NOMINATION OF SANDRA DAY O'CONNOR

SEPTEMBER 18 (legislative day, September 9), 1981.—Ordered to be printed

Mr. Thurmond, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, SUPPLEMENTAL, AND SEPARATE VIEWS

[To accompany the nomination of Sandra Day O'Connor]

The Committee on the Judiciary, to which was referred the nomination of Sandra Day O'Connor, of Arizona, to be an Associate Justice of the Supreme Court of the United States, having considered the same, by a vote of 17 yeas and 1 vote of "present," reports favorably thereon, with the recommendation that the nomination be confirmed by the U.S. Senate.

The committee has concluded that Judge O'Connor is extraordinarily well-qualified for the position to which she has been nominated.
It is the solemn duty of this committee to assist the Senate in its obligation to determine whether to consent to judicial nominations put forward by the President. Never is this duty more solemn than when the nomination is to a seat on the Supreme Court, for the decisions of that Court are among the most binding and far-reaching of all the decisions made by the Federal Government.

If this Committee is to perform its duty to assist the Senate in passing its judgment upon a nomination to the Supreme Court, it must be fully informed on the question of whether or not the nominee would prove to be a good Justice. The committee must know the judicial philosophy of the nominee. It must know the nominee's stand on important constitutional issues, including how the nominee would interpret specific provisions of the Constitution. It must know the nominee's fundamental social and economic philosophy insofar as that philosophy would guide the nominee in interpreting the Constitution. For this knowledge to be valuable, it must extend beyond general assurances and vague discussions.

Last week, the Committee on the Judiciary held 3 days of hearings on the nomination of Sandra Day O'Connor to serve as Associate Justice of the Supreme Court. The Chairman is to be commended for his masterful leadership during those hearings, and for their extent and breadth. But while the hearings granted the committee every opportunity to inquire about Judge O'Connor's judicial philosophy, Judge O'Connor's vague and general answers to the questions posed prevented the Senators from learning much about her judicial philosophy. Many of the questions asked the nominee to provide the same degree of illumination on her constitutional views as has been available on the constitutional views of previous nominees who have had more experience with these issues. These questions would not have impaired the nominee's ability to decide future cases, but Judge O'Connor nevertheless refused to provide responses to many of the questions.

Judge O'Connor's judicial record and published work on constitutional questions is limited. The Senate has no guidance on how she will interpret the Constitution other than the guidance she offered during the 3 days she appeared before the committee. Unfortunately, however, she failed to answer those questions which are most valuable in determining how she will perform as an Associate Justice of the Supreme Court. This failure makes it extremely difficult for this Committee to discharge its duty faithfully with respect to her nomination.

Perhaps more important, this failure may set a dangerous precedent for future nominations to the Supreme Court. It is necessary, therefore, that the record show the dissatisfaction of some members of this Committee with the nature of the statements offered by Judge O'Connor in response to questioning by members of this Committee. The Senate cannot well perform its advice and consent function under such circumstances.

John P. East.
Charles E. Grassley.
Jeremiah Denton.
SUPPLEMENTAL VIEWS OF SENATOR CHARLES E.
GRASSLEY REGARDING THE NOMINATION OF SANDRA
DAY O'CONNOR TO BE AN ASSOCIATE JUSTICE OF THE
U.S. SUPREME COURT

One of the most important roles a Senator plays is in the advice
and consent process which accompanies the executive branch nomi-
nations to the Federal judiciary. As a member of the Senate Judiciary
Committee, I take this role very seriously. It is in this committee
where the record is established regarding the qualification, competence
and judicial philosophy of nominees who will perhaps serve for the
rest of their lives on the Federal bench. Whether or not nominees
are confirmed will most often depend on what is in the committee
record; given that premise it is essential that the record be as com-
plete as possible. It is only because I feel that the record could have
been more exhaustive that I file these supplemental views.

I stated at the time of the announcement of Judge O'Connor's
nomination that I would keep an open mind until after the hearing
process was completed and the record was established. I reviewed
all of the testimony and weighed it very carefully before casting
my vote in favor of Judge O'Connor's nomination.

I shared the concerns voiced by many of my constituents, that
Judge O'Connor might be in favor of abortion on demand. However,
during the course of the hearings she answered many questions
directed by myself and other committee members to the issue of
abortion and those answers along with strong supportive testimony
given by active pro-life Arizona State legislators convinced me to
vote in favor of her confirmation. My only reservation is that she
refused to comment specifically on the Roe v. Wade decision stating
that she was fearful that she may be committing herself to decide
a certain way in similar cases which may come before the Supreme
Court.

I do not agree with Judge O'Connor that commenting on past
Supreme Court decisions is a commitment to hold a certain way on
future cases and I feel that in order that we, as Senators, fulfill
our duty it is incumbent upon us to discover a nominee's judicial
philosophy. An integral part of that philosophy is most likely indi-
cative of the nominee's perception of constitutional law, including
specific decisions.

In that we had a very limited number of judicial opinions rendered
by Judge O'Connor on constitutional questions it was my hope,
by asking specific questions regarding past Supreme Court decisions,
that the committee might obtain a clearer understanding of her
philosophy. It was never my intent to obtain a commitment from
Judge O'Connor that she would hold either to affirm or reverse certain
cases in the future. My purpose was to satisfy my questions regarding
Judge O'Connor's record in that I felt it was less complete than many
other Supreme Court nominees who have had extensive experience either on the Federal bench or in leadership positions in the profession of law.

Public statements and judicial opinions by those past nominees resulted in an abundance of material to draw from in attempting to discover their views on constitutional issues, material which was lacking with regard to Judge O'Connor.

It is with only that reservation that I cast my vote enthusiastically for Judge O'Connor's confirmation. She demonstrated to me that she is and will continue to be a thoroughly competent judge who renders well reasoned, thoughtful opinions and who will be a contributing factor in providing the Supreme Court with new direction, one which will be a reflection of the Reagan administration's philosophy of interpretation of the Constitution not a redrafting thereof.

CHARLES E. GRASSLEY.
SEPARATE VIEWS OF SENATOR JEREMIAH DENTON ON THE NOMINATION OF SANDRA DAY O'CONNOR TO THE U.S. SUPREME COURT

The Senate Judiciary Committee has, without dissent, recommended the confirmation of Mrs. Sandra Day O'Connor as an Associate Justice of the U.S. Supreme Court. Although I am new to the Senate, I am quite uncomfortable with the point of view so prevalent in the O'Connor hearings regarding the proper role of the committee in the confirmation process.

Primarily, I am troubled by the contention that a nominee need not discuss, endorse or criticize specific Supreme Court decisions. The basis for this contention is that such discussion would lead to later disqualification when cases arise that are similar to those that led to the establishment of a particular doctrine.

In my view, acceptance of this argument by the committee has created a particularly unfortunate situation in light of this nominee's past actions with regard to legislation on abortion and the limited number of judicial decisions upon which to determine her views on this and other issues. I had regarded as relatively unimportant the nominee's previous voting record on the abortion issue because Judge O'Connor had indicated that she had had a personal change of heart on the subject of abortion. Thus I had hoped to make a decision about her fitness for office on the basis of answers given to questions posed in the committee hearing. However, the nominee repeatedly declined to answer questions about her view of the legal issues presented in the case of Roe v. Wade. Relying upon the argument advanced earlier, she stated that, in her opinion, any criticism of that decision would prejudice her with regard to the abortions question.

Others have reasoned that neither this nor any other "single issue" should stand in the way of the confirmation of the nominee. I respectfully disagree with the notion that the rights of unborn human beings represent a single divisive issue that should not overshadow the otherwise excellent credentials of Judge O'Connor. Abortion—the wrongful taking of a human life—is not simply a political issue; the question of when life begins and of how it should be protected at all stages is essentially a civil rights question, and one which I believe is of immense importance.

The denigration of human life by increasingly relying on subjective measures of its "quality" or "meaningfulness" rather than on the principle that all life is God-given is frighteningly reminiscent of Hitlerian ideology. If government by judicial fiat removes the protection of the right to life from a class of individuals—in this case the unborn human being—then, the protection guaranteed others—the handicapped, the aged and the terminally ill—might also be lost in the years to come. Moreover, biomedical research is quickly producing a whole series of new ethical questions about the nature and meaning of
life. The Supreme Court's decision in *Roe v. Wade* indicated a judicial willingness to alter fundamental historic protections by defining the concept of "person" so as to permit the elimination of the fetus, even as science was widening the concept of life.

This Nation is currently involved in a dialogue that must not cease until it resolves this fundamental question of human rights. The terrible reality of the debate over abortion is that it has divided households, it has divided friends and it has divided this body. We cannot dismiss the abortion issue when considering judicial nominees simply because the Nation has not reached a consensus. Every public official, and indeed, most citizens should exercise their right to speak out on this issue. It seems that once in every century a nation faces such a pivotal question, and I and millions of others cannot divorce the concept of the right to life from the concept of equal justice under the law.

The Supreme Court in its holding in *Roe v. Wade* asserted final authority over the rights of the unborn fetus. Many argue that the Congress and the States have, in the course of a decade, reached a point at which further legislative remedy of abortion excesses is impossible without the approval of the Court. Prospective Justices cannot argue convincingly that the widespread controversy surrounding this issue makes their public pronouncements any more subject to criticism than the statements of the elected officials who must give advice and consent concerning judicial appointments. Prospective Justices might find that their criticism of a particular doctrine could make confirmation a more difficult process, but it does not mean that they will or should find themselves in violation of the statutes, ethical canons and other judicial renderings governing disqualification of Supreme Court Justices.

However, I recognize that others for whom I have enormous respect, including the Chairman of this Committee, agree with Judge O'Connor in her caution in replying to questions that attempt to elicit her views as to the correctness of prior decisions of the Court. Many of those same people are highly respected opponents of the abortion procedure. All the same, I do not believe that this Committee can properly fulfill its duty to the rest of the Senate regarding any judicial nomination when it lacks an accurate estimate of the nominee's position respecting an issue of overriding importance to the general welfare of the United States.

In this context, I personally view the committee's role as a separate and distinct function from the decision which must now be made by the Senate as a whole. I respectfully contend that the committee should serve as an investigatorial body with respect to these nominations—eliciting as thorough and precise responses to specific questions as it possibly can—in order that the rest of the Senate can make a fully informed decision on the nomination. The role of the full Senate I would liken to that of judge—assessing the committee proceedings and judging the nominee on qualifications, experience, integrity and opinions on basic legal questions.

This investigatorial responsibility of the Committee is even more awesome when considered in light of the fact that this appointment is one of life tenure. This is not a four-year, assistant secretary appointment. If confirmed, the nominee will have continuous potential
for influencing a critically important issue for an indefinite period.

Given my own position on this most basic question of human life, and given the reluctance of Judge O'Connor to address the legal question of abortion in a forthright manner, I could not, in my perceived role as investigator, assent on hope nor dissent on uncertainty, with respect to my vote in the Committee.

My vote on the floor of the Senate may well be different because of the way I view my role as Committee member specifically and Senator generally—and for some other reasons. As a Senator on the floor, I do not feel obliged to restrict my judgment on the nominee to what was revealed within the Committee hearings.

But in the final analysis, I believe the Committee on the Judiciary may have abrogated, in large measure, part of the responsibility of the Senate's constitutional role with respect to this most important nomination.

Jeremiah Denton,
U.S. Senator.
SUPPLEMENTAL VIEWS OF SENATOR ARLEN SPECTER

I find Judge Sandra Day O'Connor to be well qualified to serve as an Associate Justice of the United States Supreme Court.

During the confirmation hearings she demonstrated her commendable judicial temperament, keen intelligence, and general legal competence. She was frank and forthcoming in her responses to me and my colleagues. In addition to her knowledge of substantive legal issues and sensitivity to constitutional guarantees, her extensive testimony over 2 days of hearings provides ample evidence of her personal stamina and physical well-being.

Judge O'Connor possesses a fine record of educational achievement at Stanford University. She has served her State as both an appellate and trial court judge, as a legislator and majority leader in the Arizona Senate and as an assistant attorney general. Her background underlies her appreciation for basic principles of our republican form of government.

Her fine family and her civic involvement attest to her good character and moral values.

In sum, Judge O'Connor is a well-chosen nominee for the High Court and I take great pleasure in voting in favor of recommending her confirmation by the United States Senate.

Arlen Specter.