SANDRA D. O'CONNOR
JUDGE

(602) 255-4828

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
WEST WING, STATE CAPITOL BUILDING
1700 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

August 26, 1981

The Honorable Jesse Helms
United States Senate
Washington, D.C. 20510

Dear Senator Helms:

Thank you again for your gracious courtesy and hospitality during our visit in your office on Thursday, July 16. At that time you furnished me with a letter asking me to address two questions, one concerning whether Roe v. Wade was a proper exercise of judicial authority, and the other concerning the proper application of the doctrine of stare decisis in constitutional law.

After careful reflection, I remain of the view that a prospective Supreme Court Justice should not make public statements on issues which might later come before the Supreme Court. Indeed, the very authority on which you rely, Justice Rehnquist's memorandum opinion in Laird v. Tatum, 409 U.S. 824 (1972), supports this position. In Laird v. Tatum, Justice Rehnquist drew a clear line between statements made by an individual prior to being named by the President for judicial appointment and statements made by a designee or nominee of the President. He recognized that statements about specific issues made by a nominee to the bench risk the

appearance of being an improper commitment to vote in a particular way. As Justice Rehnquist stated:

> In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge. 409 U.S. at 836 n. 5.

In my judgment, Justice Rehnquist, as a nominee before the United States Senate, adhered to the line identified in his Laird opinion. Hearings at 23, 30. As does Justice Rehnquist, I believe that judges must decide legal issues or questions within the judicial process, not outside of it and unconstrained by the oath of office.

Other nominees to the Supreme Court have scrupulously refrained from commenting on the merits of recent Court decisions or specific matters which may come before the Court. Justice Stewart, for example, declined at his confirmation hearings to answer questions concerning Brown v. Board of Education, noting that pending and future cases raised issues affected by that decision and that "a serious problem of simple judicial ethics" would arise if he were to commit himself as a nominee. Hearings at 62-63. The late Justice Harlan declined to respond to questions about the then-recent Steel Seizure cases. Hearings at 167, 174, and stated that if he were to comment upon cases which might come before him it would raise "the gravest

kind of question as to whether I was qualified to sit on that Court. Hearings at 138. More recently, the Chief Justice declined to comment on a Supreme Court redistricting decision which was criticized by a Senator, noting, "I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit." Hearings at 18.

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

The first question set forth in your letter asks my opinion of the correctness of Roe v. Wade and how I believe the case should have been decided. For the reasons stated above, it would be inappropriate for me to answer that question at this time. However, I can assure you that I am aware of the criticisms of Roe v. Wade with regard to its description of historical precedent and the conclusions to be drawn therefrom, with regard to the textual basis for the decision's interpretation of the Constitution, and with regard to the Court's apparent conception of its role in superintending the actions of state legislatures. These criticisms and possibly others may well be presented to the Court as a basis for overruling Roe v. Wade should that decision be challenged. If I were on the Court at that time, I would carefully weigh these arguments and interpret the Constitution to the best of my ability, with due consideration for the framers' intent, the appropriate role of the judicial branch, and principles of federalism.

Your second question, concerning my view of the doctrine of stare decisis, speaks to my judicial philosophy generally, not to a specific case or issue, and therefore I am happy to answer it. Our system of justice requires a profound respect for precedent. As Justice Cardozo once observed, if every decision of a court were opened to re-examination in every case, the law would be hopelessly confused and virtually impossible to administer. I would, therefore, be exceedingly reluctant to discard

precedent of the Supreme Court in approaching any case. However, I am also mindful that Justice Frankfurter, who spoke strongly of the importance of law as a force of coherence and continuity, distinquished between stare decisis in relation to constitutional issues, which he deemed to be open to re-examination because legislatures cannot displace a constitutional adjudication, and statutory issues, which he believed should not be re-examined merely because an earlier decision is later thought to be wrong.

In my judgment, occasions may arise when a Justice of the Supreme Court should cast a vote contrary to precedent. When a Justice believes that a precedent was built upon flawed understandings of basic constitutional provisions, then a Justice should cast a vote contrary to the prior decision of the Court. A well-known example is the Supreme Court's reversal of the doctrine of Swift v. Tyson, 16 Pet. 1 (1842), which held that federal courts possess general common law powers to make law in diversity cases, in the landmark opinion authorized by Justice Brandeis in Erie Railroad v. Tompkins, 304 U.S. 64 (1938). Because of the numerous legal and practical impediments to rectifying error by constitutional amendment, constitutional decisions should not, I believe, be wholly insulated from re-examination.

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

Memorandum

Subject	Date
Judge O'Connor	August 28, 1981

To

Jon Rose, Assistant Attorney
General, OLP (Rm. 4234)

Dick Hauser, Deputy Counsel
to the President, 2nd Flr. West Wing

Sherrie Cooksey, Special Assistant
for Legislative Affairs, Rm. 107, East Wing

From

Carolyn B. Kuhl
Special Assistant to
the Attorney General

CBK

Attached are copies of further materials on busing and on bail reform which we sent Judge O'Connor yesterday per the request she made at your meeting with her in Phoenix.

Attachment

BUSING

Q. What remedies for segregated schooling are mandated by the Equal Protection Clause of the Fourteenth Amendment? In particular, does the Fourteenth Amendment require race-conscious assignment of pupils or busing in order to achieve racial balance in the schools?

A. Senator, at the outset I must state my personal view that the availability to all children of high quality education is a critically important social goal. The obligation and the authority to provide that education to all generally resides in the political branches of government. However, intentional official acts of segregation which deny persons access to equal educational opportunities raise constitutional matters for the courts. Supreme Court cases teach that the role of the Court is necessarily limited to ascertaining where a constitutional violation has occurred, and fashioning remedies tailored to that constitutional violation.

The landmark decision in this area is, of course, Brown v. Board of Education, 347 U.S. 483 (1954). There, the Court held that the Equal Protection Clause of the Fourteenth Amendment proscribes enforced racial segregation in public schools. In reaching that conclusion, the Court explained that the effect of segregation on contemporary public education must be examined in expounding the Constitution. The Court maintained that segregation with the sanction of law deprives black children of equal educational opportunities, notwithstanding equality of physical facilities and other tangible components of public school education.

In sum, the equal protection vice of enforced racial segregation was held to be inferior educational opportunities available to black students because they were branded with an official legal stigma which generates a feeling of inferiority. I do not believe that the Court has ever read Brown I to conclude that racial imbalance in classrooms without the sanction of law would inherently deny black children equal educational opportunities or equal protection of the laws.

Remedies for segregated schooling were first addressed in Brown II, 349 U.S. 294 (1955). The Court declared that the goal of a desegregation remedy was the admission of students on a racially nondiscriminatory basis undertaken with all deliberate speed. In fashioning equitable decrees toward this end, the judiciary was admonished to accommodate both public and private needs, and to employ practical flexibility.

Neither Brown I nor Brown II ordained that racial balance in the classroom was an ingredient of a proper desegregation remedy. In Brown II the Court stated that the goal of the remedy was to vindicate "the personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis." 349 U.S. at 300-301. The teaching of those cases is that racially neutral pupil assignment plans, coupled with equal educational opportunities, is the nature of the relief to be granted for the injuries caused to individual students by a segregated school system operating with the sanction of law.

The Court has been far from clear about the role of race-conscious assignment in the achievement of "admission to public

schools . . . on a nondiscriminatory basis." Brown II refers to revising school districts into compact units "to achieve a system of determining admission to the public schools on a nonracial basis . . . . " 349 U.S. at 300 (emphasis added).

In Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), the Court overturned an order that prohibited any school in the Pasadena school district from having a majority of minority students for an indefinite period. In Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971), the Court endorsed the use of racial quotas as a starting point, but even there acknowledged that the goal of a desegregation plan is not to eliminate all one-race schools.

The principal goal in fashioning appropriate remedies in this area is to ensure access by the disadvantaged students to the quality education denied as a result of unconstitutional official action. The focus of these remedies, as I understand it is not upon numerical racial balance as an end in itself. As three members of the Supreme Court recently complained:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one race schools, courts may produce one race systems. Parents with school age children are highly motivated to seek access to schools to obtain quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and judicial oversight, accelerates the exodus to the suburbs of families able to move. . . . (Justice Powell, joined by Stewart and Rehnquist in dissenting from a denial of certiorari in Estes v. Metropolitan Branches of the Dallas NAACP, 100 S. Ct. 716 (1980)).

In addition, I am aware of several studies showing that mandatory busing or student assignment schemes seeking racial balance is counterproductive because it precipitates an exodus from the public school system, and diverts time, attention, and resources of the community away from encouraging and supporting the educational development of pupils.

The Court has endorsed a number of acceptable devices other than busing for remedying unlawful segregation. The Court has indicated in dictum that in some circumstances realignment of school districts and some transportation of students may be the only effective remedy for unlawful segregation. North Carolina v. Swann, 402 U.S. 43 (1971). Even taking this dictum on its face, however, I question how often busing really is the only effective device for remedying unlawful segregation in light of Brown II's definition of an acceptable remedy. I have voiced concern in the Arizona legislature about the effectiveness and social costs of the mandatory busing remedy. Several other justices have expressed similar concerns in published opinions. Keyes v. School District No. 1, 413 U.S. 189, 217-253 (1973) (Powell, J.); Austin Independent School District v. United States, 429 U.S. 990 (1976) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring).

BAIL ISSUES

Under the Bail Reform Act of 1966, 18 U.S.C. § 3146 et seq., the only issues to be considered by a court making a pretrial release decision in a non-capital case are the likelihood that the defendant will appear for trial and what conditions will guarantee his appearance. The Act does not provide for denial of bail and pretrial detention on the ground that release of the defendant would present a threat to the community, nor does the Act even permit consideration of the defendant's dangerousness in setting the conditions of release. The obvious problem of defendants being released under the Bail Reform Act who are prone to, and in fact do commit violent crimes prior to trial has led to a persistent call for reform of the Reform Act.

There are generally two approaches to such reform. The first, embodied in the American Bar Association's Standards on Pretrial Release, permits the consideration of future dangerousness in setting the conditions of release. If a defendant violates a condition of release, he may then be detained pending trial. The second approach goes one step further and permits not only consideration of dangerousness in fixing conditions of release but also pretrial detention if no conditions of release could reasonably assure the safety of the community. Congress followed this approach when it enacted the pretrial release provisions of the District of Columbia Code in 1970, D.C. Code 23-1322. The Attorney General's Task Force on

Violent Crime has also recommended legislation permitting courts to deny bail to persons found, by clear and convincing evidence, to present a danger to the community.

The constitutionality of such pretrial detention is unsettled simply because the fairly recent District of Columbia statute is the only one presenting the issue. Two constitutional arguments are advanced against such statutes: an Eighth Amendment challenge and a Due Process challenge. Although the Bail Clause of the Eighth Amendment simply provides that "excessive bail shall not be required," it has been argued that implicit in this provision is a constitutional right to bail in non-capital cases. In Stack v. Boyle, 342 U.S. 1, 4 (1951), an excessive bail case, the Court stated that unless the "right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning." Later that same term, however, the Court stated in dicta that "The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." Carlson v. Landon, 342 U.S. 524, 545 (1952). The question whether pretrial detention may be justified on any basis other than guaranteeing an accused's presence at trial was left open in Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979).

The Due Process challenge focuses on the determination of dangerousness. The argument is that judges are not capable of predicting future dangerousness with any degree of accuracy. It is also contended that pretrial detention for dangerousness is punishment which cannot be imposed prior to a proper determination of guilt. The commentators are sharply divided. Compare,

e.g., Mitchell, Bail Reform and the Constitutionality of Preventive Detention, 55 Va. L. Rev. 1223 (1969) (upholding constitutionality) with Tribe, An Ounce of Detention, 56 Va. L. Rev. 371 (1970) (questioning constitutionality).

These issues are timely not only because of the Task Force's recommendations, but also because the District of Columbia Court of Appeals, the highest local court, upheld the D.C. statute in an opinion handed down on May 8, 1981. United States v. Edwards, No. 80-294. An appeal has been docketed in the Supreme Court. The majority, in an opinion by Chief Judge Newman, specifically rejected the Eighth Amendment argument, relying heavily on the history of the inclusion of the Bail Clause in the Bill of Rights. The majority also ruled that pretrial detention was not punishment under the test articulated in Bell v. Wolfish, supra, and that the procedural protections in the statute provided sufficient assurances of accuracy in the judge's prediction of future dangerousness. There was a dissent by Judge Mack on the pretrial detention point.

FROM: Phyllis Schlafly

68 FAIRMOUNT, ALTON, ILLINOIS 62002 / (618) 462-5415

RELEASE: SEPTEMBER 4, 1981

WHO PROMOTED SENDING WOMEN INTO MILITARY COMBAT?

One of the biggest mysteries in the politics of national defense in recent years has been the peculiar push to assign women to serve in military combat. It is very difficult to find anyone who favors it; no country in the world does it; nothing in history or reason or logic supports it.

Yet the existence of an orchestrated campaign to achieve this objective (the repeal of 10 U.S.C. 6015 and 8549) was obvious when the House Armed Services Committee, Military Personnel Subcommittee, held four days of hearings on that proposal on November 13-16, 1979. Based on the massive evidence against women in combat, the effort to repeal the male-only combat laws was quietly dropped.

Diligent research has just uncovered where the original idea came from: a little-known federal body called DACOWITS -- the Defense Advisory Committee on Women in the Services. This is a group of 30 civilians, mostly women, each appointed by the Secretary of Defense for a three year term, "to assist and to advise the Secretary of Defense on policies and matters relating to women in the Services."

An examination of the minutes of the DACOWITS meetings shows that this group, throughout the decade of the 1970s, carried on a steady barrage of pressure against the Armed Services in behalf of full sex-integration even to the assignment of women to military combat. Here is the official record:

DACOWITS Recommendation of April 6-10, 1975: "#9. That the Department of Defense initiate an amendment of Title 10, U.S.C. Section 6015 to remove the total prohibition against assignment of women to vessels other than hospital or transport vessels thereby allowing assignment of persons (male or female) to vessels and aircraft in accordance with individual qualifications of the person to be assigned and the particular mission to be performed. (Utilization)"

DACOWITS Recommendation of October 5-9, 1975: "#5. That the Department of Defense direct the Department of the Navy to initiate a legislative proposal to revise or repeal Sec. 6015, Title 10, U.S. Code, to provide women of the Navy and Marine Corps access and

assignment to vessels and aircraft under the jurisdiction of the Department of the Navy. (Utilization) #6. That the Department of Defense direct the Air Force to initiate an amendment or repeal of Sex. 8549, Title 10 U.S. Code, so as to permit assignment of women to aircraft. (Utilization)"

DACOWITS Recommendation of April 21-25, 1976: "That the Office of the Secretary of Defense direct the Department of the Navy to initiate legislation to revise or repeal U.S.C. 6015, so as to provide women of the Navy and Marine Corps access and assignment to vessels and aircraft under the jurisdiction of the Department of the Navy; and that OSC direct the Department of the Air Force to initiate amendment or repeal of 10 U.S.C. 8549, so as to permit assignment of women to aircraft. (Utilization)"

DACOWITS Recommendation of November 14-18, 1976: "#8. That laws now preventing women from serving their country in combat and combat related or support positions be repealed. Rationale: Self-explanatory." This recommendation resulted in wire service news stories headlined: "Combat Role for Women Urged; DACOWITS Seeks Law Change."

The word "Utilization" after the above recommendations means that they came from the "Utilization Subcommittee." Here is how the proceedings of that Subcommittee, which met four times during the April 6-10, 1975 DACOWITS meeting, reveal the author of the recommendation to put women in combat:

"Judge O'Connor initiated discussion of Title 10, U.S.C., Sec. 6015 relating to the Navy's prohibition against assignment of women to vessels other than hospital or transport vessels. ... This resulted in the following motion by Judge O'Connor, seconded by Dean Heyse, and agreed upon by all present: That the Department of Defense initiate amendment of Title 10, U.S.C,, Sec. 6015 so as to remove the total prohibition against assignment of persons (male and female) to vessels and aircraft in accordance with the qualifications of the person to be assigned and the particular mission to be performed."

Judge Sandra O'Connor was appointed to a three-year term on DACOWITS in 1974 and became the principal sponsor of the effort to repeal the laws that exempt women from military combat. Those are the same two laws (10 U.S.C. 6015 and 8549) which the majority of the Supreme Court ruled on June 25, 1981 justify the exemption of women from the military draft. The Court treated the exclusion of women from military combat as fundamental to our civilized society. Sandra O'Connor is simply out of step. (end)

3—SPECIAL ASSIGNMENTS AND DETAILS

adrons: detail of
s to command.
nt: assignment of
ers as custodians
n foreign countries.
s: detail of naval
erintendents or in-

ub.L. 91–482, § 2C,
082, struck out item
uadrons: detail of
command."
ub.L. 90–235, § 4(a)
68, 81 Stat. 759, 760,

ed. Pub.L. 91–482, § 1(a), Oct. 21, 1970, 84 Stat.

, 1956, c. 1041, 70A
hat the President
r on the active list
the grade of com-

ed. Pub.L. 90–235, § 4(b)(1), Jan. 2, 1968, 81 Stat.

, 1956, c. 1041, 70A
detail to military
ges that gave in-
military tactics of
superintendents or

ed. Pub.L. 90–235, § 4(a)(2), Jan. 2, 1968, 81 Stat.

, 1956, c. 1041, 70A
r the detail of of-
Corps of the Navy
vices to the Armed

HAPTER 555—ADMINISTRATION

s.
lations for Marine

and ratings: au-
ablish.
ers: authority for
een Marine Corps
Corps of the Navy.
rs: duty; qualifi-
ictions.
Reserve members
tired pay.
shore duty; limi-

fficers of vessels.

Pub.L. 92–310, Title
1972, 86 Stat. 203,

ub.L. 92–168, § 2(3),
t. 489, struck out
hich read "Aviation
viator," and "Avia-
viation pilot.", re-

ub.L. 91–198, § 1(3),
15, substituted "na-
"naval aviation ob-

Regulations

ndex to Notes

Sec.
5986. Technical institutions: detail of naval officers to promote knowledge of naval engineering and naval architecture.

struck out item 5984, which read: "Military institutions and colleges: details as superintendents and instructors", and item 5987, which read: "American National Red Cross: detail of officers in the Medical Corps".

mander and assign him to the command of a squadron, with the rank and title of a flag officer.

professors and retired officers and petty officers of the Navy, with their consent, as instructors in military drill and tactics.

Forces Division of the American National Red Cross. See section 711a of this title.

Sec.
6021. Aviation duties: number of personnel assigned.
6022. Aviation training facilities.
6024. Aviation designations: naval flight officer.
6027. Medical Department: composition.
6028. Medical Service Corps: composition.
6029. Dental services: responsibilities of senior dental officer.
6031. Chaplains: divine services.
6032. Indebtedness to Marine Corps Exchanges: payment from appropriated funds in certain cases.
6034. Regulations for retired pay based on service in the Reserve.

1968 Amendment. Pub.L. 90–235, § 7(a)(5), Jan. 2, 1968, 81 Stat. 763, struck out item 6033, which read: "Woman member: definition of dependents".

1967 Amendment. Pub.L. 90–130, § 1(22), Nov. 8, 1967, 81 Stat. 380, eliminated item 6030 which read: "Nurse Corps officers: authority."

1961 Amendment. Pub.L. 87–123, § 5(24), Aug. 3, 1961, 75 Stat. 266, deleted item 6020

3. Force and effect

Navy Regulations approved by the President are endowed with the sanction of law. Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, App.D.C.1961, 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed.2d 1230, motion denied 81 S.Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, rehearing denied 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

Navy regulations approved by the President, if constitutional, have the force of law. Garmon v. Warner, D.C.N.C.1973, 358 F.Supp. 206.

8. —— Particular regulations

The phrase "tradesmen or their agents," as used in an article of the Navy Regulations providing that tradesmen or their agents shall not be admitted within a command except as authorized by the commanding officer, covered an employee of a cafeteria operated by a private corporation on a naval installation under a contract with board of governors of the installation. Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, App.D.C.1961, 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed.2d 1230, motion denied 81 S.Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, rehearing denied 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

Navy regulation requiring recommendation for discharge of naval enlisted person within three months of expiration of term by immediate commanding officer refers only to discharges for undesirability, inaptitude, physical or mental disability, unfitness, or on account of under age and does not extend to special order of the Secretary of the Navy or discharge ordered by chief of naval personnel. Unger v. U. S., 1964, 326 F.2d 996, 164 Ct. Cl. 400.

Navy regulation authorizing unsuitability discharges for alcoholism complied with this section requiring approval by President of navy regulations, where President, as authorized by section 301 of Title 3, authorized Secretary of Defense to approve alterations of navy regulations by Secretary of Navy and Secretary of Defense had approved regulation in question. Reed v. Franke, C.A.Va.1961, 297 F.2d 17.

Naval officers in command of naval installation have ample authority to control the ingress and egress of civilians to and from premises of command under naval regulations relating to security on naval installations. Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, 1960, 284 F.2d 173, 109 U.S.App.D.C. 39, affirmed 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed.2d 1230, motion denied 81 S.Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, rehearing denied 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

Contention that policy, not articulated in approved military regulations, precluding Marine reservists from wearing shorthair wigs over long hair was justified because wigs would interfere with military operations could not be sustained in absence of evidence that there had in fact been any such interference or that any Marine reserve unit had in recent decades been called for instant distant combat duty, and in light of evidence that hair can be cut to Marine requirements in a very few minutes. Garmon v. Warner, D.C.N.C.1973, 358 F.Supp. 206.

In the case of Marine reservists, policy forbidding shorthair wigs over long hair at weekend drills, not articulated in any approved military regulation, was not supported by any legitimate military need despite psychological arguments related to discipline and morale, and thus exceeded statutory authority. Id.

9. Persons affected by regulations

Under Navy Regulations, commanding officer of a naval installation had power to summarily withdraw permission of a civilian employee of a private cafeteria operator to enter the installation, upon determination that she failed to meet security requirements of the activity. Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, App.D.C. 1961, 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed. 2d 1230, motion denied 81 S.Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, rehearing denied 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

13. Instruction

Instruction by Bureau of Naval Personnel issued by Acting Chief of Naval Personnel was regulation having force of law and was, in legal effect, "in evidence" without offer as evidence, which was merely for convenience of trial court, and instruction should have been considered in construing enlistment extension agreement. Rehart v. Clark, C.A.Cal.1971, 448 F.2d 170.

§ 6015. Women members: duty; qualifications; restrictions

The Secretary of the Navy may prescribe the manner in which women officers appointed under section 5590 of this title, women warrant officers, and enlisted women members of the Regular Navy and the Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions.

As amended Oct. 20, 1978, Pub.L. 95–485, Title VIII, § 808, 92 Stat. 1623.

1978 Amendment. Pub.L. 95–485 substituted provision prohibiting assignment of women to duty on vessels or in aircraft engaged in combat missions or assignment, other than to temporary duty, on naval vessels except hospital ships, transports, and vessels of similar classification not expected to be assigned combat missions for provision prohibiting assignment of women to duty in aircraft engaged in combat missions or duty on naval vessels other than hospital ships or transports.

Index to Notes

½. Constitutionality
Provision in this section barring assignment of female personnel to duty on navy vessels other than hospital ships and transports violates equality principle embodied in U.S.C.A.Const. Amend. 5. Owens v. Brown, D.C.D.C.1978, 455 F. Supp. 291.

1. Judicial review
Constitutional validity of Marine Corps regulation which mandated the discharge of women marines for pregnancy was subject to judicial review. Crawford v. Cushman, C.A.Vt.1976, 531 F.2d 1114.

Under either traditional or strict scrutiny standard, congressional classification of men and women into two categories for service upon combat vessels mandated by statute which provides that women may not be assigned to duty on Navy vessels other than hospital ships and transports violated no equal protection rights of plaintiff, an unsuccessful applicant for NROTC four-year scholarship, and thus difference between number of scholarships awarded and standards of eligibility for men and women were rationally related to provision, maintenance, government and regulation of the Navy. Kovach v. Middendorf, D.C.Del.1976, 424 F.Supp. 72.

2. Waiver
Without independent legal advice, female marine's failure to object to her discharge, under Marine Corps regulation which mandated the discharge of women marines for pregnancy, could not be treated as a "knowing" waiver of objection. Crawford v. Cushman, C.A.Vt.1976, 531 F.2d 1114.

3. Regulations
While the Marine Corps may as a matter of substantive policy constitutionally be given ample latitude to discharge an employee for pregnancy, as for any other disability where mobility and readiness or ability to perform work is likely to be impaired for any substantial period of time, the area appears to be one where the military police formulation and application is constitutionally required to take the form of individual decision making since the ability of the individual employee to cope with the needs of the job is dependent upon her individual abilities. Crawford v. Cushman, C.A.Vt.1976, 531 F.2d 1114.

Marine Corps regulation which mandated the discharge of women marines for pregnancy could not rationally be justified on the basis of the administrative convenience of "knowing where your people are and their capacity to respond." Id.

4. Assignment of female personnel
Alleged morale and discipline problems caused by integration of men and women aboard navy ships furnished no basis for upholding ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports since whatever problems might arise from integrating ships and crews were matters that could be dealt with through appropriate training and planning. Owens v. Brown, D.C.D.C.1978, 455 F.Supp. 291.

Fact that military affairs were implicated did not mean that challenge to ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports raised a nonjusticiable political question. Id.

Likelihood of influencing legislative efforts to revise ban on assignment of female personnel to duty on navy vessels other than hospital ships and transports did not afford a principled basis for avoiding a determination of whether ban violated U.S.C.A.Const. Amend. 5. Id.

5. Class action
Action challenging bar on assignment of female personnel to duty on navy vessels other than hospital ships and transports was certified as class action, notwithstanding concern that some female personnel might not share representative plaintiff's desire to remove such bar, since issue was not whether Navy must assign female personnel to ship duty against their wishes but whether navy authorities must exclude women from ship assignments whether or not they wish to go to sea. Owens v. Brown, D.C.D.C.1978, 455 F.Supp. 291.

§ 6020. Repealed. Pub.L. 87–123, § 5(23), Aug. 3, 1961, 75 Stat. 266

Section, Act Aug. 10, 1956, c. 1041, 70A Stat. 376, provided for detail of Marine Corps officers for duty in the supply department for a period of four years.

§ 6023. Repealed. Pub.L. 92–168, § 2(1), Nov. 24, 1971, 85 Stat. 489

Section, Acts Aug. 10, 1956, c. 1041, 70A Stat. 376; Oct. 13, 1964, Pub.L. 88–647, Title III, § 301(15), 78 Stat. 1072, provided qualifications to receive aviation designation of naval aviator. See section 2003 of this title.

§ 6024. Aviation designations: naval flight officer

Any officer of the naval service may be designated a naval flight officer if he has successfully completed the course prescribed for naval flight officers.

As amended Feb. 26, 1970, Pub.L. 91–198, § 1(2), 84 Stat. 15.

1970 Amendment. Pub.L. 91–198 substituted "naval flight officer" for "naval aviation observer" wherever appearing and struck out requirement that such officer have been in the air at least 100 hours.

Legislative History. For legislative history and purpose of Pub.L. 91–198, see 1970 U.S.Code Cong. and Adm.News, p. 2446.

§ 6025. Repealed. Pub.L. 92–168, § 2(2), Nov. 24, 1971, 85 Stat. 489

Section, Act Aug. 10, 1956, c. 1041, 70A Stat. 377, provided qualifications to receive aviation designation of aviation pilot. See section 2003 of this title.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

August 17, 1981

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

Dear Mr. Chairman:

In the course of preparation for hearings on the nomination of Sandra D. O'Connor to be an Associate Justice of the United States Supreme Court, counsel requested that we prepare a briefing book for the use of the Committee.

The enclosed material includes the attributed article and judicial opinions of Judge O'Connor, as well as a balanced collection of the local (Arizona) and national press reports and analyses, both prior and subsequent to the nomination. The Introduction contains explanations of the various parts of the volume as well as necessary caveats. In addition we will submit a supplement to this volume including any subsequent decisions by the nominee and news reporting immediately prior to the hearings.

The legal material in this volume was prepared by Leland E. Beck, legislative attorney in the American Law Division. The press coverage was assembled by Shirley Loo, George H. Walser, John M. White and C. Lee Burwasser of the Library Services Division. If you have further questions regarding the nomination, please feel free to call Mr. Beck on 287-6413.

Sincerely,

Gilbert Gude

Gilbert Gude
Director

INTRODUCTION

In preparation for hearings on the nomination of Sandra Day O'Connor to be an Associate Justice of the United States Supreme Court, counsel requested that a briefing book be compiled for the use of the Committee on the Judiciary. This volume contains the one attributed article (page 3) and judicial opinions (in publication order, page 22) by Judge O'Connor, recorded remarks before the Arizona Senate (in chronological order, page 214), a balanced selection of news articles from local and national media about the nominee (in chronological order, page 246) and polls taken on the nomination (page 372).

Judge O'Connor has written thirty-three opinions on the appellate bench which are generally available as of the date of transmittal. It appears that none of these decisions have been reversed on appeal. These include twenty-nine opinions published in the West Publishing Company's National Reporter System (Pacific Reporter, Second Series) and four slip opinions retrieved through the Mead Data Corporation's LEXIS system. Other opinions may exist, although we consider that possibility unlikely unless the opinion is a memorandum decision distributed only to counsel. Because of the lag time in legal publishing, decisions and opinions issued in the last two months have not become available.

The material collected from the Journals of the Arizona Senate is of special note since it reflects the state of the art in most State legislatures. Only limited, and specifically requested, floor remarks are placed in the journal, particularly privileged remarks and explanations of votes. Thus the official Journal records only limited reflections of the views of the nominee. Other legislative activity must be gleaned from news reports.

The news materials collected for this volume have been provided by the morgues of the Arizona Daily Star; contemporary material has been culled from the Phoenix Republic, the Phoenix Gazette, and the national media subsequent to the nomination. Rather than attempting to provide a complete file of material from specific papers, which would necessarily include reduplication of wire stories as well as peripheral stories, we have attempted to provide a balanced and wide ranging collection arranged in chronological order. We consider these stories adequately reflect the detail and variety of news and analysis on the nominee. Inclusion or exclusion of particular articles in no way indicates factual accuracy of the reports.

Relevant portions of three national polls on the nomination are included: Gallup, Harris and NBC/Associated Press. These are included for informational purposes relating to the nomination process, not the nominee.

The materials in this volume are limited to those available on August 15, 1981, subject to supplementation prior to hearings on the nomination. Cases and opinions handed down after approximately May 17, 1981 have been requested from Judge O'Connor's chambers. News reports on one of these cases, however, do appear. This material also does not include Arizona Senate Journals for the First and Second Special Sessions of the Thirty-First Legislature (1973) or the Second Regular Session of the Thirty-First Legislature (1974). These volumes are missing from the Library of Congress collections and have been requested from the Arizona Secretary of State. Finally, only the major polls are presented; others may exist that have not come to our attention.

The full citation of the law review article and judicial opinions appears in the Table of Contents. The Index of Legal Subjects contains references to major topics keyed to the pagination of the primary material of the briefing

book -- the law review article, judicial opinions and legislative material. A separate index has been provided for the press coverage because this material is significantly different in scope and tenor than the statements by the nominee. These indexes provide ready references to subjects of interest to the Members. Several notes should be made about the organization of the legal index.

"Administrative law" includes all substantive and procedural aspects of Arizona administative law. Judge O'Connor does not appear to have considered any cases from the bench involving federal administrative law.

"Constitutional law" covers both Arizona and federal constitutional law, including, but not limited to, constitutional rights of criminal defendants, equal protection of the laws, etc. Arizona and federal constitutional law are indexed together due to the considerable overlap of specific provisions. In a number of cases, the provisions of the Arizona Constitution provide equivalent rights to the federal Constitution.

In one particular case, only the Arizona Constitution is cited and the decision appears to rest squarely on the State Constitution, although a parallel provision appears in the federal Constitution. Sende Vista Water Co., infra, at 99, 102 (takings and just compensation). On the other hand, certain federal Constitutional rights do not appear to have parallels in State Constitutions, although statutory requirements may be imposed. E.g., Brooks, infra, at 106, 115 - 116 (federal constitutional and state statutory claims for a speedy trial). Many cases, however, do not rest clearly on either the State or Federal Constitution.* Accordingly, constitutional questions have been indexed together.

---

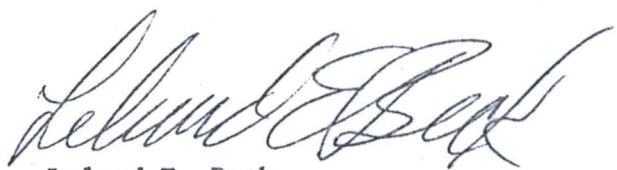
* Whether a decision relies on the United States Constitution or on independent and adequate State grounds is the functional test which the Supreme Court applies to determine whether it would have jurisdiction over that case. See, generally, R. Stern and E. Gressman, Supreme Court Practice (1978) 230-245.

"Civil Procedure" includes only non-constitutional, non-criminal questions of procedure before the Arizona courts. We note here the similarity between the Federal Rules of Civil Procedure and the Arizona Rules of Procedure for the Superior Courts. While the Arizona Supreme Court has not fully adopted the Federal Rules of Civil Procedure for use in the Arizona Superior Courts, many provisions of the federal rules have only been adjusted to accommodate Arizona terminology. Nonetheless, all discussions are founded on Arizona law.

"Criminal Law and Procedure" includes only non-constitutional discussions of criminal law and procedural rules. Accordingly, such subcategories as speedy trial appear under both constitutional and criminal law headings.

"Contracts" and "torts" are traditional categories of common law. Many concepts of contract and tort law are similar and have been merged in common law. Additionally, much of the common law in these areas has been displaced by statutory law. Thus, many cases are not easily categorized. The best characterization of traditional legal theory has been attempted, but in some cases the controlling principles of contracts and torts are the same.

Finally, the organization of the index can not be free of judgment. In this case, we have attempted to organize the index under the most functional legal framework.



Leland E. Beck
Legislative Attorney
American Law Division

Table of Contents

* * * * *

* * * * *

INDEX OF LEGAL SUBJECTS

[The development and limitations of this index are explained in the Introduction, supra, pages iv - vi.]

INDEX TO GENERAL SUBJECTS