

NOMINATION OF SANDRA DAY O'CONNOR

THURSDAY, SEPTEMBER 10, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:08 a.m. in room 1202, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, Laxalt, Hatch, Dole, East, Grassley, Denton, Specter, Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Baucus, and Heflin.

Staff present: Vinton D. Lide, chief counsel; Quentin Crommelin, Jr., staff director; Duke Short, chief investigator; and Candie Bruse, chief clerk.

The CHAIRMAN. The Judiciary Committee will come to order. The questioning of Judge O'Connor will now continue. Senator Grassley of Iowa is next in line. Senator Grassley.

Judge O'Connor, I remind you that you are still under oath.

TESTIMONY OF SANDRA DAY O'CONNOR, OF ARIZONA, NOMINATED TO BE ASSOCIATE JUSTICE, U.S. SUPREME COURT— Resumed

Judge O'CONNOR. Yes, Mr. Chairman.

Senator GRASSLEY. Thank you, Mr. Chairman.

Welcome back, Judge O'Connor. According to the television last night, you did very well.

Unlike the other nominees, Judge O'Connor, you do not have a strong record on major judicial issues for us to review. That is not your fault; that is because you served on State courts as opposed to Federal courts. You have not served on the Federal court of appeals, as the Chief Justice did, or held the leadership position on policy matters that was evident from Justice Powell's position in the ABA or Justice Rehnquist's activities in the Justice Department.

All of us on this committee respect your obligation not to comment on certain matters but I hope that you will understand that in light of your lack of written record on major issues, it is our obligation in this hearing to attempt to insure that you do not prove as great a surprise to President Reagan as Earl Warren was to President Eisenhower. [Laughter.]

JUDICIAL PHILOSOPHY

Frankly, it has been my observation that every candidate for the Senate is a fiscal conservative and every nominee to the Supreme

Court is a strict constructionist but once they take their seat it may be an entirely different matter. That is true of the Senate as well as the Supreme Court. Therefore, this is really the only forum in which we as Senators can learn of your judicial philosophy, thereby allowing us to fulfill our duty in making a proper decision, and it is to that end that I proceed with some questioning.

I understand that part of your reason for not commenting on specific cases is that you may have to disqualify yourself from similar cases should they arise before the Court. As a part of your preparation for this hearing, did you read the statute that governs the kind of statements you are claiming privilege from making?

Judge O'CONNOR. Mr. Chairman and Senator Grassley, if you are referring to title 28, United States Code, section 455—

Senator GRASSLEY. Yes.

Judge O'CONNOR [continuing]. And the ABA canon 3(c), yes, I have read those. I have also, of course, been guided in large measure by my review of the positions taken by prior nominees to the Supreme Court when they have appeared before this body.

I am sure you know, Senator, that beginning with the earliest such occasions the nominees have felt reluctant to answer questions concerning issues that may come before the Court, and there are many expressions of that concern which have I think been called to our attention during the course of these proceedings.

Senator GRASSLEY. Are you familiar with Justice Rehnquist's comments in *Laird v. Tatum*, where respondents urged him to disqualify himself because of public statements he made about the constitutional issues that were raised in the case? He made these statements prior to his nomination as a Supreme Court Justice.

Justice Rehnquist's comments went on for 6 pages, citing not only the above statute but also various instances where Justices not only had commented publicly on substantive constitutional issues but actually had been principal authors of the laws that later came before the Supreme Court, before the Supreme Court decided the constitutionality of that law, for support for his position.

Have you reviewed the transcripts of confirmation hearings of other Court nominees who have appeared before this committee? You have indicated that perhaps you have done that.

Judge O'CONNOR. Yes, Senator Grassley, I have done that.

Senator GRASSLEY. As far as you know, is it true that no other member of the Supreme Court has ever had to disqualify himself from a case because of policy statements made outside of the courtroom?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I cannot answer that question. My review of the transcripts of the prior hearings reveals that the nominees have been rather careful in this area not to put themselves in that kind of a position.

In *Laird v. Tatum*, in which the question was raised and Justice Rehnquist had to address himself to it, it really related to certain statements that he had made prior to becoming a nominee for the Supreme Court. We do not live in a vacuum, of course, and I have served as a State legislator and as a trial court judge. Certainly, I would not expect that my statements or activities in that State legislative body or as a State trial court judge could fairly be said

to disqualify me from sitting on a case subsequently on the United States Supreme Court, when some of those same issues would subsequently be addressed.

Basically, that is what Justice Rehnquist was discussing in *Laird v. Tatum* but I think it might be useful to also quote Justice Rehnquist from the same case, when he was discussing the situation of a nominee at a hearing such as this, in which he said:

I would distinguish quite sharply between a public statement made prior to nomination for the bench on the one hand, and a public statement 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.

In that paragraph I think Justice Rehnquist did try to distinguish the situation to which you refer; namely, statements or conduct that occurred prior to becoming a nominee versus the process following the nomination.

Senator GRASSLEY. Could I suggest to you that you did not read the entire quote, because in *Laird* Rehnquist noted that as to disqualification there is no difference between a nominee's statements and prior statements.

Judge O'CONNOR. Mr. Chairman, Senator Grassley, the quote that I have read I thought did correctly reflect and quote Justice Rehnquist's view of the situation of the nominee at the hearing. Indeed, my review of his own confirmation hearing would lend some substance to that view, wherein he on occasion had to consider the same troubling questions that we are considering now in the sense that there were some things which might come before the Court which he felt he was unable to address directly.

Senator GRASSLEY. He differentiates between propriety as opposed to disqualification, but at this point I do not care to follow that particular point any more except to ask you, in your process of reviewing nominees' reactions before confirmation hearings, did you have an opportunity to read Justice Powell's comments on *Escobido* and *Miranda* in his confirmation hearings?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, yes, I did.

Senator GRASSLEY. I suppose, then, that you are aware of the fact that he did express an opinion and he was careful to make clear that it was at the time that he was head of or active in the ABA. At the time he said that he expressed the view that the minority opinions were much sounder than the majority opinions. He did express that in the confirmation hearings.

Judge O'CONNOR. Mr. Chairman, Senator Grassley, the practice of holding confirmation hearings really began with Justice Stone. It was dropped, I think, until Justice Frankfurter was nominated to the Court in 1937, and at the beginning of Justice Frankfurter's hearing he observed that he would not care to express his personal views on controversial issues affecting the Court.

When the Chief Justice, Chief Justice Berger was asked a question which might bear on how a conceivable case could be decided, he said,

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 before any other court on which I may sit. I think I must limit any comments in that way.

This is basically the thrust, Senator Grassley, of the nominees who have appeared before the Senate committees and have been questioned on matters which indeed might come before the Court.

Senator GRASSLEY. Do you feel that Justice Powell went further than he should have in his comments on the *Escobido* and *Miranda* case?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I am sure Justice Powell responded only in a manner which he felt was appropriate at the time.

Senator GRASSLEY. Judge O'Connor, could you tell us how many discussions you had with the President personally or by telephone prior to his announcement of your selection?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, yes: two.

Senator GRASSLEY. Can I ask you for how long a period of time those two were, approximately, in minutes?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, it would be really a speculation on my part because I was very engrossed, as you might imagine, in the conversation. I was not watching any clock or my watch.

We had a discussion at the White House—I am not certain how long that lasted—and we had a discussion on the telephone prior to the nomination.

Senator GRASSLEY. To the best of your recollection, what were some of the things that he asked you in those conversations?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I think it would not be proper for me to disclose the contents of private conversations which I had with the President about this matter.

Senator GRASSLEY. OK. Did he ask you any policy questions?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I really do not think that it is appropriate for me to relate what was stated, other than that I think it would be proper for me to assure you that I was not asked to make any commitments concerning any issue which might come before the Court.

Senator GRASSLEY. Would you repeat that, please?

Judge O'CONNOR. I was not asked to make any commitments, Senator Grassley, about what I would do or how I would resolve any issue to come before the Court. I think it would be proper for me to assure you of that.

Senator GRASSLEY. Well, could you generalize to any extent? Was any of the conversation that you had with the President similar to any of the things that the members of this committee are asking you?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I would suggest that I should not properly reveal the content of those conversations.

Senator GRASSLEY. Did the President ask you not to discuss that conversation?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I would suggest that I should not reveal the contents of the conversation but I am in no way suggesting that that was at his request. That is my perception of what is proper.

COURT-ORDERED BUSING

Senator GRASSLEY. Judge O'Connor, yesterday we heard your personal views on some issues. I really was hoping to have not your personal views but how you might express your judicial philosophy, and general approaches to things that might come before the Court.

You did give us your personal view on at least one issue, the subject of abortion. Since we are going to probably cast a vote for or against you based upon your personal views more so than statements of substance that we would get on issues that may come before the Court, could I ask you for your personal views on busing, forced busing?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I assume you mean in the context of the court-ordered busing in connection with school desegregation cases?

Senator GRASSLEY. Yes.

Judge O'CONNOR. Mr. Chairman, Senator Grassley, as you are probably aware, again any comments that I would make on this subject about my personal views have no place in my opinion in the resolution of any legal issues that might come before the Court.

Senator GRASSLEY. OK. No; I want your personal views in the same vein, in the same context and in the same environment you gave us your personal views on abortion. I would like to have your personal views on busing.

Judge O'CONNOR. Speaking to that end, perhaps illustrative of that is the position that I did take in the legislature when I had occasion to vote in favor of a memorial that requested action to be taken at the Federal level to terminate the use of forced busing in desegregation cases.

This is a matter of concern, I think, to many people. The transportation of students over long distances and in a time-consuming process in an effort to get them to school can be a very disruptive part of any child's educational program.

In that perhaps I am influenced a little bit by my own experience. I grew up in a very remote part of Arizona and we were not near any school. It bothered me to be away from home to attend school, which I had been from kindergarten on. In the eighth grade I attempted to live at home on the ranch and ride a schoolbus to get to school. It involved a 75-mile trip each day, round trip, that is, and I found that I had to leave home before daylight and get home after dark.

I found that very disturbing to me as a child, and I am sure that other children who have had to ride long distances on buses have shared that experience. I just think that it is not a system that often is terribly beneficial to the child.

Senator GRASSLEY. Thank you, Judge O'Connor. My time is up.

The CHAIRMAN. The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge O'Connor, following the line of questioning that Senator Grassley pursued in regard to your meetings and conversation with the President, did the President offer you any jellybeans? [Laughter.]