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than 80% would like to see jurisdiction over such sensitive issues as abortion, school busing, and school prayers withdrawn from the federal courts;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.