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September 4, 1981

TO: Senate Committee on the Judiciary
Hon. Strom Thurmond, Chairman
Hon. Joseph Biden, Ranking Minority Member

FROM: American Law Division

SUBJECT: Questions for the Hearings on the Nomination of Hon. Sandra D. O'Connor to be an Associate Justice of the Supreme Court of the United States

Counsel has requested that we prepare questions to be posed to the nominee in the above captioned hearings. This memorandum presents factual bases and questions in chronological and subject matter sections, as follows:

Particular issues which have drawn substantial interest -- e.g. abortion, the Equal Rights Amendment -- are included in the period in which the issues have arisen. Part V is a series of questions that the Committee may be interested in asking relating to contemporary legislative policy before the Committee. These are included in order to assist the Committee in evaluating the opinions of the nominee on particular questions. Part VI raises questions of contemporary concern on the Court for conflicts of interest and is designed to elicit the background on particular facets of her prior legal experience with the business

of the Supreme Court, the contents of investment portfolios, the impact of the nominee's husband's legal practice on her capacity to sit as a Justice in particular kinds of cases, and the nominiee's opinions on recusal and blind trusts. Reference has been made to the hearings on previous nominations[1/] to the Court

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1/ Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court, 76th Cong., 1st Sess. (1939); Nomination of Robert F. Jackson to be an Associate Justice of the Supreme Court, 77th Cong., 1st Sess. (1941); Nomination of John Marshall Harlan to be an Associate Justice of the Supreme Court, 84th Cong., 1st Sess. (1955); Nomination of William Joseph Brennan to be an Associate Justice of the Supreme Court, 85th Cong., 1st Sess. (1957); Nomination of Charles E. Whittaker to be an Associate Justice of the Supreme Court, 85th Cong., 1st Sess. (1957); Nomination of Byron R. White to be an Associate Justice of the Supreme Court, 87th Cong., 2d Sess. (1962); Nomination of Arthur J. Goldberg to be an Associate Justice of the Supreme Court, 87th Con., 2d Sess. (1962); Nomination of Abe Fortas to be an Associate Justice of the Supreme Court, 89th Cong., 1st Sess. (1965); Nomination of Thurgood Marshall to be an Associate Justice of the Supreme Court, 90th Cong., 1st Sess. (1967); Nomination of Warren E. Burger to be Chief Justice of the United States, 91st Cong., 1st Sess. (1969); Nomination of Harry A. Blackmun to be an Associate Justice of the Supreme Court, 91st Cong., 2d Sess. (1970); Nominations of William H. Rehquist and Lewis F. Powell to be Associate Justices of the Supreme Court, 92d Cong., 1st Sess. (1971); Nomination of John Paul Stevens to be an Associate Justice of the Supreme Court, 94th Cong., 1st Sess. (1975).

Full hearing records are also available for nominees not confirmed. Nomination of Abe Fortas to be Chief Justice of the United States and Homer Thornberry to be an Associate Justice of the Supreme Court, 90th Cong., 2d Sess. (1968); Nomination of Clement F. Haynsworth to be an Associate Justice of the Supreme Court, 91st Cong., 1st Sess. (1969); Nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court, 91st Cong., 2d Sess. (1970).

Several nominees did not appear before the Committee. Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court, 64th Cong., 1st Sess. (1916) (confirmed); Nomination of John J. Parker to be an Associate Justice of the Supreme Court, 71st Cong., 2nd Sess. (1930) (rejected); Nomination of Tom C. Clark to be an Associate Justice of the Supreme Court, 81st Cong., 1st Sess. (1949) (confirmed); Nomination of Sherman Minton to be an Associate Justice of the Supreme Court, 81st Cong., 1st Sess. (1949) (confirmed).

Other hearings appear only in typescript form. "Nomination of Potter Stewart to be an Associate Justice of the Supreme Court", 86th Cong., 1st Sess. (1959). Chief Justice Warren and Associate Justice Reed did not appear before the Committee during confirmation hearings. "Nomination of Stanley F. Reed to be an Associate Justice of the Supreme Court", 75th Cong., 1st Sess. (1937); "Nomination of Earl Warren to be Chief Justice of the United States", 83rd Cong., 2nd Sess. (1954).

and the materials previously forwarded to the Committee in the Briefing Book.[2/] Each suggested line of questioning is prefaced with a discussion of the scope and rationale of the inquiry and the type of information which is expected to be elicited.

As a prefatory note, there is no entrenched procedure for the questioning of the nominee. Justice Frankfurter was the first nominee to appear before the Committee in 1939, and even suggested that there might be some impropriety in his appearence. Nonetheless, he was responsive to questions raised by the Members and commented on testimony of prior witnesses. Frankfurter, at 107-128. Justice Harlan appeared after all other witnesses and responded to the points raised by them. Harlan, at 135-136. See, also, Fortas, at 38-41. More recently, nominees have been the lead witnesses before the Committee, if other witnesses wished to oppose the nomination. E.g. Marshall, Carswell, Rehnquist/Powell, Blackmun, Stevens, But cf., Haynsworth, at 39 - 107, 273 - 312. In some cases, no witnesses in opposition appeared. E.g., Burger.

[Footnote 1, continued from previous page]:

Some of the transcripts amount to notes, introduction to executive sessions, or summary actions. Nominations of William O. Douglas to be an Associate Justice of the Supreme Court (executive session); Frank Murphy to be an Associate Justice of the Supreme Court, (notes); Harlan Fiske Stone to be Chief Justice of the United States (summary action).

On several nominations, no committee action appears to have been taken at all. Hugo Black, as a Senator, was accorded the courtesy of the Senate.

Accordingly, the material used in preparation of this memorandum includes: Frankfurter, Jackson, Harlan, Brennan, Whittaker, White, Goldberg, Fortas, Fortas/Thornberry, Marshall, Burger, Rehnquist/Powell, Blackmun, Stevens, and "Stewart".

2/ References to the Briefing Book previously forwarded to the Committee, as supplemented, are to the pages on which material appears therein, as follows: "Briefing Book, p. 1."

Substantial dialogue on the propriety of raising questions of a nominee's judicial philosophy with respect to questions which have or may come before the Court can be found in the previous hearings. Harlan, at 135 ff, 175 - 176; Brennan, at 17-19, 36-39; Fortas, at 43, 46-47; "Stewart", at 42 - 76, ff; Fortas/Thornberry, at 103 ff (Fortas); Id., at 273, 275, 276 (Thornberry); Marshall, at 10 - 13, 25 ff; Rehnquist/Powell, at 16 ff, 137 ff (Rehnquist), 206 ff. (Powell). Cf. Blackmun, at 56 ff; Stevens, at 27 ff. The problem arises in the context of the perception of the nominee that to provide either a post-decisional interpretation or an interpretation which would either (a) provide a basis for future argument before the Court, (b) provide an indication of predisposition, (c) implicitly commit the nominee to a particular decision in the future, or (d) require the nominee to recuse himself or herself from hearing the particular or a related matter because of prior public statements, would violate the separation of powers between the Congress and the Court. The response of Committee Members has varied from deference to the nominee's perception of the problem to rejection of the position and further questioning on precise lines of constitutional doctrine and decision. However, questions of constitutional doctrine and personal belief have been, and might in this instance be, raised on the basis of prior non-judicial statements of the nominee and contemporary personal allegiance to those enunciated positions. We have attempted to draw questions along these particular lines in order to clarify the issues and provide a basis on which the nominee might respond. In each instance we have provided the factual basis for the questions within the question in order that the basis for the question is directly explained to the nominee. Thus, the prefatory discussion is commended for use by the Committee in posing the individual questions. We are not suggesting that the positing

of these questions resolves the question and that the nominee should be expected to respond; rather we only suggest that these questions provide a possible form in which the nominee might be responsive.

I. Private Practice (1959-1963)

The scope, duration and mix of clientele and workload after returning to Arizona (Briefing Book, p. 1) should give the basic thrust of the nominee's intentions toward the practice of law. The nominee's experience as a Deputy County Attorney and as a civil attorney for the Quartermaster Market Center does not appear particularly relevant, although an initial question on each is posed in order to sketch the outlines of these positions. See, Briefing Book, at 1.

1. In what years were you admitted to the practice of law in California and Arizona? In what federal courts and when?
2. To your knowledge, has any complaint ever been filed against you with either the Disciplinary Board of the State Bar of Arizona or the State Bar Court of California alleging unprofessional conduct? If so, what were the allegations made in the complaint and the disposition of the complaint?
3. During 1952 - 1953, immediately after law school, you served as Deputy County Attorney for San Mateo County, California. Would you please tell the Committee what your duties were in this position and what clients you advised and cases you handled?
4. During 1954 - 1957, while your husband was stationed in Germany, you served as a civil attorney with the Quartermaster Market

Center in Frankfurt, West Germany. Would you please tell the Committee what your duties were in this position?

After returning to Arizona in 1957, the nominee began practicing law privately. During this period, the nominee's three sons were born, limiting the nominee's practice. There is no indication of the composition of the nominee's law practice in the public record; therefore a substantial amount of questioning seems justified. The following questions are designed to hone the description of the nominee's legal career.

5. Between 1959 and 1963, what was the nature of your law practice?
6. With whom were you associated?
7. Was your practice full time or part-time?
8. What specific areas of law did you practice within the broad field(s) you have described?
9. How would you characterize the degree of your practice as counseling, negotiation, administrative, trial or appellate practice? Plaintiff or defendant?
10. How much of your practice was before the federal courts? Which federal courts?
11. Have you ever brought or defended a case before the United State Supreme Court?
12. Who were your largest clients in terms of fees? In terms of hours devoted to their work? In terms of the size of the client itself?

13. Subject to the limitations upon you which the attorney-client privilege might impose, would you please give the Committee an account of the nature of your work for -----?

14. To the best of your knowledge, are there any outstanding matters from this period which might require you to recuse yourself from sitting on any case which might come before the Supreme Court?

Specific client representations have been discussed in a number of prior confirmation hearings. E.g., Fortas 40 at (Lattimore security clearance), 47-48 (Phillips Refining Co.), 48-49 (Walter Jenkins); 50 (President Johnson); Harlan, at 167-169 (American Optical Co., etc.);

The development of lines of questioning along client representation beyond this point requires specific answers to the questions above.

II. Assistant Attorney General (1965-1969)

There is no indication of the role the nominee played in the office of the Attorney General of Arizona. Accordingly, similar questions to those under private practice are raised here.

15. You served as an Assistant Attorney General of Arizona from 1965 to 1969. What agencies did you advise during this tenure? What type of matters were you responsible for during this period? Did you have authority to settle these matters? Did you have authority to take matters to court?

16. Did you supervise other attorneys in the Attorney General's Office?

17. Subject to the limitations imposed upon you by any attorney-client privilege which may survive, did any of the matters

which you handled raise questions of federal constitutional law? Would you please explain to the Committee the questions which the agencies involved presented to you and the positions you took? Was the advice you tendered accepted by the agencies? Were these positions successfully litigated before Arizona courts? Before Federal Courts?

18. To the best of your knowledge, are there any matters which arose during this period which would require you to recuse yourself from hearing any case which might come before the Supreme Court if confirmed?

III. State Legislator (1970-1974)

Perhaps the most fruitful area of discussion, and certainly the most controversial, is the nominee's activities in the Arizona State Senate between 1970 and 1974. In this series of questions, the political questions of the nominee's position on the Equal Rights Amendment and abortion may be asked. In light of the controversy over the scope of expectable answers, this series is raised after general discussions of the nominee's role.

19. You were appointed to the Arizona Senate in 1969 to fill an unexpired term. Would you please explain to the Committee the circumstances of that appointment?

20. During the sessions of the 29th Legislature, to what committees were you appointed? What legislation was considered by those committees? What legislation which you supported in committee became law and why did you support it? What legislation which you opposed in committee became law, and why did you oppose it?

21. What bills did you sponsor during the 29th Legislature? What was the disposition of each of those bills? As to the bills which did not become law, what did you intend to accomplish?

The last two questions might be repeated with regard to the Thirtieth and the Thirty-First Legislatures in order to provide a full basis for further questions on particular bills. In later questions we will raise particular pieces of legislation which have been discussed during the pendency of the nomination. It is also important to delve into the role of the nominee as Majority Leader of the Arizona Senate during 1974. However, because that volume of the Journal cannot be found in the Library of Congress collection, Briefing Book, at vi, we have no basis for offering useful questions. Therefore, we next turn to the controversies over the Equal Rights Amendment and abortion.

22. The Arizona Daily Star, on December 15, 1972, attributed the following quotation to you: "Perhaps the Equal Rights Amendment (ERA) is one issue about which women should inform themselves -- what it would mean. They should consider, for example, that drafting women would be a conceivable result of ratification." [Briefing Book, at 251]. To the best of your recollection, is this quotation accurate?

23. What other ramifications from ratification of the ERA did you consider conceivable at that time?

24. Do you still believe that these are conceivable results?

25. The July 2, 1981, the Arizona Daily Star, described your posture on the ERA in the Arizona Senate as follows: "In the Senate, she hammered away at the men who dominated Arizona's Legislature, urging them, in vain, to pass the

Equal Rights Amendment. However, in 1972, Arizona's two Republican members of the U. S. Senate, Barry Goldwater and Paul Fannin, voted against the amendment, prompting Mrs. O'Connor, a staunch Republican, to admit that she was somewhat bewildered by their opposition." [Briefing Book, at 267]. Do you believe that this statement accurately described your position at the time?

26. What was the extent of your advocacy for the ERA before the Arizona Senate?

27. Senators Goldwater and Fannon voted against the submission of the ERA to the States for ratification. Had you discussed their positions, and your own, with them at the time?

28. What arguments did you make in favor the ratification of the ERA?

29. Do you believe that those arguments are valid today?

30. It has been reported that in 1973 you succeeded in amending an ERA ratification resolution in the Judiciary Committee to provide for an advisory referendum. [Briefing Book, at 313, 322]. Would you please explain what the amendment was and why you proposed it? Did you believe that the Senate of Arizona did not accurately reflect the position of the people of Arizona on this issue?

31. It has also been reported that in 1974 you sponsored a bill to the call a referendum of the citizens of Arizona on the issue. [Briefing Book, at 322]. Was this the same proposal which you made in the Arizona Senate Judiciary Committee?

32. The Committee recognizes that there is a problem with asking

a Supreme Court nominee about past or potential cases before the Court. The questions we have asked thus far have been based on past non-judicial, public actions and statements which you have made. The questions we ask about controversial or judicial matters in this context are not intended to commit you to any position on the Court should you be confirmed. Rather, the Committee is only interested in your personal views. The Committee fully recognizes that particular cases which might come before the Court will be limited by the facts of the case and precedents which you have not researched in preparation for this hearing. Before turning to specific subjects, would you care to add any further comment on your personal views as to this particular subject?

33. Do you favor ratification of the Equal Rights Amendment?

34. In 1970, it has been reported, Arizona repealed all restrictions on abortions.[3/] It has further been reported that you voted in favor of the repealing legislation in Committee and that there is no record of your vote on the floor of the Senate [Briefing Book, at 369 - 370].[4/] Would you please explain this repealer and your position on it?

35. The National Review of August 7th, 1981, includes the following statement: "In 1974, the year after Roe v. Wade, a legislative proposition came before the Arizona legislture.

3/ Briefing Book, at 369 - 370.

4/ We have been unable to confirm these enactments through the Senate Journals or the Session Laws of Arizona.

It called on Congress to pass a Human Life Amendment to the U.S. Constitution. In the event, it failed in the Senate Judiciary Committee. According to critics, Mrs. O'Connor voted against the Amendment" [Briefing Book, at 370]. Would you please explain this Senate Concurrent Resolution and your position on it.

36. It has also been reported that, in 1974, a rider prohibiting university hospitals from performing abortions was attached to a bond authority for the construction of a football stadium.[6/] You were reported to have opposed this rider on the grounds that it was not germane. [Briefing Book, at 370]. Would you please explain your position on the bill and rider. Would you please explain your personal view on whether the government should limit spending for the performance of abortions?

37. In 1973, you were one of ten sponsors of H.B. 1190, a bill related to family planning, which was held in the Senate Rules Committee and apparently died there.[7/] Would you please explain that bill to the Committee and why you supported it? Do you hold those views today?

38. Are there other bills which you introduced or supported in the Arizona Senate that involve this area of which the Committee should be aware?

38. Without regard to the Constitutional questions involved and

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6/ Laws 1974, ch. 170, § 15; Ariz. R.S. 15-730 (1974).

7/ Journal of the Senate, Thirty-First Legislature of the State of Arizona, First Regular Session, 147, 158, 277 (1973); Cf. Briefing Book, at 299.

without stating any view which should be attributable to you for the purposes of legal argument, what is your personal view on abortion?

39. In 1973, Senate Bill 1005 was passed establishing a capital punishment procedure for Arizona Courts.[8/] The bill was approved by the Senate Judiciary Committee and a Free Conference Committee, on both of which you sat. Would you please explain you position with regard to that bill?

40. Do you hold the same personal position on capital punishment today?

41. In 1973, Senate Concurrent Resolution 1001 was approved by the Senate to amend the Arizona Constitution to provide for the election of judges. You offered the following remarks to explain your vote on this resolution: "S.C.R. 1001 offers at last an opportunity for the voters of this state to decide if they wish to have their judges initially appointed and to be submitted to periodic election to determine whether the judges should be retained in office. By passage of this resolution we allow the voters to make this decision for themselves. Voters in a number of other states have opted for such a system. Many voters have indicated to us a desire to consider this question." [Briefing Book, at 240]. In 1971, Senate Concurrent

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8/ Laws 1973, ch. 138, § 5; Ariz. R.S. 13-454 (1973). This provision was declared unconstitutional in Richmond v. Caldwell, 450 F. Supp. 519 (D.Ariz. 1978). A new provision was approved subsequently. Laws 1978, ch. 215, § 2; Ariz. R.S. 13-703 (1978, 1980).

Resolution 6 was approved by the Senate. In this instance, you stated, "There are two basic methods of initially selecting judges which are being used by the fifty states today. There are advocates of both systems. Many people today, including the President of the United States and the Chief Justice of the U. S. Supreme Court are speaking in favor of the system of initial apppointment of judges. This system, when coupled with the placement of each judge's name on the ballot at regular intervals for retention or rejection will secure greater voter participation than presently. The people of Arizona are entitled to choose which system of judicial selection they want to have. If the Legislature does not pass this Senate Concurrent Resolution, the people of Arizona will be denied even the opportunity of making this decision." [Briefing Book, at 227]. The Framers of the Constitution decided that Federal judges should be appointed to sit during good behavior and our practical experience has been that they are removable only by impeachment. Do you believe that the proposition of periodic voter approval is a better method for the retention of federal judges?

42. In 1972, Arizona Senate Concurrent Resolution 1002 was approved by the Senate urging an amendment to the United States Constitution permitting each State to establish residency requirements for public welfare assistance. You commented: "Because I believe the language in Senate Concurrent Resolution 1002 is inaccurate with respect to

the actual holding of the U. S. Supreme Court concerning residence requirements, I vote NO." [Briefing Book, at 233].

Would you please elaborate on the resolution and your vote?

The possible follow-up questions along these particular legislative acts are boundless, but the types of questions which may be profitably posed are illustrated above, and will be suggested by the responses of the nominee to the above questions. These questions focus on the high points of the nominee's legislative career, or, at least, those points in the nominee's career which appear to have been important enough for her to take advantage of the right to explain a vote, or which are politically notable at this time. This illustrative list does not suggest that these areas were controversial at the time of the nominee's actions.

IV. Judge (1975-1981)

Judge O'Connor was first elected to the Superior Court for Maricopa County in 1975 and served until 1980. Only one opinion appears to have survived: State v. Farrari, Briefing Book, at 22. In Farrari, Judge O'Connor had been called to sit on the Arizona Supreme Court to fill a vacancy created by another judge's failure to sit. Judge O'Connor ascended to the Arizona Court of Appeals in 1980. For the court, she has written 38 opinions, five of which will appear in the Supplement to the Briefing Book. Judge O'Connor has written no concurring or dissenting opinions of which we are aware. In the following line of questioning, we have attempted to cover the major issues of the nominee's judicial career that have substantial federal implications. In addition, we have posed several specific questions which have not appeared to have been presented to the nominee, but which are important for the determination of the scope of the nominee's background and approach to judicial decision-making.

43. How would you describe the quantity and mix of the your caseload during the five years that you were a trial judge?

44. How would you describe your relations with counsel?

45. Several articles have reported your judicial conduct toward lawyers as "demanding". [Briefing Book, at 332]. Much has been made about the competency of lawyers before the federal bar and elsewhere. Do you believe that there is a problem of competence or performance in the trial bar? If so, what do you believe is the cause of the problem and what actions do you believe would help solve or mitigate the problem?

46. How many trial rulings which you made have been reversed on appeal? Would you please explain the circumstances of these cases.

47. Turning to criminal law and procedure, have you had experience as a trial judge with the application of the Exclusionary Rule? Would you please explain the cases in which it arose?

48. Based on your experience, do you believe that the Exclusionary Rule has deterred unlawful or lawful conduct by law enforcement officials?

49. Have you had experience with the Miranda rule? Would you please explain the cases in which the Miranda rule arose?

50. Based on your experience, has the recitation of rights under Miranda properly protected defendants or been an impediment to lawful questioning?

51. The right to counsel is guaranteed by the Sixth Amendment. Have you had occasion to rule upon cases in which provision

of the right to counsel was at issue? Based on your experience, do you believe that the right to counsel should be applied to the extent presently applied?

52. Do you believe that the "critical stage" analysis for the onset of the right to counsel is an accurate reflection of the needs of defendants for counsel?

53. As we have previously discussed (Questions 39 and 40), you have had experience with the concept of capital punishment as a legislator. Have you had any experience under the bill passed in 1973 as a trial judge before that bill was declared unconstitutional in 1978? Would you please explain these cases.

54. In the area of waiver of constitutional rights, you have stated in your article, "State criminal defendants seeking habeas corpus relief in the federal court must raise their constitutional objections in a timely fashion in the state proceedings, or they will be held to have waived their claim for relief, absent a showing of cause why the objection was not raised and also a showing of actual prejudice. [footnote omitted]. We can expect a number of petititons to be filed for habeas corpus relief to test the extent to which failure or defense counsel to raise the issue in the state proceedings will establish good cause for avoiding the waiver. Competence of counsel may be relevant to the determination of good cause and of prejudice." Briefing Book, at 6 - 7]. Would you please elucidate on the experiences and reasons

which have lead you to this conclusion? Do you believe that exhaustion of state court system procedures is an appropriate prerequisite for petitioning for habeas corpus in the federal courts?

55. To what extent should federal habeas corpus be available to State prisoners?

56. Do you believe that competency of counsel poses a serious threat to the finality of criminal convictions? Do you believe there is a substantial difference in the quality of retained and appointed counsel?

57. Vehicular searches have posed a most vexing problem in recent years. Do you believe that the automobile, generally, warrants different treatment under the Fourth Amendment?

58. What might be termed "parcel" (trunks, suitcases, paper bags) searches have also been vexing in recent years, particularly in conjunction with automobile searches. Is there a standard which can be consistently applied to searches of parcels, or must this be a case-by-case approach?

59. Turning to more general considerations, questions of statutory construction have been the frequent subject of nomination hearings. What is your approach to the determination of statutory construction?

60. What test have you applied to determining whether the language of a statute was clear and unambiguous?

61. What process do you use to determine the purpose of a statute?

62. What process do you use to determine the intent of a legis-

lature when the language of the statute is not clear and unambiguous?

71. Where the language, purpose and intent of the statute conflict, how do you resolve those conflicts?

72. Where a statute, including its purpose and the legislatures intent, does not fully apply to a particular situation, what process do you employ to resolve the dispute?

73. There are many views on the process of deciding cases. One school holds that a judge "finds" common law; another that the judge "declares" common law. In the statutory area, there is a school of marked deference to the political branches of government, while another school holds that judicially created law is inevitable? How would you describe your judicial philosophy toward the creating and expounding of the law?

74. The extrajudicial activities of Supreme Court Justices -- e.g. Jackson's prosecution at Nuremberg, Warren's investigation of the assassination of President Kennedy, Frankfurter's and Fortas's advice to Presidents -- have raised both conceptual and practical concerns about judicial independence and detachment. Except for the honorary functions such as the Chief Justice's position on the Smithsonian Regents, do you believe it is proper for a Justice to participate in any other official or semi-official activities while on the Court.

75. Should a Justice be free to advise private persons?

76. In a few conspicious instances in recent years, the Court has decided cases without hearing oral argument. Do you

believe that this is an appropriate exercise of the judicial power? What benefits do you believe flow from oral argument?

77. Briefs filed in the Court are often voluminous and the Court has recently imposed stringent page limitations on documents filed with the Court. Do you believe that the convenience of the Court in this regard and the demand for conciseness outweighs counsel's need to fully argue the case?

Clearly a large number of other possible questions are suggested by these lines of inquiry. A number of particular lines of inquiry have been reserved for development along legislative proposal lines.

V. Policy Options

In this section, we attempt to suggest types of policy questions which are of continuing concern to the Congress and on which the nominee may have opinions useful to the Committee in formulating legislative options. These questions will provide some insight into the policies which the nominee would support as a general proposition. The type of questioning here is substantially different from the background and experience, or philosophy questions posed above.

78. Speedy trial is another right guaranteed by the Sixth Amendment and applied to the States. In addition, Congress has passed a statutory limitation on the time from arrest or indictment to trial (18 U.S.C. § 3161 et seq. (1976, as amended)). We note from your opinions on the Court of Appeals that you have had at least a brush with the Constitutional right as well as with the Arizona legislative requirements. Do you believe that a balancing test is appropriate for these determinations? Do you believe that statutory requirements

on the courts, prosecutors and defense lawyers are beneficial to the fair administration of criminal justice?

79. The Exclusionary Rule has been debated in a variety of forums, including Congress. Proposals have been made to supplement or supplant the exclusion of evidence with a civil damages remedy. Do you believe that a civil damages remedy is appropriate for the violation of Fourth Amendment rights?

80. Under the Rules Enabling Act,[9/] the Judicial Conference prepares rules of civil, criminal and appellate procedure and rules of evidence for the District Courts and Courts of Appeals. Congress has altered proposed rules on a number of occasions. Do you think that the development of rules of procedure and evidence is a process best left to the courts or is there a proper role for Congress?

81. In your article, you considered the reasons which have been propounded in support of federal diversity of citizenship jurisdiction. [Briefing Book, at 13 - 16]. Should Congress change diversity jurisdiction, and, if so, in what way?

82. The jurisdictional amount requirement in federal question jurisdiction was recently abolished. Should a jurisdictional amount requirement be reimposed in order to transfer initial determinations of some federal question questions to the State courts, or are there certain areas in which the initial determination of federal questions should be vested in State courts?

9/ 18 U.S.C. § 3771, 3772 (1976); 28 U.S.C. § 2071, 2072, 2076 (1976).

83. In a number of particular subject matter areas, Congress has considered the problem of forum shopping, such as patents and tax litigation. Should Congress seek to place jurisdiction over certain areas in a single federal court, and, if so, what subjects do you believe would be most profitably vested in a single court? What form should such a court take?

84. Congress has also provided a mechanism for the centralized resolution of pretrial issues in cases with similar causes of action arising in different districts, known as the Judicial Panel on Multidistrict Litigation. Do you feel that such a centralized disposition should be expanded?

85. The federal courts decide thousands of trial issues and appeals each year. Many of these decisions are not published, and those decisions which are published can be found in a variety of private publications. Accordingly, not all cases decided by federal courts are available to all attorneys. Should Congress determine a policy on publication of decisions.

86. In 1979 the Devitt Committee recommended, and the Judicial Conference adopted, a resolution that, "As a condition of admission to practice, applicants pass a bar examination, covering the Federal Rules of Civil, Criminal, and Appellate Procedure, and the Federal Rules of Evidence, federal jurisdiction and the Code of Professional Responsibility;" and "Attorneys who conduct a federal civil trial or any phase of a criminal proceeding satisfy an experience

requirement of four supervised trial experiences, at least two of which involve actual trials in state or federal courts".[10/] Would you agree with this recommendation?

87. In your article, you indicate a belief that the quality of State courts has risen significantly in recent years. [Briefing Book, at 15 - 16]. Do you believe that litigants of federal questions should have a choice of State or Federal forums, or should the State forum be mandated in certain instances?

The Committee's calendar for this Congress may also serve for to highlight the different topics of concern which may be posed to the nominee for comment. We would expect that answers to the above questions, and others, would provide the Committee with a basis for understanding the nominee's views on matters of federal jurisdiction and procedure without implicating matters which may come before the Court at some future time. Finally, we suggest that the responses to particular questions, in tandem with the various options before the relevant subcommittees, will provide the basis for more in depth questioning.

VI. Conflict of Interests

Several detailed questions would appear to be relevant in ascertaining the degree of potential recusals due to conflict of interests, the perceptions of such potential conflicts and the views of the nominee on the question. Allegations of conflict of interest and motions of recusal are governed by 28 U.S.C. § 455 (1976). We are not here suggesting that there is likely to be

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10/ Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judiciary Conference of the United States, September 21, 1978, 83 F.R.D. 215, 189 (1978).

a problem of undue numbers of recusals or questions of judicial propriety in determining whether recusal was appropriate in a particular case, but we do suggest that the novelty of the position of this nominee warrants closer review than previously has been attempted in nomination hearings. Accordingly, the outline of questions focuses on the past relations of the nominee's law practice, the past and present practice of the nominee's spouse, the disclosure requirements of the Ethics in Government Act and the procedure for challenges and recusal under § 455 and the Supreme Court Rules.

88. In 1973, an issue was raised that you had a conflict of interests in the State legislature between your amendments to a clean air bill and your husband's law practice involving Kennecott Copper. You responded to the letter questioning your activity on the floor of the Senate. [Briefing Book, at 218 - 219]. Would you please explain the substance of this issue for the Committee.

89. We have previously discussed your own law practice and service as an Assistant Attorney General, legislator and judge. Recusal from hearing a case before a federal court is governed by 28 U.S.C. § 455. Are you familiar with this provision of the Code? Were you on the federal bench instead a member of the Arizona Legislature, would you have recused yourself in a similar situation?

90. Rule 28.1 of the Rules of the Supreme Court of the United States, as amended on October 21, 1980, provides, in pertinent part, "Any document, except a joint appendix or a brief <u>amicus curiae</u>, filed by or on behalf of one or more corporations,

shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiearies) and affiliates of each such corporation. This listing may be done in a footnote. If such listing has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need be included in the document currently being filed." Are you familiar with this Rule?

91. Rule 28.1 assists the Clerk of the Court in administering ommitted parties requirements of the Rules, but also provides the Justices with a checklist of all interested parties for the purposes of determining possible recusals. What standards do you believe it is appropriate to utilize in determining when recusal will be required of you under § 455 as illuminated by information under Rule 28.1.

92. In what type of practice does your husband engage? What is the scope of the practice of his law firm? Who are your husband's major clients? Who are the firm's major clients?

93. What litigation has your husband or his firm undertaken before the federal courts? What interstate litigation has your husband or his firm undertaken before the state courts?

94. To the extent that you have knowledge of the matter, would you please explain the nature of the work done by your husband or his firm for -----? Do you know whether an

attorney/client relationship continues in this matter?

95. Do you generally discuss your work in the past work with your husband, and vice versa?

96. What stocks and bonds do you possess? If confirmed, would you place these holdings in a blind trust?

97. Public Law 95-521, Title III, which we amended as recently as last October, [11/] requires federal judges to periodically disclose their own, spouse's and children's financial holdings, assets and liabilities. Are you familiar with these provisions of the Ethics in Government Act?

98. The forms are similar, but not exactly the same, as the financial statement you provided to the Committee. In light of your experience and your husband's practice, do you feel that these disclosure requirements are sufficient to guide counsel in determining when it would be appropriate to suggest recusal?

99. If you are confirmed, do you believe that there will be any more than an insignificant number of cases in which the problem of conflicts of interest will arise?

As we have previously suggested, these questions do not exhaust the possibilities for eliciting useful information from the nominee. To the contrary these questions pose starting points for further development in light of answers which the nominee may offer at the hearing and in the financial disclosure

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11/ Pub. L. 95-521, Title III, §§ 301 - 309, 92 Stat. 1851 - 1861, October 26, 1978, as amended, Pub. L. 96-19, 98 Stat. 37 - 43, June 13, 1979; Pub. L. 96-417, Title VI, § 601(9), 94 Stat. 1744, October 10, 1980, found at 28 U.S.C. App. §§ 301 - 309 (West, 1981).

statements made to the Committee.

Finally, we must reiterate that the problem of raising questions about particular cases and constitutional philosophy have been problematic in past nomination hearings. To the extent that we have raised these questions, we have attempted to do so in light of past actions and non-judicial pronouncements of the nominee. We might suggest that such a format is profitable in avoiding the dialogue on the proper role of the nominee in confirmation hearings while also acquiring information which indicates the personal views of the nominee on political and social issues. In addition, the development of such questions has not been the turning point on which the Committee has historically decided whether to recommend confirmation to the full Senate. This is, however, an option. We must also reiterate that these questions do not necessarily solve the problem, or provide a basis for expecting a response, but provide only an option for approaching the problem.

If we can be of further service, please feel free to call on us.

Leland E. Beck
Legislative Attorney

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

September 3, 1981

TO: Sherrie Cooksey
Special Assistant for
Legislative Affairs
Room 107, East Wing

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

CBK

RE: Judge O'Connor

After reviewing Senator Hatch's briefing book for Judge O'Connor, we prepared questions and answers in those areas we had not covered previously. These materials are enclosed.

Enclosures

Q. The 1965 Katzenbach decision sticks in my mind as a particularly onerous example of "judicial activism." Katzenbach upheld a Congressional statute banning literacy tests in voting even though the Supreme Court had declared such tests constitutionally permissible. The Court held that Congress could use the 14th Amendment enforcement clause to direct state voting policies even though the states were not acting to any degree in violation of the Constitution. Congress thus defined the Constitution different from the Court and the Court deferred. Is this a sound decision today? Would you recommend that Congress use this Court-granted precedent to define other terms in the Constitution?

A. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court considered the constitutionality of §4(e) of the Voting Rights Act which restricted the states' ability to require literacy tests in certain circumstances. The Court held that Congress was empowered to enact §4(e), thereby prohibiting enforcement of some state literacy tests, by virtue of Section 5 of the Fourteenth Amendment.

Section 5 of the Fourteenth Amendment states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Court in Katzenbach interpreted Section 5 to grant Congress powers similar to the broad powers expressed in the Necessary and Proper Clause. The Court then considered whether the relevant section of the Voting Rights Act was "appropriate legislation" to enforce the Equal Protection Clause, applying the McCulloch v. Maryland, 4 Wheat, 316, standard of whether the statute can be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end," and whether it is consistent with and not prohibited by "the letter and spirit of the Constitution." Katzenbach, 384 U.S. at 651.

The Katzenbach decision does not seem to me to represent "judicial activism." Rather the Court's interpretation of Section 5 of the Fourteenth Amendment gives Congress a special role in enforcing the Equal Protection Clause. Of course, this may encourage Congressional activism insofar as Congress enacts legislation going beyond what is required by the Fourteenth Amendment.

As to the applicability of Katzenbach outside of the Fourteenth Amendment area, there obviously is a parallel between the Necessary and Proper Clause and Section 5 of the Fourteenth Amendment insofar as the Court has interpreted them to grant similar powers to the Congress. Section 2 of the Fifteenth Amendment tracks the language of Section 5 of the Fourteenth Amendment, as does a clause of the proposed ERA.

[Note that South Carolina v. Katzenbach, 383 U.S. 301 (1966), upheld other sections of the Voting Rights Act, including the pre-clearance provision, as being within Congress' power under Section 5 of the Fifteenth Amendment. The Court rejected the argument that "Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms -- that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts." 383 U.S. at 327. Justice Black, in a partial dissent, argued that the pre-clearance provisions, requiring that several southern states submit proposed changes in their voting laws to the Attorney General for approval, were unconstitutional. Justice Black noted

that in the original Constitutional Convention proposals to give Congress the power to veto or negative state laws were debated extensively and were overwhelmingly rejected. He found no such power in the Fifteenth Amendment.]

[Note also that in Fullilove v. Klutznick, 100 S. Ct. 2758 (1980), an affirmative action case, the plurality opinion of the Chief Justice cites Section 5 of the Fourteenth Amendment as one basis for Congress' power to enact legislation which set aside 10% of federal funds granted for local public works projects to be used to procure services from minority-owned businesses.]

1964 CIVIL RIGHTS ACT AND SCHOOL BUSING

Q. The 1964 Civil Rights Act said that "desegregation" means the assignment of students to schools "without regard to race," and does "not mean the assignment of students to public schools in order to overcome racial imbalance." Can you explain how the Court has interpreted that language to still allow mandatory busing on the basis of race? What is your impression of that reasoning?

A. Senator Hatch, the Court interpreted the language you quote in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). I have not studied the legislative history of the 1964 Civil Rights Act, and I certainly would want to do so carefully before interpreting the Act. However the Court in Swann stated that the term "desegregation" is used in the statute to define the type of cases the Attorney General is empowered to initiate; that is, "desegregation cases." Id. at 17. The Court stated that the legislative history indicated that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in situations of "de facto," as opposed to "de jure" segregation. That is, according to Swann the definition of "desegregation" was meant to define the type of case the government can bring, not to limit the kind of remedy the government can seek.

I do not feel at liberty to say whether or not I agree with the reasoning of Swann. I reiterate that I would want to examine the legislative history carefully before interpreting the Act.

Q. As you just mentioned, the Court in Swann confined the language I just read from the Civil Rights Act to de facto segregation in the North and made it inapplicable to the South where segregation had been required by law. Is this reading of the language supported by legislative history? Would you follow your honest reading of the legislative history of Congress even if it went against your own personal predilections? How would you have decided the Swann case?

A. I have not had an opportunity to examine the legislative history and would wish to do so in detail before ruling. I most assuredly would try to put my personal predilections to one side when interpreting any statute. Judges do not make policy. That is the role of Congress.

In addition to the legislative history I would also consider the language of the statute itself, since this is the starting point of all statutory construction, and the way that the language relates to other provisions of the statute with regard to Congress' statutory scheme.

EXTENSION OF THE ERA

Q. The Supreme Court has said that state ratification ought to be "reasonably contemporaneous." What in your mind is "reasonably contemporaneous" with regard to [ratification of] Amendments?

A. A bit of history is useful here. In Dillon v. Gloss, 256 U.S. 368 (1920), a unanimous Court stated that the Constitution impliedly requires that a properly submitted constitutional amendment must die unless ratified within a "reasonable time." In Coleman v. Miller, 307 U.S. 433 (1939), the opinion of the Court, joined by three Justices, holds that Congress has the power, under Article V of the Constitution, to fix a reasonable time limit for ratification of a proposed amendment and that Congress's resolution "of the question whether the amendment, had been adopted within a reasonable time would not be subject to review by the courts." 307 U.S. at 454. Four Justices who wrote a concurring opinion in Coleman would have gone farther. These Justices would have held that the process of amendment is "political" in its entirety, and that "insofar as Dillon v. Gloss attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved." Id. at 459 (Black, Roberts, Frankfurter & Douglas, J.J., concurring).

To return to your question, the setting of time limits for ratification of amendments is for Congress. Under the holding of Dillon v. Gloss state ratifications should be "reasonably contemporaneous." And I think Coleman v. Miller can fairly be read to hold that a congressional determination as to whether a proposed amendment has been adopted within a reasonable time is not subject to judicial review.

Q. The Court rejected numerous equal protection objections to Congress' judgment that it may limit public funding of abortions. Do you think those rejections were appropriate? Can you generally draw a distinction between rights and federal funding?

A. In Harris v. McRae, 448 U.S. 297 (1980), the Court held that certain limits on the use of federal funds to finance abortions did not violate the guarantee of equal protection of the laws. The Court reasoned that although the impact of such a provision may fall most heavily on the indigent, poverty had never been held to be a "suspect" classification calling for heightened scrutiny. The Court therefore applied the traditional rational basis test, and upheld the law because it bore a rational relationship to the government's interest in protecting the potential life of the fetus.

In Harris the Court relied on the earlier decision in Maher v. Roe, 432 U.S. 464 (1977), which held that a state decision to provide funds for the medical expenses associated with childbirth but not certain abortions did not violate equal protection. In both Harris and Maher the Court stressed that the right to an abortion previously recognized in Roe v. Wade did not mean that there was a right to federal funding of abortions.

While I do not think it appropriate for me to comment on the correctness of these Supreme Court decisions, I do recognize that the question of the existence of a right and the question of federal funding for the exercise of that right present distinct issues. As a general matter, the existence of a right does not automatically mean there is a right to federal funds to advance that right. To take an obvious example, there may be a First Amendment right to broadcast ideas or publish a newspaper, but that hardly means the government must provide all comers with a soundtruck or printing press.

Q. Should the Civil Rights Act of 1871, 42 U.S.C. § 1983, which was drafted to provide a remedy for violations of constitutional rights committed under the color of state law, be interpreted to impose substantial new burdens upon state and local governments?

A. As you know, Senator, the Supreme Court in Monell v. New York City Department of Social Services, 426 U.S. 658 (1978), overruled its previous decision in Monroe v. Pape, 365 U.S. 167 (1961), and held that municipalities had no good faith immunity to lawsuits brought under § 1983. The other case increasing the exposure of state and local governments to such lawsuits was Maine v. Thiboutot, 448 U.S. 1 (1980). That case held that there was, at least on its particular facts, a section 1983 remedy for violations of federal statutory as well as constitutional rights.

Maine v. Thiboutot, however, has been limited by two Supreme Court decisions of last Term. As explained in Middlesex County Sewerage Authority v. National Seaclammers Ass'n., 101 S. Ct. 2615, 2626 (1981):

> "The Court . . . has recognized two exceptions to the application of § 1983 to statutory violations. In Pennhurst State School and Hospital v. Halderman, 101 S. Ct. 1531 (1981), we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights' under § 1983."

In Middlesex County the Court held, on the basis of the first exception, that no section 1983 action would lie for violations of the Federal Water Pollution Control Act or the Marine Protection, Research and Sanctuaries Act. The Court reasoned that the remedies provided by those statutes were intended by Congress to be exclusive. The content of the second exception mentioned in Pennhurst and Middlesex County is still very much undecided.

In another significant decision last Term the Court interpreted section 1983 as not permitting the award of punitive damages against a municipality. City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981). In that case the Court specifically recognized the problem of increased financial liability confronting municipalities. Id., at 2761.

The problem of liability is aggravated by the fact that under 42 U.S.C. § 1988 a state or municipality violating section 1983 can be held liable for attorneys fees. The Court has granted certiorari to hear a case in which the lower court denied attorneys fees under section 1988 to a plaintiff who prevailed on a claim that a state highway regulation violated the commerce clause. Consolidated Freightways Corp. v. Kassel, No. 79-1618. One issue in the case is the scope of section 1983 -- does the commerce clause secure rights to persons, to come within section 1983, or does it simply allocate governmental authority between the states and federal government?

Issues concerning the interpretation of section 1983, and thereby affecting the potential liability faced by state and local governments, have, therefore, occupied the Court of late and will continue to do so in the near future. It is important to note, however, that all of these cases have turned on statutory interpretation. In such areas Congress, and not the Court, has the final say. If Congress disagrees with the Court's interpretation of section 1983 it is free to amend the statute and set the matter straight.

Q. Does the Constitution require the Supreme Court to scrutinize sex distinctions in the law on the same basis as racial distinctions? What about other distinctions, such as age; are they equal with sex and race?

A. The question of the appropriate analysis to apply to sex discrimination cases has not been an easy one for the Court. Just last Term in the statutory rape case, Michael M. v. Superior Court, 101 S. Ct. 1200, 1204 (1981), the Court candidly remarked: "As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications." A majority of the Court, however, has never held that gender is a suspect classification calling for the strict judicial scrutiny which is applied to classifications based on race, McLaughlin v. Florida, 379 U.S. 184 (1954), ancestry, Oyama v. California, 332 U.S. 633 (1948), and, in certain cases, alienage, Graham v. Richardson, 403 U.S. 365 (1971).

The Court has not precisely defined what it is that makes some classifications "suspect". In San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973), however, the Court did list several indicia of a suspect class, including being "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Women, of course, form a majority of those eligible to participate in the political process.

Although the Court has not analyzed gender discrimination cases under strict scrutiny, it is true that in past cases, as

Justice Powell has put it, the traditional minimum rationality test has taken on a somewhat "sharper focus". Craig v. Boren, 429 U.S. 190, 210 n. *(1976) (concurring opinion). In Craig v. Boren a plurality announced a "middle scrutiny" test which has been applied in some decisions. That test requires the gender classification to bear a "substantial" relation to an "important" governmental objective. More recently, however, the Court seems to be eschewing any preoccupation with standards of review and simply asking if the gender classification "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Court, 101 S. Ct. 1200, 1204 (1981). For example, in Michael M. the Court upheld the application to males only of a statutory rape law designed to prevent teenage pregnancy, since females, unlike males, already faced the natural deterrent of pregnancy. In Rostker v. Goldberg, the Court upheld male-only draft registration since females, unlike males, were not eligible under current law for combat.

The Supreme Court has held, in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), that age is not a suspect classification. The Court reasoned that any particular age did not mark a "discrete and insular" group needing "extraordinary protection from the majoritarian political process," but rather a group to which we all had either belonged or hoped to belong.

RIGHT TO PRIVACY

Q: Judge O'Connor, what was the origin of the "right" to privacy in Supreme Court cases? Do you think that creation of such a "right" was appropriate?

A. Senator Hatch, as I understand it, privacy as a "right" of constitutional dimensions was not explicitly recognized by the Court until 1965, in Griswold v. Connecticut, 381 U.S. 479 (1965). There, the Court invalidated a state statute which imposed criminal penalties for the use of contraceptives on the ground that the statute infringed upon a constitutionally protected "zone of privacy."

The opinion in the case is complex, in that six Justices found some basis for finding a protected privacy right in the Constitution. As I recall it, Justice Douglas found an independent basis for deducing a right to privacy from the seldom-cited Ninth Amendment, which provides that the enumeration of specific rights in the Constitution not be construed to deny other rights "retained by the people," such as the "inalienable rights" referred to in the Declaration of Independence. His opinion for the Court went on to provide that the Bill of Rights read as a whole also implies a right to privacy. Justice Douglas said: "Specific guarantees in the Bill of Rights have penumbras [or additional protections] formed by emanations from those guarantees."

Others of the six Justices in Griswold who agreed that a right to privacy exists cited other bases, such as the Due Process clause of the Fourteenth Amendment. In so interpreting the Fourteenth Amendment, the Court thus invoked the doctrine of constitutional scrutiny referred to as "substantive due process."

I know that the right to privacy has been cited as one of the grounds for decision, for example, in Roe v. Wade and in Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973)(striking down a state law which regulated the distribution of off-color films to individuals). I therefore prefer not to opine on the constitutional merits of these very current issues.

I feel that the Court has an important role to play in safeguarding the individual from certain excessive government actions. However, I would note my general view that the judiciary must move in a neutral and restrained way in announcing rights not explicitly provided for in the text of the Constitution. Lochner v. New York (1905) demonstrated the temptation for the Court improperly to second-guess state economic and health regulations. State laws which in part regulate on moral grounds may be even more difficult for a court to scrutinize because they are not as susceptible to judicial evaluation by objective criteria; thus, a judge must be circumspect to avoid being influenced by his or her personal views. Finally, while the "zone of privacy" would appear to include the personal intimacies of home and family, Griswold does not appear to offer a consensus view of the precise basis or definition of the right to privacy. This uncertainty may render more difficult the task of state legislators to ensure that their lawmaking activities conform to constitutional norms.

In sum, I think that the enforcement of protected individual liberties is an extremely important function of the Court. I

have not formed a final judgment regarding the Griswold holding, but can assure you that in reviewing future cases I would seek to ensure that my decisions are based upon a principled reading of the Constitution.

SIGNIFICANCE OF CERTAIN "LANDMARK" CASES

Q. Judge O'Connor, describe for us the current significance of the following cases: Marbury, McCulloch, Gibbons, Dred Scott, Erie, Slaughterhouse Cases, Miranda, Engel, and Roe.

(To the extent we can determine Senator Hatch's angle here, it appears that he wants to establish that the seminal Supreme Court cases establish plenary policymaking authority in the political branches of government with a restrained constitutional review function residing in the judiciary. Cases like Engel, Miranda and Roe are, I am sure, viewed by Hatch as abuses of the Fourteenth Amendment by the Supreme Court to expand its authority to dictate policy to the states.)

A. The cases you have mentioned are indeed "landmarks", and while they deal with a broad array of issues, can all be said to contribute substantially to our understanding of the role of the federal judiciary in our constitutional system.

1. Marbury v. Madison (1803). This decision establishes authoritatively the power of the federal judiciary to review the constitutionality of actions of the coordinate branches of government and to refuse to give effect to those actions determined to be unconstitutional. Within the doctrine of judicial review, however, are limitations upon the scope of that review authority -- the developing notion of judicial restraint.

2. McCulloch v. Maryland (1819). This decision establishes the scope of federal legislative power in upholding the power of Congress to charter a Second Bank of the United States. The decision developed the principles of supremacy and preemption which govern the relationship between federal and state legislative decisions in similar subject matter areas. Chief Justice Marshall established in McCulloch the scope of the "necessary

and proper" clause of the Constitution (Article I, Section 8) which establishes the legislative power of Congress to govern in a broad range of substantive areas so long as the end is "legitimate" and "within the scope of the Constitution" and the "means" are reasonably related to the "ends". These limitations suggest the scope of the judicial review function.

3. Gibbons v. Ogden (1824). Here, the Court established the reach of the Commerce Clause (Art. I, Section 8) in upholding regulation by Congress of a steamboat monopoly between New York and New Jersey. The Court broadly concluded that within other relevant constitutional limitations, Congress may broadly regulate commercial activities as long as they "concern more states than one". Gibbons reinforces the view that substantive policy decisions are appropriately reserved to the political branches of government.

4. Dred Scott v. Sandford, 60 U.S. 393 (1857). Here, the Supreme Court ruled that freed slaves cannot necessarily bring suit in federal court, because they are not entitled to U.S. citizenship unless they are lawfully citizens of a state. Put another way, the Court announced that federal citizenship was derivative from state citizenship. The unhappy Dred Scott decision was a result of, among other things, judicial policy-making in the face of a Constitution which was silent on the definition of citizenship. The decision was promptly overruled by Congress in the Fourteenth Amendment.

5. In Erie Railroad v. Tompkins, 304 U.S. 64 (1938) the Court held that in diversity cases not involving the federal Constitution or acts of Congress, federal courts must apply state law. This case explicitly overruled Swift v. Tyson, 41 U.S. 1 (1842), in which the Court had held that federal judges in diversity cases could fashion and apply a body of "federal general law" which would essentially be judge-made. Thus, Erie stands for the proposition that the function of the judiciary is necessarily limited and does not extend to making substantive law and policy appropriately reserved either to political branches of the federal government or the states.

6. In the Slaughterhouse Cases, 83 U.S. 36 (1873) the Court first interpreted the newly-passed Fourteenth Amendment. The Court refused to strike down a law passed by the Louisiana legislature which granted a slaughterhouse monopoly. The Court principally reviewed the challenged state action under the "privileges and immunities" clause of the Fourteenth Amendment and read that clause's protections exceedingly narrowly. As I recall, the majority viewed the Fourteenth Amendment as having been passed to provide certain protections for blacks, but having almost no other effect on the previously-existing allocation of authority between the state and federal governments.

Interestingly, the Court in the Slaughterhouse Cases was restrained in the sense that it resisted any reading of the Fourteenth Amendment which would create new civil rights oversight authority in the federal courts or Congress at the expense of the states. However, commentators have also described this

decision as activist in the sense that, to an extent, the Court appeared to let its own views of what the law ought to be affect its reading of a constitutional provision. Subsequent cases have established that the Fourteenth Amendment requires a more thorough review by federal courts of state legislation than had been the case prior to its adoption, but the case is an important chapter in the developing doctrine of judicial restraint.

7. Miranda v. Arizona, 384 U.S. 436 (1966). Here, contrary to the narrow reading of the Fourteenth Amendment in the Slaughter-house Cases, the Court exercised federal civil rights review authority over state activities pursuant to the due process clause of the Fourteenth Amendment. Due to Fourteenth Amendment "in corporation" of the Fifth and Sixth Amendments, the Court imposed upon state law enforcement officials the requirement that criminal suspects be expressly warned of their right to counsel and their right to remain silent. The procedural requirements of Miranda, like the exclusionary rule, were fashioned by the Court itself, but the case remains a significant federal requirement upon state law enforcement officers and as such further comment would be inappropriate.

8. Engel v. Vitale, 370 U.S. 421 (1962). Here, the Court ruled that, pursuant to the Fourteenth Amendment, the Establish-ment Clause of the First Amendment is applicable to state author-ities and prohibits state officials from formulating prayers for public school children, even if students are excused from partici-pating. As I recall it, the Court reviewed the history of the

religion clauses and reasoned that "a union of government and religion tends to destroy government and degrade religion." History teaches that religion is a critical component of the development of this Republic. The Engel case sets limits to the relationship between church and state and is also significant in that it involves a federal court reading of Fourteenth Amendment to authorize jurisdiction over the states in enforcing guarantees of the Bill of Rights. I have formulated no final judgment regarding the Court's reasoning on the merits of this or related cases.

9. Roe v. Wade.