California Women Lawyers commends President Reagan for his selection of Judge Sandra Day O'Connor. Such a nomination demonstrates the administration's commitment to equal justice under law and recognition of the importance of an independent judiciary.

Sandra Day O'Connor will bring to the Court a unique combination of experience as a legislator, a government lawyer, a trial judge, and an appellate judge. The quality and breadth of her legal background evidence her outstanding credentials for this appointment. An honors graduate of Stanford University Law School, her entire legal career has been a progression of distinguished records of achievements and accomplishments. Her record reflects a commitment to the principle of equal justice under law.

California Women Lawyers supports the confirmation of Judge O'Connor because she is a highly capable and eminent jurist of outstanding quality. Sandra Day O'Connor is a person of intelligence, integrity, and discipline. Her presence as a Justice of our Nation's highest forum will serve as a model for all persons and will inure to the profound benefit of our society.

The CHAIRMAN. I do not believe there are any questions.

I want to thank you for appearing here today on behalf of your organization and presenting testimony. Thank you very much. You are now excused.

Our next witness is Gordon S. Jones, representing United Families of America.

Mr. Jones, come around. Mr. Jones, you have 5 minutes.

Hold up your hand and be sworn in.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF GORDON S. JONES, EXECUTIVE DIRECTOR, UNITED FAMILIES OF AMERICA

Mr. JONES. I do.

Mr. Chairman, my name is Gordon Jones. I am the executive director of United Families of America. I do have a prepared statement which I would like to have included in the record, and then I would like to make some separate statements, if that will be all right.

The CHAIRMAN. Without objection, that will be done. Try not to duplicate.

Mr. JONES. I will try not to duplicate.

Mr. Chairman, I also would like to congratulate you on the forthright statement you made about the propriety of the Supreme Court's action in 1973 in rendering the *Roe* v. *Wade* decision. I am a little bit afraid that you have disqualified yourself as a potential Supreme Court nominee, however, on the basis of testimony that we have heard over the last 3 days.

I confess, Mr. Chairman, that I am somewhat disappointed at the direction the hearings have taken, the apparent acquiescence in the idea that nominees to the Supreme Court should not be required or do not need to express their views on important constitutional and social issues.

In my prepared testimony I discussed some public polling data which indicate that the American people as a whole have lost

confidence in the Federal judiciary. The data in the poll, which was a recent poll conducted by the Sindlinger Corp., indicate that 90 percent of the American people do not think that the Federal judiciary reflects their views. As many as 80 percent would like to see jurisdiction withdrawn from the Federal courts in such sensitive areas as busing and abortion. Almost 70 percent would like to see Supreme Court Justices elected, and nearly three-quarters would favor seeing Justices of the Supreme Court stand for reconfirmation.

The performance of this committee and Judge O'Connor during the nomination proceedings can only, in my opinion, widen that gap between the people and their judges. In fact, it appears to United Families of America that the committee is in the process of completing a total abdication of final policymaking authority to the Federal courts in the United States.

Judge O'Connor asserted during her hearing that it would be inappropriate for her to comment on the most important issues facing the American people and their policymakers today. To a very great extent, that simple assertion has been enough to discourage even the most tenacious cross-examiner on the committee, including former district attorneys.

That principle has been asserted in the past, of course, by other nominees, though I find it nowhere justified in the Constitution, in statutes, or in canon, but never in the past has it been acquiesced in so completely. In the case of past nominees, either there was an adequate public record so that close questioning was not really needed, or members of the committee persisted anyway in examining the nominee until they got the answers that they wanted after all.

During the hearings in the last 3 days, Judge O'Connor refused to answer Senator Metzenbaum as to the constitutionality of antitrust policy. She refused to answer Senator Laxalt about the constitutionality of the exclusionary rule. She refused to answer Senator Hatch's questions about the constitutionality of affirmative action. She refused to answer Senator Grassley's questions about the legislative veto.

Senator Dole asked her about the rights of aliens, and she declined to give an opinion on the constitutionality of limitations on the rights of aliens. Senator Specter talked about setting bail, and she declined to answer questions in that respect. She declined to answer anybody's questions about *Roe* v. *Wade,* with the possible exception of Senator Mathias who apparently asked her during a private visit to his office what she thought about that, and she—according to the New York Times—told him that she would abide by that precedent.

The fact is, Mr. Chairman, that Federal judges are policymakers. They are policymakers, moreover, who sit totally outside the democratic process. We cannot vote on them. They are appointed essentially for life, and once they are there, they are beyond our reach. Our only hope is that Senators during the confirmation process will ask them the kinds of questions that will elicit from them their policy views on the important issues which they will deal with on the Supreme Court.

If Senators will do that and nominees will be forthcoming about their views, then the American people can determine whether the Senators are acting responsibly in voting to confirm those nominees. When you allow nominees to refuse to answer questions of this type, you deny us the opportunity to render a political judgment on the only possible object of that judgment, Senators seeking reelection.

In the very brief time that remains, I would like to distinguish between a nominee's personal views and what her views or his views are of what the Constitution says. I do not care what Judge O'Connor thinks about abortion. Frankly, she can run an abortion clinic on the side and it will not bother me, so long as she cannot find in the Constitution an absolute right to abortion, which is what the Supreme Court did in 1973.

I reiterate that the issue is not abortion but judicial activism. *Roe* v. *Wade* happens to be the worst example of judicial activism in this century but there are many other examples of it. What we need to know is what Judge O'Connor thinks about the Constitution. How does she regard that? What previously undiscovered rights does she find there that nobody noticed in the last 200 years?

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Jones, for your appearance here and the testimony you have given. You are now excused.

[Material follows:]

STATEMENT OF GORDON S. JONES, Executive Director

UNITED FAMILIES OF AMERICA

Mr. Chairman:

I am Gordon Jones, Executive Director of United Families of America. UFA is a grass-roots lobbying group concerned with the entire range of social policy affecting the American family. We very much appreciate this opportunity to appear before your Committee, to discuss the nomination of Sandra Day O'Connor to the Supreme Court of the United States, the present state of the federal judiciary, and the relationship between the two.

To begin with, Mr. Chairman, we submit that the federal judiciary is in trouble. A public opinion poll conducted in May by the Sindlinger organization reveals almost shocking mistrust of the federal judiciary by overwhelming majorities of the American people. In fact, that poll reveals that only 10% of the American people think that federal judges reflect their personal views.

The federal bench is, of course, the least democratic of our governmental institutions. Its members are appointed by the President, typically confirmed after only cursory examinations of their credentials by the Senate, an examination which almost never touches on their broad political and social philosophy, after which they serve essentially for life, unchecked by any other institution, unreachable by the citizens whose lives they so closely regulate. Theoretically, the federal judiciary is an anomaly in the American Republic, and has been recognized as such from the beginning. It is not surprising that the American people should feel so cut off from their ruling class of judges. It is perhaps surprising to learn to what lengths they are prepared to go to correct their alienation.

For example, according to the Sindlinger Poll, nearly three-quarters of all Americans would like to see federal judges reconfirmed from time to time; nearly 70% would actually like to see them elected, as many State judges are. Better than 80% would like to see jurisdiction over such sensitive issues as abortion, school busing, and school prayers withdrawn from the federal courts;

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80% would prevent the Supreme Court from overturning federal or State laws by less than a two-thirds vote; and a solid majority of 55% would like to see Congress be able to overturn Supreme Court decisions by a two-thirds vote.

These views of the American public clearly indicate the seriousness of the loss of faith experienced by the federal courts in recent years. Attacks on the Supreme Court are nothing new, of course, and I am not going to take the Committee's time to review them. That job has been done by such scholars as Louis Boudin, Sidney Hook, and Edwin S. Corwin, much better than I can do it, and I am sure the distinguished members of this Committee are already familiar with the philosophical issues here.

Nor would I like to suggest that United Families of America supports election or reconfirmation of federal judges. At this point, we are not suggesting remedies, merely pointing out that a dangerous situation exists, one that needs to be corrected before more drastic measures are taken against a judiciary which, unchecked, exercises intimate influence over the most basic institutions of our society. The influence of the courts, and in partiuclar the Supreme Court, is both direct and indirect, but it is pervasive. Writing in the current issue of The Public Interest, Mr. Edward A. Wynne describes the tenuous, but real, connection between decisions of the Court and the social attitudes of the American people. "Ultimately," he writes, "...the courts are significantly responsible for the present distressing situation in our schools. Courts, and judges, surely realize that their decisions not only shape case law, but also often determine climates of opinion. Those climates do not always bear a one-to-one correspondence to formal court decisions, but the relationship is usually traceable."

What Mr. Wynne says about the schools can be said, and has been said, about criminal law, about medical law, about regulatory law, and about every aspect of our increasingly legalistic society.

Thus it will always be when the makers of law are not responsible to those on whom the law must be enforced. And the federal courts are now the supreme makers of law in the United States, with all due deference to the members of this Committee, and the members of this Senate. In fact, it is largely due

to the deference of this body, this national legislature, that that situation has come about. Through acquiescence by Congress (not always silent), the Supreme Court has come to be the Supreme Lawgiver, and now sits as a sort of continuing Constitutional Convention shaping and re-shaping the supreme law of the land to fit the prejudices of the day, or rather, the prejudices of a majority of the Justices. Members of the Court itself have made that case even more strongly than I do today.

If we are not to resort to the drastic structural changes in the Court mentioned as desirable by respondents to the Sindlinger Poll, how are we to re-establish some connection between the average person and the rarefied atmosphere of the federal bench? One way is through confirmation hearings such as this one. But the hearings will have to be conducted properly: they will have to concentrate on the essentials, which are much more philosophical and social than technical and experiential.

Since the American people cannot vote on their federal judges, it is imperative that they be given some way to judge the Senators who do vote on them. If the American people want judges who are tough on criminals, the Senators have to be willing to ask questions of nominees which will expose their views on criminal law. Then if the Senators vote to confirm a nominee whose views are squishy soft, that Senator can be brought to account at the polls.

If the American people want judges who will be restrained in the creation of new constitutional rights, the members of this Committee have an obligation to ask questions about the nominee's judicial philosophy. They have an obligation to insist on answers to those questions. If the answers reveal a particularly inventive nominee, and the Senate wants to confirm anyway, the vote of the Senators in favor can be used by their future opponents at the polls, which is where we normally exercise political control over government.

Nominees must not be allowed to refuse to answer specific questions. No one is suggesting that a nominee actually promise a vote on any specific issue. But I think the members of the Senate Judiciary Committee are astute enough to frame issues that will elicit the desired information. It is the will

that has been lacking in the past.

The quintessential question for the purpose of revealing latent judicial activism is, of course, the Court's decision in The Abortion Cases, and that is why so much attention has been lavished on it during these hearings and since the nomination of Judge O'Connor. Roe v. Wade, handed down in 1973, is arguably the worst decision in the history of the Court; certainly it is the worst-reasoned, worst-argued decision of this century. That opinion is held not only by opponents of abortion, but by many of its supporters as well. Roe v. Wade has essentially no defenders as a matter of law, though it has many as a matter of policy.

But that is the point: Roe v. Wade was not a matter of law, but a matter of policy. In a policy determination the Supreme Court simply decided that there should be no restrictions on the liberty of abortion in the United States. It was a classic case of judicial legislation which remains a blot upon the books. In the case of a legislature which so egregiously misread the preferences of the American people, the recourse would be to the polls. But there are no polls which can reach Mr. Justice Blackmun. The author of this law sits beyond the reach of the people who pay his salary, who accord him deference, and who are forced to live (or in this case die) under his decree.

Roe v. Wade is an abortion case, but that is only incidental. The extension of judicial power would be as indefensible if the case involved contract law. In Roe v. Wade the Court simply invented a right that had not previously existed anywhere except in the wildest dreams of the National Abortion Rights Action League.

For those reasons, Mr. Chairman, UFA would argue that questions about Roe v. Wade are entirely appropriate. Not only are they appropriate, they are essential. We can tell more about the judicial philosophy of a nominee to the federal bench by the answers he or she gives to questions about Roe v. Wade than we can from answers to any other questions.

Specifically, Judge O'Connor should be asked whether Roe v. Wade was correctly decided. That question is just as legitimate as a question about the

correctness of the Dred Scott decision, or Plessy v. Ferguson, or Brown v. Board of Education. The intent of such a question is not a focus on a "single issue," unless the attitude of a nominee towards judicial lawmaking is a "single issue." If it is, it is certainly a "single issue" with which this Committee should be very much concerned.

If Judge O'Conner responds that Roe v. Wade was correctly decided, United Families of America would have to oppose the nomination. Moreover, we think it would be the duty of all the members of this Committee to oppose the nomination. Such an answer would reveal in Judge O'Connor the very kind of penchant for judicial activism and irresponsibility which produces polls such as the one mentioned earlier. It would tell us far more about her than she reveals in saying that she is "personally opposed" to abortion. That statement is totally irrelevant. We are, and you should be, far more concerned about what she thinks the Constitution says about abortion than about what she thinks about it.

Should she make such a response, the Right to Life movement would have an obvious obligation to hold responsible at the polls those Senators then voting to confirm Judge O'Connor's nomination. That much is obvious. Less obvious is the fact that every group and individual concerned about limitations on the federal judiciary would have an obligation to hold those Senators responsible. That is so because as I said, Roe v. Wade is only incidentally an abortion decision. It is the leading case on judicial activism.

Should Judge O'Connor respond that Roe v. Wade was incorrectly decided, it would remain to ascertain how she feels about the doctrine of stare decisis. While there is much merit in respect for precedent in many areas of the law, there is no place for it in matters of basic constitutional law, and decisions distorting the Constitution should not be left unchallenged and uncorrected. That is as true for Roe v. Wade as it was for Dred Scott, and I pair the two cases advisedly.

Finally, Mr. Chairman, United Families of America would like to urge this Committee to adopt this line of questioning for all nominees to the federal judiciary. One does not hire employees without some examination of their

suitability for the job. In the case of the federal bench, particularly the Supreme Court, the qualifications are restraint, conservatism, and an understanding of the organic, fragile nature of large and complex polities. Formal training and experience are interesting, but not determinative. Questions of social philosophy and economics are at the basis of the controversies imposing strains on the American Republic now, as throughout our history. Attitudes towards those questions cannot be ascertained by looking at law school records and decisions on employee compensation. In fact, where these questions are concerned, Sandra O'Connor's actions as a State legislator may be far more revealing. Certainly they are troubling to many of us concerned about the direction the federal bench has taken. Absent any development of her views, which can only be demonstrated under questioning by this Committee, we are forced to reach conclusions about her suitability on the basis of that record.

Farther down the road, this Committee should give serious attention to the nature of the crisis in the judiciary. Pending in Congress right now are several measures which would impose restrictions of one type or another on the federal judiciary. These measures are reactions to a judiciary gone wild, unchecked in the expression of its will, and without effective counterweights. If the Congress does not impose those counterweights, the fragile bond holding our polity together will come unglued, just as it did in 1776. The tyranny is not dissimilar. In both cases it was imposed by a governing body out of reach of its subjects.

If we stand in the current crisis as Sam Adams did in the earlier one, it is within the power of members of this Committee to act the part of William Pitt. May you be more successful than he was.

Thank you.