

Your answers at this hearing, not your previous record, will determine my estimate of your position on this and other issues because I trust you and because I know you, like many others I have known, can have changed your mind and still be changing your mind on this issue. I believe the Congress has been changing its collective mind, as evidenced by the recent passage by the Senate of the Hyde amendment.

Each of us Senators on this committee must fulfill, according to his own conscience, his role as set forth in article 2, section 2 of our Constitution, and my vote will be a reflection not of my respect for you or President Reagan, but will reflect my best estimate of how your appointment would tend to affect the general welfare of this country.

It is my earnest hope that your responses will be neither broad nor bland, because I will base my single vote on those responses. Since I am not a lawyer, I would request, Mr. Chairman, that a statement by a constitutional lawyer, Mr. William Bentley Ball—which differs with some of the opening statements made today—be placed in the record. I ask unanimous consent that that be done.

The CHAIRMAN. Without objection, the balance of the statement by the distinguished Senator from Alabama will be placed in the record.

Senator DENTON. Thank you, Mr. Chairman.
[Material follows:]

PREPARED STATEMENT BY SENATOR JEREMIAH DENTON

Welcome Mrs. O'Connor: As I told you at our meeting in July, I am personally delighted that President Reagan has nominated a woman to be Associate Justice of the United States Supreme Court. For an attorney this is the highest tribute the government can bestow, and by his choice the President has reposed the highest trust in you, as an American, an attorney and as a jurist.

As you are very much aware, your nomination was greeted with what might be called mixed reviews, and quite frankly from information which has come to my attention it appears that President Reagan may have been misled by a July 7, 1981, report prepared by a senior Justice Department official. The report to which I refer has been thoroughly dissected by those in opposition to your nomination and while perhaps not dispositive of the issue, these analyses raise legitimate concerns in the minds of many with respect to your attitudes on such issues as abortion, the proposed Equal Rights Amendment, and your record while in the Arizona Senate. Moreover, if the memorandum is to be accepted at full value, then certain questions with respect to your credibility are apparent.

While I realize that people of good conscience can be in favor of abortion under certain circumstances, I firmly believe that this government is founded upon respect for the dignity of human kind, and that in my view those Americans who favor what has come to be known as "Pro-choice" abortion undermine this basic concept.

In my previous conversation with you I told you that I had not made a decision as to how I would vote on your nomination. I have still not made a decision. My judgment will be based on information which I have developed prior to these hearings together with my evaluation of your responses to questions put to you at the hearings. After all, the purpose of these hearings is not merely to confirm you, but to find out who you really are and what convictions you possess on great issues. The fact that you are a woman must not, in and of itself, dictate the result. We as Senators must fulfill our role of advising and consenting to the nomination of judges of the Supreme Court as set forth in Art. II, Section 2 of the Constitution. We cannot merely acquiesce in the selection of President Reagan no matter how highly we regard him and the quality of his leadership.

In closing let me say that it is my earnest hope that your responses will be neither broad nor bland, as a lack of knowledge or lack of specificity in answers could easily be perceived as a lack of qualification or of candor.

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

(By William Bentley Ball)¹

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

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

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

Philosophy is everything in dealing with the spacious provisions of the First Amendment, the Due Process Clauses, equal protection and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when, in these vital areas of the Constitution, there is really very little language to "strictly" construe. As to other areas of the constitution (e.g., Article 1, Sect. 4—"The Congress shall assemble at least once in every year . . ."), to speak of "strict construction" is also absurd, since everything is already "constructed".

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

Comment: "Mrs. O'Connor is said to be pro-abortion."

Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

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

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

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

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

What are the candidate's views on:

The proper role of administrative agencies and the assumption by them of powers not clearly delegated?

The use by IRS of the tax power in order to mold social views and practices?

The allowable reach of governmental control respecting family life?

Busing for desegregation?

The proper role of government with respect to non-tax supported, private religious schools?

Sex differentiation in private employments?

Freedon of religion and church-state separation?

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too—and important—would be questions to the candidate calling for agreement with, disagreement with, and

¹ Former chairman, Federal Bar Association Committee on Constitutional Law.