover also shows the 1980 Republican platform—which included a promise to pick federal judges who oppose abortions—with the word "VOID" stamped on it. The New Right believes Judge O'Connor has actively promoted abortion rights.

"We just don't know which straw will break the back of the coalition," Mr. Viguerie comments. "Will it be this one, or the next one?"

If the pressure is kept up against Judge O'Connor, he suggests, "you're going to see a different kind of judge" named to future vacancies on the Supreme Court and lower federal courts.

At the White House, aides are aware of the coalition's aims, realizing, they say, that the anti-O'Connor effort is more a symbol than a threat to her nomination.

One presidential lobbyist working to keep Judge O'Connor's path smooth remarked: "They [the New Right] feel they must make a point for the future: to be consulted about their issues."

That aide, who asked not to be identified, indicated, though, that the White House does not view the opposition as only part of a larger strategy. Her position on abortion, which at this point remains somewhat clouded, makes some of the opposition genuine, the lobbyist conceded.

"Individual people in the [New Right] movement are adamantly opposed to her because of her position on some issues," the aide commented.

For that reason, the nominee will go to hearings ready to give a full explanation of her positions, according to the presidential aide. "She's her own best witness, and she hasn't been a witness yet."

One of the points the New Right has been making against her, in Mr. Viguerie's magazine, on the radio spots and elsewhere, is that she has not answered questions about what she really thinks and has done on abortion.

That undoubtedly will be the dominant issue at this week's hearings, according to the coalition leader. Other points that will be pressed, he said, are her views on tax credits for private school tuition and tax-exempt status for private Christian schools that are racially segregated.

In past hearings on Supreme Court nominees, future justices have begged off answering questions that seemed designed to test how they would vote on legal or constitutional issues.

Anticipating that Judge O'Connor might do that, aides to some senators are preparing to circulate a memo arguing that the nominee has an obligation to answer all questions bearing on judicial philosophy, and should go unquestioned only on a narrow range of matters directly before the court.

Most of the questions that her challengers want answered have to do with her voting record as a member of the Arizona state Senate. According to the White House aide, Judge O'Connor is prepared to give a very full account of "why she voted as she did, at the time that she did."

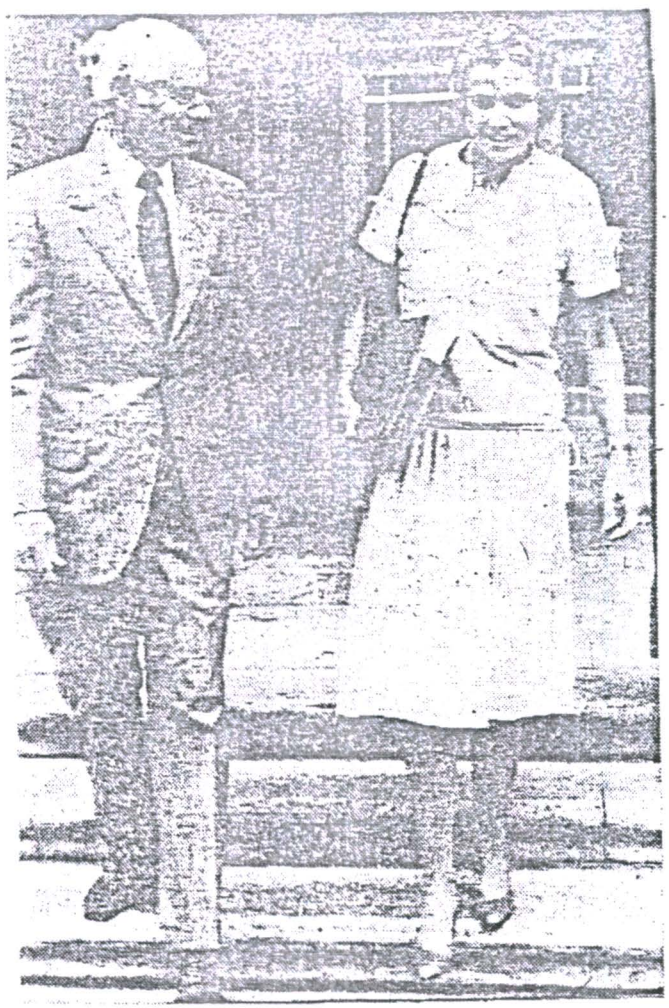
There is nothing in that record, the aide contended, that will be a source of serious difficulty for the nominee.

Last week, Judge O'Connor seemed to have removed the chance that her financial status would cause problems as it has for some court nominees. She and her husband disclosed their investments and assets, and none appeared controversial.

Her challengers, even while conceding that there may not be a single vote cast against her in the final Senate tally, do insist that it is premature to say there will be no problems at all for her.

An aide to Senator John P. East (R, N.C.), one of the Senate's strongest foes of abortion, said: "It is hard to say what might come up at the hearings." He did not say he knew of any specific problem, however.

The hearings are scheduled to continue through Friday. Judge O'Connor herself is expected to be on the witness stand at least one day and perhaps two.



AP

Attorney General William French Smith and Supreme Court Justice-designate Sandra Day O'Connor leave the Justice Department Friday.

O'Connor file

September 11, 1981

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In his letter of September 9, 1981, Senator Humphrey sets forth the following questions:

1. Do you believe that all human beings should be regarded as persons for the purposes of the right to life protected by the Fifth and Fourteenth Amendments?

2. In your opinion, is the unborn child a human being?

3. What is your opinion of the decision of the Supreme Court in the 1973 abortion cases, Roe v. Wade and Doe v. Bolton?

4. Do you believe the Constitution should be interpreted to permit the states to prohibit abortion? If your answer is yes, are there any types of abortions where you think the Constitution should be interpreted so as not to allow such prohibition?

5. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child has an abortion performed on her?

6. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is sterilized?

7. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is given contraceptives by a third party?

The first and second questions concern the definition of human life and the legal consequences which attach to that definition.

Congress is currently considering proposals directly addressed to these issues. Questions concerning the validity and effect of these proposals, if any are passed, might well be presented to the Supreme Court for decision.

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

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

Questions three and four directly raise the issue of the correctness of particular Supreme Court decisions. In Roe v. Wade and Doe v. Bolton the Supreme Court held that states may not prohibit abortions during the first trimester of pregnancy. Questions related to the issues reached in these decisions may come before the Court, and the Court may also be asked to reconsider the decisions themselves. For the reasons I have stated in this letter as well as in my testimony before the Senate Committee on the

Judiciary, it would therefore be inappropriate for me to answer questions three and four.

The fifth question concerns the constitutional validity of a law requiring parental consent prior to the performance of an abortion on an unmarried, unemancipated minor child. Several state statutes dealing with this subject have come before the Court and have resulted in sharply divided decisions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court ruled unconstitutional a statute requiring parental consent before an unmarried person under 18 could obtain an abortion. The Court specifically noted, however, that it was not ruling that every minor was capable of giving effective consent, simply that giving an absolute veto to the parents in all cases was invalid. In Bellotti v. Baird, 443 U.S. 622 (1979), the Court struck down a statute which required parental or judicial consent prior to the performance of an abortion on an unmarried minor. The Court failed to agree on a majority rationale. Just last Term, however, in H.L. v. Matheson, 101 S.Ct. 1154 (1981), the Court upheld a Utah statute requiring notification of parents prior to an abortion, at least as the statute was applied to an unmarried, unemancipated minor who had not made any claim as to her own maturity. These decisions indicate that the area is a particularly troublesome one for the Court, and also one in which future cases can be expected to arise.

The Supreme Court has recognized that "the parents' claim to authority in their own household is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1958) (plurality). My sense of family values is such that I would hope that any minor considering an abortion would seek the guidance and counseling of her parents.

The sixth question concerns the constitutional validity of a law requiring parental consent before an unmarried, unemancipated minor child is sterilized. Once again I would hope that any minor considering such a drastic and usually irreversible step would seek the guidance of his or her parents and family. It would be inappropriate for me, however, to express any view in response to a specific question concerning the legality of a parental consent law, because the whole area of the constitutionality of statutes requiring parental consent is in a stage of development and because such statutes are likely to be presented to the Court for review. My hesitation is also based on the fact that I have not had the benefit of a specific factual case, briefs, or arguments.

The final question concerns the constitutional validity of a law requiring the consent of parents before an unmarried, unemancipated minor child is given contraceptives by a third party. In Carey v. Population Services International, 431 U.S. 678 (1977), the Court struck down a law making it a crime for anyone to sell or distribute nonprescription contraceptives to anyone under 16.

The case, however, did not involve a parental consent requirement; indeed, Justice Powell found the law offensive precisely because it applied to parents and interfered with their rights to raise their children. Id. at 708 (concurring opinion). A three-judge district court found a state law prohibiting family planning assistance to minors in the absence of parental consent unconstitutional as interfering with the minor's rights, T.H. v. Jones, 425 F.Supp. 873, 881 (Utah 1975), but when the case reached the Supreme Court it was affirmed on other grounds, 425 U.S. 986 (1976). The constitutional question is therefore still open, and I must respectfully decline any further comments for the reasons set forth previously.

Mr. Chairman, I appreciate the opportunity to set forth my views on these matters in response to Senator Humphrey's letter.

Sincerely,

Sandra Day O'Connor

9:30 Thurmond office
Powell Bob AG, Judge
AG will pick them up
w/spouses + 3 sons
O Connor file

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION HEARINGS - SANDRA DAY O'CONNOR
SEPTEMBER 9-11, 1981

AGENDA

OPENING REMARKS
(Chairman and Ranking Minority Member - 5 minutes
Committee Members - 3 minutes)

Senator Thurmond
Senator Biden
Senator Mathias
Senator Kennedy
Senator Laxalt
Senator Byrd
Senator Hatch
Senator Metzenbaum
Senator Dole
(Senator DeConcini)
Senator Simpson
Senator Leahy
Senator East
Senator Baucus
Senator Grassley
Senator Heflin
Senator Denton
Senator Specter

PRESENTATION OF NOMINEE

The Honorable William French Smith,
Attorney General

REMARKS BY MEMBERS OF UNITED STATES SENATE FROM ARIZONA

Senator Goldwater
Senator DeConcini

~~REMARKS BY OTHER MEMBERS OF UNITED STATES SENATE~~

? Jennings Randolph?

REMARKS BY MEMBERS OF UNITED STATES HOUSE OF REPRESENTATIVES FROM ARIZONA

Congressman Rhodes
Congressman Udall
Congressman Stump
Congressman Rudd

OPENING STATEMENT BY NOMINEE

QUESTIONS OF NOMINEE BY MEMBERS OF COMMITTEE
(Two (2) rounds of fifteen (15) minutes each)
and possible further q's if Chmn deems approp.

Senator Thurmond
Senator Biden
Senator Mathias
Senator Kennedy
Senator Laxalt
Senator Byrd
Senator Hatch
Senator Metzenbaum
Senator Dole
Senator DeConcini
Senator Simpson
Senator Leahy
Senator East
Senator Baucus
Senator Grassley
Senator Heflin
Senator Denton
Senator Specter

QUESTIONS BY OTHER UNITED STATES SENATORS

Senator Jepsen
Senator Humphrey } in writing for nominee

TESTIMONY OF WITNESSES

J. Randolph is testimony

Honorable Bruce Babbitt (5 minutes)
Governor of Arizona

Panel (5 minutes each)
Honorable Leo Corbet
Honorable Stan Turley
Honorable Alfredo Guitierrez
Arizona State Senate

Panel (5 minutes each)
Honorable Tony West
Honorable Donna Carlson West
Honorable Art Hamilton
Arizona House of Representatives

Panel (5 minutes each)
Honorable William Jacquin
Director, Arizona Chamber of Commerce
Honorable Margaret Hance
Mayor, City of Phoenix
Honorable Jim McNulty
Arizona Board of Regents

The Reverend Jerry Falwell (5 minutes) ?

Panel (5 minutes each)
Dr. J. C. Willke
Dr. Carolyn F. Gerster
National Right to Life Committee

Ms. Brooksley Landau (5 minutes)
American Bar Association

Dr. Carl McIntire (5 minutes)
International Council of Christian Churches

Ms. Arnette R. Hubbard (5 minutes)
National Bar Association

Gordon S. Jones (5 minutes)
United Families of America

Honorable Joan Dempsey Klein (5 minutes)
National Association of Women Judges

Honorable Dick C. P. Lantz (5 minutes)
Judge, Eleventh Judicial Circuit, Florida

TESTIMONY OF WITNESSES (continued)

Frank Brown (5 minutes)
National Association for Personal Rights in Education

Ms. Eileen Camillo Cochran (5 minutes)
California Women Lawyers

Father Charles Fiore (5 minutes)
National Pro-Life Political Action Committee

Ms. Anne Neamon (5 minutes)
Citizens for God and Country

Ms. Nancy Kramer (5 minutes)
Committee for Public Justice, Inc.

Ms. Eleanor Smeal (5 minutes)
National Organization for Women, Inc.

Ms. Lynn Schafran (5 minutes)
Federation of Women Lawyers Judicial Screening Panel

Ms. Kathy Wilson (5 minutes)
National Women's Political Caucus

STATEMENT OF SANDRA DAY O'CONNOR

SEPTEMBER 9, 1981

Mr. Chairman and Members of the Committee

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

As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, but I happily share the honor with millions of American women of yesterday and today whose abilities and conduct have given me this opportunity for service. As a citizen, as a lawyer and as a judge I have, from afar, always regarded the Court with the reverence and the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of ensuring that basic constitutional doctrines will be continually honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the United States Supreme Court that we all turn when we seek that which we want most from our government: equal justice under the law.

If confirmed by the Senate, I will apply all my abilities to ensure that our government is preserved and that justice under our Constitution and the laws of this land will always be the foundation of that government.

I want to make only one substantive statement to you at this time. My experience as a state court judge and as a state legislator has given me a greater appreciation of the important role the states play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the state and federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.

If confirmed, I face an awesome responsibility ahead. So, too, does this Committee face a heavy responsibility with respect to my nomination. I hope to be as helpful to you as possible in responding to your questions on my background, beliefs and views. There is, however, a limitation on my responses which I am compelled to recognize. I do not believe that, as a nominee, I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future court action might make it necessary to disqualify myself on the matter. This would result in my inability to do that which would be my sworn duty, namely, to decide cases that come before the Court. Finally, neither you nor I know today

the precise way in which any issue will present itself in the future or what the facts or arguments may be at that time or how the statute being interpreted may read. Until those crucial factors become known, I suggest none of us really know how we would resolve any issue. At the very least, we would reserve judgment until that time.

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

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

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

(Introductions to follow)

Finally, I want to thank you, Mr Chairman and Members of the Committee, for allowing me this time.

I would now be happy to respond to your questions.

From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

OPENING STATEMENT FOR SANDRA O'CONNOR NOMINATION
SEPTEMBER 9, 1981

ARTICLE II, SECTION 2 OF THE CONSTITUTION STATES THAT THE PRESIDENT "SHALL NOMINATE, AND BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, SHALL APPOINT . . . JUDGES OF THE SUPREME COURT." ACCORDINGLY, WE SHARE WITH THE PRESIDENT THE VITAL CONSTITUTIONAL FUNCTION OF SHAPING THE FUTURE OF AMERICAN JURISPRUDENCE.

WE WOULD PROFIT BY RECALLING THE REASONS THE FRAMERS OF THE CONSTITUTION SPLIT THE NOMINATION PROCESS FOR SUPREME COURT JUDGES BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES. THE FRAMERS UNDERSTOOD THE IMPORTANCE OF THE SUPREME COURT TO THE NEW REPUBLIC. WHEN MOVING TO ELIMINATE INFERIOR FEDERAL COURTS FROM THE CONSTITUTIONAL PLAN, DELEGATE JOHN RUTLEDGE FROM SOUTH CAROLINA STATED THAT:

> /T/HE RIGHT OF APPEAL TO THE SUPREME NATIONAL TRIBUNAL /WILL/ BE SUFFICIENT TO SECURE THE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENTS. (1 FARRAND 129)

THROUGHOUT THE SUBSEQUENT DEBATE IN WHICH INFERIOR COURTS WERE EXCLUDED BY VOTE AND THEN RESTORED BY A COMPROMISE THAT ALLOWED CONGRESS TO ESTABLISH THEM, THE DELEGATES REPEATEDLY AFFIRMED THEIR CONFIDENCE IN THE SUPREME COURT'S ABILITY TO PROTECT CONSTITUTIONAL RIGHTS AND SUSTAIN LAWS AND POLICIES DECREED BY CONGRESS.

THE FRAMERS, HOWEVER, KNEW THAT WORDS OF LAW COULD BE SLIPPERY. THEY HAD EXPERIENCED SUCH INDIGNITIES AT THE HANDS OF THE KING'S MAGISTRATES. RECOGNIZING THAT THE INTEGRITY OF THE CONSTITUTION'S WORDS WERE AT STAKE, THEREFORE, THEY WOULD NOT LEAVE THE FORMATION OF THE SUPREME COURT TO ONE MAN. IF ENFORCEMENT OF THE CONSTITUTION WERE TO BE COMMITTED TO THE HANDS OF THE JUSTICES, THE FRAMERS WANTED

TO BE SURE, IN THE WORDS OF ALEXANDER HAMILTON, THAT THEY DESIGNED "THE PLAN BEST CALCULATED . . . TO PROMOTE A JUDICIOUS CHOICE OF MEN (INCIDENTALLY, I THINK ALEXANDER WOULD EXTEND HIS LANGUAGE TO INCLUDE WOMEN IN THIS INSTANCE.) FOR FILLING THE OFFICES OF THE UNION." IN SHORT, THIS PLAN WOULD PROVIDE A DOUBLE CHECK ON NOMINATIONS TO INSURE THAT THE CONSTITUTION AND SUCH WORDS AS "DUE PROCESS" OR "EQUAL PROTECTION" MEAN WHAT THE AUTHORS INTENDED NOT SIMPLY WHAT FIVE APPOINTEES MIGHT CUMULATIVELY CONCOCT. HAMILTON CONTINUED TO STATE WHY ONE MAN COULD NOT BE GIVEN THIS VITAL TASK:

> [ADVICE AND CONSENT] WOULD BE AN EXCELLENT CHECK UPON A SPIRIT OF FAVORITISM IN THE PRESIDENT, AND WOULD TEND GREATLY TO PREVENT THE APPOINTMENT OF UNFIT CHARACTERS FROM STATE PREJUDICE, FROM FAMILY CONNECTION, FROM PERSONAL CONNECTION, OR FROM A VIEW TO POPULARITY. AND, IN ADDITION TO THIS, IT WOULD BE AN EFFICACIOUS SOURCE OF STABILITY IN THE ADMINISTRATION. (FEDERALIST #76)

THUS THE FRAMERS UNDERSTOOD THE PIVOTAL ROLE OF THE NATION'S HIGHEST JUDICIAL FORUM AND SPECIFICALLY PROVIDED A TWO-STEP SELECTION PROCESS FOR ITS JUDGES.

WE HAVE ALL HEARD THE ENTHUSIASTIC BOAST OF FORMER CHIEF JUSTICE CHARLES EVANS HUGHES THAT "WE ARE UNDER A CONSTITUTION, BUT THE CONSTITUTION IS WHAT THE JUDGES SAY IT IS." THIS IS THE UNINHIBITED SPIRIT THE FRAMERS MEANT TO CHECK BY INVOLVING THE SENATE IN THE SELECTION OF JUDGES. THE FRAMERS OF THE CONSTITUTION FORESAW THAT THE SUPREME COURT WOULD HAVE EXTENSIVE AUTHORITY TO INSURE THAT THEIR DOCUMENT WOULD BE PROPERLY ENFORCED. PRECISELY FOR THIS REASON, THEY OBLIGATED THE SENATE TO PROTECT THE CONSTITUTION IN THE NOMINATION PROCESS.

THIS PLACES UPON US A GRAVE RESPONSIBILITY. THIS RESPONSIBILITY WITH REGARD TO JUDGE SANDRA O'CONNOR IS ONE THAT I PERSONALLY AM DELIGHTED TO PARTICIPATE IN, NOT ONLY BECAUSE OF ITS IMPLICATIONS FOR THE INTERPRETATION OF THE CONSTITUTION, BUT BECAUSE I FEEL THAT JUDGE O'CONNOR'S SENSE OF CONSTITUTIONAL JUSTICE WILL BE WORTHY OF THE TRUST PLACED IN THE SUPREME COURT BY THE FOUNDING FATHERS. AS WE EMBARK UPON THIS INVESTIGATION, HOWEVER, I WOULD LIKE TO REMIND MY COLLEAGUES AND MYSELF THAT THE STAKES ARE HIGH. WE ARE DECIDING TODAY THE FUTURE OF OUR MOST SACRED DOCUMENT.

From the office of

SENATOR JENNINGS RANDOLPH

of West Virginia

3203 Dirksen Building, Washington, D.C. 20510 Telephone: 202-224-6472

STATEMENT
SENATOR JENNINGS RANDOLPH
Hearing on Nomination of Sandra Day O'Connor
to be Associate Justice of the Supreme Court
Wednesday, September 9, 1981
10:00 a.m.

Mr. Chairman, Members of the Committee, I appreciate your giving me the opportunity to be heard on this historic occasion.

I am not overstating the case when I refer to this hearing as historic. For the first time in the 205 years of our Republic's existence the Senate is called on to judge the qualifications of a nominee to the United States Supreme Court who is a woman. I regret very much that it has taken more than two centuries to acknowledge through this nomination that just as justice should be symbolically blindfolded when determining the facts, we should be oblivious to sex when selecting those who administer justice.

Mrs. Sandra O'Connor will appear before this Committee today as the choice of our President, not solely because she is a woman, but because her record appears to qualify her to serve on our nation's highest tribunal.

I would be naive to believe that if Mrs. O'Connor is confirmed as an Associate Justice of the Supreme Court, her sex will cease to be a factor in her decisions. She will be urged to make feminist rulings; she will be criticized if she makes them or if she resists this pressure.

I look forward to the time when Justices of the Supreme Court are selected and evaluated solely on their experience, their knowledge of the law, and their dedication to the United States as a nation governed by the laws the people impose on themselves.

Mr. Chairman, when Mrs. O'Connor becomes a member of the Supreme Court, we will have succeeded at long last in having a woman occupy virtually every high office our country has to offer. The most notable exception is the White House, and I anticipate the day when the highest office in our land is not exclusively a male preserve.

A breakthrough occurred during the week in March of 1933 in which I first became a Member of the House of Representatives. It was on March 4 of that year that President Franklin D. Roosevelt (the day he took office) broke another precedent by appointing Frances Perkins as the first female cabinet member. During the 12 years that Mrs. Perkins served as Secretary of Labor she repeatedly demonstrated the wisdom of President Roosevelt's action. Her distinguished career made it easier for the other women who have subsequently served in the cabinet.

Mrs. O'Connor, I wish you well, not only during these hearings, and the Senate confirmation vote, but during the challenging years ahead. You will be called on to make many difficult decisions, but I am confident you will approach them with a spirit of fairness, justice and equity.

THE WHITE HOUSE
WASHINGTON

Date 9/8/01

To: Powell Moore

From: Morton C. Blackwell MB

_____ Please respond on behalf of the President

_____ Please prepare draft for Elizabeth Dole's signature

_____ Please prepare draft for my signature

✓
_____ FYI

_____ Let's discuss

National
Pro-Life Political Action Committee
101 Park Washington Court
Falls Church, VA 22046 (703) 536-7650

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

Mr. Chairman and Members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What price glory?

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

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

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

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

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

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

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

"Just as meaningful would be:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Wanderer

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

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

By WILLIAM BENTLEY BALL

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

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

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

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

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

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

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

Just as meaningful would be:

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

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

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

What are the candidate's views on:

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

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

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

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

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

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

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

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

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

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