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 26, 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 authored by Justice Brandeis in Erie Railroad

v. Tompkins, 304 U.S. 64 (1938). Because of the numerous legal and practical impediments to rectifying error by constitutional amendment, constitutional decisions should not, I believe, be wholly insulated from re-examination.

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

Memorandum

Subject	Date
Judge O'Connor	August 25, 1981

To Sherrie Cooksey
Special Assistant for
Legislative Affairs
The White House

From Carolyn B. Kuhl
Special Assistant to
the Attorney General

- 2927

As we discussed in our conversation this morning, I am sending you herewith a redrafted version of the letter to Senator Helms which incorporates the points you discussed with Judge O'Connor yesterday, and a working draft of a proposed response to Section III of the Questionnaire for Judicial Nominees.

Please let me have your comments.

including:

DRAFT 8-25-81

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United States Senate
Washington, D.C. 20510

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

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omit

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

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

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The duty of a nominee to refrain from making commitments to vote one side of a particular issue has a sound legal basis. A federal judge is required by law to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455; see Code of Judicial Conduct, Canon 3C. If a nominee to the Supreme Court were to state how he or she would rule in a particular case, it would suggest that as a Justice the nominee would not impartially consider the arguments presented by each litigant. If a nominee were to commit to a prospective ruling in response

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For all of the foregoing reasons it would in my view be inappropriate for me to state, at this juncture,

~~The first question set forth in your letter asks~~ my opinion of the correctness of Roe v. Wade and how I believe the case should have been decided. I must respectfully decline to answer that question because in my view it crosses the line between a request for an expression of general judicial philosophy and a request for an opinion as to the proper outcome of a case which may come before me should my nomination be confirmed. However, I can assure you that I am aware of the criticisms of Roe v. Wade with regard to its description of historical precedent and the conclusions to be drawn therefrom, with regard to the textual basis for the decision's interpretation of the Constitution, and with regard to the Court's apparent conception of its role in superintending the actions of state legislatures. These criticisms and possibly others may well be presented to the

Court as a basis for overruling Roe v. Wade should that decision be challenged. If I were on the Court at that time, I would carefully weigh these arguments and interpret the Constitution to the best of my ability, with due consideration for the framers' intent, the appropriate role of the judicial branch, and principles of federalism.

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Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

III. GENERAL (PUBLIC)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STARR

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

Dear Senator Helms:

Thank you again for your gracious courtesy and hospitality during our visit in your office on Thursday, July 16. At that time you furnished me with a letter asking me to address two questions, one concerning specific constitutional issues raised by the Roe v. Wade decision, and the other concerning my views as to the applicability of the doctrine of stare decisis in constitutional law.

After careful reflection, I remain of the view that a prospective Supreme Court Justice cannot make public statements on issues which might later come before the Supreme Court. Indeed, the very authority on which you rely, Justice Rehnquist's memorandum opinion in Laird v. Tatum, 408 U.S. 1, supports this position. In Laird v. Tatum, Justice Rehnquist drew a clear line between statements made by an individual prior to being named by the President for judicial appointment and statements made by a designee or nominee of the President. He recognized that statements about specific issues made by a nominee to the bench risk the appearance of being an improper commitment to vote in a particular way. As Justice Rehnquist stated:

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As does Justice Rehnquist, I believe that judges must decide legal issues or questions within the judicial process, not outside of it and unconstrained by the oath of office.

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

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

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

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

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

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

possibly cite more Senators

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

OMIT

save for colloquy's date

insert disqualification paragraph

The first question set forth in your letter asks my opinion as to the propriety of Roe v. Wade and how I believe the case should have been decided. I must (respectfully) decline to answer that question because in my view it crosses the line between a request for an expression of general judicial philosophy and a request for an opinion as to the proper outcome of a case which may come before (the Court.) ~~me should my nomination be confirmed.~~ ~~I can tell you only that~~ I am, (however, fully) aware of the criticisms of Roe v. Wade with regard to its description of historical precedent and the conclusions to be drawn therefrom, with regard to the textual basis for the decision's interpretation of the Constitution, and with regard to the concept of how the balance of federalism should be struck. ~~I expect that~~ These criticisms and (possibly) others will (likely) be presented to the Supreme Court as a basis for overruling Roe v. Wade should that decision be challenged. I ~~can promise~~ (assure) you that if I were on the Court at ~~that~~ (the) time (of any such challenge), I would carefully weigh these (and any other) arguments and (then) interpret the Constitution to the best of my ability, with due consideration for the framers' intent, the appropriate role of the judicial branch, and principles of federalism. ~~I cannot rightfully promise any more,~~ (disqualification sentence)

~~I can answer directly~~ Your second question concerning my view of the doctrine of stare decisis ~~since it~~ speaks to my judicial philosophy generally, not to a specific case or issue, (and I am therefore happy to answer it.) Our system of justice requires a profound respect for precedent. As Justice Cardozo once observed, if every

decision of a court were opened to re-examination in every case, the law would be hopelessly confused and virtually impossible to administer. I would, therefore, be ~~exceedingly~~ reluctant to discard precedent of the Supreme Court in approaching any case. However, (I am also mindful that) Justice Frankfurter, who spoke strongly of the importance of law as a force of coherence and continuity, 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 deemed wrong.

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

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

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

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

Office of the Attorney General
Washington, D. C. 20530

August 21, 1981

MEMORANDUM TO: Powell A. Moore
Deputy Assistant to the
President for Legislative Affairs
The White House

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

Enclosed for your comments is a redrafted version of the proposed letter to Senator Helms from Judge O'Connor. We have attempted to incorporate the suggestions you made in your telephone conversation with Ken Starr.

It seems to me it would be best not to make the statement that no nominee has ever opined as to how he would rule in a specific case. It would be possible to point to passages from a number of confirmation hearings where it appears the nominee is expressing a view on a specific issue rather than a general judicial philosophy. Justice Fortas, in hearings on his nomination to be Chief Justice, makes numerous statements concerning his views on particular cases.

Enclosure

Draft (August 21, 1981)

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

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transition of thoughts

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

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

The first question set forth in your letter asks my opinion as to the propriety of Roe v. Wade and how I believe the case should have been decided. I must decline to answer that question because in my view it crosses the line between a request for an expression of general judicial philosophy and a request for an opinion as to the proper outcome of a case which may come before me should my nomination be confirmed. I can tell you only 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 concept of how the balance of federalism should be struck. I expect that these criticisms and others will be presented to the Supreme Court as a basis for overruling Roe v. Wade should that decision be challenged. I can promise you that 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. I cannot rightfully promise any more.

I can answer directly your second question concerning my view of the doctrine of stare decisis since it speaks to my judicial philosophy generally, not to a specific case or issue. 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, 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 deemed wrong.

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

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

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

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

Office of the Attorney General
Washington, D. C. 20530

August 18, 1981

To Helms

MEMORANDUM TO: Powell A. Moore
Deputy Assistant to the
President for Legislative Affairs
The White House

FROM: Carolyn B. Kuhl
Special Assistant to
the Attorney General CBK

You may recall that on July 16, 1981, Senator Helms sent to Sandra O'Connor a letter requesting that she respond to a question concerning Roe v. Wade and a question concerning her views on the doctrine of stare decisis. Judge O'Connor has asked for our assistance in drafting a reply to Senator Helms' letter. I am enclosing for your comments a working draft of a proposed response. Also enclosed are copies of the Helms letter and an interim response which was sent by Judge O'Connor on July 22.

We would appreciate receiving any comments you may have as soon as possible. Judge O'Connor is anxious to begin formulating her reply.

Attachments

DRAFT

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

Dear Senator Helms:

I appreciate very much your 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 specific constitutional issues raised by the Roe v. Wade decision, and the other concerning my views as to the applicability of the doctrine of stare decisis in constitutional law.

I appreciate your duty as a Senator to probe the qualifications, including the judicial philosophy, of a nominee to the U.S. Supreme Court. It takes only a very brief review of prior nominees' confirmation hearings to illustrate how often that duty has seemed to conflict with the duty of the nominee to decline to answer questions which require him or her to commit to how a specific case should be decided were it to arise in the future. That the two duties may at times conflict does not suggest that either may be ignored.

The practice of a Supreme Court nominee to refrain from making commitments to vote one side of a particular issue is not of recent origin. This has long been the accepted

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

I do not believe that Justice Rehnquist's view of the propriety of a Supreme Court nominee asserting in advance what position he or she will take in a particular case is any different from that of Senator Chandler. In Laird v. Tatum, 408 U.S. 1, 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. No one comes to the Court, as Justice Rehnquist aptly stated, with a mind that is "completely tabula rasa". However, 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 clearly stated in the Laird case:

> In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge. 409 U.S. at 837 n. 5.

Judges, in sum, must decide legal issues or questions only within the judicial process, not outside of it and unconstrained by the oath of office.

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

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

Similarly, in response to questions from one Senator, Justice Rehnquist stated: "I know you realize, as well as I do, Senator Hart, my obligation to keep my response on the general level rather than trying to address specific questions. . . ." Id., at 30. Other nominees to the Supreme Court have scrupulously drawn the same line as did Justice Rehnquist, and the traditions of the Judiciary Committee, as evidenced by the colloquies of so many of its members in passing upon the qualifications of other nominees to the high court, attest eloquently to the necessity of rectitude and propriety in a nominee's responses to questions.

This much having been said, I turn to your specific questions. Your first question asks my opinion as to the propriety of Roe v. Wade and how I believe the case should have been decided. Unfortunately I must decline to answer that question because in my view it crosses the line between a request for an expression of general judicial philosophy and a request for an opinion as to the proper outcome of a case which is likely to come before me should my nomination be confirmed. I can tell you only 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

concept of how the balance of federalism should be struck. I expect that these criticisms and others will be presented to the Supreme Court as a basis for overruling Roe v. Wade should that decision be challenged. I can promise you that if I were on the Court at that time, I would study these stronger arguments as well as those in support of Roe v. Wade and interpret the Constitution to the best of my ability and with due consideration for the framers' intent.

I can answer directly your second question concerning my view of the doctrine of stare decisis since it speaks to my judicial philosophy generally, not to a specific case or issue. I believe that occasions may arise where a Justice of the Supreme Court should cast a vote contrary to precedent. When a Justice holds an unshakable conviction that a precedent was built upon flawed understandings of basic constitutional provisions or norms, then a Justice should cast a vote contrary to the prior decision of the Court. I believe, for * instance, that the Supreme Court properly reversed the doctrine of Swift v. Tyson, 16 Pet. 1 (1842), which held that federal courts possess general common law powers to make law in diversity cases, in the landmark opinion authored by Justice Brandeis in Erie Railroad v. Tompkins, 304 U.S. 64 (1938). Because of the numerous legal and practical impediments to rectifying error by constitutional amendment, constitutional decisions should not, in my judgment, be wholly insulated from reexamination.

Our system of justice requires a profound respect for precedent. As Justice Cardozo once observed, if every decision of a court were opened to reexamination 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, Justice Frankfurter, who spoke strongly of the importance of law as a force of coherence and continuity, distinguished between stare decisis in relation to constitutional issues, which he deemed to be open to reexamination because legislatures cannot displace a constitutional adjudication, and statutory issues, which he believed should not be reexamined merely because an earlier decision is later deemed wrong.

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

I think I would justify it in this manner: that presumably the nine Justices sitting on the Court at the time that Brown v. Board of Education came before them canvassed, indeed they canvassed to such an extent that they set the case down for reargument on specific issues, deeply canvassed the historical intent of the 14th amendment's framers, the debates on the floors of Congress, and concluded that the Court in Plessy against Ferguson had not correctly interpreted that.

Now, that seems to me a very proper role of the Court. Precedent is not sacrosanct in that sense. Due weight has to be given to the Justices of an earlier day who gave their conscientious interpretation, but if a recanvass of the historical intent of the framers indicates that that earlier Court was wrong, then the subsequent Court has no choice but to overrule the earlier decisions. Hearings at 167.

Thank you for this opportunity to respond to your concerns.

Sincerely,

Sandra Day O'Connor

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

July 22, 1981

The Honorable Jesse A. Helms
U. S. Senate
4213 Dirksen
Washington, D.C. 20510

Dear Senator Helms:

It was a pleasure for me to have the opportunity to meet with you last week. Thank you for taking the time to see me.

By this letter, I wish to acknowledge receipt of your letter of July 16, 1981, wherein you ask me certain questions regarding Roe v. Wade and the doctrine of stare decisis.

As we discussed, I have felt it improper for me to comment on issues which might come before the Supreme Court or to comment regarding cases which may be revisited by the Court. However, you have raised points and provided materials relating to my concern. I intend to review these materials and give them serious consideration.

Further, I intend to provide to you a complete response before commencement of the Committee on the Judiciary's hearings on my nomination.

Sincerely,

Sandra O'Connor

Sandra D. O'Connor

SO'C/bw

bcc: Kenneth W. Starr

JESSE HELMS
NORTH CAROLINA

United States Senate

WASHINGTON, D.C. 20510

July 16, 1981

The Honorable Sandra Day O'Connor
The United States Supreme Court
Washington, D.C.

Dear Judge O'Connor:

When a person of impeccable credentials and outstanding ability is nominated to a position on the highest court of the land, this nation has reason to be grateful to the President who makes such a nomination. In the case of your nomination, that expectation has been fulfilled.

However, as a Senator with a Constitutional obligation to engage in the giving of advise and consent, I am deeply concerned with the public controversy which has arisen over your legislative record in the Arizona Senate on the issue of abortion. The President has assured me that you are personally opposed to abortion, and that you have observed a conservative judicial philosophy in your tenure on the Arizona court. What is important, however, is not your personal philosophy now or in the past, but rather how your judicial philosophy might affect future rulings as a U.S. Supreme Court Justice. Therefore I am writing to you to give you the opportunity to make a written reply on a matter which is of fundamental importance to millions of Americans, born and unborn.

There has been some suggestion that it would be improper for you to make public statements on issues which might later come up before the Supreme Court. There is, in fact, no legal reason why it would be improper for a prospective Justice to make such statements. That issue was disposed of by Justice Rehnquist in his memorandum on Laird v. Tatum (408 U.S. 1), in which he denies a motion to recuse himself on the grounds of previous public statements. As the Justice said:

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses

> of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of Constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Indeed, as Justice Rehnquist concluded:

> It is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

I believe that this doctrine is sound. Therefore I address to you two questions which could help to relieve the public controversy which has surrounded your nomination:

1. Do you believe that the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), was a proper exercise of judicial authority under the Constitution and a correct interpretation of the Constiution? If not, how do you believe the Case should have been decided?

2. What is the proper application of the doctrine of stare decisis in constitutional law? Specifically, what is the duty of the United States Supreme Court when it is confronted with a case in which one of its own precedents clearly conflicts with the Constitution as the members of the Court believe it ought properly to be construed?

Your reply to these questions will be gratefully expected.

Sincerely,

Jesse Helms

JESSE HELMS:pd

No. 71-288. LAIRD, SECRETARY OF DEFENSE, ET AL. v. TATUM ET AL., 408 U. S. 1. Motion to withdraw opinion of this Court denied. Motion to recuse, *nunc pro tunc*, presented to MR. JUSTICE REHNQUIST, by him denied.*

Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

Respondents contend that because of testimony that I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings during the 92d Cong., 1st Sess., on Federal Data Banks, Computers and the Bill of Rights (hereinafter Hearings), and because of other statements I made in speeches related to this general subject, I should have

*[REPORTER'S NOTE: See also *post*, p. 901.]

[1] In a motion of this kind, there is not apt to be anything akin to the "record" that supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters that form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U. S. C. § 455, which provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motion summarize their factual contentions as follows:

> "Under the circumstances of the instant case, MR. JUSTICE REHNQUIST's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the sub-

[2] See S. Exec. Rep. No. 91-12, Nomination of Clement worth, Jr., 10-11.

ject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the department, but with those in other areas of the department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . . ." Hearings 619.

There is one reference to the case of *Tatum* v. *Laird* in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a

colloquy with Senator Ervin. The former appears as follows in the reported hearings:

> "However, in connection with the case of *Tatum* v. *Laird*, now pending in the U. S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed." Hearings 601.

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of *Laird* v. *Tatum*, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement that I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the Subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law, which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird* v. *Tatum*, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the Government's conduct of the case of *Laird* v. *Tatum*.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U. S. C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness . . . ."

Since I have neither been of counsel nor have I been a material witness in *Laird* v. *Tatum*, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of MR. JUSTICE WHITE shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States* v. *United States District Court*, 407 U. S. 297 (1972), for which I was not officially responsible in the Department

but with respect to which I assisted in drafting the brief, and in *S&E Contractors* v. *United States*, 406 U. S. 1 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird* v. *Tatum*, the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale L. J. 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Prob. 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various Departmental divisions, there is almost no connection." *Supra*, 35 Law & Contemp. Prob., at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very

similar situations differently. In *Schneiderman* v. *United States*, 320 U. S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U. S., at 207.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird* v. *Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Mr. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H. R. 2808, 78th Cong., 1st Sess., 24 (1943), quoted in Frank, *supra*, 56 Yale L. J., at 612 n. 26.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the popular-name index of the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S. Rep. No. 884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case that upheld the constitutionality of that Act. *United States* v. *Darby*, 312 U. S. 100 (1941), and in later cases construing it, including *Jewell Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U. S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Mr. Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. The Labor Injunction which he and Nathan Green wrote was considered a classic critique of the abuses by the fed-

[3] See denial of petition for rehearing in *Jewell Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U. S. 897 (1945) (Jackson, J., concurring).

eral courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Labor and the Law, in Felix Frankfurter The Judge 153, 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet, in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States* v. *Hutcheson*, 312 U. S. 219 (1941), Justice Frankfurter wrote the Court's opinion.

Mr. Justice Jackson in *McGrath* v. *Kristensen*, 340 U. S. 162 (1950), participated in a case raising exactly the same issue that he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U. S., at 176. Mr. Frank notes that Mr. Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled Liberty, Property, and Social Justice he discussed at some length the doctrine expounded in the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923). I think that one

would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Mr. Chief Justice Hughes wrote the Court's opinion in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and, more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." *Supra*, 35 Law & Contemp. Prob., at 50.

Not only is the sort of public-statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public-statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in th[illegible]n of respondents would much prefer to argue [illegible]

fore a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson;[4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Mr. Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

MR. JUSTICE DOUGLAS' statement about federal district judges in his dissenting opinion in *Chandler* v. *Judicial Council*, 398 U. S. 74, 137 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this

[4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in *Kristensen* does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

> when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policymaking divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue that later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e. g.*, the statement of Mr. Justice Harlan, joining in *Lewis* v. *Manufacturers National Bank*, 364 U. S. 603, 610 (1961). Indeed, there is [illegible]hty authority for this proposition even when the [illegible]

the same. Mr. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See *Worcester* v. *Street R. Co.*, 196 U. S. 539 (1905), reviewing 182 Mass. 49 (1902); *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903), reviewing 180 Mass. 170 (1901); *Glidden* v. *Harrington*, 189 U. S. 255 (1903), reviewing 179 Mass. 486 (1901); and *Williams* v. *Parker*, 188 U. S. 491 (1903), reviewing 174 Mass. 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong-minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." *Supra*, 35 Law & Contemp. Prob., at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself

[5] 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.

simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. *Edwards* v. *United States*, 334 F. 2d 360, 362 n. 2 (CA5 1964); *Tynan* v. *United States*, 126 U. S. App. D. C. 206, 376 F. 2d 761 (1967); *In re Union Leader Corp.*, 292 F. 2d 381 (CA1 1961); *Wolfson* v. *Palmieri*, 396 F. 2d 121 (CA2 1968); *Simmons* v. *United States*, 302 F. 2d 71 (CA3 1962); *United States* v. *Hoffa*, 382 F. 2d 856 (CA6 1967); *Tucker* v. *Kerner*, 186 F. 2d 79 (CA7 1950); *Walker* v. *Bishop*, 408 F. 2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal that may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e. g.*, *Tinker* v. *Des Moines School District*, 258 F. Supp. 971 (SD Iowa 1966), affirmed by an equally divided court, 383 F. 2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U. S. 503 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an

equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem oneself disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict between federal courts of appeals, the frequency of such instances is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification that I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U. S. C. § 453 that is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the

[6] *Branzburg* v. *Hayes*, 408 U. S. 665 (1972); *Gelbard* v. *United States*, 408 U. S. 41 (1972); *Evansville Airport* v. *Delta Airlines Inc.*, 405 U. S. 707 (1972).

practice of the former Justices of this Court guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is, denied.[7]

Probable Jurisdiction Noted or Postponed

No. 71–1476. GAFFNEY *v.* CUMMINGS ET AL. Appeal from D. C. Conn. Probable jurisdiction noted. Reported below: 341 F. Supp. 139.

No. 72–77. NORWOOD ET AL. *v.* HARRISON ET AL. Appeal from D. C. N. D. Miss. Probable jurisdiction noted. Reported below: 340 F. Supp. 1003.

[7] Petitioners in *Gravel* v. *United States*, 408 U. S. 606 (1972), have filed a petition for rehearing which asserts as one of the grounds that I should have disqualified myself in that case.* Because respondents' motion in *Laird* was addressed to me, and because it seemed to me to be seriously and responsibly urged, I have dealt with my reasons for denying it at some length. Because I believe that the petition for rehearing in *Gravel*, insofar as it deals with disqualification, possesses none of these characteristics, there is no occasion for me to treat it in a similar manner. Since such motions have in the past been treated by the Court as being addressed to the individual Justice involved, however, I do venture the observation that in my opinion the petition insofar as it relates to disqualification verges on the frivolous. While my peripheral advisory role in *New York Times Co.* v. *United States* 403 U. S. 713 (1971), would have warranted disqualification had I been on the Court when that case was heard, it could not conceivably warrant disqualification in *Gravel*, a different case raising entirely different constitutional issues.

*[REPORTER'S NOTE: See *post*, p. 902.]