I realize that there are some members of the Senate who do not share our beliefs that abortion is the most basic of all civil rights.

There is, however, general agreement that misrepresentation, evasion, and distortion of fact do a disservice to the selection of a justice to the nation's highest court.

I have every confidence that this committee will make a full investigation of this deeply flawed and seriously misleading Justice Department memorandum.

Testimony of
John C. Willke, M. D.

September 10, 1981
Senate Judiciary Committee

I am here to speak for the National Right to Life Committee. Our organization is composed of the fifty state right-to-life organizations which contain almost 2000 active chapters and an estimated membership in the millions.

We are concerned.

We exist as a movement because of the 1973 Roe v. Wade decision of the U.S. Supreme Court. Just as the Dred Scott decision of 1857 was the civil rights outrage of that century, so we see Roe v. Wade as a similar blot upon our nation in this century. In Dred Scott, the Supreme Court ruled that an entire class of living humans were chattel. This decision denied Black Americans equal protection by law.

Let us flash back in time to the post-Civil War era, and ask a question. Suppose a nominee to the U.S. Supreme Court was being questioned and his qualifications examined. Suppose that person, as a legislator, had previously voted for the continuation of slavery, not once but twice. Suppose also that he had voted against a memorial resolution asking the Congress to pass a constitutional amendment to abolish slavery, again voting for this discrimination not once but twice.

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Would it not be a proper question to inquire whether that nominee still held to his pro-slavery convictions?

We believe so. We also believe that if such earlier actions were not totally repudiated by that nominee, that nominee would be disqualified from sitting on the Supreme Court.

A century has passed. Another Supreme Court, by a similar 7-2 decision, ruled (in Roe v. Wade) that another entire class of living humans were to be reduced to the status of property of the "owner" (the mother). Further, the mother was given a newly created "right to privacy," a right that allowed her to destroy that property--her unborn child--if she wished.

Because of this ruling and because of the Court's interpretation of the word "health," we have seen the body count of unborn babies climb to its present level of 1½ million annually.

There are indeed some "single issues" which are so fundamental that they ought to be weighed very heavily in considering any lifetime appointment to the federal bench--among these, racial justice. In 1948 G. Harrold Carswell gave a speech in which he said, "I believe that segregation of the races is the proper and the only practical and correct way of life in our states." During Senate consideration of his nomination to the U.S. Supreme Court 22 years later, Judge Carswell completely repudiated this position. Yet this matter weighed heavily upon the minds of many senators, and quite properly so. Concern over Carswell's commitment to racial justice played an important role in the rejection of his nomination.

We believe that recognition of the right to life of unborn children is, likewise, a fundamental issue. Those who do not recognize this fundamental right should be considered disqualified for the federal bench.

A nominee sits before this distinguished body, which will decide whether she is qualified to sit upon the U. S. Supreme Court. There are serious questions to ask. Her record as a state legislator is disturbing.

In 1970, Mrs. Sandra O'Connor was a state senator in Arizona. Only one-third of the states had legalized abortion, most laws being highly restrictive. New York had just legalized abortion-on-demand until 24 weeks, and was to be the second last state to legalize abortion by statute. Thirty-three states were to vote on such proposed laws and to defeat them. The nation had been shocked by the radical New York law and had already read of babies surviving abortion attempts.

In this climate, Senator O'Connor voted for a bill that would have legalized abortion-on-demand in her state for the entire nine months of pregnancy. No statute remotely as radical had been seriously considered elsewhere.

This was not a casual vote on the floor during a busy legislative session. We can all understand how, in the push of a busy session, a lawmaker can at times vote without full knowledge of a bill's dimensions, and we can certainly understand how one might not always remember such a vote.

But Senator O'Connor was a member of the Judiciary Committee that had studied the bill. Hers was no casual action. Clearly, it was a deliberate vote cast with full awareness of the reach of that legislation. Furthermore, she voted for the bill a second time in a later caucus.

A few weeks ago, the nation was informed through the "Starr Memo" that Mrs. O'Connor did not remember her votes on this bill.

As events transpired, the Supreme Court in 1973 actually legalized abortion through the entire nine months of pregnancy. In 1974, the Arizona House of Representatives, by a wide margin, passed a memorialization resolution calling upon Congress to reverse that radical abortion ruling through a Constitutional Amendment.

Once again Senator O'Connor, as a member of that state's Judiciary Committee, had the issue placed before her. Once again, by voting against that resolution (even after it was amended to

exclude cases of rape and incest), Mrs. O'Connor placed herself in favor of abortion, essentially on-demand, through the ninth month of pregnancy. Again, she repeated her pro-abortion vote in caucus.

But Mrs. O'Connor has more recently stated that she is "personally opposed" to abortion. I have never met an abortion clinic operator or an abortionist who was not "personally opposed." The simple fact is that such a statement often is totally meaningless as an indicator as to how such a person views abortion for others.

There is another important point. The Supreme Court's 1973 abortion decisions had no authentic basis in the Constitution. Rather, they constituted the most extreme examples of "judicial activism" by the Supreme Court which we have seen in this century--"an exercise in raw judicial power," as Justice Byron White said in his dissent to Roe v. Wade. Even many "pro-choice" legal scholars recognize that these decisions were without constitutional foundation.

Completely aside from the question of whether or not Mrs. O'Connor personally believes that abortion should be legal or not, it is essential that the Judiciary Committee determine how she views the constitutionality of the Supreme Court's abortion decisions. If O'Connor regards the 1973 abortion decisions as constitutional decisions, and as binding precedents, then she is not in fact a judicial "constructionist," and her nomination should be rejected for that reason alone.

We recognize the possibility that a person might state that she was "personally opposed," that she might favor permissive abortion laws, but at the same time could still view Roe v. Wade as seriously flawed, an unwarranted exercise of "raw judicial power," and an unconstitutional decision that must be reversed. If in fact such was the case, we would be pleased to reevaluate our position of opposition to her appointment.

In closing, I must say that the lady sitting next to me (Dr. Carolyn Gerster) is probably no more or less perfect than the rest of us. She undoubtedly has her faults. One fault that she does not have, however, and none of us who know her could even conceive of her having, is that of being "vindictive."

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APPENDIX

1. Article from the Arizona Republic (April 30, 1970), reporting that Sen. Sandra O'Connor voted for HB 20 to legalize all abortions performed by a physician. (The bill later died in the Senate Rules Committee.)
2. Text of SB 1190, a 1973 bill to promote "family planning" which O'Connor co-sponsored.
3. Editorial opposing O'Connor's family planning bill (Arizona Republic, March 5, 1973), warning that the bill appeared to have no purpose "unless energetic state promotion of abortion is the eventual goal."
4. Page from Senate committee minutes, supporting contention that SB 1190 would have included abortion.
5. Arizona Senate Journal pages showing votes pro and con on 1974 measure to prohibit abortions at the University of Arizona hospital except to save the life of the mother (SB 1245).
6. Text of the restriction attached to SB 1245.
7. Text of 1974 House Memorial 2002, calling for Congress to enact a Human Life Amendment.
8. Phoenix Gazette article (April 23, 1974) reporting O'Connor's vote against HM 2002 in the Senate Judiciary Committee; Phoenix Gazette article (May 7, 1974) in which O'Connor claims to oppose blocking HM 2002 in the GOP Senate Caucus; and Phoenix Gazette article (May 15, 1974)charging the GOP Senate Caucus with blocking HM 2002.
9. Notarized statement by former Arizona State Senator Trudy Camping, stating that O'Connor voted against HM 2002 in Caucus.
10. Justice Department memo written on July 7 by Kenneth Starr.