TESTIMONY

of

STEPHEN GILLERS,

COMMITTEE FOR PUBLIC JUSTICE

I am an Associate Professor of Law at New York University. I am testifying on behalf of the Committee for Public Justice, of which I am a co-chairman. The Committee for Public Justice, formed in 1970, is a group of writers, lawyers, scientists, educators and other socially interested persons whose primary purpose is to call attention to dangers to public justice in American society. It has conducted studies of the Federal Bureau of Investigation, the Central Intelligence Agency, the Justice Department, the use and abuse of grand jury power, government secrecy, and the judicial appointment process. Since 1977, the Committee has published an occasional report entitled Justice Department Watch, which is read in and outside the Justice Department and excerpts from which have been printed in many newspapers and periodicals nationwide. One of the Committee's current projects is Supreme Court Watch, under which it will monitor appointments to the United States Supreme Court. It is in conjunction with that project that I testify here today.

I am testifying in support of the confirmation of Sandra Day O'Connor to the United States Supreme Court. On the other hand, if the Committee will indulge a fine distinction, I do not so much testify in support of Sandra O'Connor personally, but rather in support of the proper exercise of the Senate's institutional role in giving the President's appointment its "Advice and Consent."

A Brief History

The Senate has not been consistent in the standards it has used for weighing Supreme Court nominations. About the only definable trend which a reading of history reveals is that the rate of denial of confirmation has decreased markedly in this century.

There have been 101 men who have sat on the United States Supreme Court. There have been 51 nominations and 47 confirmations this century. Four appointees -- John J. Parker in 1930, Abe Fortas (to Chief Justice) in 1968, Clement F. Haynsworth in 1969, and G. Harrold Carswell in 1970 -- have not been confirmed. In other words, there has been one rejection or withdrawal for every 12 confirmations.

Prior to 1900, the story was different. In this earlier period, 53 men were confirmed to sit on the Supreme Court, but 20 nominations were refused. Sometimes the refusal occurred as an actual rejection after a vote. At other times the nominee's name was withdrawn when it became apparent that there would not be a confirmation. At still other times, the vote on confirmation was postponed indefinitely.

But the critical fact is that prior to 1900 there were two failures to confirm for every five confirmations, a markedly higher ratio than has occurred in this century.

As I have said, it is not easy to find a discrete pattern in the Senate's refusals to confirm. Sometimes the apparent reason was enmity between the Senate, which was controlled by one party, and the President, who was a member of another party. Occasionally there was personal or political hostility to a particular nominee. There is a higher rejection rate for nominations coming in the final year of a President's term. A candidate's perceived mediocrity or lack of integrity has sometimes been a contributing factor in the refusal to confirm. But it does not appear that a nominee's position on particular, current issues of constitutional law has played an express role in the Senate's decision to reject. This conclusion is certainly true in this century.

In sum, there have been 24 rejections and 101 confirmations. Prior to 1900, rejections occurred at a rate more than five times as frequently as they have thereafter. Of the 24 rejections, half represented nominations by five Presidents (Tyler, Fillmore, Grant, Cleveland, and Nixon), each of whom had two or more nominees rejected.

The Constitutional Convention did not clearly articulate the role the Senate was expected to play in exercising its advice and consent power. The decision to have the President appoint and the Senate confirm was an apparent compromise between those who wanted the appointment power to lie with the President alone and those who wanted to give it solely to the Senate. Until the very end, it seemed that the Convention was moving toward the latter position. In his diaries, Madison says that the requirements of confirmation would protect against "incautious or corrupt nomination" and against "flagrant partiality or error." In the Federalist Papers, Hamilton wrote that the Senate could be expected to weigh a nominee's "merit" and reject the appointment of "unfit characters." Although the quoted language is not self-evident, neither commentator seemed to envision an expansive role for the Senate.

The Senate's Role

In the balance of my testimony, I would like to discuss three subjects. I will first identify what I consider to be the clear areas of senatorial concern in deciding whether to vote to confirm a person as a Justice of the United States Supreme Court. I will then attempt to identify what I consider to be a "gray area," an area in which each Senator must conscientiously exercise his or her best judgment consistent with the Senate's institutional responsibility as a "confirming" body and not a "nominating" body. Finally, I wish to stress why I believe, particularly at this time in our nation's history, it is important that the Senate act with institutional responsibility on the nomination before it.

I believe there are five appropriate areas of inquiry. Four are fairly clear and are not likely to encounter much disagreement. They are:

> The age and physical health of the nominee. The Senate has a right to assure itself that the nominee is of an age and a state of health that makes it likely that he or she will serve a reasonable term. The Supreme

Court would suffer terribly from a series of short-term appointments. The great and ongoing constitutional debates in which it must engage depend on continuity of service. The remarkable success of this institution is due in part to the fact that, in its nearly 200 years, there have been only 101 justices, or a new appointment on the average of every two years. While I have not computed the median tenure of a Supreme Court Justice, it is worth noting that eight members of the current Court have been sitting for at least nine years. You have to go back to 1955, 26 years ago, to come up with a Court entirely different from the one we now have.

Intellect and judgment. These attributes are self-evident, although their assessment is not always easy. A nominee's professional career as a lawyer and, if he or she has been one, a judge, must be scrutinized. The nominee's standing among his or her peers at the bar should have some weight. Of course, the nominee need not be the most brilliant of the possible choices, but neither should he or she be mediocre. The job is too important for less than superior intellectual competence and judgment.

Temperament. This category subsumes emotional stability, graciousness under pressure, resilience in defeat, humility in strength, collegiality, the ability to listen, and the ability to change one's mind. Assessment of a nominee's character demands investigation of his or her standing among colleagues, subordinates, superiors, and adversaries. Furthermore, inquiries should go back at least to positions the nominee has held since graduation from law school.

Propriety or its appearance in a nominee's professional or public life. By propriety, I include integrity, honesty, law-abidingness, and a sensitivity to the appearance of each of these. On the other hand, technical or minor lapses, especially those occurring long ago in a nominee's career, are not, in my view, a basis to reject.

The fifth area of senatorial inquiry, the hardest, is the nominee's position on issues of constitutional law. I want to be emphatic about this. When it comes to current or emerging questions of constitutional law, it is decidedly not the Senate's function to enforce the IOUs that single-issue constituencies believe the President has given them and failed to honor. Those groups, if they wish to play a role in the selection of a Supreme Court Justice, may attempt to catch the President's ear before the nomination. If that fails, their only recourse is the ballot. The President exercises a much broader political discretion prior to nomination than does the Senate on confirmation.

Predictions about a nominee's position on emerging issues of constitutional law are for the President to attempt if he can. As we all know, presidents have often tried to select nominees based on anticipated attitudes toward constitutional questions. But these predictions are perilous. The

positions a nominee may have taken in the trade-offs that accompany a public career are often reassessed in the cloister of life tenure.

Does the Senate, then, have any role to play in assessing a nominee's views on constitutional issues or his or her ideology? I think it does.

As Felix Frankfurter noted in 1930, cases before the Supreme Court involve "the stuff of politics." There are a number of constitutional rules which govern us and which, though dressed as rules of law, have been so far endorsed by other of our institutions that they are also a part of our common understanding as a people. That the "separate but equal" treatment of minorities is wrong; that an indigent accused is entitled to free counsel; that courts have power of judicial review; that states have broad authority to legislate for the health and welfare of their citizens; and that the First Amendment protects communication from prior restraint are a few clear examples of these abiding values.

The Senate may properly assure itself that a nominee will not seek to undercut these and other fundamental political arrangements through the guise of constitutional interpretation. In making this assessment, the Senate should seek information from the nominee and from others. A nominee's entire public life and career may properly be explored to test his or her commitment to these abiding political values. On the other hand, the Senate must be alert that men and women who become actively involved in the issues of their time -- even the unpopular ones -- should not suffer for their activism. It will be a sad day should it ever come, as some have suggested it already on occasion has, that a requirement for reaching the Supreme Court is to remain aloof from political and economic debate and to refrain from antagonizing important interest groups.

Finally, I believe that ideological insensitivity to the reasonable concerns of the nation's legitimate interest groups may, in an appropriate case, be a basis to deny confirmation. This basis need not be further explored today because it has no possible application to the nomination of Judge O'Connor.

There is a separate category of constitutional inquiry which I suggest falls outside the Senate's jurisdiction. This category is composed of emerging or current constitutional issues, those presently before the Court. There are several reasons why the issues in this category ought to be excluded.

First, as noted above, there is minimal utility in eliciting a nominee's views on current matters of constitutional law. Any commitment a nominee might be willing to give, directly or in veiled terms, could be reassessed, and would in any event be unenforceable, once the nominee is confirmed.

Second, the Senate is institutionally incapable of passing on the various current issues of constitutional law which its shifting majorities may consider to be a matter of present political import. In Judge O'Connor's case, for example, just as some conservative Senators may pause over her perceived support of a constitutional right to abortion, liberal Senators may be troubled by her apparent willingness to restrict federal court jurisdiction in cases charging a violation of civil liberties or civil rights. If each of these groups, and several others which may have their own areas of concern, felt institutionally free to insist on a

nominee who agreed with its view on the particular matter, it is doubtful that anyone could be confirmed.

Third, even if a sizeable number of senators did concur on a current constitutional issue, insistence on a nominee who would agree -- directly or otherwise -- to adopt the same view in future cases would be unseemly and could arguably preclude participation, after confirmation, in cases raising that issue. Even more important, it ignores due constitutional process in a way I address shortly.

It is instructive, I believe, that in virtually none of the prior Senate rejections of presidential nominations to the position of Supreme Court Justice (and certainly none this century) has an expressed senatorial motive been the nominee's expected position on an emerging constitutional issue.

I recognize that there is no clear line between settled and emerging constitutional issues. Nor is either category static. Over time, issues once thought settled are questioned anew. Over time, too, a consensus develops about emerging issues and they become settled. In close cases, each Senator will have to decide for himself or herself, as each conscientiously weighs how to vote. But we need not spend a great deal of time attempting to splice the definition of "a close case." It is clear that the O'Connor nomination does not present one.

The O'Connor Nomination

If preliminary press reports are any guide, a central issue in the opposition to the O'Connor nomination will be her position on a constitutional right to abortion. I do not myself know her position. Apparently, groups and individuals opposing a constitutional right to abortion believe she supports one. If so, this is not a defensible reason to reject her nomination. Support of a constitutional right to an abortion is well within the mainstream of American law. Much judicial and scholarly authority recognize such a right. By a 7 - 2 vote, the Supreme Court agreed with this view eight years ago. It would be no more appropriate to deny Judge O'Connor's nomination for this reason than it would be were she to oppose or support other emerging constitutional principles, such as in the areas of the exclusionary rule, standing to sue, double jeopardy, or the definition of obscenity.

I recognize that there are persons and groups who do not believe there should be a constitutional right to an abortion. They have avenues to advance their cause. They can seek to persuade the Supreme Court that precedent in the area should be overruled or limited. Failing that, they may attempt to amend the Constitution. But the advice and consent power must not be used as a substitute for the amendment process, as an indirect means to reverse disagreeable Supreme Court positions.

Whether or not Judge O'Connor is fit to sit on the Supreme Court does not turn on whether or not she will promise to or can be expected to vote in a particular way in a future case raising a particular issue.

The Effect on Future Nominations

Finally, I would like to say something about why the line I attempt to draw in this testimony is so critical right now. As I said earlier, we have had 101 Justices in 190 years. This comes to an appointment, on the average, every other year. We have, however, had only one appointment in the last nine years. Five of the current Justices were born between 1906 and 1908. It is not unreasonable to expect that there will be five additional Court seats to fill before the decade is through. Going further, the current President and the next three persons to be elected president can be expected nearly to rename the entire Court.

This speaks to the Senate's institutional role. No one now knows who the president will be four, eight, or 12 years from now. No one now knows which party will control the Senate at any of these times. Precedent established with the current nomination will be invoked when future presidents nominate future men and women to sit on the Supreme Court. It would be extremely unfortunate if that precedent revealed a Senate willing to use the confirmation process to reject a nominee because she refused to adopt a particular position on an emerging constitutional question. Adoption of such a senatorial role would seriously weaken the Court and, eventually, the nation.

Thank you very much.

The CHAIRMAN. Our next witness is Ms. Eleanor Smeal, representing the National Organization for Women.

Ms. Smeal, will you hold up your hand 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?

Ms. SMEAL. I do.

The CHAIRMAN. You may proceed, Ms. Smeal. Do you want to submit a statement for the record or do you want to speak off the cuff.

Ms. SMEAL. I want to submit a statement for the record.

The CHAIRMAN. All right. Without objection, that will be included. Then try not to duplicate it because there is no use, if your statement is printed, then we do not want what you say to duplicate that.

Ms. SMEAL. I will try not to duplicate it too much but——

The CHAIRMAN. If you want to summarize it——

TESTIMONY OF ELEANOR CUTRI SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

Ms. SMEAL [continuing]. Highlight it and summarize it, yes.

As president of the National Organization for Women, I am representing today the largest organization dedicated to the advancement of equal rights for women in the United States. On behalf of our membership I would like to urge this committee to confirm the nomination of Judge Sandra Day O'Connor.

This nomination, of course, is truly historic and is a major victory for women's rights. We believe it is both important symbolically