

Senator DENTON. Sir, I was informed that there is a provision when you have a committee report for including supplementary views, and that was the reason for my request.

The CHAIRMAN. That is correct. Any Senator who wishes to state supplementary views to the majority of the committee report will have the opportunity to do so.

If no other Senator has any other questions now, we are going to excuse Judge O'Connor.

COMMENDATION OF WITNESS

Judge O'Connor, before you leave I want to say that the committee as a whole I am sure has been deeply impressed with your intellect and with your candidness, with your capacity, with your dedication. We feel if the Senate confirms you here that you will make an outstanding Associate Justice of the U.S. Supreme Court.

Judge O'CONNOR. Thank you, Mr. Chairman, and thank all the members of the committee and you for the courtesy shown to me during these proceedings. I appreciate that very much.

The CHAIRMAN. We will now hear from other witnesses. The next witness is the Governor of Arizona, the Honorable Bruce Babbitt, if he will come around and take the witness stand.

Governor Babbitt of Arizona, will you stand and be sworn?

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?

Governor BABBITT. I do.

The CHAIRMAN. Have a seat. Governor, we will be glad to hear any statement you wish to make.

TESTIMONY OF HON. BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA

Governor BABBITT. Mr. Chairman, committee members, it is a great honor for me to appear before you as Governor of Arizona to testify on behalf of the President's nomination of Judge O'Connor.

I have a written statement which I will submit for the record, and in lieu of reading that I would like to simply summarize briefly a few thoughts about this nomination.

The committee has heard and will continue to hear from many witnesses who will testify to Judge O'Connor's exemplary skills as a legislator, a judge, a lawyer, legal scholar, community leader, and family leader. I do not intend to cover that ground. I believe that even those who are appearing in ostensible opposition to this nomination concede her exemplary character, intellect, and personal qualifications to be confirmed to the Supreme Court of the United States.

In lieu of that I would like briefly to cover two other subjects: The first, why it is that I appointed her to the Arizona Court of Appeals several years ago; and, second, what I believe this nomination means to the Governors of the 50 States of this federal Union.

The name of Judge O'Connor came to me in October 1979 as one of three names on a merit selection list from which I had complete discretion to name a judge for the appellate court vacancy. Now I found myself at that time on ground somewhat similar to that

occupied by Reverend Falwell, Dr. Gerster, and others. Judge O'Connor had a splendid and productive career as the leader, the legislative leader of the Republican Party in Arizona. I was a Democratic Governor. The other two names on the list were distinguished and qualified Democrats.

I had occasion to consider how it is that a decision of this type is made, and I had occasion to reflect on the fact that we had been not infrequently political opponents. I had occasion to reflect on the thousands of votes that she had cast as a member of the Arizona Legislature, a good many of which I took exception with.

It quickly occurred to me that however appropriate it may be to compile a scorecard of votes taken on the many and diverse issues that confront a legislator, however appropriate it might be to do that to elect or judge a Governor or a Senator, that the appointment of a judge was a manifestly different process. It was not a political process of compiling scorecards, and I submit then and now that there are two considerations, considerations which I applied.

The first and obvious one is the character, intellectual ability, and judicial temperament of the candidate. I believe those issues have been covered. They are obvious. I felt then and now that from the written record and from the testimony you will hear, that she possesses those in ample quantity beyond any conceivable doubt.

The second legitimate question that I posed prior to making that appointment was this issue of judicial philosophy, an important one, an important one to me as Governor. I believed then and now that Judge O'Connor is a judicial conservative, and I use "conservative" in the old and true and institutional sense of that word, a quality I think perhaps best expressed in the decisions of Justice Frankfurter, a quality that perhaps has been missing in recent decades, or at least not fully present in recent decades in the U.S. Supreme Court and elsewhere in this land.

I believed then and now that she possesses the qualities of a judicial conservative, with all of the implications that that phrase has as we enter into a new decade where this issue of federalism, of the role of the three branches of government and the interplay between Federal and State governments is rapidly coming to the fore as one of the great and important issues of our time.

Lastly, Mr. Chairman, committee members, I would like to suggest what this nomination by the President means to the 50 Governors of this Republic, partners in this federal system mandated by the Constitution of the United States. I believe I speak for all of the Governors of this Union when I say that, like the President himself, we have become increasingly concerned about the status and the quality of the federal system.

Like the President, we have come to believe with increasing strength and conviction that the system has become unbalanced, that the Federal side of the system over the last few decades—through judicial activism, through activism in the U.S. Congress—has tipped to the point of eroding this fine balance that was contemplated by the drafters of the Constitution.

Believing that, I believe that the Governors of this Nation take great encouragement and great heart in the President's nomination of Judge O'Connor. We recognize as, Mr. Chairman, you your-

self pointed out several days ago, this is the first time in 24 years that a Justice nominee has come before this committee with a background in the administration of a State court system, the only judicial forum in this constitutional Republic where all of the matters of daily life and business and social intercourse are fit and proper subjects for judicial resolution under our Constitution.

We take heart in the fact that for the first time in 42 years a candidate comes before this committee with legislative experience, again, legislative experience on the front lines in a forum under our Constitution where all the matters of daily life are presented as issues of first import, of general import, without the restrictions that inevitably attend consideration of these issues at the Federal legislative or judicial level.

It is for this reason, Mr. Chairman, that I believe the President has uniquely selected a nominee for this season in our constitutional and legal history. It is for this reason that I recognize with many of you that this is indeed a historic occasion, and I simply urge this committee to confirm the President's nomination unanimously.

Thank you very much.

The CHAIRMAN. Thank you, Governor.

Are there any questions by any member of the committee?

Senator BIDEN. I have one question.

The CHAIRMAN. The Senator from Delaware.

Senator BIDEN. Governor, thank you. It is good to see you again. My only question is, How many more Arizona residents do you have ready for us for the Supreme Court? [Laughter.]

Governor BABBITT. There are more in line, Senator.

Senator BIDEN. Nice of you to come, Governor.

Governor BABBITT. Thank you.

Senator DECONCINI. Mr. Chairman?

The CHAIRMAN. The Senator from Arizona.

Senator DECONCINI. Mr. Chairman.

Thank you, Governor Babbitt, for being here. I know with the business of your office, the reapportionment that is under way and different things, to take the time to come out here—

Governor BABBITT. Senator DeConcini, excuse me. Let me assure you that your district is safe. [Laughter.]

Senator DECONCINI. That was the question: I wanted to be sure that you were not trying to make three Senators.

I want to point out to the committee that Governor Babbitt has established a policy for some time, since he has been in office and even before when he was an attorney general, to select judges on their merits. He has appointed a number of Republican judges to the appellate court and the superior court in Arizona, Sandra O'Connor being only one—obviously an outstanding example for all State Governors and one that I truly believe the President looked at closely in his selection process.

I am very proud that Arizona has been able to step out of the political arena of selecting judges. Indeed, Governor Babbitt deserves the great credit. I wanted to call that to the attention of my colleagues here and for the record.

Thank you, Governor.

Governor BABBITT. Thank you, sir.

The CHAIRMAN. Governor, congratulations on selecting judges on their merit, including the Republicans. [Laughter.]

If there are no other questions, we will now excuse you. Thank you very much for your appearance.

Governor BABBITT. Mr. Chairman, thank you.

[Material follows:]

Statement submitted by
Arizona Governor Bruce Babbitt
to Senate Judiciary Committee
September 11, 1981

Mr. Chairman, Members of the Senate Judiciary Committee.

I am honored to appear before this Committee to testify on behalf of Judge Sandra Day O'Connor as President Reagan's nominee to the United States Supreme Court.

This Committee will hear from many witnesses regarding Judge O'Connor's outstanding record as student and law review editor, her exemplary family life, her achievements as a State Legislator and Senate Majority Leader, Prosecutor, private practitioner, Assistant State Attorney General, Trial Court Judge, Appellate Court Judge, and community leader. The richness, diversity and depth of her experience and her impeccable character have been attested by all, even those who appear in ostensible opposition to her nomination.

I appear today sharing some common ground with Reverend Falwell, Dr. Gerster and Mr. Lofton for I too have had my differences with Judge O'Connor. Prior to becoming a judge, Mrs. O'Connor served as the Republican Majority Leader of the Arizona Legislature. I am a Democrat.

Two years ago, in October of 1979, I had occasion to reflect seriously on our political differences when her name appeared on a list of three lawyers, two Democrats and one Republican, submitted to me by a merit panel for a seat on the Arizona Court of Appeals. Under the Arizona Constitution, I had complete discretion to select from that list. I selected Mrs. O'Connor despite the fact that I did not share many of her political views. I selected her even though I could find fault with some or even many of the thousands of votes she had cast during her legislative career.

It occurred to me then that compiling a scorecard of legislative votes may be the correct way to select a Senator or a

Governor. But it is manifestly the wrong way to select a judge. The judicial function is distinctive, separate and apart from the legislative function. The judge's job is not to compile a score-card for review by the Americans for Democratic Action or the Americans for Constitutional Action; it is to defend and interpret the Constitution and laws of the United States.

The criteria that I applied to select Mrs. O'Connor over two fellow Democrats were essentially two. First, does she possess the necessary traits of intellect, character, legal excellence and judicial temperament? The answer was and is, yes, clearly manifest by both the paper record and the witnesses before this Committee.

The second proper question is whether she possesses a judicial philosophy acceptable to those who make the appointment. My answer to that question was again, yes. Mrs. O'Connor is a judicial conservative in the older and institutional meaning of that word, the meaning best expressed for me in the opinions of Justice Frankfurter. She has a strong sense of the tripartite nature of American government, of the delicate lines between judicial construction and judicial invention, and a feeling for the inherent limits within which the branches of government must function if we are to maintain that balance and tension that preserves our liberties and makes government work.

I would suggest one reason why this nomination has been received so enthusiastically by the Governors of the 50 states. Like the President, the Governors believe that our Federal system, that two-tier division of powers between the national government and the states, has in recent decades become seriously unbalanced. A great deal of the erosion of our Federal system can be laid directly at the feet of the United States Congress. However, much of the problem also lies with the United States Supreme Court. The Court in pursuit of worthy goals has not infrequently extended the reach of Federal power in ways that have compromised and undermined the ability of state courts, state legislatures and Governors to carry out the responsibilities assigned to them by the Constitution.

Many of us who believe that the time is now at hand to re-examine these issues of constitutional ends and means are greatly encouraged by this nomination.

Judge O'Connor is the splendid product of a new generation of state and local leaders who know the Constitution, who advocate good and competent government, who believe in civil rights and whose motives are untinged by racism, and who also understand what John Dickinson meant when he compared the Federal system to a Newtonian solar system, "in which the states were the planets and ought to be left to move freely in their proper orbits."

As your Chairman has pointed out, for the first time in 24 years a nominee for the Supreme Court comes before this Committee with experience gained in the turbulent front lines of a state court, the only courts of general jurisdiction in this Republic. And for the first time in 42 years, a candidate appears before this Committee with experience in a state legislature, the only forums in this Republic where all the great and mundane matters of daily life and business surface to be debated and acted upon. However divergent this rich and variegated experience may be from more common entry points, such as Wall Street, the Justice Department and the Federal bench, I believe that the Supreme Court, its judicial business and our aspirations for a renewal of the Federal system will be greatly enhanced by the addition of Sandra Day O'Connor.