NOMINATION OF SANDRA DAY O'CONNOR

THURSDAY, SEPTEMBER 10, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:08 a.m, in room 1202, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, Laxalt, Hatch, Dole, East, Grassley, Denton, Specter, Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Baucus, and Heflin.

Staff present: Vinton D. Lide, chief counsel; Quentin Crommelin, Jr., staff director; Duke Short, chief investigator; and Candie Bruse, chief clerk.

The CHAIRMAN. The Judiciary Committee will come to order.

The questioning of Judge O'Connor will now continue. Senator Grassley of Iowa is next in line. Senator Grassley.

Judge O'Connor, I remind you that you are still under oath.

TESTIMONY OF SANDRA DAY O'CONNOR, OF ARIZONA, NOMINATED TO BE ASSOCIATE JUSTICE, U.S. SUPREME COURT—Resumed

Judge O'CONNOR. Yes, Mr. Chairman.

Senator GRASSLEY. Thank you, Mr. Chairman.

Welcome back, Judge O'Connor. According to the television last night, you did very well.

Unlike the other nominees, Judge O'Connor, you do not have a strong record on major judicial issues for us to review. That is not your fault; that is because you served on State courts as opposed to Federal courts. You have not served on the Federal court of appeals, as the Chief Justice did, or held the leadership position on policy matters that was evident from Justice Powell's position in the ABA or Justice Rehnquist's activities in the Justice Department.

All of us on this committee respect your obligation not to comment on certain matters but I hope that you will understand that in light of your lack of written record on major issues, it is our obligation in this hearing to attempt to insure that you do not prove as great a surprise to President Reagan as Earl Warren was to President Eisenhower. [Laughter.]

JUDICIAL PHILOSOPHY

Frankly, it has been my observation that every candidate for the Senate is a fiscal conservative and every nominee to the Supreme

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Court is a strict constructionist but once they take their seat it may be an entirely different matter. That is true of the Senate as well as the Supreme Court. Therefore, this is really the only forum in which we as Senators can learn of your judicial philosophy, thereby allowing us to fulfill our duty in making a proper decision, and it is to that end that I proceed with some questioning.

I understand that part of your reason for not commenting on specific cases is that you may have to disqualify yourself from similar cases should they arise before the Court. As a part of your preparation for this hearing, did you read the statute that governs the kind of statements you are claiming privilege from making?

Judge O'CONNOR. Mr. Chairman and Senator Grassley, if you are referring to title 28, United States Code, section 455——

Senator GRASSLEY. Yes.

Judge O'CONNOR [continuing]. And the ABA canon 3(c), yes, I have read those. I have also, of course, been guided in large measure by my review of the positions taken by prior nominees to the Supreme Court when they have appeared before this body.

I am sure you know, Senator, that beginning with the earliest such occasions the nominees have felt reluctant to answer questions concerning issues that may come before the Court, and there are many expressions of that concern which have I think been called to our attention during the course of these proceedings.

Senator GRASSLEY. Are you familiar with Justice Rehnquist's comments in *Laird* v. *Tatum,* where respondents urged him to disqualify himself because of public statements he made about the constitutional issues that were raised in the case? He made these statements prior to his nomination as a Supreme Court Justice.

Justice Rehnquist's comments went on for 6 pages, citing not only the above statute but also various instances where Justices not only had commented publicly on substantive constitutional issues but actually had been principal authors of the laws that later came before the Supreme Court, before the Supreme Court decided the constitutionality of that law, for support for his position.

Have you reviewed the transcripts of confirmation hearings of other Court nominees who have appeared before this committee? You have indicated that perhaps you have done that.

Judge O'CONNOR. Yes, Senator Grassley, I have done that.

Senator GRASSLEY. As far as you know, is it true that no other member of the Supreme Court has ever had to disqualify himself from a case because of policy statements made outside of the courtroom?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I cannot answer that question. My review of the transcripts of the prior hearings reveals that the nominees have been rather careful in this area not to put themselves in that kind of a position.

In *Laird* v. *Tatum,* in which the question was raised and Justice Rehnquist had to address himself to it, it really related to certain statements that he had made prior to becoming a nominee for the Supreme Court. We do not live in a vacuum, of course, and I have served as a State legislator and as a trial court judge. Certainly, I would not expect that my statements or activities in that State legislative body or as a State trial court judge could fairly be said

to disqualify me from sitting on a case subsequently on the United States Supreme Court, when some of those same issues would subsequently be addressed.

Basically, that is what Justice Rehnquist was discussing in *Laird* v. *Tatum* but I think it might be useful to also quote Justice Rehnquist from the same case, when he was discussing the situation of a nominee at a hearing such as this, in which he said:

> I would distinguish quite sharply between a public statement made prior to nomination for the bench on the one hand, and a public statement by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

In that paragraph I think Justice Rehnquist did try to distinguish the situation to which you refer; namely, statements or conduct that occurred prior to becoming a nominee versus the process following the nomination.

Senator GRASSLEY. Could I suggest to you that you did not read the entire quote, because in *Laird* Rehnquist noted that as to disqualification there is no difference between a nominee's statements and prior statements.

Judge O'CONNOR. Mr. Chairman, Senator Grassley, the quote that I have read I thought did correctly reflect and quote Justice Rehnquist's view of the situation of the nominee at the hearing. Indeed, my review of his own confirmation hearing would lend some substance to that view, wherein he on occasion had to consider the same troubling questions that we are considering now in the sense that there were some things which might come before the Court which he felt he was unable to address directly.

Senator GRASSLEY. He differentiates between propriety as opposed to disqualification, but at this point I do not care to follow that particular point any more except to ask you, in your process of reviewing nominees' reactions before confirmation hearings, did you have an opportunity to read Justice Powell's comments on *Escobido* and *Miranda* in his confirmation hearings?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, yes, I did.

Senator GRASSLEY. I suppose, then, that you are aware of the fact that he did express an opinion and he was careful to make clear that it was at the time that he was head of or active in the ABA. At the time he said that he expressed the view that the minority opinions were much sounder than the majority opinions. He did express that in the confirmation hearings.

Judge O'CONNOR. Mr. Chairman, Senator Grassley, the practice of holding confirmation hearings really began with Justice Stone. It was dropped, I think, until Justice Frankfurter was nominated to the Court in 1937, and at the beginning of Justice Frankfurter's hearing he observed that he would not care to express his personal views on controversial issues affecting the Court.

When the Chief Justice, Chief Justice Berger was asked a question which might bear on how a conceivable case could be decided, he said,

> I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or before any other court on which I may sit. I think I must limit any comments in that way.

This is basically the thrust, Senator Grassley, of the nominees who have appeared before the Senate committees and have been questioned on matters which indeed might come before the Court.

Senator GRASSLEY. Do you feel that Justice Powell went further than he should have in his comments on the *Escobido* and *Miranda* case?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I am sure Justice Powell responded only in a manner which he felt was appropriate at the time.

Senator GRASSLEY. Judge O'Connor, could you tell us how many discussions you had with the President personally or by telephone prior to his announcement of your selection?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, yes: two.

Senator GRASSLEY. Can I ask you for how long a period of time those two were, approximately, in minutes?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, it would be really a speculation on my part because I was very engrossed, as you might imagine, in the conversation. I was not watching any clock or my watch.

We had a discussion at the White House—I am not certain how long that lasted—and we had a discussion on the telephone prior to the nomination.

Senator GRASSLEY. To the best of your recollection, what were some of the things that he asked you in those conversations?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I think it would not be proper for me to disclose the contents of private conversations which I had with the President about this matter.

Senator GRASSLEY. OK. Did he ask you any policy questions?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I really do not think that it is appropriate for me to relate what was stated, other than that I think it would be proper for me to assure you that I was not asked to make any commitments concerning any issue which might come before the Court.

Senator GRASSLEY. Would you repeat that, please?

Judge O'CONNOR. I was not asked to make any commitments, Senator Grassley, about what I would do or how I would resolve any issue to come before the Court. I think it would be proper for me to assure you of that.

Senator GRASSLEY. Well, could you generalize to any extent? Was any of the conversation that you had with the President similar to any of the things that the members of this committee are asking you?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I would suggest that I should not properly reveal the content of those conversations.

Senator GRASSLEY. Did the President ask you not to discuss that conversation?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I would suggest that I should not reveal the contents of the conversation but I am in no way suggesting that that was at his request. That is my perception of what is proper.

COURT-ORDERED BUSING

Senator GRASSLEY. Judge O'Connor, yesterday we heard your personal views on some issues. I really was hoping to have not your personal views but how you might express your judicial philosophy, and general approaches to things that might come before the Court.

You did give us your personal view on at least one issue, the subject of abortion. Since we are going to probably cast a vote for or against you based upon your personal views more so than statements of substance that we would get on issues that may come before the Court, could I ask you for your personal views on busing, forced busing?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I assume you mean in the context of the court-ordered busing in connection with school desegregation cases?

Senator GRASSLEY. Yes.

Judge O'CONNOR. Mr. Chairman, Senator Grassley, as you are probably aware, again any comments that I would make on this subject about my personal views have no place in my opinion in the resolution of any legal issues that might come before the Court.

Senator GRASSLEY. OK. No; I want your personal views in the same vein, in the same context and in the same environment you gave us your personal views on abortion. I would like to have your personal views on busing.

Judge O'CONNOR. Speaking to that end, perhaps illustrative of that is the position that I did take in the legislature when I had occasion to vote in favor of a memorial that requested action to be taken at the Federal level to terminate the use of forced busing in desegregation cases.

This is a matter of concern, I think, to many people. The transportation of students over long distances and in a time-consuming process in an effort to get them to school can be a very disruptive part of any child's educational program.

In that perhaps I am influenced a little bit by my own experience. I grew up in a very remote part of Arizona and we were not near any school. It bothered me to be away from home to attend school, which I had been from kindergarten on. In the eighth grade I attempted to live at home on the ranch and ride a schoolbus to get to school. It involved a 75-mile trip each day, round trip, that is, and I found that I had to leave home before daylight and get home after dark.

I found that very disturbing to me as a child, and I am sure that other children who have had to ride long distances on buses have shared that experience. I just think that it is not a system that often is terribly beneficial to the child.

Senator GRASSLEY. Thank you, Judge O'Connor. My time is up.

The CHAIRMAN. The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge O'Connor, following the line of questioning that Senator Grassley pursued in regard to your meetings and conversation with the President, did the President offer you any jellybeans? [Laughter.]

Judge O'CONNOR. Mr. Chairman, Senator Heflin, in the Oval Office I was seated next to the jellybeans but I confess to you that I was more interested in what was being said. [Laughter.]

POLICE POWER AND INDIVIDUAL RIGHTS

Senator HEFLIN. For any person going on the Supreme Court, there is a real problem that any court must face between individual rights and police power. I suppose this issue has been an issue that has confronted the Court and each individual member of the Court since the Court has really been in being.

It is the issue, of course, of the police power of the State and the issue of the police power of the Federal Government within its jurisdiction. There is the issue of constitutional rights, individual rights. There are rights that are not expressly contained within the Constitution and the amendments thereto but that have developed, such as the right of privacy.

I wonder if you would express to us your general philosophy in making decisions dealing with the conflict between the police power and individual rights?

Judge O'CONNOR. I assume you are speaking in terms of, for instance, legislation enacted for example within the police power jurisdiction of State government?

Senator HEFLIN. Well, for example, with all of our crimes, practically all of the crimes in the States, the issue arises sometimes in the language, sometimes in the application. It raises the issue of individual rights versus police power of the State.

Judge O'CONNOR. Mr. Chairman, Senator Heflin, I suppose the normal standard for review, of course, which is applied by the Court is whether the particular legislative enactment that is being reviewed bears a rational relationship to a legitimate State objective. Traditionally, if it does the enactment is upheld.

Obviously when we are dealing with some rights, for example, under the first amendment—the right of free speech or the right under the establishment of free exercise clauses, something of that sort—the Court has adopted I think a rather more stringent set of tests to determine whether those rights have been preserved. We could examine each of those individually, for instance, in the free speech area or the freedom of religion area because the Court has been rather more specific in those areas. However, just in broad, general terms, absent one of those special rights, the Court has tended to apply the usual test for the most part in determining whether a particular piece of legislation should be upheld.

Now if the legislation, either on its face or if determined by the trier of fact, was intended to be discriminatory against a particular group of people—for instance, on the basis of race or on the basis of national origin, and in some cases on the basis of alienage—the Court has applied a much stricter test in reviewing that legislation and indeed has looked to see whether that particular provision, discriminatory provision, is necessary to achieve a compelling State interest or governmental interest.

In the area of discriminatory legislation on the basis of gender, the Court has applied a sometimes shifting standard to determine

how to review those cases, something in between the strictly suspect standard and the rational basis standard.

TENTH AMENDMENT

Senator HEFLIN. Thank you.

The early decisions of the Supreme Court have recognized the essential role of the States in our Federal system of government. Justice Chase in the case of *Texas* v. *White* declared that "The Constitution in all of its provisions looks to an indestructible Union composed of indestructible States."

You know that the 10th amendment reserves to the States and to the people the powers not specifically delegated within the Constitution. At the same time, it has been recognized that the Constitution has granted plenary authority to the Federal Government to do all that is necessary and proper to carry out the express powers enumerated in the Constitution.

In light of these provisions, I would like to know your general philosophy of the role of the Judiciary in preserving Federalism.

Judge O'CONNOR. Mr. Chairman, Senator Heflin, the judiciary in my view has an important obligation in that regard. The Federal Government was the outgrowth or product of the States' willingness to band together and form a Federal Government, and it of course assumed that it had created a Federal Government of limited powers and, indeed, had delegated expressly to the Federal Government those powers that the States then thought were appropriate, and reserved in the 10th amendment to the people and to the States those powers that were not delegated.

I guess we would have to say that it is under the 10th amendment, really, that the States exercise their broad police power which has been generally regarded as a reserve power to the States. The Court through the years has not, at least in recent decades, given much specific—or, has not based many decisions on the 10th amendment.

I think I mentioned yesterday, perhaps, the one instance that comes to mind in recent years in which the Court invalidated a congressional enactment as it applied to the States, and that was in the *National League of Cities* v. *Ussery* case, in which the Federal Government had attempted to apply the wage and hour law to State employees and the Court drew the line in that instance.

It more recently, however, declined to rely on the 10th amendment to invalidate congressional enactments in the area of surface mining regulation, and said that in that instance the Congress was addressing its primary thrust to the regulation of business or private interests as such and not attempting to regulate the States as States.

I am sure that we have not seen the last of the inquiries that the Court will make, by any stretch, into the application of the 10th amendment, but it sets forth a very vital pronouncement of the role of the States in the Federal system and indeed—as a product if you will of State government, which I am—I have some concerns about seeing that State governments and local government are maintained in their abilities to deal with the problems affecting

the people. The reason for that philosophically is because I think I would agree with those who think that the government closest to the people is best able to handle those problems.

Now I guess time will tell the extent to which the Court and the Federal courts generally will rely upon the 10th amendment in their resolution of some of these problems.

ADMINISTRATIVE LAW

Senator HEFLIN. There has developed—and it has developed and is prevalent today—a tremendous number of adjudications that take place outside the formal judicial system of the Federal Government. What I am referring to are the administrative agencies. There are many people today who feel that problems are presented because administrative agencies occupy the position of investigator or prosecutor, judge, trial judge, all combined in one.

Of course, the administrative law judge system has developed. There are many people who feel that there is neither the independence nor the appearance of independence in that system. I wonder if you have any ideas as to what could be done to give more independence, more impartiality to the decisions that are made in the administrative agencies, and the scope of review by the courts which is basically within the circuit courts of appeals. Do you have any thoughts on this issue?

Judge O'CONNOR. Mr. Chairman, Senator Heflin, it is a very important subject. Much of the contact which the public has with government in general, whether it is at the State or the Federal level, is through the administrative branches of government. These are the arms of the Federal agencies and the State agencies that are actually administering the policies established by the legislative body.

As you pointed out, the practice in administrative law is to have the agency itself sit in judgment of any disputes that come with relation to that agency's regulation of the public, and many people find that that is a little bit difficult to accept in terms of having a fair and impartial resolution of their problems. That concern is understandable.

Nevertheless, it appears to be rather firmly entrenched in both the State and Federal systems. The question then becomes, how do you make it more workable? I think there is discussion, certainly, at various State levels and perhaps nationally about the extent to which you can set up impartial tribunals that are not part and parcel of the administrative agency itself to hear resolutions of the problems; discussions about whether it would serve the governmental bodies well to set up an entirely separate administrative tribunal that could serve as the trier of fact, if you will, for a number of agencies rather than just each agency administering its own. I think that these things have merit.

I believe that the Congress is also considering certain amendments to the standards of review in existence for administrative agency decisions. Typically, the standard of review has been to overturn the administrative decision only if there is an abuse of discretion made, and great weight is given to the determinations of the administrative agency. Now clearly, it would be within the

legislative function to alter that standard, to have—I suppose if the review were had de novo, that is nonproductive because it forces such a load on the courts but maybe something in between can be considered. Maybe we do not need to grant any presumptions of validity.

These are matters that I think are relevant for current discussion and perhaps merit discussion because there is a great deal of concern in the public generally about the field of administrative law.

CASE LOAD

Senator HEFLIN. One other question: I will have to maybe give you a brief background for it. In 1890 the U.S. Supreme Court had filed with it approximately 550 cases. They asked for relief. In 1891 the nine circuit courts of appeal were established to give it relief. After taking cases from the Supreme Court into those circuit courts of appeal, the U.S. Supreme Court determined 275 cases in 1891. Some of those cases were summarily decided without opinion; approximately two-thirds were decided with opinion.

Last year the Supreme Court took approximately 275 cases and has consistently taken approximately 275 cases since 1891. Cases filed with the Supreme Court last year were something in the neighborhood of 4,200, as compared to about 550 in 1891. The granting of cert or the mandatory jurisdiction that had to be exercised in those regards constituted about less than 7 percent of the cases that were filed with it. I suppose, looking over the fact that 275 cases has been almost the norm since that period of time but that the population has increased the number of cases, certainly we are more litiguous today than we were then.

You have had experience as a member of a court of appeals of your State in which I suppose that the supreme court of your State reviewed the decisions of your court of appeals. Is that correct?

Judge O'CONNOR. Correct.

Senator HEFLIN. Do you have any suggestions pertaining to the discretionary cases that the Supreme Court takes or a remedy for the overall problem? Largely, the Supreme Court today has to select the ones that they feel are important to society in general. Many cases that they might want to take, they will not take.

We also know that we have had two studies of the Fraun proposal, and the Ruska Commission had worked on this. Do you have any thoughts pertaining to some method of relief to the U.S. Supreme Court, and relief to the public and to the litigants that file, where they have cases that cry out for consideration?

Judge O'CONNOR. Mr. Chairman, Senator Heflin, I believe that you have personally been involved in an in-depth review of this area. You likewise have come from a State court system in which you have taken a great personal interest in the affairs of the administration of justice and I think are very well informed on the subject.

However, you have pointed out the extent and really dramatic nature of the problem which the Court presently faces in terms of sheer numbers. Several things I suppose are possible. One of the things that is being studied and considered, I am told, is a national court of appeals, something in between the Federal courts of appeal

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and the Supreme Court which conceivably could assimilate some additional number of the issues that need to be resolved, at least to the extent that we have differing opinions among the various Federal courts of appeal.

This is certainly one possibility, one that would have to be studied with a great amount of care in terms of determining what its jurisdiction would be, whether in fact it would alleviate the situation or not, what types of cases it would really handle. Justice James Cameron of our Arizona Supreme Court has done some work in this area as well and is publishing something on the subject currently.

Another possibility, it seems to me, would be to consider removal of the mandatory jurisdiction of the U.S. Supreme Court. As you know, some cases must be accepted on appeal. Possibly giving the Court the opportunity to have entirely discretionary jurisdiction on appeal could be helpful in the long run.

Whether there are other things that can actually curtail the tremendous problem we are having with numbers, I do not know. One would like to think that with less extensive regulation, that perhaps at some point some issues would become settled and would no longer become the subject of as much litigation as we have, so maybe we have to approach it from all aspects. Maybe we are encouraging litigation at the bottom level at the same time we are trying to solve the problem at the top.

Senator HEFLIN. Thank you.

The CHAIRMAN. Senator Denton of Alabama.

Senator DENTON. Thank you, Mr. Chairman.

Good morning, Judge O'Connor.

Judge O'CONNOR. Good morning.

Senator DENTON. We have had references to this being an ordeal, an inquisition. I do congratulate you on your endurance and your poise, your graciousness. I would like it known that I do not feel like an inquisitor; I do not feel condescending.

I had a little scrapbook of sayings which sort of guided my life. They were printed, three or four of them, in a newspaper article once and they were included in a book I wrote. One of them was, "An officer should wear his uniform as a judge his ermine—without a stain."

Therefore, I have a tremendous respect for your profession, for your position. I have a tremendous respect for you as a woman who has fulfilled the indispensible roles of wife and mother in such a successful way, and then has gone on to extrapolate into fields of professional accomplishment which would amount to, in my opinion, in sum constituting pretty much an ideal woman. I ask you these questions with that feeling toward you.

The other gentlemen here have asked you questions about such subjects as judicial activism, civil rights, separation of powers, because respecting you at least as much as I, they are concerned about matters which affect the welfare of this country vis-a-vis the prospect of your nomination.

I am compelled to ask, for the same reason, about abortion. As I ask, I have in mind the cultural shock of my returning to this country after almost 8 years away from it. We had changed in a lot of ways, as you could probably imagine—we talked about this

together—from 1965 to 1973. It was, I think, a devastatingly accelerated sort of self-degradation period which I believe we are tending to recover from.

Among the changes I noted was the abortion issue, abortion being totally accepted, although the ruling had been a little earlier. It was just an accepted thing, and it was appalling to me but not as appalling as it is today. In other words, I have gone through a recognition of how important abortion is, since 1973 to now, a much greater appreciation for what it consists of.

I did not understand why there was so much concentration on abortion, for example, by the Catholic Church in 1973 when I returned. I thought, "Why are they picking on that instead of some of the other things that are going on, the massage parlors, the absolute free sex thing, the perversion? Why abortion?"

I gradually found out, just from thinking about it, but I did note that, you know, for thousands of years in Judeo-Christian society abortion was about the worst word you could say. In the Navy we used to have an expression: "That plan is an abortion." It was the worst condemnation you could give to it in 1960, and all of a sudden when I come home in 1973, you do not say that any more. It is totally outmoded.

What remarkable enlightenment occurred to mankind to make that happen in Judeo-Christian society, I did not understand, and still do not. I am concerned about it in other ways, as I expressed yesterday and might express again today.

Based on my earlier conversation with you and your testimony up to this time, it is my belief that you have changed your position on abortion since you were in the Arizona Legislature. Under what conditions do you now feel abortion is not offensive?

Judge O'CONNOR. Mr. Chairman, Senator Denton, for myself it is simply offensive to me. It is something that is repugnant to me and something in which I would not engage. Obviously, there are others who do not share these beliefs, and I recognize that. I think we are obligated to recognize that others have different views and some would draw the line in one place rather than another.

Senator DENTON. That is the line I am asking you about: In your personal view, where do you feel abortion is not offensive in the respect of drawing that line? We here in the Congress have had to think in those nitty-gritty terms. Each individual in the world, really, and the United States in particular, is thinking in those terms now. It is an agonizing question, and I do respect the differing points of view of others. I do know that I came through several transition periods myself but I am asking you where you now are in drawing that line. Where is it inoffensive?

Judge O'CONNOR. Mr. Chairman, for myself I have to draw it rather strictly. I am "over the hill." I am not going to be pregnant any more, so it is perhaps easy for me to speak. For myself, I find that it is something in which I would not engage.

For those in the legislative halls, it poses very difficult problems for them in drawing those lines legislatively. They are presently constrained, of course, by the limitations placed on by the Court in the *Roe* v. *Wade* decision, and if you were to draft legislation today I suppose it would have to be drafted with that case in mind while it remains on the books.

Senator DENTON. Well, with all due respect, we are dealing with such nitty-gritty distinctions as rape, incest, and so forth, save the life of the mother. I am asking your personal reflection on the inoffensiveness with respect to those kinds of conditions. Where do you think it occurs? Where does it become inoffensive? I realize that this is not with respect to you, your personal body, but with respect to justice or compassion, the sum of which you view life with.

Judge O'CONNOR. Mr. Chairman, Senator Denton, it remains offensive at all levels. The question is, what exceptions will be recognized in the public sector? That is really the question.

Senator DENTON. Where do you feel that the possibility should occur?

Judge O'CONNOR. I find that it is a problem at any level. Where you draw the line as a matter of public policy is really the task of the legislator to determine. Would I personally object to drawing the line to saving the life of the mother? No; I would not. Are there other areas? Possibly. These are things that the legislator must decide.

Senator DENTON. Well, candidly, personally, in terms of a tubal pregnancy with the impossibility of delivering that fetus, the operation to take it from the mother can be viewed as an abortion to save the life of the mother. I want to confess that I am in favor of that activity. I would not refer to it as abortion, but I want to say that you are more conservative than I in the answer you just gave.

Do you feel that your present attitude will remain as a final position? If not, which way do you feel likely to trend on the issue?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I cannot answer what I will feel in the future. I hope that none of us are beyond the capacity to learn and to understand and to appreciate things. I do not want to be that kind of a person. I want to be a person who is open-minded and who is responsive to the reception of knowledge.

I must say that I do expect that in this particular area we will know a great deal more 10 years from now about the processes in the development of the fetus than we know today. I think we know a great deal more today than we knew 10 years ago, and I hope that all of us are receptive and responsive to the acquisition of knowledge and to change based upon that knowledge.

ROE VERSUS WADE DECISION

Senator DENTON. Retrospectively, do you feel comfortable about the correctness of the *Roe* v. *Wade* decision?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I do not quite know what that question means. If you mean, am I unaware of the concerns that have been expressed about it, of course I am aware of the concerns that have been expressed.

Senator DENTON. What I mean is, as a person are you comfortable with the status quo of sort of psychological environment, peer pressure about what is right and wrong, that that decision has left?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I am concerned about the extent of public concern about that issue. Obviously, law which does not have a broad consensus, if you will, is

always a concern to us because we are here in a broad sense in Government as servants of the people. Lawmakers, it seems to me, have to be concerned about the views of the public generally and about broad segments of the public who feel strongly about certain issues. That is vitally important in the lawmaking field.

I think that the judicial branch is, of course, designed to be not directly responsive to public pressure, and rightly so. I think all of us would concede that it would be unwise to have courts try to resolve public issues in a given case that is before the courts on the basis of public sentiment but, of course, it is always a concern to us and should be a concern to us when there is a broad level of public discontent about some issue.

Senator DENTON. Well, a great many people regard the *Roe* v. *Wade* decision as the most extreme example or one of the most extreme examples of judicial preference for "personal ideas and philosophy" over textual and historical sources of constitutional law. As I understood you earlier in your answers, you were in favor of a judge ruling from those bases rather than from what had become, perhaps temporarily, a public perception in terms of what is OK and not OK.

Judge O'CONNOR. Mr. Chairman, Senator Denton, yes, I do feel that a judge is constrained by the processes surrounding the judicial system to resolving issues based on the framework of the particular case that has come before the judge, the particular facts, the particular statute, and the law applicable to those.

WOMEN SERVING IN COMBAT

Senator DENTON. Would you give your present personal position with respect to women serving in actual military combat or ships and planes which would likely become involved in combat?

Judge O'CONNOR. Mr. Chairman, Senator Denton, it seems to me that consistent with the recommendation I made when I served on the Defense Advisory Committee on women in the service, that the term "combat" should be specifically examined with regard to specific assignments, and that women should be considered if they are in the military for service on assignments taking into account their ability and the specific mission to be performed.

I did not favor and do not favor today a complete exclusion, for example, of any women naval personnel from a ship merely because it is a ship and it is in the U.S. Navy. I think that it has to be examined much more closely than that, and that process has in fact been occurring and it is one which I think is appropriate.

Senator DENTON. My question was not directed toward the Dacowits testimony, with which I am familiar, but just your personal preference. Assuming that we knew whether or not a woman would be committed in combat, would you be for or against that commitment?

Judge O'CONNOR. Mr. Chairman, Senator Denton, speaking as a personal matter only, I have never felt and do not now feel that it is appropriate for women to engage in combat if that term is restricted in its meaning to a battlefield situation, as opposed to pushing a button someplace in a missile silo.

Senator DENTON. In other words, you would not want them to be in a position to be shot?

Judge O'CONNOR. To be captured or shot? No, I would not. [Laughter.]

Senator DENTON. Well, it may astound this audience, but at the Naval Academy not too many months ago there were young ladies standing up and demanding to be placed in just that position, and saying that that was their right to do so because they were accepted into the Naval Academy, so it really is not all this laughable, you know. I am glad to hear that is your opinion, Judge O'Connor.

Yesterday in describing yourself as a judge, you said that two of the characteristics that have stood you in good stead over the years are a short memory and a tough skin.

I see my time is up. I will be asking you something about the Starr memorandum in the next session. I thank you very much, Judge.

The CHAIRMAN. The Senator from Pennsylvania, Mr. Specter.

DEATH PENALTY

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge O'Connor, I compliment you on your tour de force of yesterday. I think that indirectly you have answered a number of questions, with respect to capability, by the preparation and legal skill that you have demonstrated with your answers, and with respect to your temperament, your good health, and stamina.

Did you have occasion while in the Arizona Senate to vote on the death penalty issue?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes, I did, I think more than once.

Senator SPECTER. How did you vote?

Judge O'CONNOR. Mr. Chairman, Senator Specter, after the *Furman* v. *Georgia* case, which basically overturned a good many State death penalty statutes for all practical purposes, Arizona along with other States engaged in an effort to reexamine its statutes and determine whether it was possible to draft a statute which would be upheld by the Supreme Court in the wake of *Furman* v. *Georgia.*

I participated rather extensively in that effort, in a subcommttee which actually put together the language that was ultimately adopted in the State legislature for reenactment of the death penalty in Arizona. I voted for that measure after it was drafted and brought to the floor. I subsequently had occasion to, in effect, apply it as a judge in the trial court in Arizona in some criminal cases.

I had previously participated in a vote on another death penalty bill that I recall that may have come about before the one in the wake of *Furman* v. *Georgia,* and that was a proposal to enact some mandatory penalties in certain situations. My recollection is that I voted against that proposal.

Senator SPECTER. Have you changed your views since you voted in favor of the death penalty?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I felt that it was an appropriate vote then and I have not changed my view.

PRETRIAL BAIL

Senator SPECTER. Judge O'Connor, have you had occasion to set pretrial bail?

Judge O'CONNOR. Mr. Chairman, Senator, yes, I have; not often, but I have.

Senator SPECTER. In the setting of pretrial bail, did you consider the dangerousness of the defendant or did you limit your consideration to his likelihood of appearing at trial?

Judge O'CONNOR. Mr. Chairman, Senator, the circumstances in which I was called upon to set bail all related to some murder charges in which, under Arizona's statutory provision, the judge also considers, if you will, the nature of the evidence against the defendant and other factors in setting bail.

I am aware of the current discussion that is going on at the Federal level generally about whether dangerousness should be considered as a factor, and indeed whether it can be under the eighth amendment and the prohibition against excessive bail.

Senator SPECTER. When you set the bail, did you consider the issue of dangerousness to the community in your evaluation of the bail?

Judge O'CONNOR. Mr. Chairman, Senator, only indirectly, I suppose, because what I was considering was the fact that it was a death case and the extent of the evidence which had been obtained. Upon the strength of that, the bail was determined, so indirectly dangerousness perhaps was a factor.

PREVENTIVE DETENTION

Senator SPECTER. Judge O'Connor, what are your philosophical views about bail and preventive detention as that concept may conflict with the presumption of innocence in criminal trials?

Judge O'CONNOR. Mr. Chairman, Senator, these matters are certainly presently being debated and considered here, I believe, as well as in the courts. Unless I am mistaken, there is a case now awaiting action at the U.S. Supreme Court on a petition for certiorari, possibly, from the District of Columbia area involving the validity of the District of Columbia amended bail statute. Therefore, I would be reluctant to indicate a particular view on the validity of that but I would indicate to you my broad personal concern as it reflects upon individual liberty.

It seems to me that all of us come to the judicial system encumbered, if you will, by our previous known activities. If people have been previously convicted of offenses and these convictions are known, or if for example someone has been charged with an offense and released on bail and then charged again with another offense and these factors in the record are known, these things perhaps—speaking purely as a matter of personal belief and not as a reflection on the legal issues involved—possibly merit consideration in the determination of bail.

FUNDING FOR JUVENILE CRIME

Senator SPECTER. Judge O'Connor, with admittedly limited resources available, what priority would you personally assign to

funding for juvenile crime prevention as contrasted with other aspects of the criminal justice system?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I would assign a high priority to that particular area. One reason I would do so is because the great bulk of crime is committed by people who are very young and it seems to me that we need to concentrate our efforts on that particular age group. If there is something we can do at an early age to discourage a criminal career, it is all-important, because I think the public is very, very distressed with the extent of crime in this country. Indeed, I regard it as one of the most serious problems that we have in this Nation and I would like to see effort devoted to prevention of crime at an early age.

LIKELIHOOD OF REHABILITATION

Senator SPECTER. Does your experience in the criminal court suggest to you that there is a better likelihood of rehabilitation among juvenile offenders?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes. I think the earlier you reach an offender, the first time something happens if something effective can be done you have a better chance of stopping a subsequent repetition of that offense.

Senator SPECTER. Judge O'Connor, do you think that it is appropriate for Supreme Court Justices to be advocates for social reform, as Chief Justice Burger has been for improvements in the correctional and prison system?

Judge O'CONNOR. Mr. Chairman, Senator Specter, it does seem to me that the Chief Justice has a significant role to play in expressing views on the administration of justice and on matters closely related thereto. It seems to me that that is something that all of us in this Nation can value and can benefit from.

Senator SPECTER. Do you think it appropriate for Supreme Court Justices to participate in other activities, as Chief Justice Warren did on the Warren Commission, or Justice Roberts did on the Pearl Harbor Commission, or Justice Jackson did at Nuremburg?

Judge O'CONNOR. Mr. Chairman, Senator Specter, that bothers me somewhat. I just wonder how there is time to do anything like that. As I view the work of the Court, I wonder that there is time to eat much less engage in a lot of other outside activities.

LIMITED JURISDICTION

Senator SPECTER. Judge O'Connor, if the Congress can limit the jurisdiction of the Supreme Court on constitutional issues, as you say ex parte *McCardle* suggests, how can the U.S. Supreme Court maintain its role as the final arbiter of the Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I do not think that I have suggested that that line has been finely drawn by the Court. It has not been reexamined, really, since ex parte *McCardle*, and I did not mean to suggest or imply that that is a fixed, final position because that issue is very likely to be addressed.

However, I have also expressed yesterday my concerns that to the extent that the Supreme Court lacks appellate jurisdiction to resolve some area of the law, then we no longer would have a capacity within the Federal judicial system to have that Court

determine, indeed, what is the proper interpretation of a particular provision, or the law in the area from which its jurisdiction has been taken. This of course should be a concern to people in reviewing proposals for deprivation of jurisdiction.

Senator SPECTER. Well, in your testimony yesterday you left open that aspect of an interpretation of ex parte *McCardle.* My question to you is, how can the jurisdiction of the Court be limited on constitutional issues, given the Court's responsibility under the Constitution? Is there anything that is an open issue there to be decided?

I am not asking you for a preview on your judgment. I am asking you, if there is any justiciable issue there? Is it not plain that the Court must retain jurisdiction over constitutional issues and that the Congress cannot possibly eliminate that jurisdiction if we are to preserve the role of the U.S. Supreme Court on constitutional issues?

Judge O'CONNOR. Well, Mr. Chairman, Senator Specter, these are the concerns that I have tried to express that I think have to be considered, of course, in connection with any discussion of the limitation of the Court's jurisdiction. My effort was simply to point out that we really do not have much to look at after ex parte *McCardle,* which was a case which did uphold, as you know, the withdrawal of jurisdiction of the Supreme Court from considering appeals in habeas corpus matters. That affected a pending appeal. The Court simply upheld that particular exercise, and we have very little since then.

As I tried to explain, I think the constitutional scholars who have written on this subject have come to different conclusions as to the extent to which subject matter jurisdiction can be removed.

Senator SPECTER. Judge O'Connor, is it not inevitable for the Supreme Court to be influenced, at least to some extent, by considerations of social policy when the Court interprets the U.S. Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, in one sense we are all the product certainly of our experiences. People assume the role of judge encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.

However, the framework within which a given case is decided should, in my view, be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.

Senator SPECTER. I thought the questioning and your responses yesterday on *Brown* v. *Board of Education, Plessy* v. *Ferguson,* and the exclusionary rule were very enlightening, so I took occasion last evening to go back and reread *Brown.* I would disagree respectfully with your suggestion that the Court in *Brown* rested on a more intensive look at the origin of the 14th amendment. Without citing the direct language, I think the holding is very plain that the Court was looking to the effect of segregation on public education.

With respect to the exclusionary rule and what you described as a judge-made rule, *Mapp* v. *Ohio* was based on constitutional grounds and I think explicitly by the holding.

When you consider the intervention of the Supreme Court in the criminal field starting with *Brown* v. *Mississippi* and its prohibition against forced confessions, which neither the legislature of Mississippi or the Congress of the United States had addressed—I am just wondering if under your interpretation of "strict construction" you would not agree that there is an avenue and an opening where even the most strict constructionists would look to social policy in the decisions of the U.S. Supreme Court in meeting issues to which the Congress or State legislatures have not directed their attention?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I simply would acknowledge that to a degree that has occurred.

Senator SPECTER. Don't you think it is proper—if you take a strict constructionist like Justice Harlan in *Brown* v. *Board of Education,* and we could give a lot of other examples—that however strict a constructionist may be, there is some latitude appropriately to consider public policy or social policy in interpreting the Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, it is a factor in the sense that it is properly brought before the Court, and I have indicated to you that I think in the presentation of cases these matters are brought very poignantly to the Court through the briefs and through the arguments. To that extent, obviously, they are considered in that sense but by an appropriate mechanism, I suggest to you.

The suggestion that the Court should look outside the record in the presentation of the case in an effort to establish or consider social concerns or values, is what I have indicated I think would be improper in my view.

Senator SPECTER. Thank you very much, Judge O'Connor.

Thank you, Mr. Chairman.

PRAYER IN PUBLIC SCHOOLS

The CHAIRMAN. Thank you.

We shall now begin the second round of questions.

Judge O'Connor, I shall propound certain questions to you but I want to make it clear that if you feel that any of these questions would impinge upon your responsibilities as an Associate Justice of the Supreme Court, then you say so after the question is asked and before any answer is expected.

Judge O'Connor, the first amendment forbids the establishment of a State religion. The first amendment also prohibits interference with the free exercise of religion. This second prohibition is often overlooked. Please share with us your views on the free exercise clause as it relates to, first, prayer in public schools.

Judge O'CONNOR. Mr. Chairman, as you know the Court has had occasion in several instances to consider the State action, if you will, in connection with prayer in the public school system. The Court has basically determined that it is a violation of the first amendment, both the establishment and free exercise clause, to

mandate a particular prayer, even though it is nondenominational in character, for recitation by the pupils on a regular basis. The Court has even so determined despite the fact that an individual pupil may ask to be excused from that exercise.

In succeeding cases the Court has also prohibited the required Bible reading in the public schools as part of a regular program. I do not think it has prohibited, however, reference or reading the Bible in connection with other studies, for example, of history.

These cases of the Court have been the subject of an enormous amount of concern by the public generally. That concern, I think, is reflected because of the many connections that we have as a people with religion. I think this Senate opens every one of its sessions with a prayer. Certainly every session of the Supreme Court opens with a statement concerning the role of God in our system. We have a motto in this country of "In God We Trust." We refer to God in our pledge of allegiance.

I think the religious precepts in which this country was founded are very much interwoven, if you will, throughout our system. That is why the resolution of these problems under the first amendment has been very difficult.

I think at the present time the Court has indeed restricted the recitation of prayers in the public school system which in any sense are part of the public school program, despite the free exercise clause. This has given rise, of course, to different constitutional amendment proposals on occasion that have been considered in this Congress. At the present time the Court rulings continue to stand.

CHARITABLE EXEMPTION

The CHAIRMAN. Now would you share with us your views on the free exercise clause as it relates to the use of the Federal taxing power to pressure religious schools.

Judge O'CONNOR. Mr. Chairman, I believe that what you are referring to probably is the action by the Internal Revenue Service to withdraw the charitable exemption status under section 501(c) of the Internal Revenue Code to a particular school or schools, based on alleged policies of admission of pupils to those schools. At least I understand that there have been some such instances.

Speaking very generally only, the Internal Revenue Service policy in this regard has been said, I believe, to raise questions in the area of the extent to which the Internal Revenue Service should be a revenue-collecting agency as opposed to an agency concerned with public policy issues; and secondarily issues concerning the extent to which the Internal Revenue Code authorizes IRS to effectuate those policies.

Now I believe that there are at least two cases in which petitions for a writ of certiorari raising these issues are presently pending before the Court, and I would anticipate that action would be forthcoming with regard to those petitions, Mr. Chairman.

FIRST AMENDMENT DOES NOT EXTEND TO OBSCENE MATERIAL

The CHAIRMAN. Judge O'Connor, the Supreme Court has consistently held that obscene material is not protected by the first

amendment. What are your views on the application of the first amendment in the area of pornography?

Judge O'CONNOR. Mr. Chairman, generally speaking, I think the law is established by virtue of the cases that have been handed down in this area, that the first amendment right of free speech does not extend to obscene material. The problem has been, of course, in the definition of what is obscene.

It would be very tempting to quote from Justice Potter Stewart on that subject, but I will refrain and mention only that I think the most recent determination of the court on what is obscene is found in *Miller* v. *California*, in which the Court laid down basically three tests to consider in determining what is obscene.

That includes, I believe, an examination as to whether the average person applying contemporary community standards would find the subject obscene or appealing to the purient interest; and, second, whether the act in question or material in question depicts patently offensive sexual conduct as specifically defined by State law; and then, finally, an examination as to whether the material has any underlying literary or scientific or other value. Having applied those tests, if it is determined then that the material is obscene, the Court has held that its distribution or sale can be restricted.

I, in the legislature, had occasion to attempt in various years to prepare and consider legislation in Arizona which would be in compliance with the Supreme Court's holdings on obscenity, and believed that as a matter of public policy the distribution of material which in fact is obscene is undesirable, and particularly with respect to distribution to minors.

The CHAIRMAN. Judge O'Connor, in response to an earlier question from Senator Hatch you emphasized, and I believe correctly, the importance of seeking the intent of the original framers when faced with the need to interpret a provision of the Constitution. The Supreme Court is also called upon to construe specific statutes.

What is your approach in construing specific statutes? Would you feel constrained by the language of the statute and the legislative history or would you feel empowered to imply or create a consensus that might not have existed in the legislative branch?

Judge O'CONNOR. Mr. Chairman, it seems to me important in construing statutes that the Court look at the specific legislative enactment itself, the language used, and any legislative history which is available in connection with it, as aids in the proper interpretation. These are crucial factors.

The difficulty arises, I suppose, when the legislative history does not cover the particular question and where the language is somehow confused or conflicts with some other statutory provision which has been enacted. In those instances I think the Court simply has to rely on traditional means of interpreting statutes.

RIGHT TO KEEP AND BEAR ARMS

The CHAIRMAN. Judge O'Connor, as you know the second amendment to the Constitution states that "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." In light of that consti-

tutional prohibition, to what extent if any do you feel that Congress could curtail the right of the people to keep and bear weapons that are of value in common defense?

Judge O'CONNOR. Mr. Chairman, this question is one that has not been addressed very often in the courts. I think I recall only one instance, and that was in *United States* v. *Miller*, which was a very long time ago in the 1930's. The Court had to consider the National Firearms Act of 1934, which was an enactment of Congress, and it restricted as I recall the carrying of certain types of guns in interstate commerce. The Court upheld that enactment and said that the second amendment did not guarantee the right to people to have any certain type of weapon or arms.

I do not know that we have anything that has been handed down since then by way of Supreme Court interpretation. Certainly, as far as I am able to determine, most cases in the lower courts have applied the second amendment as being a prohibition against Congress in interfering with the maintenance of a State militia, which appeared to be the thrust of the language in the amendment.

Certainly the various States have considered a variety of statutes concerning the possession and use of weapons in connection with their police power which is reserved to the States. Typical examples of those are laws which, for instance, prohibit the carrying of concealed weapons or laws which impose additional penalties for crimes committed with the use of a gun. That kind of legislation is rather frequent.

The CHAIRMAN. Judge O'Connor, should the opinions of any one court of appeals be given any greater precedential value than those of the other Federal circuits? Would you prefer a continued emphasis on concentrating venue for certain subjects in one particular circuit, for example, administrative law questions in the Court of Appeals for the District of Columbia, or do you feel that diversity of thought would be beneficial?

Judge O'CONNOR. Mr. Chairman, I suppose in reality we give more credence to the opinions of those judges whom we respect and admire, and perhaps that is how we view them rather than giving more credence to the opinions from one particular circuit than another. I am sure that the court of appeals serving the District of Columbia inherently gets many more administrative law questions than other districts, by virtue of the fact that we have so many Federal administrative agencies located here, and that has resulted in a concentration.

However, generally speaking, I would think that the opinions of all the appellate circuits at the Federal level are entitled consideration and very weighty consideration.

INTERPRETATION OF THE CONSTITUTION BY STATE COURTS

The CHAIRMAN. Judge O'Connor, as a State court judge did you ever feel that the Federal judiciary considered its ability to interpret the Constitution to be superior to that of judges in State courts? Do you believe that State courts can be depended upon to interpret the Constitution as correctly as Federal courts?

Judge O'CONNOR. Mr. Chairman, that depends of course on the capacity of the individual State court but, speaking very broadly

only, it seems to me that we do have in this Nation many very fine State courts and that we would do well to allow those State courts to function as indeed I think they are intended to function in considering a wide range of issues, including those of Federal constitutional principles as those cases arise. It is my belief that our State courts can serve us well in that regard, and I have confidence for the most part in their capacity to handle these very complex issues.

The CHAIRMAN. Thank you.

The distinguished Senator from Delaware, Senator Biden.

Senator BIDEN. Thank you very much.

To follow up on the question of the chairman about State courts, and the article you wrote in the William & Mary Law Review, Judge, isn't it true that historically the State courts have not done too well with regard to interpreting the Federal Constitution? The rationale for why the Supreme Court is better able to interpret the Constitution relates to the independence of that body, lifetime tenures, and the fact that many State courts are elected bodies and subject to political pressures. As for familiarity with the material, the fact of the matter is most State court judges do not regularly resolve constitutional questions, whereas the Federal judges do.

One of the things I would like to ask you is, do you truly believe that on balance the Federal judiciary is not more qualified than the State judiciary to interpret the Constitution of the United States of America?

Judge O'CONNOR. Senator Biden, we obviously in kur system have adopted the notion that we do need a Federal court system and we do need a U.S. Supreme Court to be the final determiner of these issues. I do not quarrel with that. I think it is a wonderful system but what I have tried to point out is that we have a dual system of courts in our country.

We have State court systems that also deal day-in and day-out with these constitutional issues. Indeed, the vast bulk of all criminal cases are tried in the State courts, not the Federal courts, and there is not a trial in a criminal case in a State court that does not raise certain Federal constitutional issues with which those courts have to deal. State courts are in fact dealing day-in and day-out with Federal constitutional issues and it is my belief that they are well-equipped to do this, and that we should not assume that because their manner of selection may differ or their length of tenure may differ, that they are less independent. I have seen some really remarkable examples of courage among State court judges in dealing with issues.

LIFE TENURE

Senator BIDEN. I do not dispute that but if that is true—I do not dispute that there are remarkable examples, but if that is true then the need for life tenure on the Supreme Court becomes much less significant. Some of my colleagues right here in the Senate suggest that there should not be life tenure. Some suggest that there should be mandatory retirement. I even heard it suggested there should be election.

Therefore, if in fact that is true, Judge, you are undercutting the argument that in fact life tenure is essential to the independence

of the Supreme Court. There must, by definition, be some difference at least in degree.

I go back to the point again—I do not want to belabor this—but the reason the Federal courts got into this business in the first place is that the State courts did not—I emphasize, did not—interpret the Constitution in a way that the Federal courts felt proper.

They got into the business because citizens in the South and citizens in my State decided that they were going to keep some citizens in different positions than other citizens. They got into the business because they thought that they had to protect individual rights of citizens in certain States that the State courts obviously, on their face, refused to protect.

That is why they got into the business, and I just get sick and tired, quite frankly, of all this talk. Everything that has to do with the Federal branch of Government, whether it is the Federal courts or the Congress or anything Federal is bad, and States are good. I remind you and I remind my colleagues and I remind the audience that the reason the Federal Government got into 90 percent of the business it got into is that the State courts did not do the job.

I do not want to debate it with you. You are welcome to respond if you would like but I just think it is malarky to talk about how State courts historically are so competent and State court judges are equally competent on balance as Federal court judges. If that is the case, then we should change the Federal system and make it much easier.

Judge O'CONNOR. Mr. Chairman, Senator, I have not suggested that there is not a need for the Federal courts, and I am sure you recognize that. That has not been suggested.

Senator BIDEN. No; I am not saying that, but do you think there is a need for life tenure? Is there a need for life tenure for Supreme Court Justices?

Judge O'CONNOR. Life tenure, of course, is provided in the Constitution and to change that would require a constitutional amendment.

Senator BIDEN. I know that. Is there a need for that? Let me ask you a direct question: Do you think there is a need for that? I know it is in it. Do you think there is a need for it?

Judge O'CONNOR. Mr. Chairman, Senator Biden, it seems to me that judges can function independently under alternate systems of tenure.

Senator BIDEN. I agree.

Judge O'CONNOR. I do not believe that it is essential to the integrity or function of a given judge that that judge have life tenure.

Senator BIDEN. I see.

Judge O'CONNOR. That is quite a different question from saying, should we with the U.S. Supreme Court amend the Constitution so that we do not have it? I think it has served us perhaps reasonably well through the years, and those are different questions, but I do truly believe that it is possible for judges to function independently and well under alternate systems.

Senator BIDEN. I agree that that is the case. We have examples of it. I also agree that there are a number of public officials who are destined to be in the second edition of Profiles in Courage. I believe that there are brilliant women and men in every field, but I would suggest that the Founding Fathers were pretty smart. They perceived the vulnerabilities that exist in human nature and the exigencies of the times and what pressures they bring on people, and decided that it was not worth the chance to count on exceptional courage.

Let me go to one other point, to follow up on what Senator Specter said. Judge, I am going to vote for you. I think you will make a very good judge but I am a little disturbed about the reluctance to answer any questions. [Laughter.]

I am not being facetious. I mean that sincerely.

Let me read you from the *Brown* case. In the *Brown* case it says: "In approaching this problem"—the problem referred to is whether or not "separate but equal" is an appropriate doctrine—"we cannot turn back the clock to 1868 when the amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation of public schools deprives these plaintiffs of equal protection of the law."

I see nothing in the decision, there is no place in the decision where the Court said anything other than, straight up, "We are not reexamining the 14th amendment, we are not reconsidering it; we are saying that social changes, social policy, and social mores in America have changed to now make it reprehensible to allow any school board, any State, any jurisdiction, to say black folks cannot go to school with white folks for whatever the reason."

That was a fundamental change in the social mores of this country. The Court made no pretense about on what basis they were making it. They did not go back and say the 14th amendment was misinterpreted. They flat out said, "We are reflecting the change in social policy."

I know you know that, and I know it is difficult for you to respond to that because as soon as you respond to me you are going to have 14 other men jumping on you to say something else, so I will not even ask you to answer it, but I hope you know that I know you know. [Laughter.]

DISQUALIFICATION

However, I will ask you some specific questions that will not get you in trouble but have to be asked in my capacity as the ranking member. I guess these are the very dull questions that nevertheless should be on the record. They relate to the questions of recusal or disqualification. With all due respect, they relate to your distinguished husband.

Title 28, United States Code, section 455, requires disqualification of a judge when their spouse

(1) has a financial interest in the subject matter in controversy or any other interest that could be substantially affected by the outcome of a proceeding, or

(2) is a party to a proceeding or an officer, director, or trustee of a party, is acting as a lawyer in a proceeding, is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Now your spouse is a distinguished partner in a law firm in Phoenix, Ariz., and by virtue of the community property laws of Arizona, you have an undivided one-half interest in that partnership, as we understand it. What standards will you use to determine when to disqualify yourself? Will you make an effort to determine what cases your spouse has worked on in the past? Will you keep yourself aware of the names of clients that your spouse has represented in the past? Will you determine when deciding an issue in the future whether your spouse has any connection with the parties in that case?

Judge O'CONNOR. Mr. Chairman, Senator Biden, yes. These are very serious matters and of great concern to anyone serving on the bench. It is a concern when the judge is married to an attorney that the judge be informed about the clients that the spouse is representing, and indeed the clients that the firm is representing, and to exercise great care in avoiding participating in any case in which it might be said that there was some relationship there.

Senator BIDEN. I have no doubt you will do that, Judge, but give us an idea mechanically of how you plan on being kept apprised of what cases your distinguished husband's law firm is involved in. I mean, mechanically how does that happen? I know that is clearly your intent; I have no doubt about your integrity but, mechanically, how do you do that?

Judge O'CONNOR. Well, at the Federal level as I understand it and in the Supreme Court, the parties are required, for instance, in the case of a corporation to reflect and list for the benefit of the Judges of the Court all of the subsidiaries and related companies involved, so that you do have an opportunity to know in fact what the links are with that party. Then it becomes necessary for you to determine whether that is on any list of clients that the office has, and of course they maintain such lists, so that is fairly easily done in a mechanical sense.

In addition, if the law firm in any capacity had been connected with the case, that would appear in the record someplace in the case below. I mean, they would have appeared as parties; they would show up on the pleadings. You know who has been representing them, so you have the further question, then—assuming that neither the spouse nor the law firm had any connection whatever with the case—if it related to a client, an occasional client or even a frequent client of the firm but in this instance the client was dealing with a matter that arose in another State and with another law firm. Then you have to determine whether that connection is such that a disqualification is necessary.

Senator BIDEN. I appreciate your taking the time to go into that. I think it is important that it be on the record, and for the public who are watching this hearing and for those who have a more cynical view of our system, our Congress, our courts, that there is a mechanism, that you are aware of the mechanism, that you have every intention of maintaining in a very scrupulous fashion adherence to that mechanism. That is why I bothered to ask the question.

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My time is running out, but let me ask you one other question, if I may, about the appropriateness to be involved in promotion of social issues. Would it be, in your opinion, inappropriate for you as the first and only woman at this point on the Supreme Court—if you are confirmed, as I believe you will and should be—to for example be involved in national efforts to promote the ERA?

Judge O'CONNOR. Mr. Chairman, Senator Biden; I believe that it would be inappropriate.

Senator BIDEN. Why would it be inappropriate for you to do that while it is appropriate for Justice Burger to be traveling around the country telling us and everyone else what State and Federal jurisictions should do about prison construction and what attorneys should do about law schools and how they should be maintained, and whether or not we should have barristers and solicitors. I mean, what is the distinction? Is it a personal one or is there a real one?

Judge O'CONNOR. Mr. Chairman——

Senator BIDEN. I do not suggest he should not do that; I want to know what your distinction is. [Laughter.]

Judge O'CONNOR. It seems to me that it is appropriate for judges to be concerned and, indeed, to express themselves in matters relating to the administration of justice in the courts, and as to matters which would improve that administration of justice in some fashion. Certainly the court system is very heavily involved in the criminal justice system.

Senator BIDEN. However, doesn't he also speak not just about administration of justice? Hasn't he spoken—correct me if I am wrong—but hasn't he spoken about procedural changes in the law, not just for the administration of justice, in the broad sense of whether there are prisons or whether there are backlogs in the courts, but actually what should be the law relating to criminal matters and other matters? I mean, he has gone beyond and suggested legislation.

Judge O'CONNOR. Mr. Chairman, Senator Biden, yes, I think that the canons of judicial ethics do say that a judge may engage in activities to improve the law and the legal system and the administration of justice. I am sure that those statements which have been made are made in——

Senator BIDEN. I just do not want you to wall yourself off, Judge. You are a tremendous asset. You are a woman and the first one on the Court; don't let these folks, me included, run you out of being that. You are a woman; you do stand for something that this country needs very badly. We need spokespersons in positions of high authority. Don't lock yourself in, in this hearing or any other hearing, to do things that you are not proscribed from doing in the canons of ethics.

It is your right, if it were your desire, to go out and campaign very strongly for the ERA. It is your right to go out and make speeches across the country about inequality for women, if you believed it. Don't wall yourself off. Your male brethren have not done it. Don't you do it.

You are a singular asset, and you are looked at by many of us not merely because you are a bright, competent lawyer but also because you are a woman. That is something that should be adver-

tised by you. You have an obligation, it seems to me, to women in this country to speak out on those issues that you are allowed to under the canons of ethics. Don't let us intimidate you into not doing it.

[Applause.]

The CHAIRMAN. I will warn the audience there will be no clapping, and the police will remove anyone who attempts it again.

Senator BIDEN. Will they remove the person who causes it, Mr. Chairman? [Laughter.]

I apologize. My time is up.

The CHAIRMAN. I wish to tell the police to remove anyone who attempts to express himself in such a manner, if it occurs again.

The distinguished Senator from Maryland, Senator Mathias.

TV IN THE SUPREME COURT

Senator MATHIAS. Thank you, Mr. Chairman.

These last few moments, Judge O'Connor, have been recorded on television and transmitted to the world. In fact, not only these last few moments but these last 2 days we have all been basking in the bright lights that are required for television.

I am wondering what your attitude is towards the introduction of television cameras into the courtroom of the Supreme Court. Justice Potter Stewart recently said that—

> Our courtroom is an open courtroom. The public and the press are there routinely. Since today TV is a part of the press, I have a hard time seeing why it should not be there too. As I understand the present technology, disruption is hardly a threat anymore, and I think it is difficult to make an argument to keep TV out when you allow everyone else in.

Of course, that is the conclusion that our chairman has made about this meeting, and I am wondering how you feel about TV in the Supreme Court.

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I would certainly want to wait until I had served on the Court, and discussed the situation with others and been privy to the concerns that others may have on the subject before I would formulate a position on it.

However, let me tell you that at least in Arizona we have been allowing cameras in the appellate courtrooms, television cameras, and I have participated as an appellate court judge in court with television cameras present. The experience has been reasonably satisfactory, I would say, as far as I am concerned. I have not yet participated in or did not participate in a trial in which television cameras were permitted in the courtroom.

It has been my thought that, as the technology improves and as it is possible to have that recorded without the necessity for the bright lights and with cameras which are not readily apparent, and without noise and interruptions, that it is conceivable to me that the technology will be such that we will conclude that it is less disruptive than perhaps originally might have been the case. Therefore, I would anticipate that we have not seen the last of the development in this area because, as you have correctly noted, television has become an important means of communication for people generally.

Senator MATHIAS. I think that is right. Through television, you have become known to millions of Americans. The disruptive aspect which might be complained about in a trial is unlikely to be a problem in the Supreme Court.

Let me move on now to another subject which is routinely considered by this committee when we have nominees for the courts or nominees for the Office of Attorney General before us, and that is the question of private clubs that discriminate on the basis of race, religion, sex, or national origin. Do you believe that it is appropriate for Federal judges to belong to organizations of this kind?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, the judicial conference has been considering this precise question, and in general has espoused the view that it is not desirable for Federal judges to belong to clubs which discriminate on the basis of race, sex, or national origin. It is suggested that in each instance that will be left to the individual conscience of the judge, at least that is the present status of it.

I do not disagree with it in general as it is applied to professional associations, certainly, or to clubs which discriminate on the basis of race. I, myself, belong to several women's clubs and they are service clubs, if you will, organizations that have devoted themselves to bettering the community. They do not discriminate on the basis of race or national origin but have no male members. I cite specifically the Soroptimist Club of Phoenix and the Charter 100, and the Junior League of Phoenix of which I am now a sustaining, not an active, member. It is not my feeling that those memberships should necessarily be dropped because of going on the Federal bench.

FIRST AMENDMENT

Senator MATHIAS. Let me turn to the first amendment. Chief Justice Burger has written that "a responsible press is an undoubtedly desirable goal but that press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated." Would you feel in general harmony with those views of the Chief Justice?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I am not sure that I know the total thrust of that language or those comments. Would you care to expand and explain to me?

Senator MATHIAS. Well, I think generally it is whether or not you feel the first amendment is a comprehensive guarantee of freedom of expression; whether or not efforts to limit the first amendment in various ways, adopting the Chief Justice's words, to make the press more responsible, are in fact proper and constitutional.

Judge O'CONNOR. Mr. Chairman, the first amendment right of free speech, Senator Mathias, is a crucial right. It is a right which in this country has been recognized by the Court as having some precedence over many other rights that are also important. Cases examining statutory restrictions on the right of free speech have applied very strict standards, and appropriately so, very appropriately so.

The restrictions or exceptions have been rather limited in nature. They relate generally, as we know, to matters which are obscene; in the area of commercial speech to fraudulent speech or misleading speech; and in the case of other speech to speech which is basically to incite a riot or other criminal action. Beyond that, very few limitations have been upheld, and appropriately so, in my view.

Senator MATHIAS. Would you go as far, do you think, as the late Justice Black, who said that you had to take the first amendment right at face value: that when it said that "Congress shall make no law respecting the limitation of freedom of speech," that it meant just that?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I suppose not in the sense that I accept and recognize the exceptions that have already been placed, as I have mentioned.

BALANCE BETWEEN FREE PRESS AND FAIR TRIAL

Senator MATHIAS. What about the place where the first amendment collides with other guarantees, let's say, the guarantee of a fair trial or the right of privacy? Where would you make the balance between a free press and a fair trial?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, these are very difficult issues and, of course, the Court has been addressing them in connection with criminal trials. In the *Gannet* case, of course, the Court held that it is at least possible and that it would draw the balance in that case in favor of upholding the ability of a trial court, under appropriate circumstances, to close a pretrial hearing.

In a subsequent case, however, arising out of Virginia, the Court said that the trial itself will generally be open to the public and the press despite the defendant's wish to perhaps have it closed, except in certain circumstances which the Court did not define. It did not absolutely rule out the possibility that in a particular case that a defendant's right to fair trial would not take precedence, but it did not enlighten us as to the circumstances when that would occur.

I have found in my own experience that the conduct of the business of the courts is public business. On no occasion did I close the doors to my courtroom to the media. We conducted all of the business which I had, at least, in public. I felt that that worked well.

There are other things that a court can do to protect a defendant's rights in a given situation, such as sequestering the jury if that is necessary. It is also possible to change the venue of the trial if the media attention is so great that no fair trial can be obtained, so I think there are ways of dealing with the situation that give some flexibility to the court in an individual situation.

Senator MATHIAS. Therefore, you think—as I hear you answering—that the balance should be wherever possible in favor of the free press, the first amendment question?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I do not want to be drawing any lines that are going to prove troublesome in connection with a given case, but I do feel that the conduct of trials in public is appropriate and that it is hard for me to visualize

circumstances that would make it absolutely necessary to close the doors, although it is conceivable that there are such. There are other avenues open for a judge to employ.

Senator MATHIAS. Well, to go back to the question we discussed earlier kf electronic coverage of a trial, suppose it would be determined in a given case that television coverage was going to be disruptive for some reason. Would you then consider that, let's say, radio coverage which does not require lights, does not require cameras, might be an appropriate way in which to provide for a full public access to the information that was available?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, that would not be offensive to me personally, had I been a trial court judge. I would want, of course, to comply with the canons of judicial ethics applicable in my State, and would be very concerned about doing that. As you know, not all States have made it possible for courts to be recorded either on the radio or by television; in fact, very few have.

DOCTRINE OF PRIOR RESTRAINT

Senator MATHIAS. Of course, here in the Senate we have on some occasions, notably the Panama Canal Treaty debate, used radio as an alternative for television as a means of informing the public of precisely what is happening here.

Now one recurring issue with respect to the first amendment is the applicability of the doctrine of prior restraint. We had a notable case recently, the *Progressive Magazine* case, in which they had published a diagram of how to build your own atom bomb. What are your views on the doctrine of prior restraint, and particularly when it is raised with a plea of national security?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, again the balancing test is sometimes extremely difficult to employ. Under the first amendment, it would appear that the line will be drawn in favor of no prior restraint unless the Government bears and meets its extremely heavy burden to establish that indeed there is an actual danger affecting the national security which is very real and very present, before any prior restraint would be authorized.

It seems to me that that is an appropriate way to approach the issue. It is not an easy burden for the State—or the Federal Government in that case—to bear and, indeed, they usually lose but it should at least be possible for the Federal Goverment, it seems to me, to present an appropriate case that would truly affect national security.

Senator MATHIAS. Therefore, you would describe the burden not merely as heavy but as extremely heavy, before they can successfully argue for prior restraint.

Judge O'CONNOR. Well, Mr. Chairman, Senator Mathias, I would hope I would not be held to that in writing an opinion but it is somewhere in that range. It is a very great burden which the Government has in order to justify a prior restraint.

Senator MATHIAS. Personally, I would think the burden would be an extremely heavy one.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts, Mr. Kennedy.

Senator KENNEDY. Thank you very much. Thank you, Mr. Chairman.

To follow along on the issue which Senator Mathias has raised but to approach it in a somewhat different manner—and that is the claim of national security and how you balance the national security interest versus the first amendment—I think at the time when I was going to law school a number of years ago, the general rulings at that time were that whenever the Executive claimed national security, a very heavy deference was given to the Chief Executive or to the Office of the President.

We have seen and recent history has taught us the need to scrutinize the claims of the executive branch with great care before contemplating the inhibition on free speech, free association, free press, and the right of dissent. These cases which involved the Pentagon papers, the Elsberg break-in, I think reflect that as really a different view or a different role by the Court in reviewing the claims of national security.

I was interested in hearing your own attitude, how you as an individual view the role: whether you view the role as an umpire in our Federal system, weighing the competing first amendment and national security claims. Are you going to give the complete, basic, and overwhelming presumption to those who make the claim? Are you going to examine in some detail the background for such claim? How will you approach this general issue?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I think I would not approach it by the application of presumptions but, rather, that it would be appropriate to know the basis upon which the claim is made as fully as possible.

Senator KENNEDY. Therefore, as I understand your answer, rather than just deferring to those that claim it, you would assume an active role in examining the underlying assumptions for such a claim.

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, yes, it would seem to me to be the appropriate role of the Court.

Senator KENNEDY. In another area that was raised by some of our colleagues on the issue of crime and law enforcement, and your responses to another Senator's inquiry about the doctrine of stare decisis, I wonder as you view the development of criminal law rulings that have been made over the last 20 years, whether you will follow the doctrine of stare decisis for the holdings of the Supreme Court in some of these important areas of preserving the individual rights of the defendant.

Will you follow that doctrine of stare decisis as closely as you may in some of the other areas? Whatever our definition of judicial activism will be, or how it has been established over the course of these hearings, is it your basic feeling that you will follow those criminal law holdings of the Court in the past as precisely as you might in other areas of policy?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I would expect to apply my view of the rule of precedent evenhandedly, without respect to the area of the law to which we are referring.

MIRANDA RULE

Senator KENNEDY. As a judge, and in your experience as a judge, how much impact has the exclusionary rule and the *Miranda* rule on confessions actually had on prosecutions that you have dealt with?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I want to distinguish the two because I had different experiences concerning them.

Senator KENNEDY. Well, I would be interested in both.

Judge O'CONNOR. I had many criminal felony trials on the trial court bench, many. That is all I did, all day long, for 2 years, and had others throughout the remainder of my time on the bench.

The *Miranda* rule was one which frankly those in Arizona did not greet with a lot of enthusiasm. It came from Arizona; it was an Arizona case and, of course, those in Arizona thought they had done the right thing, so it required a period of adjustment.

It requires the recitation of some rights which frankly can become rather mechanical in its recitation, and as applied to those criminals who have had extensive experience with the law, I think some of those defendants could recite the rights more easily than the peace officers assigned to do the task. However, for some it has had meaning, for some who are not experienced in the criminal law, being advised of their rights has had a substantive effect and a meaning.

My experience on a trial court is that the application of *Miranda* has not resulted in an inability of the police to still be reasonably successful in their efforts to gain information and obtain statements. It has, no doubt, precluded some but on a broad, general basis I cannot say that I think the police have been unable to cope with it.

We have had to have *Miranda* hearings in advance of every trial to determine to what extent these statements must be excluded, and it was seldom that we had to exclude the statements. People continued to make statements despite the fact that they had been warned of the consequences, in large measure. Therefore, I cannot say that I think the application of *Miranda* has simply tied the hands to the extent that police work is ineffective.

EXCLUSIONARY RULE

Senator KENNEDY. How about in the exclusionary rule? How many times did that come up, say, in the time of your 2 years?

Judge O'CONNOR. Many, many times. Almost always in a drug case.

Senator KENNEDY. I see. How many times did that really affect the outcome, either in an acquittal or a reversal?

Judge O'CONNOR. A number of times. I think the exclusionary rule, from my simple observation as a trial court judge, has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police.

I am not suggesting, and do not want to be interpreted as suggesting that I think it is inappropriate where force or trickery or some other reprehensible conduct has been used but I have seen examples of the application of the rule which I thought were unfortunate, on the trial court.

Senator KENNEDY. Do you think that either rule has had much of an impact on the rate of crime, for example, in Arizona?

Judge O'CONNOR. That is a very speculative sort of a thing for me to respond to. I would not think that the *Miranda* rule has actually affected the crime rate. Conceivably, the exclusionary rule has had some effect in some areas of the crime rate, possibly in the drug enforcement.

Senator KENNEDY. In an entirely different area, the Court has had increasing involvement in complex claims involving Native Americans, redress, broken treaties, and these have involved large tracts of lands and large sums sought for compensation. Your record shows an awareness of a special obligation to Native Americans. Could you give us some idea, in general, as a westerner, how you would approach these issues in order to try and deal with a sense of justice and equity to the Native Americans and still balance the legitimate claims of others, without unduly disrupting the lives and the economy of the rest of a State's citizens who are perhaps completely innocent bystanders?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, Arizona is fortunate in having approximately 14 Indian tribes and a great deal of reservation land in the State. I think it adds to the cultural diversity of Arizona and the interests that we enjoy.

It also has given rise to some litigation, as you have mentioned, in a variety of contexts and it has given rise to some disputes on the legislative level concerning the appropriate boundaries for representative bodies. As you know, on the reservation Indians are not subject to State taxation, and I would say that much of the litigation which I have seen arises out of the framework of the taxabilitiy of certain transactions which occur on the reservation, transactions involving non-Indians and Indians, or non-Indians but on the reservation, and so forth.

These matters have developed over the years a body of law dealing particularly with these relations, and the Indian tribes enjoy certainly a special status and special exemptions in the area of taxation and other State regulation.

Senator KENNEDY. I was thinking not only of taxation but water rights. Even in my part of the country, because of the failure of the Congress to pass enabling legislation, there still are some very serious questions about land distribution and the real title to various land.

I was just interested in your own concern about the fairness and equity to Native Americans, and how you balance some very solemn obligation responsibilities that we have with the rapid development in some parts of the country among agricultural interests and other types of interests. How you are going to approach these matters. Clearly you have had a strong interest in these issues in the past. I think for many Native Americans they would be interested in the concern that you will bring to the Court about their interests.

Judge O'CONNOR. Well, Mr. Chairman, Senator Kennedy, I view with interest and concern the problems of the Native Americans, as I do every other discreet group which has suffered from disadvantages. I would approach each particular case involving a question of taxation or water rights or land ownership as I would any other case for any other citizen, I would hope, very evenhandedly. I would try to deal with it in as fair a manner as I know how. I am aware of the background and the heritage and the problems, and I would try to resolve the cases on the basis of the facts of the case and the law applicable to that particular situation.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah, Mr. Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have to apologize to you because I have to conduct my own committee this afternoon, so I will not be able to sit in and listen to your responses, but I have satisfied myself from our almost an hour discussion and other discussions subsequent to that, that you are an excellent choice for the U.S. Supreme Court and a long overdue one at that.

However, I do have some questions I think are important to put on the record, and I would like to just take a few minutes of your time and ask them here today.

In a number of decisions over the years, the Court has held that the 14th and 15th amendments require proof of intent or purpose prior to a finding of a constitutional violation. Given that this is the standard, and given that Congress chooses to use either of these amendments as the basis for a statutory measure, would you believe that the Congress might constitutionally adopt some lesser standard for identifying violations?

I might add, putting policy aside, do you believe that the Congress would have to have constitutional authority to do this?

AFFIRMATIVE ACTION

Judge O'CONNOR. Senator Hatch, I am not sure I quite understand yet the thrust of the question. Now this is in connection with affirmative action?

Senator HATCH. Yes; it would be affirmative action, and let's use that as a perfect illustration. I will give you an illustration: In recent years, some in the civil rights community and in the Justice Department have developed a test for determining the existence of discrimination that looks to the effects or disparate impact of an otherwise neutral action, rather than to whether there is some discriminatory intent or purpose or motivation, in other words, some wrongful state of mind.

Now considering that, and considering that the Court has held in a number of cases that the standard of proof generally requires some degree of intent or purpose, even circumstantially, do you believe that Congress could adopt a lesser standard than some proof of intent in these cases, and do you think that the Congress might constitutionally adopt some lesser standard in order to resolve some of these problems or identify violations?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, this whole area of affirmative action is one that has given rise, of course, to some fairly recent litigation touching upon both congressional enactments and State statutory enactments and policies.

In general, it appears to me that what the Supreme Court has done is to say that the enforcement clauses of the 14th and the 15th amendments, giving Congress the power to enforce those amendments by appropriate legislation, has been to acknowledge a power of Congress that goes beyond, if you will, the direct application of those amendments on their face.

In other words, if the 14th amendment or the 15th amendment on its face would have been held by the Court, as it has been, to require proof of discriminatory purpose, or intent, on the other hand the Court has said that Congress can apparently go beyond that in its enactments, to a degree.

I think the area of the law is still undeveloped in some respects but we are seeing several examples, at least, in court decisions that have been handed down where the power of Congress under the enforcement sections has extended beyond the bare applicability of the statutes. I would assume that Congress in its wisdom would be considering, as I know you are, the appropriate statutory resolution of these matters. I am sure that we will continue to see additional litigation.

DISCRIMINATORY INTENT

Senator HATCH. Let me put it another way: There seems to be a fundamental distinction between men and women of good will on the issue of identifying what constitutes "discrimination." To some, the act of discrimination requires some mental element, some demonstration of a mind purpose, or a motive. To others, statistical imbalance is enough to show racial or ethnic discrimination without any proof of intent whatsoever, even by circumstantial evidence or otherwise.

Do you have any views on this matter personally? In other words, can you brand somebody a discriminator or as racially motivated or a racist without some element of intent, whether it is circumstantial or otherwise?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, again without intending to represent that this is a legal decision on any of these very complicated matters that would come before the Court, my general personal approach would be to look for discriminatory intent, evidence of that.

Senator HATCH. Thank you.

Yesterday Senator Metzenbaum asked you a series of questions about 42 United States Code 1983, which is a very volatile subject today in American jurisprudence. His questions, it seemed to me, may have left a lingering impression that I would really like to see resolved.

He maintained that Federal rights such as those arising in social security cases and the like should be accorded a right of access to the Federal courts. Now is there any particular type of claim or particular class of cases that give a claimant a right to have his claim adjudicated in the Federal courts?

Maybe I could clarify that even a little bit more. In the *McCurry* case of this year, the Court reversed a court of appeals holding that appeared "to be a generally framed principle that every person asserting a Federal right is entitled to one unencumbered opportunity to litigate that right in the Federal district court, regardless of the legal posture in which the Federal claim arises, but" the Court continues "the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee but leaves the scope of the jurisdiction of the Federal district courts to the wisdom of the Congress."

The Court then proceeded to reject every other "conceivable basis for finding a universal right to litigate a Federal claim in a Federal district court."

Now does this Supreme Court language seem to support your reading that the State courts are worthy of more credence in these type of cases?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I do not know whether that is what the Court had in mind when it wrote those words, but we have discussed I guess at length in these hearings my belief that indeed State courts can provide a hospitable forum for the hearing of Federal rights.

Certainly the Supreme Court in the recent session handed down several decisions in this whole area of examining Federal statutes to determine when those statutes created a cause of action for someone and when they did not. It appears to me to be an area in which the Court, at least more recently is looking more closely at the congressional legislation to determine if indeed there is such a right.

This is an area, I might add, in which I think the Congress has a very important role as well as the courts, Congress in its role to make clear whether it intends to be creating some cause of action, and if so, what.

Senator HATCH. Yesterday, in response po one of Senator Thurmond's questions, you noted that you supported a bill in the Arizona Senate, 1165, I believe, which disallowed funding for abortions unless medically necessary, but later you told Senator Dole that this bill bascially reflects your views today, or at least that is the way I understood it. How did you understand the meaning of "medically necessary" in 1974, and can you draw a distinction, either in your past role as a State legislator or in your current role as a judicial nominee, between Federal rights and Federal funding to further rights?

Judge O'CONNOR. Mr. Chairman, my recollection is that that is not exactly the language of the bill, and I will refer to it.

Senator HATCH. I am not sure myself.

Judge O'CONNOR. It contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of the mother——

Senator HATCH. I see.

Judge O'CONNOR [continuing]. Or where pregnancy resulted from rape, incest, or criminal action. That was the language of the bill.

Senator HATCH. Therefore, you would limit it to that language.

Judge O'CONNOR. That was the provision to which I referred, which was adopted and passed. The other portion of your question was——

Senator HATCH. The other portion was, can you draw a distinction either in your past role as a State legislator or in your present role as a judicial nominee, between Federal rights and Federal funding to further rights?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, yes, I think that the establishment or recognition, if you will, of a particular constitutional right has been held by the Court not to carry with it a right to funding for the exercise of that right, if that is what you mean, and I believe that has been reasonably established.

Senator HATCH. I think that helps.

Several recent Supreme Court decisions have sharply—I will go back to that *Thibidoe* decision that I brought up prior because I think it is an important issue of today—several recent Supreme Court decisions have sharply expanded the liability of municipalities under section 1983. The *Thibidoe* case, for an example, extended th scope of 1983 to include violations of any Federal law instead of just civil rights law. The *Owens* case eliminated even the good faith defense for municipalities.

Now what distinctions would you make to prevent further expansion of 1983, or really can it be expanded any further?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I am not sure that I know that it can. Since the *Thibidoe* case the Supreme Court has handed down several additional cases to which you have referred this morning which have in fact not found a cause of action being created in those specific contexts of the legislation, so I think *Thibidoe* has been modified to a degree by subsequent cases.

Senator HATCH. It has been expanded, in many ways.

Judge O'CONNOR. It has been expanded in other areas. Certainly the municipalities have no good faith defense, athough I think the other public officials and employees are still granted the good faith defense.

Another recent case has held that no punitive damages are allowable.

Senator HATCH. Of course, you cannot convince the municipalities of that because there are multibillions of dollars of actionable claims against municipalities all over this country today, as a result of *Thibidoe*, both the *Thibidoe* and the *Owens* cases.

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I think it is a matter of concern and I think it is a matter of concern not only within the context of individual cases to come before the Court but to the Congress itself as it reviews these provisions.

ATTORNEYS FEES

Senator HATCH. In your article in the William & Mary Law Review, you indicate that the attorneys fees statute, section 1988, might profitably be modified to reduce the number of section 1983 suits and to reduce the burden on State and local governments. Now since we are discussing that in our committee now—on the Subcommittee on the Constitution, which I chair—do you have any

specific recommendations for amending section 1988 with regard to attorneys fees?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, nothing specific other than to suggest that categories of types of actions perhaps could be considered and weighed with regard to it. To preclude appropriate causes of action or to discourage appropriate causes of action by removing the capacity to collect attorneys fees would no doubt be unwise, but to discourage causes of action that are specious, or in areas in which the Congress never intended, if you will, that the section be applicable would present another matter for consideration.

Senator HATCH. Judge, I would just like to say in closing that I have certainly enjoyed listening to you. I think this is a very difficult position to be in, with all these lights and all these people and all these questions and all these Senators, but I think you have acquitted yourself really well.

I personally am very proud of you, and I am going to support you, as I indicated quite a while ago, and be very proud to have you on the Supreme Court of the United States of America. I am very pleased with having you here during these hearings, and having you have this opportunity.

Judge O'CONNOR. Thank you.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. The committee will now stand in recess until 2:30.

[Whereupon at 12:55 p.m. the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The Judiciary Committee will come to order.

Questioning of Judge O'Connor by the members of the committee will continue.

Judge O'Connor, I would remind you that you are still under oath.

Judge O'CONNOR. Thank you, Mr. Chairman.

The CHAIRMAN. We will now hear from Senator Laxalt of Nevada.

PRESIDENTIAL AUTHORITY OVER INDEPENDENT AGENCIES

Senator LAXALT. Judge O'Connor, in 1972 legislation which was sponsored by you was enacted by the Arizona Legislature giving the State attorney general power to approve all regulations proposed by State agencies.

Here at the Federal level the experts have debated what inherent authority the President has over Federal agencies, including the so-called independent agencies, due to his constitutional role as Chief Executive.

We are in the throes now of attempting to enact and implement administratively as well as up here legislatively substantial regulatory reform. The essence of that problem is jurisdictional in part.

I would like to have your views as to what Executive authority over the so-called independent administrative agencies you believe a President of the United States has.

Judge O'CONNOR. Mr. Chairman, Senator Laxalt, I think it may depend on the legislation in each instance as to what role has been envisioned for the Executive with respect to some particular agency.

I recognize that Congress is dealing today in terms of legislative review of the relationship that would be appropriate in terms of agency regulation.

In fact, I think some consideration is being given—if I am not mistaken—to even having the legislative body itself involved by some sort of legislative review.

These proposals, of course, have not been tested yet; and I cannot speak to the constitutional validity of them, I think; but it involves essentially a question of the essential separation of powers concept and the extent to which, under the separation of powers at the Federal level, it is considered desirable to have some form of oversight of the administrative bodies, whether it be by the executive branch or the legislative branch.

To the extent that these administrative agencies are executive agencies or agencies under the executive branch of Government and that the executive branch is given some role of oversight in connection with them, it does not appear to involve a question of separation of powers.

To the extent that the concept or vehicle used is one of legislative review of the regulations or the actions, we have different questions at play.

In Arizona, as you have indicated, the State adopted a practice in the year that you mentioned of having the attorney general part of the executive branch review the regulations of agencies of the executive branch for legality prior to their adoption by those agencies. That system seems to have served reasonably well.

Senator LAXALT. If I understand you correctly, in the absence of some legislative prohibition there would be no constitutional bar on the grounds of separation of powers or otherwise, restraining a President from exercising direct authority and responsibility over the independent agencies if the legislation in question opened the door for him to do so?

Judge O'CONNOR. Mr. Chairman, Senator Laxalt, it would appear to me—again without attempting to express any legal opinion on a given case—that within the executive branch, provided the legislation allowed for it, the executive branch could be assigned certain roles for review of those executive branch agencies.

Senator LAXALT. As you indicated, a combination of proper oversight here of those agencies plus general supervision on the part of the Executive theoretically at least should get the job done?

Judge O'CONNOR. Senator Laxalt, we would hope so.

VENUE RULES

Senator LAXALT. Let us talk about venue for a moment. I do not know whether or not you have followed the progress of rather substantial venue legislation we are pursuing through this committee.

Under section 1391 of title 28 of the United States Code actions in which the Government is a party may be brought in one of four

places—I am sure you are already familiar with this—No. 1, where the plaintiff resides; two, where the defendant resides; three, where the cause of action arose; or, four, where any real property involved in the action is located.

As you probably already know from your previous experience in a Western State, many cases involving Federal land located in Western States are brought here in Washington, D.C. As a result, there is little opportunity for individuals vitally interested in the outcome to participate in such a proceedings effectively.

We have had land decisions decided here; we have had water decisions affecting our water decided here by district judges within the District of Columbia.

In addition, there is some feeling that the Federal judges in those Western States have a better understanding of the practical consequences of these lawsuits over land use.

Considering that the Federal Government owns or controls approximately 50 percent of the land in the Western States—and in your State and mine substantially more than that; ours is 87; I do not know exactly what yours is, but I think it is near that—people in those States increasingly feel that they have no say about significant matters that affect them on a daily basis.

Now, Judge O'Connor, do you consider a change in the venue rules which requires suits to be brought in the district where the outcome of the suit will have the greatest impact an appropriate action by this Congress?

Judge O'CONNOR. Senator Laxalt, it appears to me that that determination is one that is peculiarly appropriate, I suppose, to the legislative branch to determine.

If there were no other impediments involved normally we would want to consider in terms of where a cause of action is brought some of the factors affecting the convenience of the parties. In other words, if most of the parties find that it would be more convenient to have the trial brought in a particular location rather than another, that is a factor that normally one would want to consider.

As far as any statutory changes are concerned concerning the provisions for venue, that seems to me to be a policy question appropriate for the legislative branch to address certainly.

Senator LAXALT. Do you see that this poses any degree of constitutional question?

Judge O'CONNOR. Senator Laxalt, I do not know offhand whether any particular constitutional issue could be raised concerning it. I really have not studied that problem and would want to have the benefit of some research before I could answer that. None comes immediately to mind, but I have not researched the question.

JUDICIAL NOTICE

Senator LAXALT. I understand.

Let us talk about judicial notice for just a moment or so. Reviewing your own record, it has been very pleasant for this Senator as a former lawyer and one who has worked on this committee for quite a while to find that you have, in fact, as a judge, exercised considerable judicial restraint. You, in fact, in your position, have been a

judge rather than a public official or a legislator; and you have operated within those constraints.

One of the areas where license can be used, I would imagine, by any judge, is in looking beyond the record factually as a judge may or may not find that record and getting out into the labyrinth that we call judicial notice. This brings into play then, factually and otherwise, an independent situation which may or may not be proper.

In this general area I would like to ask you this, Judge O'Connor: In the context of several of your own opinions you have been called upon to address the permissible scope of judicial notice. As a matter of policy rather than one of statutory construction, what do you, as a judge who has sat on the State level and who now aspires to sit on our highest court, view as the proper range of judicial notice?

I suspect that in controversial cases that have been alluded to here previously *Roe* v. *Wade* and others—perhaps our Supreme Court in that situation did, I think, indulge in far too much latitude in this area. May I have your views?

Judge O'CONNOR. Senator Laxalt, with respect to the application of those things of which a court can take judicial notice I can share with you my views as a State court judge when I have had to face the question, and that basically is that the court was allowed to take judicial notice only of matters which were, in effect, beyond dispute—for example, a date or the time within which the Sun rose or set on a given date, or the location of a particular community geographically, or something of that sort.

These are the instances in which we would normally apply judicial notice at the State level—I would say very limited circumstances.

Senator LAXALT. Do you see an application of the doctrine in respect to the functions of the Supreme Court?

Judge O'CONNOR. Senator Laxalt, I have not had occasion to review all the instances in which the Supreme Court has been called upon to take judicial notice of something, so I would be perhaps not in a position to give you examples of where the Court may have adopted a broader view if it has. I can only speak from my experience as a State court judge in which the application of the doctrine would be very limited.

REGULATORY STATUTES MAY VIOLATE CONSTITUTIONAL DOCTRINE

Senator LAXALT. Judge O'Connor, as chairman of the Regulatory Reform Subcommittee within the framework of this general committee I am becoming increasingly involved with issues of lawmaking by administrative agencies.

Senator Heflin alluded to this during the course of his questioning but did not have an opportunity to pursue it further, so I would like to if I may.

Many have criticized the Congress for giving this power to agencies too broadly without sufficient guidelines, essentially abdicating congressional responsibility to legislate to the agencies.

That has been part of our problem here. We have passed legislation for many years in general form and, I think as a political

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matter, passed the buck downtown and let them do the dirty work by fleshing it out with rules and regulations on the part of many agencies, none of whom in terms of personnel are responsive to the process—unelected people.

Some eminent legal figures have concluded—I guess eminent legal figures are ordinarily those who agree with you—that certain of these statutes violate constitutional doctrine that Congress may not delegate its lawmaking power without clear and adequate guidelines.

Now, Judge O'Connor, do you believe that some existing regulatory statutes may be unconstitutional because of the failure of Congress to adequately lay down the general policies and standards that animate those statutes?

Judge O'CONNOR. Senator Laxalt, it seems to me that there was a time in our Nation's history when the Supreme Court used to look under the separation of powers doctrine at the delegation of legislative power to the executive and administrative agencies and review very strictly those delegations. Those were the days of *Schlecter Poultry* v. *United States* back in the 1930's.

Such an uproar arose at that time that ultimately the Court reversed that trend and began to approve very sweeping delegations of power to administrative agencies and has upheld agency regulations which had really a very tenuous basis of support in the legislation itself.

One can recall for example the *Red Lion Broadcasting* case where, under very limited delegation by Congress, very sweeping regulations were upheld.

My observation is that in recent years there are some indications at least that the Court is examining the legislative basis for agency regulations more carefully than had been the case for a while.

A very recent case dealt with whether an agency had to make a cost-benefit analysis of its regulations, and I believe the Court indicated that because that was not reflected as a duty in the legislation therefore none would be implied.

Certainly it would appear to me that the legislative branch has a very important role to play in this area in terms of determining for itself the extent to which it wants to be specific in its delegation and limitation of power to the Administrative agency to adopt regulations.

Just as a personal view expressed by one who has been in the legislative branch, it seemed to me then that very careful guidelines were appropriate to be drawn by the legislative branch in permitting agencies to adopt rules and regulations. Certainly the legislative branch has a terribly important role in this.

The Court's role then becomes one of examining the legislation to determine whether, in fact, the administrative agency is authorized to adopt the types of regulations that it has. In that regard I can only indicate to you what I may see as a trend of more careful study of that matter by the courts.

Senator LAXALT. I thank you very much, Judge.

Mr. Chairman, that concludes my time and my questioning. I thank the chairman. I thank the judge.

The CHAIRMAN. The distinguished Senator from Ohio, Senator Metzenbaum.

CONCERNS OF THE POOR

Senator METZENBAUM. Judge O'Connor, your testimony yesterday led us down some paths about which I would like to make a few comments.

Your thoughts for limiting attorney's fees in section 1983 cases and keeping the $10,000 jurisdictional prerequisite for other Federal question cases, in my opinion, actually strike at the heart of Federal jurisdiction.

I think that what disturbs me particularly is that apart from whether the Federal courts should have this jurisdiction in general, the attorney's fee and $10,000 limitations actually strike only one group of litigants, and that is the poor. That is one reason Congress created the right to attorney's fees in section 1983 cases just a few years ago, in 1976.

Since this is a matter that seems to me to be so relevant, since I am concerned that if there is any group of people in this country at the moment who are the forgotten people of the country and who are going to be even more forgotten in the months and years ahead, I am disturbed about that kind of expression or that direction.

I wonder if you would care to comment, because in your past legislative history, in all fairness, I see nothing to indicate that you have been indifferent to the concerns of the poor.

Judge O'CONNOR. Senator Metzenbaum, indeed I am not indifferent to the concerns of the poor.

The legislation in section 1988, as I read it, is certainly not limited to the award of attorney's fees to people who are impoverished. Indeed, I suppose a very wealthy individual can file a suit under section 1983 and seek attorney's fees under section 1988. So I do not believe that the legislation, as drafted at least, is in any way limited to a protection of the poor.

No doubt a portion of the motivation for its enactment was to enable suits to be brought by anyone regardless of their means to do so.

Senator METZENBAUM. But the attorney's fee question hurts them the most because those who are the "haves" can hire their own lawyers. It is the "have nots" who really have the difficulty of finding counsel, and counsel taking it then on an "if come" basis could get awarded attorney's fees under the law. Your article suggests a contrary point of view.

Judge O'CONNOR. Senator Metzenbaum, my article suggested that Congress should review very carefully its delegations of authority to sue in the first instance and also a review of those matters in which it thinks attorney's fees provisions are appropriate.

The article in no way suggested that that was a function of the judiciary, and I am sure that Congress in its wisdom will consider all of these factors as it makes this type of review.

I have not suggested, I think, that people who are impoverished be denied access to the courts. In fact, that would be a most unfortunate suggestion and one which I would not make.

But the extent to which Congress wants to authorize suits in the first instance in the Federal courts as opposed to the State court

and the extent to which Congress wants to authorize suits and have attorney's fees a possibility are appropriate things, it seems to me, for the Congress itself to consider as a matter of policy.

MORE LITIGATION IN STATE COURTS

Senator METZENBAUM. You mention the matter of the State courts. Actually you also suggest that more litigation ought to be in the State courts rather than just full access to the Federal courts.

But actually State courts really have had more experience in the constitutional issues where criminal matters were involved, and much less experience with respect to civil constitutional claims, which are the subject of all section 1983 civil rights cases and other Federal question cases. You would agree with that, would you not?

Judge O'CONNOR. Yes; I would agree generally that the expertise of the State courts in the constitutional area, while not exclusively confined to criminal cases, has been primarily in terms of numbers in that area.

I think that the State courts have developed a pretty good capacity to deal with those questions, and I see no reason why that capacity could not be extended to other areas as well.

Senator METZENBAUM. In view of your desire to shift Federal question and section 1983 cases to the State courts and to rely on the State legislatures as indicated by your response to the Judiciary Committee questionnaire, would you disagree with this statement by Justice Stewart speaking for a unanimous Court in *Mitchum* v. *Foster* in 1972 that, "the very purpose of section 1983 was to interpose the Federal courts between the States and the people as guardians of the people's Federal rights to protect the people from unconstitutional actions under color of State law whether that action be executive, legislative, or judicial"?

Obviously, he is saying that we need to have that Federal right and the right to go into the Federal court because in many instances the denial of rights occurred not alone at the executive level, not alone at the legislative level, but also at the judicial level.

If you force those cases back into the judicial level, then how does the litigant get a chance to protect his or her civil rights?

Judge O'CONNOR. Senator Metzenbaum, I do not disagree at all with the statement that you read. The framework of review could of course encompass making an initial presentation of one's case at the State level in any given situation, and if it were believed that a Federal right had been violated and that it was not adequately vindicated at the State level then to pursue the remedy further through the Federal courts. That certainly is a possibility, it strikes me.

Senator METZENBAUM. I am not sure I follow that. If you cannot get your rights litigated and the court has ruled against you in the State court, are you suggesting that you could relitigate the issue in the Federal courts?

Judge O'CONNOR. I am suggesting, Senator Metzenbaum, that to the extent that one is in a Federal court and believes that the

result on an issue of Federal law was erroneously received or determined one can raise that issue then in the Federal court.

Senator METZENBAUM. Do you not think res judicata would prevail to cause the Federal court to dispose of that matter rather summarily on the basis that the case had been decided and the constitutional issue had been raised in State court?

Judge O'CONNOR. Senator Metzenbaum, not if you are appealing from that very matter of course res judicata is not attached. If you are pursuing your remedy in Federal court, and you feel an error has been made, and you then go to the Federal court for review, no, you are not precluded from doing that.

If on the other hand you had litigated your case, and dropped it, and had taken no appeal or petition for review in the Federal system, and then tried to pursue it again, yes, then you would have a res judicata problem.

Senator METZENBAUM. If you had litigated the issue in the State court, and the State has ruled that you had no Federal right or constitutional right, and you do not appeal, and then you file suit anew in the Federal court, is it not entirely probable or logical that defense counsel would immediately file a motion to dismiss on the basis of res judicata?

Judge O'CONNOR. Yes, Senator Metzenbaum, if you do not pursue your immediately available remedies within the Federal system and let it be terminated at the State level. Yes, of course, you are thereafter precluded.

Senator METZENBAUM. What would be the immediately available remedy in that instance? You have lost in the State court; now what is your immediately available Federal remedy?

Judge O'CONNOR. You can file your petition for certiorari of course if it has been determined adversely on the Bederal issue. If you have gone to the highest State court you can certainly do that.

Senator METZENBAUM. Now you have to take your case all the way up through the appellate procedure and then file your petition for certiorari with the Supreme Court. That really is not really a very practical remedy for the average litigant because by that time he or she has pretty well run out of money, particularly if they are not well-heeled. That would mean you were in the fourth court: You had been in the lower court, the appellate court, and the supreme court of the State, and then you take the case on certiorari. Then you have to make out that Federal issue that is involved.

I just wonder whether realistically speaking, by moving more of the civil cases through the State courts and forcing litigants there and also denying them their attorney's fees, a great injustice would not be done to hundreds of thousands and maybe millions of Americans who might otherwise want to litigate a Federal question.

Judge O'CONNOR. Senator Metzenbaum, these are the precise things that I would assume this body would consider when it considers that issue. Of course you want to review all these matters very carefully. I am sure that the Senate in its wisdom will do precisely that.

JUDICIAL ACTIVISM

Senator METZENBAUM. All right. Let me change the subject. In your response to the committee's questionnaire and your other answers here you have made it very clear that you are opposed to "judicial activism."

Exactly what is and is not judicial activism is not that easy to define. It is very easy to say that the Supreme Court or the court should not make laws.

I would like to ask some questions about some of the major issues in some cases that have already been decided by the Supreme Court. Most of them are quite old and probably will never again come before the Supreme Court.

The *Baker* v. *Carr* case—this 1962 decision allowing the Federal courts to require local legislative bodies to be fairly apportioned—probably did more to reshape our political system than almost any other decision of the Supreme Court. It largely ended the gross malapportionment that existed in many States.

In your opinion was that decision an inappropriate exercise of judicial activism?

Judge O'CONNOR. Senator Metzenbaum, you are correct in your characterization of the dramatic results of that decision and its progeny. I think what the Court really did in *Baker* v. *Carr* was to reexamine the question of what is a political question which the Supreme Court will or will not consider.

I think before *Baker* v. *Carr* the Court had taken a more restrictive view, if you will, of what is of justiciability—of what is a political question—and in what case will the Court avoid deciding it at all because it is a political question.

In *Baker* v. *Carr* it really drew more liberal lines, if you will, in determining what is a political question which the Court will consider. That now appears to be the leading case on the subject of what is or is not a political question.

Senator METZENBAUM. And that is the case that established the one man, one vote rule.

Judge O'CONNOR. That is correct.

Senator METZENBAUM. Was that an inappropriate exercise of judicial activism?

Judge O'CONNOR. Senator Metzenbaum, I may have been heard to comment at the time that it concerned me but—that perhaps it was. Certainly the time that has intervened in the meantime and the acceptance of that decision has put it pretty much in place in terms of its present effect and application.

SEX DISCRIMINATION

Senator METZENBAUM. Do you think there was inappropriate judicial activism in 1971 for the Burger Court to rule for the first time in *Reed* v. *Reed* that sex discrimination was unconstitutional?

Judge O'CONNOR. Senator Metzenbaum, it was in my view an appropriate consideration of the problem of gender-based discrimination.

CRUEL AND UNUSUAL PUNISHMENT

Senator METZENBAUM. Do you think it inappropriate judicial activism for a Federal district court to order major changes in a prison after finding that conditions in a penal system constituted cruel and unusual punishment? That was in the case of *Hutto* v. *Finney*, which reached the Supreme Court in 1978.

Judge O'CONNOR. Senator Metzenbaum, I think the constitutional provision against cruel and unusual punishment has been of course part of our Constitution for many years; and it is certainly not inappropriate for the Court to consider a case that alleges that a particular prison condition constitutes cruel and unusual punishment. I do not view that as any unusual exercise of judicial activism.

You can examine then the particular remedies that are selected by the Federal district court, assuminx it finds such a condition, and then begin to discuss the extent to which the district court remedies exceed what is regarded as an appropriate exercise of the Court's discretion once that condition is found. It seems to me that is a different question.

Senator METZENBAUM. I have just one last question. I have a number of other cases of this same kind of judicial activism, but my real question is this: Is not the matter of judicial activism a question of which side of the court you are on—and I mean tennis court, not the court in the other sense—a question of which way the ball bounces as to whether one man's or one woman's judicial activism is not another party's legalistic approach to what should or should not be done, and that overreacting to the question of judicial activism could be just as bad as overinvolvement by the courts in attempting to make new law?

I would just hope that this question of judicial activism would not be of such a nature as to cause you to lean over backward or forward with respect to the actions of the Supreme Court, because I think it is these cliches that get us all in trouble. I do not think they will get you in trouble, but I at least for one would hope that the Court would not do less in meeting its responsibilities than it has done in the past in order to protect constitutional rights of the people of this country.

Judge O'CONNOR. Senator Metzenbaum, there is always a danger in oversimplification and in sloganism, and I understand that.

Senator METZENBAUM. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kansas, Mr. Dole.

Senator DOLE. Thank you, Mr. Chairman.

Judge O'Connor, in your testimony yesterday you expressed your feeling that it is not the job of the Court to establish public policy through its judicial work. As a practical matter we know that the Court has frequently found justification for such policymaking by expansive readings of the constitutional or statutory law.

Today we find courts running school systems, apportioning legislatures, managing railroads, and generally involved in a whole host of activities which would have been unthinkable a generation ago.

Sometimes those of us in the Congress feel that the Court has gone beyond interpretation of law to an extent that it makes it difficult to know who, in fact, is setting policy for our Nation.

We have talked generally about your philosophy of judicial restraint. I wonder if you might be more specific on the question of how that philosophy can be imparted to lower courts. Is there something that the Supreme Court might do to impart some of that restraint to lower courts?

Judge O'CONNOR. Senator Dole, I suppose every time the Supreme Court acts in terms of publishing an opinion that expresses a point of view that point of view is read and heard and considered by all the other Federal courts and the State courts.

To the extent that the Supreme Court expresses concepts of judicial restraint I assume that those are addressed.

Obviously, the other very simplistic answer is that judges, like lawyers, enjoy attending training programs, seminars, and so forth; and all of these means are constantly available for dissemination of concepts of appropriate judicial management and action.

BAKKE DECISION

Senator DOLE. I think also it appears to many of us on the outside at times that the Court avoids controversy and attack from outside sources by avoiding decisions on difficult issues until it is presented with a very narrow, well-defined case. There are a number of examples of that.

One I recall is the affirmative action decision—the so-called *Bakke* decision. The Court avoided a decision on the constitutionality of reverse discrimination until presented with the issue of quotas in that case.

Do you have any opinion on whether or not the Court shirks its responsibilities by following this practice—by waiting for just the right case, a very narrowly defined case?

Judge O'CONNOR. Senator Dole, I have not participated of course in the discussions that surround that particular activity.

I believe that the Court had previously rejected an affirmative action case on the grounds that the issue was then moot—in other words, that the plaintiff who had filed was no longer attending the institution and the question had become moot. That was not the situation, I gather, in *Bakke,* and the Court took jurisdiction.

The doctrine of not accepting a case which is moot is not an absolute one. Exceptions have been made in the past, particularly for those instances in which otherwise the case could never get to the Court.

However, in general the Court has attempted to, I suppose, accept jurisdiction of those cases in which it feels an issue has been appropriately raised that would lend itself to resolution.

Senator DOLE. So you are not concerned that they may, in effect, sometimes avoid coming to grips with a matter by waiting for some narrowly defined case to come before the Court?

Judge O'CONNOR. Senator Dole, of course it is a concern. We all hope that matters of great significance and in which there is a need for a final voice, if you will, are given the opportunity to be heard.

These are very delicate questions, I am sure, that have to be addressed on a case-by-case basis; and applying all the normal principles of review, is this case appropriate for acceptance?

I am sure that another factor of course is the tremendous number of cases and the limitation inherently that exists because of the incapacity to accept more than a fairly limited number of matters each term.

ILLEGAL ALIENS

Senator DOLE. Let me shift to another matter which is of considerable interest and probably will become more of interest—and maybe for that reason you cannot fairly comment on it.

The Court has never decided whether aliens who enter the United States illegally should be afforded the full protection and rights guaranteed under the 14th amendment.

The dispute finds recent expression in a suit filed against the State of Texas by certain organizations who claim that the State must make educational facilities available to the children of illegal aliens.

Do you have any general views as to the extent to which due process and equal protection rights should be afforded to illegal aliens?

Judge O'CONNOR. Senator Dole, that is an issue that is currently either awaiting certiorari or has been accepted. It is a matter which is going to make its way I think soon to the U.S. Supreme Court and a matter of grave concern to many people.

Our country has, as you know, received within its borders in recent years large numbers of illegal aliens; and the question of the right of those individuals to a public school education, for instance, and other rights is a matter that is of concern to many and which does raise serious constitutional questions, and those questions are likely to be heard soon, I believe.

Certainly with regard to the subject of aliens generally the Court's primary reported decisions have really dealt with those who are legally in the country, and various standards for review—in fact, a rather strict standard for review—in many instances has been applied to cases arising in that area.

Senator DOLE. I certainly accept that answer. I am certain this case will find its way to the Court, and you will be asked at that time I assume to apply the proper principles of law or equity.

I addressed a question to you yesterday with reference to the exclusionary rule following a question asked by Senator Laxalt, and I think there was a question asked this morning by another member of the committee. You responded with an example of a case in which you had to exclude wiretap evidence under title 3 of the 1968 Omnibus Crime Control and Safe Streets Act.

In that legislation Congress attempted to provide for admissibility of wiretap evidence under a formula which called for court supervision over the use of electronic surveillance techniques by Federal and State enforcement authorities.

This statutory scheme has subsequently been upheld by the Supreme Court, and this scheme could well serve as a precedent for

other congressional efforts to limit the scope of the exclusionary rule.

I would be interested in receiving your thoughts on your problems with the 1968 act in the cases you referred to yesterday.

Judge O'CONNOR. Senator Dole, for one thing the act applied to information obtained by private individuals in addition to those who are peace officers. The exclusionary rule as we know it under the fourth amendment is applicable only to information or evidence obtained by peace officers. If a private individual obtains evidence illegally it is not excluded in court in a criminal action based on the exclusionary rule.

However, Congress in that act has applied it not only to peace officers but to information or evidence obtained by private citizens.

In addition, the act by its terms I believe makes a blanket prohibition of the use in court and provides for no "good faith" exception, if there is such a thing, as has been addressed in some of the Federal courts with regard to the criminal exclusionary rule.

Senator DOLE. Finally, I was not able to be here this morning, but we were monitoring the session, and I understand that Senator Thurmond asked a question concerning the second amendment right of citizens to keep and bear arms.

Your response, as I understand it, included the citation, *United States* v. *Miller*—one of the few instances where the Supreme Court has ruled in recent years on the scope and meaning of the second amendment.

In that case the Supreme Court upheld the constitutionality of the National Firearms Act of 1934. That act was based on Congress' power to place transfer taxes and national registration on gangstertype weapons such as machine guns and sawed-off shotguns.

These and similar weapons, however, certainly would be appropriate for use by militias or State militias, and it seems to me that the state of the art firearms technology of that decision would be open to question if the matter came before the Court again.

In these days—and I think as recently as yesterday—we hear announcements of increased crime rates, especially violent crimes committed with firearms.

Can the several States or the Federal Government impose restrictions on private possession and use of sporting firearms without violating the constitutional guarantees of the second amendment?

Judge O'CONNOR. Senator Dole, possibly there is a difference under the second amendment question with respect to what the States can do and what the Federal Government can do. At least that is a possibility.

The *Miller* case addressed the power of Congress to enact certain prohibitions under the commerce clause of the carrying of certain types of weapons.

In a very brief decision actually, the Court simply held that the second amendment did not guarantee the right of people to have a certain type of weapon but rather was addressed to a prohibition against Congress interfering with the maintenance of a State militia.

We just do not have additional determinations by the Court of the meaning of that act. We do know, however, that the States, acting in their police power, have adopted a wide range of statutes regulating the possession and use of firearms.

It is a matter of great concern to many people. In Arizona at least that regulation has been limited by and large to a regulation prohibiting the carrying of concealed weapons and provisions limiting the use of weapons at all in certain inhabited areas, regulations concerning the use of firearms by the very young, and also statutes that impose additional penalties on people who commit crimes involving the use of weapons.

It has been the view, at least in our State, of the legislators at this point that the legislative power if it exists to further limit the use or ownership of firearms by citizens for sport purposes or for self-defense should not be limited. I think that has been a policy decision at the legislative level and not tested under the second amendment that is applicable.

Senator DOLE. Judge O'Connor, the other questions I have you have addressed, I think, directly or indirectly. I yield back the balance of my time, and I want to indicate my strong support for your nomination.

Judge O'CONNOR. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Arizona, Mr. DeConcini.

PROBLEM OF CRIME

Senator DECONCINI. Mr. Chairman, thank you.

Judge O'Connor, thank you for your fine testimony today. It has been exceptional, as was yesterday's.

I would like to address a couple of general areas with you. If you can labor through them I would be most appreciative.

The problem of organized crime, violent crime, and drug-related crime in this country has surfaced once again as a primary subject and a primary objective of many of us in the Senate; and certainly now the administration has come forward with a, not termed a "war on crime," but some specifics; and I think some of them are very positive. A number of Senators here have suggested specific legislation.

I wonder, Judge O'Connor, if you could just characterize in a general sense what you believe—first of all, if you agree that it is the problem that I believe it is; and, second, what you believe the Court can do and should do to participate in a more active way or passive way, but in some way, to bear some of the burden of improving the safety of the citizens of this country?

Judge O'CONNOR. Senator DeConcini, you have done a tremendous amount of work in this particular area, perhaps because of your background in law enforcement in Pima County and your continued interest thereafter at the State level and this body.

It seems to me that it is a subject of tremendous concern to a tremendous number of people.

We have truly an unacceptably high crime rate in our Nation. We certainly have an unacceptably high crime rate in the State of

Arizona and in the city of Phoenix and surrounding areas. All public officials in our area have exhibited a real concern about it.

It seems to me that there is no avenue, whether it be legislative or judicial, that should not be explored to see how we can improve the situation.

If I had an answer to these problems of how to instantly reduce crime I would be more than happy to give them to you; I do not know.

But we must, I think, within the judicial system itself strive constantly to resolve criminal cases rapidly. I think delay in that area simply promotes a disillusionment of people with the ability of the system to function. So we have to be concerned about the speed with which we handle these matters.

I think we have to be concerned within the judicial branch about at what point we can say that a case has been fairly litigated and fairly reviewed on appeal or on post-conviction review and now it is at an end. There must be some way to more effectively do that. That has to be a concern of people on the bench as well as legislators.

We have to be concerned, I suppose, with the imposition kf fair and appropriate remedies. It will always be a concern, I am sure, to judges on the bench that there are appropriate facilities in which to place convicted defendants if an incarcerative sentence is appropriate.

We have to be concerned, I think, with insuring that there is the power at least to order those who are convicted to make restitution in appropriate instances and the means of enforcing that.

Senator DECONCINI. Judge O'Connor, you spell it out well. Obviously, you feel the Court has a responsibility and should be a partner in any effort by any government, whether it is State or Federal, to attempt to improve the quality of life by lessening the crime.

Mr. Chairman, I would like to call to the committee's attention a letter, dated September 9, 1981, from Congressman Bob Stump, the Congressman from the third district of Arizona. I understand the chairman is going to insert it in the record in the proper place.

I want to explain to Judge O'Connor that Congressman Stump has written a very laudatory letter, one that is very explicit about serving with you in the Arizona State Senate when he was minority leader and you were majority leader. I will furnish you a copy of it.

I am very pleased that that will be in the record.

The CHAIRMAN. Without objection, that letter will be placed in the record. I intended to do it at the conclusion of the questions by the Senators, but I can do it now if you wish.[1]

Senator DECONCINI. No. That will be fine, Mr. Chairman. I just wanted to call it to the attention of Judge O'Connor.

Judge, in your William and Mary law review article—which I am sure now you probably wish you had published and had a royalty from the sale of those that everyone will be clamoring for—you go into the area of more involvement of the State courts. You com-

[1] Letter can be found on page 216.

ment on the expanded jurisdiction that Congress has recently granted to the Federal magistrates and the bankruptcy judges.

Do you feel that there is room for continued expansion of the role of these officials and these courts and others like them that might alleviate the burden on the article 3 courts, providing obviously that it does not diminish quality of justice?

Judge O'CONNOR. Senator DeConcini, I suppose we will want to look at the results of the expanded jurisdiction and the bankruptcy level to see in fact how that works and if it is a satisfactory solution.

I think that it is not inappropriate to consider the establishment of additional tribunals or different tribunals to handle a specific aspect of the workload, and I am sure that lawyers everywhere will be wanting to monitor the work of the new bankruptcy court. I think you had a substantial responsibility in connection with that legislation.

Senator DECONCINI. Do you think it is worth pursuing, whether it is on a trial basis or otherwise, an attempt to broaden the jurisdiction of other than article 3 courts to attempt to relieve and provide some other access to the courts other than just the article 3?

Judge O'CONNOR. It merits consideration. I hope that it is not always at the expense of State participation or involvement.

COURT ADMINISTRATION

Senator DECONCINI. The problem of court administration has greatly increased over the past 15 years or so. On the Federal level Chief Justice Burger has been keenly aware of the problem and has attempted in a very positive manner to deal with it; and though I have not agreed with everything he has said or done certainly it is an improvement, in my opinion.

In addition to your work, assuming you are confirmed—and I am sure that that is going to happen—on specific cases that you will handle as an Associate Justice, do you anticipate that you will be active in a broad sense in court administration? Are you bent in that direction at all? Do you feel it is a proper area for you to delve into, and can you share with us any ideas or what your direction will be?

Judge O'CONNOR. Senator DeConcini, I do have an interest in court administration. It is very important to me because, having been a judge, it has become apparent to me that effective court administration is essential in this day of burgeoning caseloads in both the State and the Federal courts. The numbers are such that unless we do the job more efficiently we are not going to do it well.

I think my greatest concern has been in the area of delay. We have made efforts both at the State and Federal level to handle criminal cases more expeditiously, and mandates have been legislated to require that.

This is at the expense then of the ability of the courts to handle expeditiously general civil litigation. People who have to wait, for example, to go to trial in a civil case are being denied justice, in my view, very dramatically. That simply is not acceptable in our system.

We have to find ways to make the system work so that people can have more rapid access to the courts when access is needed. So court administration is a vital tool in this area.

I participated in an experiment in the trial court in Maricopa County to provide speedier trial practices for civil cases generally. That experiment was very, very successful, thanks largely to the efforts of presiding Judge Bloomfield.

I think there is room for improvement nationwide in this area. I have an interest. Whether I will be encouraged or even allowed by virtue of time pressures to engage in that if I were to be confirmed for the U.S. Supreme Court I cannot say, but time and other circumstances permitting I would be very interested.

Senator DECONCINI. You are not reluctant to get involved in it assuming the time is there?

Judge O'CONNOR. No.

Senator DECONCINI. You mentioned the experiment in Maricopa County. After you are confirmed I do not know if we will be able to ask you over, Judge, to testify and give us a little background on that. Can you just tell us very briefly—because it has been a great interest of mine—how that project did succeed?

Judge O'CONNOR. The project for the civil delay reduction had several components. One was that we required that lawyers be ready for trial much sooner than normally is the case, so it compressed their preparation time substantially.

Senator DECONCINI. What happened if they were not ready?

Judge O'CONNOR. There were always avenues if justice truly required it to extend the time, but we found that in the great bulk of cases it was not required.

Then the lawyers were given a specific date on which the matter would go to trial, and there was a no continuance policy. So the lawyers who came in and had a vacation or had other reasons for continuing the case were simply turned aside, and we went ahead on the trial date that was scheduled. If the particular judge to which it was assigned was already in trial then another courtroom and another judge were found, even if we had to go to the community to find judges pro tempore.

The system had the effect of encouraging a great many settlements, and those that did not settle did go to trial as scheduled, and it was very effective.

Senator DECONCINI. Has Maricopa County adopted that on any larger basis, or has any other jurisdiction in Arizona, to your knowledge?

Judge O'CONNOR. Senator, Maricopa County has greatly expanded the program due to its success.

Senator DECONCINI. I want to compliment you and the court system there for that trial experiment. Obviously, I think it has been successful from what I have heard, even though there has been a little moaning and groaning by members of the trial bar there, but I think that is a good sign.

Judge O'Connor, much of the Federal courts' judicial and nonjudicial activities are conducted behind and beyond the public eye. The executive and legislative branches have opened many of their proceedings to public scrutiny under the so-called sunshine laws, particularly in those areas of the Federal court nonjudicial work,

such as meetings of the Judicial Conference of the United States or the council meetings of the various circuits where no cases are discussed or no debate is focused and the decisions are administrative or quasi-legislative matters.

Do you think it would help the process at all if some sort of sunshine laws were applicable in this specific area of the judiciary?

Judge O'CONNOR. Senator DeConcini, you mean concerning only the conference matters, or the rulemaking function, or policymaking functions?

Senator DECONCINI. Yes.

Judge O'CONNOR. I really do not know whether sunshine laws would be helpful in that regard or not. I have not had information as yet on the extent to which opening the meetings has been productive or nonproductive. I can speak only from my experience as a legislator in which I did support open meeting laws in Arizona and operated extensively in the public sector under those laws and have found it satisfactory. I have not had experience at the judicial level with that application.

Senator DECONCINI. Do you think it is worthy of some consideration by the judiciary and some debate within the judiciary?

Judge O'CONNOR. Senator DeConcini, that is not inappropriate at all to expect it to be discussed and considered.

Senator DECONCINI. Judge O'Connor, I want to thank you again for your fine testimony the last 2 days.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Thank you.

Senator Simpson was next, but he is not here. Senator Leahy, the distinguished Senator from Vermont, is next.

JUDICIAL ACTIVISM

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate the opportunity to be here as I mentioned before.

As I think some of us have mentioned to Judge O'Connor, unlike the chairman, for some of us this is the first time that we have been present at the confirmation hearings of a Supreme Court Justice. That is only one small reason for the good attendance by Senate standards at these hearings. I think Judge O'Connor's personality and abilities are the main reason. I am glad we have had this opportunity.

Judge, I would like to follow up on a point raised earlier this morning by Senator Specter.

In *Brown* v. *Board of Education* I suppose we go back and forth on the question of whether we were trying to determine judicial activism, whether it is a question of judge-made law or simply further research into the old law—why we have *Brown* v. *Board of Education* as law today and not *Plessey* v. *Ferguson*.

I would just read from one part of *Brown* v. *Board of Education* because I quite frankly had not read it since law school days and went back and reread it. That is the part in the Chief Justice's decision where he says,

> * * * in approaching this problem we cannot turn the clock back to 1868 when the amendment was adopted or even to 1896 when *Plessey* v. *Ferguson* was written. We must consider public education in the light of its full development and its present

place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

I state that simply—and I do not mean to get back into the whole debate on it all over again—because in my mind it appears more that the Court in effect was making law rather than simply finding some new interpretation of the Constitution.

Judge O'CONNOR. Senator Leahy, the Court did hold ultimately that separate educational facilities in the public school system were inherently unequal under the equal protection clause.

The Court did, of course, ask for extensive historical research and data in connection with its study of the problem.

In its written opinion you are correct in stating that the Court did not particularly refer to the historical analysis in reaching its decision. However, the effect of it is to determine that the equal protection clause meant what it says and that separate is not equal.

I suppose that most students of the law today would agree that that was an appropriate interpretation of that language.

To an extent, and certainly in its famous footnote, it referred to matters that traditionally are not referred to by the Court in reaching those solutions, and that of course was the subject of a lot of attention at the time.

Senator LEAHY. Of course what is judicial activism to some may probably be strict constructionism to another.

I recall probably one of the most memorable days I spent in law school, and that was the day I was selected to have lunch with Hugo Black.

Hugo Black was seen by many people certainly as a judicial activist. I recall him saying—I recollected it I believe this morning when Senator Mathias mentioned him—his views of the first amendment.

He said,

The First Amendment says there should be no abridgement on the right of free speech, and I read that as a strict constructionist meaning there should be no abridgement on the right of free speech.

He was adamant on that.

In applying that standard of course in some of the decisions he wrote he was accused of judicial activism.

In a decision that your immediate predecessor, Justice Stewart, wrote in 1972—he said, quoting *United States* v. *Bass,*

Unless Congress conveys its purpose clearly it would not be deemed to have significantly changed the Federal/State balance. Congress has traditionally been reluctant to define as a Federal crime conduct readily denounced as criminal by the States. We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between Federal and State criminal jurisdiction.

I would assume that that would be along the lines—without going into that particular case—of how you feel a Justice should approach a case involving judicial construction and federalism?

Judge O'CONNOR. I think that was an appropriate statement, Senator Leahy.

Senator LEAHY. The reason I mentioned the difficulty is that in that same case Justice Douglas dissented—and here is somebody who is seen very much as an activist—where he said,

> The Court today achieves by interpretation what those who were opposed to the Hobbs Act in this case were unable to get Congress to do.

He was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, who were all convinced that Congress had intended to usurp the power of State government to prosecute violence committed during a lawful labor strike in this particular case.

I am a former prosecutor, and I think Justice Stewart was correct. I agree with his statement. He strictly construed the statute and deferred to State authorities to prosecute acts of labor violence.

Our distinguished chairman of course has been here much longer than I have. He now feels that we need legislation that would make labor violence a crime to be handled by Federal authorities. So the issue can go back and forth. I am not really looking for an answer. I am just saying that we can make a bad mistake, and those who report on these hearings can make a bad mistake by trying to fit any one case or any one Justice into a one-line definition. I think you would agree on that.

Judge O'CONNOR. Yes; I would. I would also simply comment that Congress can be very helpful of course to the courts if it indicates what its intention is when it passes legislation as to whether it intends to preempt State jurisdiction or not. Sometimes those direct expressions can be most useful to the courts.

RIGHT TO PRIVACY

Senator LEAHY. I could not agree with you more. I think we make a bad mistake in the Congress where, in trying to get legislation through that everyone can rally around, we make it sometimes either too bland or too nonspecific, and then we pass it on to the regulators for applicable regulations. They have little to guide them. You put one more layer in there, and everyone sits back comfortably thinking that at some time or another some advocate for one side or another will bring it before the Court for the Court to work it out. That is a bad situation.

I know that there are areas where we will continue to have regulation and litigation. I know of your own fights in Arizona for tough antipollution controls, which bring about regulations and litigation, but it is a price that society should be willing to pay.

The Constitution does not speak of a right to privacy, but lately the question of a right to personal privacy comes up in opinions more and more. Do you have any views on that right within the Constitution?

Judge O'CONNOR. Senator Leahy, you are correct that the Constitution does not mention the right to privacy directly. The Constitution has been interpreted though by the Court as carrying with it a penumbra of rights under the Bill of Rights, and within that doctrine the Court, I think in *Griswold* v. *Connecticut,* first addressed directly and recognized a right of privacy. That was the case involving the right to sell or possess contraceptive devices in that State and overturned a State statute prohibiting that.

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The right to privacy has been recognized again by the Court in several other cases, one involving the possession I believe of some obscene material among other things.

The Court seems to have established that there is such a right.

Senator LEAHY. How do you feel on that?

Judge O'CONNOR. I accept the fact that the Court has established that.

The ninth amendment of course refers to a reservation to the people of other rights not enumerated. I do not believe the courts have directly pinned the right of privacy to the ninth amendment by any means; but it is simply a reference or an acknowledgement, if you will, in the Constitution that people do have certain other rights that are not enumerated.

WILLIAM AND MARY ARTICLE

Senator LEAHY. Reference was made once more to the William and Mary article. Just as a matter of curiosity, how did you come to write that article?

Judge O'CONNOR. I am beginning to wish, Senator Leahy, that I never had. [Laughter.]

However, the William and Mary Law Review in its wisdom was aware that the relationship of our dual system of State and Federal courts and their workings is an unusual one in terms of the international field—other nations do not have such systems—and that inherent in such a dual system are certain areas of concern and interrelationship that is of interest at least to those in the system.

The Law Review decided to invite some noted legal scholars to write some major papers on the subject and then decided to invite several Federal and State court judges to participate in the seminar and in the panel discussion and to make remarks.

That sounded to me like it would be fine—as a State court judge I would be happy to participate—and after I said fine I learned that they would like an article in addition. That is how the article came about.

Senator LEAHY. Judge O'Connor, I am in one moment going to do something that Senators do only with the utmost reluctance, and that is yield back the balance of time available to us. We do this even with more reluctance if there is a television camera going somewhere.

I will just simply repeat what I said yesterday and what I said earlier when we met in my office: I really do not care whether an appointee to the U.S. Supreme Court is Republican, Democrat, conservative, or liberal. I care about competence, honesty, and integrity. I feel that you have certainly demonstrated that throughout these hearings, and I will very enthusiastically vote for your confirmation.

Judge O'CONNOR. Thank you, Senator.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from North Carolina, Mr. East.

Senator EAST. Thank you, Mr. Chairman.

Mr. Chairman, before I begin my questioning I would like to request that a memorandum that has been prepared by the staff of the Subcommittee on Separation of Powers dealing with the subject of appropriate questions for the nominee to the Supreme Court be made a part of the record of these hearings. I would like to make that request.

The CHAIRMAN. Without objection, it is so ordered.

[Material follows:]

Memorandum on the Proper Scope of Questioning of Supreme Court Nominees at Senate Advice and Consent Hearings

To: Subcommittee on Separation of Powers
Senator John East, Chairman

From: Grover Rees III
Assistant Professor of Law, The University of Texas (on leave 1981-82)
Counsel, Subcommittee on Separation of Powers

September 1, 1981

I. Introduction

In a few days the Senate Judiciary Committee will hold public hearings on the nomination of Sandra O'Connor to serve as a Justice of the United States Supreme Court. There is currently a great deal of interest in what questions Senators will ask Judge O'Connor at the hearings, and in whether she ought to answer specific questions about her views on constitutional questions. This interest has been generated partly because of the controversy over Judge O'Connor's public record on the abortion issue, but also because of a relative uncertainty, among Senators and the interested public, about her general constitutional philosophy. In her public career as a legislator and as a state court judge, Judge O'Connor had few occasions on which to express her opinions on constitutional questions. The Senate advice and consent hearings, therefore, will constitute an unusually large part of the public record when the Senate votes on her nomination. It is thus especially important that Senators be informed on the proper scope of questioning at advice and consent hearings on Supreme Court nominees.

Understandably but unfortunately, most of what has been said and written on this question has been in the context of specific questions to specific nominees. The

Senators and the nominees concerned tend not to have given the question much advance consideration, and they tend to divide up according to their relative enthusiasm for the nomination at hand, with the strongest opponents favoring the broadest scope for questioning and some of the nominees themselves taking the narrowest view. Before turning to the record of prior confirmation hearings, therefore, it will be helpful to consider whether any rules for questioning can be deduced from generally accepted propositions about the role of a Supreme Court Justice and the role of the Senate in advising and consenting to Court nominations.

The controversy over questioning at confirmation hearings stems from a tension between two incontrovertible propositions: First, the Senate has a duty to exercise its advice and consent function with the most careful consideration and the greatest possible knowledge of all factors that might bear on whether the nominee will be a good or a bad Supreme Court Justice. Second, a Justice of the Supreme Court owes the litigants in each case his honest judgment on what the law is, and such judgment would be compromised if a nominee were to promise his vote on a particular case or class of cases in an effort to facilitate his confirmation.

These two duties are in tension but not necessarily in contradiction. They suggest a series of standards by which to judge the propriety of a question put to a Supreme Court nominee at advice and consent hearings:

1) Does the question seek information that it would be proper for a Senator to consider in deciding whether to vote for or against a nominee's confirmation?

2) Can the nominee answer the question without violating his obligation to decide honestly and impartially all the cases that will come before him as a Justice?

3) If there is a possibility that by answering the question the nominee might risk a violation of his future obligations as a Justice, but the information is relevant to the decision the Senator must make, can the information be obtained in some other way than by asking the nominee?

4) If relevant information cannot be obtained otherwise than by asking the nominee, can the question be asked and answered in such a way as to minimize the risk of compromising the nominee's future obligation as a Justice?

It is the purpose of this memorandum to inquire whether, according to these standards, it would be proper for Senators to expect Judge O'Connor to answer specific questions about her views on constitutional law. The memorandum will also deal with the propriety of questions and answers about the nominee's views on social, economic and political matters. Precisely because these two classes of questions are closely related, it is important to bear in mind that they present different problems. For instance, the question whether a nominee personally favors abortion (or the death penalty, or pornography) may be asked and answered with little risk of compromising a future case, since a judge's personal views on the merits of an issue are supposed to be irrelevant to his judgment on whether the Constitution requires or prohibits a certain result; yet exactly insofar as the nominee's personal views are irrelevant to future cases, it may be improper for a Senator to cast his confirmation vote on the basis of what those personal views are. A nominee's views on whether laws against abortion are <u>constitutional</u>, however --- or on any other constitutional question --- are highly relevant to the nominee's future performance as a Supreme Court Justice, and may therefore be a proper reason for a Senator to vote for or against confirmation; yet it has been suggested that

a nominee may not share these highly relevant views with Senators, lest their expression be construed as a promise to vote a certain way in a future case.

With regard to the nominee's views on questions of constitutional law, therefore, and also with regard to political, social and economic views, this memorandum will consider first whether such views may properly be considered by Senators in casting their confirmation votes. The next inquiry will be whether expression of such views at confirmation hearings could be a basis for disqualifying a Justice from participating in the Court's consideration of a case, or might otherwise be regarded as tainting the Justice's participation in such a case. Finally, illustrative questions, answers and approaches to the problem taken by Senators and nominees at past confirmation hearings will be discussed.

II. The Scope of the Duty to Advise and Consent to Supreme Court Nominations.

Article II, section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ." There is broad agreement among constitutional scholars that the Senate's duty to "advise and consent" to Supreme Court nominations is at the very least an obligation to be more than a rubber stamp for the President's choices. The most widely cited modern discussion of the question is by Professor Charles Black of the Yale Law School, who wrote in 1970 that "a judge's judicial work is . . . influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time."[1] Professor Black argued that in voting on whether to confirm

judges --- who, unlike officials of the executive branch, "are not the President's people. God forbid!"[2] --- Senators have a duty to consider the judge's views on such questions, just as the President considers their views in deciding whether to nominate them. "In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in a man's fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."[3]

Charles Black is a great and honest scholar whose work has long been admired by students of the Constitution of all political and philosophical views, but it is not inappropriate to note that he is a liberal Democrat who was writing in an age when the President was a conservative Republican and the Senate was controlled by liberal Democrats. It is interesting to observe the similarity of Black's views to those expressed in 1959 by William Rehnquist, a conservative Republican who had then recently served as a Supreme Court clerk. Discussing the Senate debate on the nomination of Justice Charles Whittaker, Rehnquist complained that the discussion had

> succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two states.[4]

Rehnquist distinguished the Senate's duty in voting on the nomination of a judge of a lower federal court --- whose principal duty is to apply rules laid down by the Supreme Court, and whose integrity, education and legal ability are

the paramount factors in his qualification --- from the confirmation of a Supreme Court Justice:

> The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making --- the "due process of law" and "equal protection of the laws" clauses --- are about the vaguest and most general of any in the instrument. The Court in Brown v. Board of Education, [347 U.S. 483 (1954)], held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.
>
> Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? . . . . The only way for the Senate to learn of these [views] is to "inquire of men on their way to the Supreme Court something of their views on these questions."[5]

Both the Black and the Rehnquist articles take the position that it is proper for Senators to vote for or against Supreme Court nominees on the basis of social, economic and political views. It is important to note that the basis for this position is the suggestion that, rightly or wrongly, such views are likely to affect the future Justice's positions on questions of constitutional law. Therefore it is at least as proper for Senators to vote on the basis of nominees' views about the meaning of the Constitution per se --- the text and history of the document itself --- as on the basis of views that are relevant only insofar as they will indirectly affect the Justice's constitutional philosophy.

It is also important to note that some students of the Constitution believe that at least some parts of the Constitution really are "there," with clear meanings and

leaving little room for injection of the judge's own views. If a Senator believed that a certain constitutional question had a right answer and a wrong answer, then it would be at least as proper for the Senator to vote against a Court nominee who disagreed with him on this question as it would be for the Senator to vote against a nominee whose social or political philosophy made it likely that he would disagree with the Senator in an area where the text of the Constitution was less clear. This is especially true today, when disagreements over constitutional law are often framed in terms of whether the Court ought to "make law" or "interpret the Constitution." To the extent that a Senator believed that a judge could reach a certain result only by "making law," that Senator would be justified in voting against a nominee who reached that result. The difference in result would be evidence of a difference in constitutional philosophy.

Other scholars have generally agreed that social and economic philosophy, insofar as they reflect on a judge's likely position on constitutional issues, are legitimate bases on which Senators might vote to confirm or reject Supreme Court nominees.[6] As recently as last May two prominent constitutional law professors, testifying before the Subcommittee on the Separation of Powers in opposition to the proposed Human Life Bill, suggested that the advice and consent power may legitimately be used to influence the Supreme Court's decisions on constitutional questions. Professor Laurence Tribe of the Harvard Law School testified that "Congress has not been without

important devices for making its will felt and known through amending the Constitution . . . . However, apart from amendment, there are other measures. . . . There are a great many things that can be done legislatively, not the least of which is expressed through the power of advice and consent in the Senate when appointments are made to the United States Supreme Court."[7] Professor William Van Alstyne of Duke University Law School agreed with Professor Tribe that "[i]t is not illicit of Congress to make its displeasure [with a Supreme Court decision or a pattern of such decisions] felt incidental to the appointment process."[8] These remarks were made in response to a question by Senator East asking what actions Congress might take to effect a reversal of Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court decision holding that the Constitution contains a right to abortion.

If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy --- and especially if, as Black and Rehnquist suggest, a Senator may have a duty to base his vote at least partly on the nominee's views --- then the Senator ought to have some way of ascertaining what these views are. Before turning to whether a nominee's future obligations as a Justice may bar him from answering questions which the Senator otherwise seems to have a duty to ask, one should observe that the nominee's views, unlike his other qualifications, will often be difficult for the Senator to ascertain except by directly asking the nominee. Education and experience can be reduced to lines on a resume. Integrity can be attested to by witnesses other than the nominee. Even the presence or absence of a "judicial temperament" might be deduced by

observation of a nominee testifying on subjects that are general and in no way sensitive. Yet unless the nominee has a long prior record of writings, speeches, and/or lower court opinions on constitutional issues --- a condition met by many Supreme Court nominees, but not by Judge O'Connor --- the advice and consent hearings constitute the only forum in which Senators can learn of the nominee's philosophy.

It should also be observed that useful knowledge about questions of constitutional law will rarely be gained except through specific answers to specific questions, usually about actual or hypothetical cases. Almost all Supreme Court nominees have testified that they are "strict constructionists" who believe courts should always "interpret the Constitution" and never "make law." Justice Blackmun, for instance, testified at his confirmation hearings that

> I personally feel that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideas and philosophy, but would attempt to construe that instrument in the light of what I feel is its definite and determined meaning.[9]

Several years later Justice Blackmun wrote the Court's opinion in Roe v. Wade, supra, which is generally regarded as among the most extreme examples of judicial preference for "personal ideas and philosophy" over textual and historical sources of constitutional law. Justice Fortas, a Warren Court member generally regarded as a "liberal," was asked to what extent he believed "the Court should attempt to bring about social and economic changes," to which he responded, "Zero, absolutely zero."[10] Professor L.A. Powe of the University of Texas Law School concludes that "Senate questioning has proved astonishingly ineffective in eliciting the desired information. Questions can always be answered less specifically than desired. . . . If the questions were

inartfully drawn and left room for maneuvering, one can fault the senators, but the nominees understood the purposes of the questions --- their responses simply were not designed to assist the Senate."[11]

Labels can be misleading. A judicial nominee might sincerely consider himself a "strict constructionist" and yet believe that the Constitution guarantees rights to abortion, racial balance in the public schools by means of mandatory busing, and other things that an equally conscientious Senator might regard as evidence that the nominee is reading his own social, political and economic views into the Constitution. By the same token, a self-styled "progressive" nominee might believe in a "living Constitution" yet be convinced that the Constitution does not forbid the states from operating segregated schools. If the nominee has a duty not to discuss specific doctrines --- and specific past Supreme Court cases, which are the building blocks of doctrines --- then he has a duty not to provide the Senate with more than labels and slogans. These will not help, and may actually obstruct, Senators in performance of their duty to advise and consent only to nominees whose views they believe to be consistent with the Constitution.

III. Statements at Confirmation Hearings as Bases for Disqualification or as Evidence of Prejudice

A nominee's discussion of questions of constitutional law at confirmation hearings, outside the context of specific pending cases, is not a proper basis for his disqualification from cases involving these questions that come before the Court after his confirmation. Nor should such discussion be viewed as evidence that the nominee will not honestly and impartially decide future cases.

The statute governing disqualification of Supreme Court Justices is 28 USC § 455, which provides:

> Any Justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, or appeal, or other proceeding therein.

In the case of Laird v. Tatum, 409 U.S. 824 (1972), respondents had urged Justice Rehnquist to disqualify himself. One ground for the proposed disqualification was that prior to his nomination as a Supreme Court Justice he had publicly spoken about the constitutional issues that were raised in the case. After noting that the statute did not seem to require disqualification on the ground that the Justice had made public statements, Justice Rehnquist stated that public statements about the case itself might constitute a discretionary ground for disqualification, but he sharply distinguished public statements about what the Constitution provides, outside the context of the specific case on which disqualification is demanded. Rehnquist's history of the modern Court's attitude toward public statements by Justices disposes of the argument that such statements are grounds for disqualification:

> My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.
>
> Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act: indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S Rep No 884, 75th Cong. 1st Sess (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, United States v Darby, 312 US 100, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941), and in later cases construing it, including Jewel Ridge Coal Corp. v Local 6167, UMW, 325 US 161, 89 L Ed 1534, 65 S Ct 1063 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly crit-

icized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. "The Labor Injunction" which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal

courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat 70, 29 USC §§ 101–115 [29 USCS §§ 101–115]. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, United States v Hutcheson, 312 US 219, 85 L Ed 788, 61 S Ct 463 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in McGrath v Christensen, 340 US 162, 95 L Ed 173, 71 S Ct 224 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it), 340 US, at 176, 95 L Ed 173. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length the doctrine expounded in the case of Adkins v Children's Hospital, 261 US 525, 67 L Ed 785, 43 S Ct 394, 24 ALR 1238 (1923). I think that one

would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Chief Justice Hughes authored the Court's opinion in West Coast Hotel Co. v Parrish, 300 US 379, 81 L Ed 703, 57 S Ct 578, 108 ALR 1330 (1937), in which a closely divided Court overruled Adkins. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel and

when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." Frank, supra, 35 Law & Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before

a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Christensen would have preferred not to argue before Mr. Justice Jackson;* that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v Judicial Council, 398 US 74, 137, 26 L Ed 2d 100, 90 S Ct 1648 (1970), strikes me as being equally true of the Justices of this Court:

"Judges are not fungible: they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this

when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle

years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, e.g., the opinion of Mr. Justice Harlan, joining in Lewis v Manufacturers National Bank, 364 US 603, 610, 5 L Ed 2d 323, 81 S Ct 347 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See Worcester v Street R. Co. 196 US 539, 49 L Ed 591, 25 S Ct 327 (1905), reviewing, 182 Mass 49 (1902); Dunbar v Dunbar, 190 US 340, 47 L Ed 1084, 23 S Ct 757 (1903), reviewing, 180 Mass 170 (1901); Glidden v Harrington, 189 US 255, 47 L Ed 798, 23 S Ct 574 (1903), reviewing, 179 Mass 486 (1901); and Williams v Parker, 188 US 491, 47 L Ed 559, 23 S Ct 440 (1903), reviewing, 174 Mass 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, supra, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.[6]

409 U.S. at 831-36 (footnotes omitted.)

Since a Justice has discretion to disqualify himself whenever his past association with a case would make it improper for him to sit on the case, the consistent refusal of Justices to disqualify themselves in areas where they had previously expressed their views on the law strongly suggests that these Justices did not regard such statements as evidence of prejudice. If a statement prior to nomination would not constitute prejudice, then neither would the same statement made after nomination but before confirmation -- nor, for that matter, a statement about an abstract question of constitutional law or about a past Supreme Court case by a sitting Justice. As Justice Rehnquist concluded in Laird, supra:

> The oath . . . taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.

409 U.S. at 838-39.

The most persuasive argument against discussion of specific questions of constitutional law by nominees at confirmation hearings is not that this will prejudice their decisions in future cases, but that they will be tempted to alter their positions in order to facilitate confirmation, or that the public will perceive such trimming even if it does not actually occur. Indeed, Justice Rehnquist added a footnote in his Laird opinion expressing this concern:

> In terms of propriety rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

409 U.S. at 836 n.5. This statement is in direct conflict with the sentiments expressed in Rehnquist's 1959 article on the need to "inquire of men on their way to the Supreme Court something of their views on these questions," but it is not unpersuasive. Indeed, if it were not so important that Senators have the necessary information with which to comply fully with their duty to advise and consent to Supreme Court nominations, Rehnquist's concern about the appearance of impropriety might be dispositive. If, however, a way can be found for the nominee to share relevant information with the Senate without giving rise to a suspicion of bribery or blackmail, then the duty to cast an intelligent vote on the nomination --- and the nominee's duty to assist Senators in casting such votes by answering candidly all relevant and proper questions --- become paramount.

The tension between the Senators' and the nominee's respective duties can be resolved, first, by a good faith effort to understand each other's problems. Such understanding would entail a mutual recognition that a candid discussion of a question of constitutional law at a confirmation hearing is <u>not</u> a promise to vote a certain way. This is true precisely because of the judicial oath cited by Justice Rehnquist in his <u>Laird</u> opinion. A Supreme Court Justice promises to consider all arguments raised by counsel in briefs and oral arguments in all the cases that will come before him. There is also the prospect of collegial

decision-making, and of the changes that time, experience and study can effect in any person's attitudes and beliefs. Insofar as a statement that Roe v. Wade was wrongly decided or Brown v. Board of Education rightly decided is not given or taken as a promise of a vote in all future cases on abortion or civil rights, the spectres of bribery and blackmail are banished. Nor is it too much to expect of our Supreme Court nominees enough integrity to resist the temptation actually to change their views, or to pretend such a change, in order to secure confirmation.

Even with the best of faith, some questions will go too far. It is improper for a nominee to comment on a specific pending case, because here the appearance of impropriety --- the possibility that expectations will be raised which the Justice will be reluctant to disappoint, and consequently the Justice's unwillingness to give full consideration to a specific set of briefs and oral arguments --- is far greater than in a case where a Felix Frankfurther happens to sit in a labor case or a Thurgood Marshall in a civil rights case. For the same reason, a hypothetical question that is too similar to a case now pending before the Court, or likely to come before it soon, would be unacceptable. Insofar as actual prejudice can be avoided, however, the prospect of improper appearances must be balanced against the need of the Senate for information on which to base the exercise of its constitutional duty. The balance must be struck in such a way as to leave the nominee free to discuss leading Supreme Court cases such as Brown and Roe, without which an intelligent discussion of the fundamental problems of constitutional law is impossible; in such a way as to leave Senators with something more than resumes and slogans as a basis for their decision.

IV. An Illustrative History of Advice and Consent Hearings

> For the last two decades the confirmation hearings have evinced persistent Senate questioning of witnesses about their beliefs on stare decisis, specific past decisions of the Court, and their probable votes in certain types of potential cases. The senators who ask such questions have a simple position --- given the importance of the Supreme Court and a nominee's lifetime appointment, the Senate needs all relevant facts in order to make informed decisions. As Senator Ervin has stated, if the Senate "ought not to be permitted to find out what his attitude is toward the Constitution, or what his philosophy is," then "I don't see why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate. Just give them [the Executive] absolute power in the first place."[12]

The history of Senate confirmation hearings reveals a wide range of attitudes toward the proper scope of questioning, with the attitudes of Senators ranging from Senator Ervin's view to that expressed by Senator Hart, who in Justice Fortas's nomination to the Chief Justiceship urged his colleagues not to ask questions that went beyond the past written statements of the nominee.[13] Likewise the nominees have varied in their attitudes: Justice Minton refused to appear before the committee on the ground that "I might be required to express my views on highly controversial and litigious issues affecting the Court,"[14] whereas Justice Blackmun predicted that he would vote to uphold the death penalty except in cases where a state imposed it for a pedestrian crossing against a red light.[15]

The closest thing to an "official" position that has emerged from the hearings was a ruling made by Chairman Eastland during the Stewart hearings. Senator Hennings raised a point of order suggesting that it was improper to question the nominee on his "opinion as to any of the decisions or the reasoning upon decisions . . . heretofore . . . handed down by that court." Senator Eastland ruled that Senators could ask any questions they liked, but that the nominee was free to decline to answer any questions he thought

improper. Senator Hennings withdrew his point of order after several Senators had indicated their support for the Eastland ruling.[16] Since the Eastland ruling seems only to state the obvious --- that no Senator will be prevented from asking any question he likes, and no attempt will be made to force a nominee to answer a question if he prefers not to --- it is of little value as authority on what questions and answers are proper.

The most common pattern in confirmation hearings at which nominees appeared personally was for the nominee to express reservations about discussing specific past Supreme Court cases, and to decline to answer some questions on this basis, but subsequently to answer others. The following exchanges are typical:

> Senator Ervin. . . . And if the Constitution means the things that were announced in the opinions handed down on May 20, 1968, why one of the smart judges who served on the Supreme Court during the preceding 178 years did not discover it?
>
> Justice Fortas. Senator, again, much as I would like to discuss this, I am inhibited from doing it. I respectfully note, if I may, sir, that the granddaddy of all these cases, in my judgment . . . was the famous Scottsboro case. It was in that case that Mr. Justice Sutherland said that the critical period in a criminal prosecution was from arraignment to trial --- arraignment to trial. I think that can fairly be characterized as dictum. But it was that statement that I think has been sort of the granddaddy of all this.
>
> Now here I have done something I should not have done. I am sorry, sir.[17]

*****

> Senator Mathias. . . . Now, I am wondering if, No. 1, you think these cases should be overruled?
>
> Mr. Powell. I would think perhaps, Senator Mathias, it would be unwise for me to answer that question directly. . . . Indeed on the facts in Escobido, I think, the Court decided the case, plainly correctly, but our concern was with respect to the scope of the opinion rather than with the precise decision.[18]

*****

> Mr. Rehnquist. Well, I certainly understand your

interest, Senator. The expression of a view of a nominee on the constitutionality of a measure pending in Congress, I feel the nominee simply cannot answer.

. . . .

Mr. Rehnquist. Let me answer it this way: To me, the question of Congress' authority to cut off the funds under the appropriation power of the first amendment is so clear that I have no hesitancy in saying so, because I do not regard that as a debatable constitutional question.

Mr. Rehnquist. Well, I suppose one is entitled to take into account the fact that public education in 1954 is a much more significant institution in our society than it was in 1896. That is not to say that that means that the framers of the 14th amendment may have meant one thing but now we change that, but just that the rather broad language they used now has a somewhat different application based on new development in our society.

Senator Bayh. . . . Let me ask you this: Do you feel that busing is a reasonable tool or a worthy tool or that it is a useful instrument in accomplishing equal educational opportunities, quality education for all citizens?

Mr. Rehnquist. I have felt obligated to respond with my personal views on busing because of the letter which I wrote and I have done so with a good deal of reluctance because of the fact that obviously busing has been and is still a question of constitutional dimension in view of some of the Supreme Court decisions, and I am loath to expand on what I have previously said.

My personal opinion is that I remain of the same view as to busing over long distances. The idea of transporting people by bus in the interest of quality education is certainly something I would feel I would want to consider all the factors involved in. I think that is a legislative, or at least a local school board, type of decision. [19]

*****

Just as some nominees expressed a narrow view of what questions they could properly answer and then tended to answer rather more questions than they had intended, others stated a relatively broad view and then answered fewer questions than their general statement seemed to justify. For instance, Justice Marshall repeatedly said that he was refusing to answer only those questions that he actually expected to come before the Court soon, not just those that might conceivably come before the Court, and he indicated his willingness "to discuss the fifth amendment and to look it up against

the recent decisions of the Supreme Court," but he found reason to object to most specific questions.[20]

It should also be noted that some judges who refused to answer questions did so on a narrow ground. Brennan and Stewart had both received recess appointments, and declined to comment on cases on the grounds that they were sitting Justices.[21] Fortas, a sitting Justice during the hearings on his nomination to be Chief Justice, also declined on this ground.[22] Harlan observed that he realized the Senators had a problem, but that his record was well known and that the Senators should vote on the basis of what they knew about him.[23] Frankfurter, who also declined to answer specific questions,[24] also had a voluminous public record on a wide range of constitutional issues.

One issue that almost all nominees felt comfortable discussing was the doctrine of stare decisis. Although a nominee's views on stare decisis are at least as valuable an indicator of his votes on future cases as are his views on specific past Court decisions, no nominee objected to discussing the doctrine on the ground that it might prejudice his decision in some future case, and nominees including Brennan, Fortas, Marshall and Rehnquist discussed the doctrine and its application to constitutional law.[25]

Most of the questions and answers in confirmation hearings, however, have been in the unhelpful rhetorical mode. Nominees have assured the committee that they are strict constructionists who believe that the Court must "interpret the Constitution" and never "make law" or "amend the Constitution." Brennan, Marshall, Fortas and Blackmun are among these adherents of the intentions of the Framers.[26] Only Haynsworth and Carswell seemed to have

any use for the "living Constitution."[27]

Finally, it is worth noting that at least one "single issue" dominated a number of the confirmation hearings. Race --- as a social and political issue and also as a constitutional matter --- was prominent in the Stewart, Haynsworth, Carswell and Rehnquist hearings.[28] Indeed, two of the three nominees rejected during this century, Carswell and John J. Parker, were defeated partly because of racist campaign speeches made during pre-judicial political careers.[29] The other issue on which Carswell was attacked was mediocrity,[30] while Parker, an outstanding judge, was attacked for the constitutional and political dimensions of a decision he had written upholding an injunction against violating a "yellow dog" anti-union contract.[31] Rehnquist was asked about his personal opposition some years earlier to a local open-housing ordinance and about his activities as a pollwatcher allegedly discouraging black persons from voting;[32] he and almost all nominees after 1954 were asked numerous questions about Brown and its progeny.[33] Thus if Judge O'Connor were asked about her voting record in the state legislature on abortion and related issues, about her position on Roe v. Wade, and about the relationship between her personal, political and constitutional views on the abortion issue, it would hardly be an unprecedented attempt to ferret out discrete elements of a nominee's "whole lifeview" and "sense, sharp or vague, of where justice lies in respect of the great questions of his time."[34]

[1]Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 657-58 (1970).

[2]Id. at 660.

[3]Id. at 663-64.

[4]Rehnquist, The Making of a Supreme Court Justice, Harvard Law Record, October 8, 1959, at 7,8.

[5]Id. at 10.

[6]See, e.g., J. Harris, The Advice and Consent of the Senate 303, 313 (1953); Kutner, Advice and Dissent: Due Process of the Senate, 23 DePaul L. Rev. 658 (1974); Note, 10 Stanford L. Rev. 124, 143, 147, (1957)

[7]Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, on S.158, The Human Life Bill, Thursday, May 21, 1981, at 111 (testimony of Professor Tribe).

[8]Id. at 114 (testimony of Professor Van Alstyne).

[9]Blackmun Hearings at 12.

[10]Fortas II Hearings at 105-06.

[11]Powe, The Senate and the Court: Questioning a Nominee, 54 Tex. L. Rev. 891, 893, 895.

[12]Id. at 891-92, quoting Stewart Hearings at 43-44.

[13]Fortas II Hearings at 123.

[14]95 Cong. Rec. 13803 (1949).

[15]Blackmun Hearings at 60. Justice Blackmun was responding to a series of hypothetical questions posed by Senator Fong. In a separate statement in the committe report on the Blackmun nomination, Senator Robert Byrd (D.,W.Va.) recounted in detail how Senator Fong "commendably continued to elicit" the nominee's views on specific questions, and endorsed Blackmun's nomination because of his "strict constructionist" views. Blackmun Report at 12-13.

[16]Stewart Hearings at 41-60.

[17]Fortas II Hearings at 173.

[18]Powell Hearings at 231-32.

[19]Rehnquist Hearings at 33, 168-69.

[20]Marshall Hearings at 54-63.

[21]Brennan Hearings at 17-18; Stewart Hearings at 63. Justice Stewart had commented extensively on a number of Supreme Court decisions prior to this assertion of his right not to comment on such decisions. Id. at 11-62.

[22]Fortas II Hearings at 181.

[23]Harlan Hearings at 139.

[24]Frankfurter Hearings at 107-08.

[25]Brennan Hearings at 39-40; Fortas II Hearings at 110-15; Marshall Hearings at 156-157; Rehnquist Hearings at 138.

[26]Brennan Hearings at 40; Marshall Hearings at 54; Fortas II Hearings at 105-106; Blackmun Hearings at 74.

[27]Haynsworth Hearings at 75; Carswell Hearings at 62 ("The law is a movement, not a monument.").

[28]Stewart Hearings at 61-65; Haynsworth Hearings, passim; Carswell Hearings, passim; Rehnquist Hearings, passim.

[29]Carswell Hearings, passim; Parker Hearings, passim; Rehnquist, supra note 4, at 8.

[30]Carswell Hearings, passim.

[31]Parker Hearings, passim; Rehnquist, supra note 4, at 8-9.

[32]Rehnquist Hearings at 70-73.

[33]See, e.g., sources cited in note 28 supra.

[34]Black, supra note 1, at 657-58.

Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I welcome you back again.

I bumped into you briefly a few moments ago over in the Senate building, and we are back in here again. It is a pleasure to be with you.

Time presses upon us. I would like, in the 15 minutes that I have, to commence by picking up a loose end we were talking about when time cut me off yesterday. If I might, please, I would just very briefly here review the bidding.

I had focused—it is true—upon this issue of abortion. It is of course an important public issue in its own right, but I think one could pick other issues dealing with race relations, rights of women, the death penalty, and so on and so forth, to allow us some way or other in microcosm to get at this question of judicial philosophy and basic personal values on fundamental issues of the day.

As I understood your position yesterday on this matter of abortion—you of course have repeated since then—you are personally opposed to it, except in extraordinary circumstances, as a general policy of birth control. You were negative on it, as I understood your position.

I then turned to the question of how one might approach it in dealing with it in the public arena as a matter of public policy. As I understood your position there, you said you thought it was very much a legislative type of function.

I do not wish to put words in your mouth. Please correct me if you think I am in error here. You thought it also might be looked on as a State function—at least historically it had been prior to *Roe* v. *Wade.*

I then turned to *Roe* v. *Wade* and asked you what you thought of this quotation from Justices White and Rehnquist in which they described the majority opinion as being an improvident and extravagant exercise of the power of judicial review.

On this matter of *Roe* v. *Wade* it is not only important because of the issue that it dealt with—namely, the abortion issue—but it is also probably the premier case that many offer in suggesting that the Supreme Court had gone way beyond any reasonable conception in its role as an interpreter and applier of the law. As is said here, it is just an improvident and extravagant exercise of the power of judicial review that is the legislative function.

In fact Justice Rehnquist in his own dissent said,

> The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose upon each one partakes more of judicial legislation than it does of the determination of the intent of the drafters of the fourteenth amendment

Just to put the question to you again, as I understand it you do not wish to comment upon Justice Rehnquist's observations on this case?

I think it is particularly intriguing because you and Justice Rehnquist of course were in law school together, as I understand it, and were classmates and I presume might even have had the same teachers for constitutional law. So it adds a bit of heightened interest to it.

Again if I might have your response to their observations on this case?

Judge O'CONNOR. Senator East, with all respect, it does seem inappropriate to me to either endorse or criticize a specific case or a specific opinion in a case handed down by those judges now sitting and in a matter which may well be revisited in the Court in the not too distant future. I have great reluctance to do that.

I recall the late Justice Harlan who at his confirmation hearing was asked, much as you have asked, questions about *Roe* v. *Wade.* He was asked his comments and reactions to the then-recent steel seizure cases.

His response was that if he were to comment upon cases which might come before him it would, "raise the gravest kind of question as to whether I was qualified to sit on that Court."

More recently the Chief Justice was asked to comment on a Supreme Court redistricting decision which was subject then to a great deal of criticism by some Senators. The Chief Justice noted that:

> I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the Court on which I now sit or on any other Court on which I may sit.

These are things that have concerned others before me and concern me now.

Senator EAST. I was noting earlier though, for example, your willingness in response to a question from Senator Metzenbaum about *Baker* v. *Carr.* You said that you were concerned about that case at that time, which I gather meant you had reservations about it.

I might for example inquire: Were you concerned about *Roe* v. *Wade* at that time?

Is there a tendency here to be selective in terms of which cases or doctrines you will or will not comment on; or, I guess, quite specifically, is the reluctance particularly applicable to *Roe* v. *Wade* and the abortion issue?

Judge O'CONNOR. Senator East, I am trying not to be selective in those matters to which I am willing to react, if you will. Certain things have been rather well decided and are not likely to be coming back before the Court directly or in any closely related form on the merits, if you will. With that situation my observation in the prior transcripts is that there is not the same reluctance expressed.

I felt it was a little unlikely, I suppose, that the Court was going to retreat or reconsider the basic precepts behind *Baker* v. *Carr.*

ADVISE AND CONSENT

Senator EAST. Of course the reapportionment issue, as the death penalty issue, as the rights of minorities issue, as the rights of women's issue, as the question of abortion—these things—I am simply probing—do they not constantly recur?

Let me restate it. If you are arguing that a prospective Supreme Court nominee cannot indicate particular values or sentiments on prominent issues of the time—if I might shift the focus of this to the whole problem of the Constitution and separation of power—it seems to me the confirmation process becomes almost meaningless; it simply means it is reduced to ceremony and résumés.

I do not, for heavens' sakes, wish this to be understood in terms of any personal reflection upon you because you have done an outstanding job. I am concerned as a Senator, as I look at the concept of separation of power, where we are supposed to be a part of this process of appointment to the Supreme Court. The President nominates, and we are supposed to advise and consent.

If in our fulfilling that obligation which the framers gave to us we are forbidden to get real substantive comment on issues of consequence—for example, previous doctrines and cases—I dare say we set a precedent—potentially, do we not?—whereby we cannot really fulfill any meaningful constitutional obligation; hence, we might suspense with it.

It is frustrating, as a Senator, because the Senate and the Congress are trying, I feel, in so many ways to reassert their policy-making function which many feel has been eclipsed by the bureaucracy under the direction of the executive branch or frequently by the Supreme Court and the judiciary.

We are given a few tools in the Constitution to try to assert our check and balance in separation of power. One of those is to be a part of the confirmation process. We have clearly that check or balance under the Constitution, but if we are forbidden by our own practices or those insisted upon by nominees, I query whether that formal and fundamental check and balance—and probably the most fundamental one we have in the appointment process—is not negated and eliminated simply because questions cannot be asked in a fairly thorough and substantive way.

I can appreciate you cannot promise anything; I can appreciate you could not comment upon pending cases; but when we are told that there cannot be comment upon previous cases and previous doctrines of substance, I query as one lowly freshman Senator whether we are able really to get our teeth into anything.

We are setting a precedent here. It has been noted that half of us have never been in on this process before, and you are probably the first of a number we are going to have coming up down the road with President Reagan.

I would hope that the Senate and the Judiciary Committee would set the precedent for confirmations of substance and depth and meaning.

You have certainly been an outstanding witness; there is no question about that. I probe it not in a personal way; I probe it in a constitutional sense as to whether we the Senators are really going to be in a position to make a substantive judgment.

I appreciate your candor in *Roe* v. *Wade,* and I certainly respect your judgment and your unwillingness to pursue it in greater depth. I do not wish to belabor the obvious, and so I will let the issue of *Roe* v. *Wade* rest because you have clearly indicated your reluctance to get into the specifics of it.

If I might please, Mrs. O'Connor, let me shift to one other point—time moves on—a different area beyond *Roe* v. *Wade,* but it relates to the check and balance that the Congress has upon the Supreme Court and the Federal judiciary. This is the question that Senator Specter so properly raised this morning on the question of jurisdiction under article 3.

Under article 3 of the Constitution, as you are well aware, there is the language dealing with this question of the appellate jurisdiction of the U.S. Supreme Court.

We are told that, "the Supreme Court shall have appellate jurisdiction both as to law and to fact with such exceptions and under such regulations as the Congress shall make." That is very explicit language to me, indicating that we do have that check or balance to set the limits, great or small, of the Supreme Court's appellate jurisdiction. You were noting that article 3.

Then the question was: Do we have any Supreme Court precedent on it? You noted ex parte *McCardle.*

I was interested in your comment. You said, "This is all we have; we don't have much to look at."

I would query, Mrs. O'Connor. We have an express provision in the Constitution. We have a Supreme Court decision that expressly upholds it. I would say that is a great deal to look at. That is about as convincing as one might make the case if stare decisis, precedent, and express language mean anything.

Am I correct in understanding your position that this is a very open, clouded issue whether the Congress has the power to deal with the question of the appellate jurisdiction of the U.S. Supreme Court? Do you think that is very much an up-in-the-air question?

Judge O'CONNOR. Senator East, only in the sense that we do not have experience as yet in the area of the Congress having actually passed legislation which becomes law and which says, for instance, the U.S. Supreme Court shall have no further jurisdiction over any question relating to, let us say, busing of schoolchildren. We have not had that kind of legislation enacted, and therefore no test, if you will, of the validity of that.

When I said that it was an open question I think I referred to the fact that a number of constitutional scholars have written articles on that very question simply because there are so many proposals now pending in the Congress to limit the appellate jurisdiction of the Supreme Court and also jurisdiction of the lower Federal courts in a variety of areas. So the subject has become one of interest.

I did point out that some believe that ex parte *McCardle* was perhaps not the complete answer to all questions which might potentially arise without power to be exercised in some fashion by the Congress. So I suppose in that sense we would logically expect that such an enactment could be questioned.

Ex parte *McCardle* is the case which was decided on a specific enactment of Congress repealing appellate court jurisdiction of the Supreme Court in that instance of any habeas corpus holdings of the lower courts. That simply is all that we have on that area.

If I might go back to your previous question for one moment to make one comment I would appreciate it. That is, in trying to draw the line on past cases where you feel comfortable in making comments as a nominee and those which you do not, I am simply aware in this instance that there are a number of people who have urged and continue to urge that the *Roe* v. *Wade* case—those who believe it was incorrectly decided who urge that the matter should be brought back before the Court at the earlier date and the Court

should be asked to consider again that question or questions related closely to it.

I think that it does fall in a category for that reason of concern as opposed to those cases where we are not hearing that kind of an approach.

Senator EAST. Mrs. O'Connor, on that point, every fundamental constitutional question is never fully resolved; it is always recurring, in whatever field it is. I see what you are saying, and I respect your judgment on it. I just respectfully disagree in that questions are always recurring, being reexamined, and redefined.

I do not see anything that is unique about this one as opposed to the others because they too shall be coming back, and I suspect this one will be coming back for an indefinite period of time.

But, again, I thank you for your courtesy and responsiveness. Mr. Chairman, I have run out my time.

The CHAIRMAN. The distinguished Senator from Montana, Mr. Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I think it would be helpful if we pursued the same issue a little further.

It is my understanding that subsequent to the *McCardle* case the *Kline* case was decided which held that the Congress cannot limit Supreme Court jurisdiction in order to achieve a certain result.

Not only are there various constitutional scholars who come down on different sides, but the case law here is a bit confused, too. Is that not the case?

Judge O'CONNOR. Senator Baucus, you are correct. I think approximately 4 years after ex parte *McCardle* we had the case in 1872 of *United States* v. *Kline.*

I believe—I am not certain—that case involved a removal of jurisdiction at a lower Federal court level and was not directly related to the appellate jurisdiction of the U.S. Supreme Court. I could be wrong, but that is my recollection.

The case involved a matter which was then pending involving a litigant in the lower Federal court who had obtained a Presidential pardon for disloyalty in the Civil War, and he had a claim which was being made which he was entitled to make based on the Presidential pardon.

The Congress passed a law which in effect directed the court to dismiss the lawsuit of any person who had obtained a Presidential pardon for disloyalty in the Civil War. It was directed of course at that precise lawsuit, and the Supreme Court did hold that that action by Congress, which was directed toward resolving a particular case, was invalid.

Senator BAUCUS. Yesterday when we discussed this same issue I asked you as a matter of public policy how far you felt Congress should go in limiting Supreme Court review of constitutional questions. You appropriately did not give a definitive answer to that question.

Nevertheless, I was left with the impression that you had certain problems with limiting Supreme Court jurisdiction because you cited a vote that you had cast in the Arizona Senate on a related issue.

I would like to quote from the minutes of the Arizona State Senate, which quote you, after your vote in opposition to Senate Memorial No. 1. This was on February 25, 1970. It substantiates the point you made to me yesterday.

I quote—this is you:

> The issue is whether we want to advocate stripping the supreme court of jurisdiction over certain matters because we disagree with some of its decisions. I too disagree with certain United States Supreme Court decisions in the field of pornography and obscenity, but I cannot advocate limiting the Court's appellate jurisdiction. Once we start such a procedure, where do we stop?

My question is whether you still subscribe to that view.

Judge O'CONNOR. Senator Baucus, I was of course speaking as a legislator in 1970, and I do not want to be put in the position of suggesting to other legislators how they should view the situation today.

But that certainly was my expression at that time in regard to the proposal that was before us. I do not think that I would have retreated from that position thereafter as a legislator.

SPECIALTY COURTS

Senator BAUCUS. Turning to another area, because our country is getting more complex, some have suggested that we create specialty courts, particularly specialty courts of appeal—a tax court of appeals for example; some have suggested an environmental court of appeals.

My question to you is what is your general view of the degree to which Congress should set up specialty courts of appeals as opposed to letting the circuit courts of appeals and the Supreme Court handle complicated and arcane issues as generalist judges.

Judge O'CONNOR. Senator Baucus, Senator DeConcini was really addressing some of the same questions with me this afternoon.

I do not know that I have a clear picture in my own mind of precisely how such courts would work. I think the Congress is now in a position to evaluate the bankruptcy court structure that it has established—and that certainly is a specialty court in a sense—and can determine whether the enhanced jurisdiction that has been given to that bankruptcy court will work well in that specialized area. If it does and if people generally are satisfied, then perhaps it can be considered in some other areas.

Senator BAUCUS. I am wondering though, as an appellate court judge, what guidance you might give us. Do you think it is good public policy to move in the direction of setting up specialized courts; or is it better public policy for appellate court judges as generalists to hear cases arising from different directions?

Judge O'CONNOR. Senator Baucus, as an appellate court judge, I have personally valued the opportunity to deal with a wide range of cases and issues. I have been happier in my work, if you will, just as a personal matter, to have the opportunity to deal with a broader range of issues.

What we really want to know is what best serves the public generally—what is going to make the court system work best and not what pleases the appellate court judges.

Senator BAUCUS. That is correct.

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Judge O'CONNOR. In that regard I think we have to develop a little experience before we can say that it is appropriate to go off in a certain area.

It is conceivable to me that in some areas they are so completely specialized that it is not totally inappropriate to at least consider it—conceivably in the tax or patent area, for example—but do we need ultimately some avenue back into the general court system for some final review from that specialized first treatment? These are the questions that need to be evaluated, I think.

REDUCTION OF VIOLENT CRIME

Senator BAUCUS. As you know, this committee and the Congress have been asked by the President to take up a major crime package. On that agenda are many items including the death penalty, sentencing reform, bail reform, preventive detention, elimination of the exclusionary rule, and a massive program to build more prisons.

Based upon your experience as a jurist, a legislator, a mother, or as a citizen, tell us how you think we should go about addressing the problem of violent crime. In which of these areas do you think we should spend most of our time and attention?

How much do you think we should devote resources to rehabilitation? Or is that passé? Should we spend time on enacting tougher longer sentences?

I am just curious as to what your general philosophy is toward violent crime and how we reduce violent crime.

Judge O'CONNOR. Senator Baucus, I wish I had a ready and an easy answer, because I think the problem is of enormous significance to us as a people and as a nation. I think it is of grave concern to our citizens, and certainly it is to me.

My experience with the criminal justice system has resulted in some disappointments in the lack of effectiveness; the recidivism rate is extremely high, and the crime rate generally is extremely high. We have to ask why.

It is a question that I have asked myself many times, and I think it is partially a result and factor of a general breakdown, if you will, of the standards that we apply in our society to moral behavior. I truly believe that.

Whether there is some legislative remedy to that I question. It is a matter that has to concern every one of us, and we have to attempt in every way we can to set standards that will discourage criminal behavior.

It seems to me that we are a mobile society, we are no longer a rural society, and we live big cities, our neighbors do not know us, and we do not know our neighbors. We do not have extended families living together, and so the pressure that comes from peer pressure, if you will, to behave in certain acceptable ways no longer exists for most people in our Nation. I think these things contribute, frankly, to the crime problem.

I also believe that our ready access, at least in the Southwest, to the drug traffic has contributed heavily to the crime problem in those Western States. It has been a very serious matter, and if there were some way to spend a little more effort and control in

the problem of traffic in heavy narcotic drugs I think it would be time and effort well spent.

If there is a way to provide more prison space, it is evident that there is a great need for that at both the State and the Federal level. We simply have more population, we have high crime rates, we have people who are being sentenced, and there is no space for them.

In Arizona, for example, we have a State prison sentence that the legislature has devised as a sentencing structure that was intended to be very specific for the judges. Certain crimes would have certain fixed sentences imposed.

We are so short of prison space in Arizona that a 5-year sentence that is imposed by the judge might result in a release within 3 months because there is no room at the prison. That kind of system is not effective.

So there are many means, and I think we need to approach them on a broad front. I wish I had some easy answers, but I do not think I do.

Senator BAUCUS. Frankly, I commend you on your answer because I think it is very complex and there is no simple solution. For example, I think that the building of prisons or lengthening of sentences alone is not the answer. It is a very complicated problem.

It reminds me of something that H. L. Mencken once said, "For every complicated problem there is a simple solution, and it's usually wrong." We have to exercise every effort at our command to try to resolve it, but it is going to be a complicated and a very difficult effort.

As a westerner I know you are very aware of some of the resource conflicts that are emerging in our country. The West has a lot of coal; oil and gas development is a potentially promising source of energy for our country; oil shale is developing in the West.

As I am sure you know, the Western States also are trying to protect their own resources. They have enacted severance taxes to compensate for the costs of development, including the disruptions and dislocations that might occur in those States.

As energy becomes more desired in our country, there is a greater potential for more conflict between Eastern States and Western States—the producing States in the West and the consuming States in the East.

I am curious as to how you see the tension resolving itself and the degree to which you think the 10th amendment will have any meaning as these cases arise.

The Supreme Court, as you may know, not too long ago held that Montana, for example, properly imposed a severance tax on coal that is mined in the State of Montana. The court held that the commerce clause did not prevent the State from imposing such a tax.

How do you see the Federal-State tensions moving, and what guidance would you give us in trying to help resolve that?

Judge O'CONNOR. Senator Baucus, I do not think I can give the Congress any particular guidance in that area. These are matters as far as the Congress is concerned that affect very directly the

State and Federal relationship. So these issues will be debated fully here and explored from a policy standpoint.

With regard to the 10th amendment, to the extent that the regulations I suppose are directed or the Federal statutes, if you will, are directed toward the activities of private business as opposed to the activities of the States as States, the most recent pronouncements indicate that the 10th amendment would not be considered as a bar.

So I do not know that we can look to that for guidance in the extent to which the Federal Government is properly regulating activity of private business within the States in this developing field.

Senator BAUCUS. I guess my question really is what you see in the Constitution that enables States to control the development of their own resources as opposed to provisions in the Constitution which allow the Congress to limit State control over resource development. Unfortunately my time is up, so we cannot pursue this any longer.

I want to close, though, by saying that this is probably the last time you and I are going to have to chat publicly over these matters. I think you have been an excellent witness.

There is a possibility that you may reappear later after the other witnesses. That has not been finally determined, but in all probability you will not return.

I frankly want to praise you and tell you that I think you have done very, very well. I wish we had more opportunity to discuss more substantively some of the issues that are coming before the Court.

I understand your reluctance to get into some of these matters in great detail. I agree that you should not discuss them publicly more than you have. Your restraint in addressing these questions has caused my admiration for you to increase rather than decrease.

Further, I think it is in large respect your personal views on substantive issues is less important than your competence and your integrity. You have certainly demonstrated the highest integrity and the highest competence in your testimony before us.

I just want to wish you the very best of luck. You are going to have to bear heavy responsibility on the Court. In many ways I envy you. We all send our best wishes with you. Thank you.

Judge O'CONNOR. Thank you very much, Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Iowa, Mr. Grassley.

Senator GRASSLEY. Judge O'Connor, since I tend to look so serious whenever I ask questions I would like to spend just a few minutes being philosophical and commenting in much the same vein as my predecessor, Senator Baucus, has just done.

This may be the last time you and I will have conversations unless, for instance, you would be nominated for Chief Justice some day and come back before the committee.

As I think about the things that I would hope for you, I have to think about the first thing you said to me when we met privately in my office. I was very relieved to have you say it and open up the conversation in that way. You said something to me like, "And

you're a farmer, too." You then went into a discussion of your background, having obviously done your homework about what Chuck Grassley was all about.

That did not mean so much at the time, until I was later visiting with somebody in my home State who said things that were complimentary about you. Although the way I repeat them they may not come out that way, they are intended to be complimentary.

As he was trying to explore with me whether or not you ought to be confirmed—and it was his opinion you should be—he too had read something about your rural background, and that you had worked your way through the legal system and the political system to become what you are today.

He looked upon your appointment as a breath of fresh air. His understanding of your background had a great deal to do with his looking sympathetically and approvingly at your nomination.

I think the implication was that here you are, a person who has been successful, you have come from a rural State with a rural background, and people who have that sort of background cannot be all bad—in fact, your having a rural background could bring a dimension to the Supreme Court that was refreshing to him.

I put together what he said with what you first said to me, and realized that there is something very personal about you, brought out in meetings like this, that cannot help but impress us very much.

I say this now because I am always one to ask questions, never having time at the end of a 15-minute interval for these kinds of comments.

At any rate, this is the way that I have looked at you in the 6 weeks or 2 months that I have had an opportunity to know about you and read about you.

LEGISLATIVE VETO

Now I would like to ask you a question that would follow up on what I believe Senator Dole brought up. He was getting into a philosphical discussion with you about whether or not administrative agencies had been delegated too much power by the Congress and the extent to which that delegation ought to be reviewed, and further controlled by Congress.

I would like to ask you somewhat the same question that I asked you in our private conversations in my office—how you look at the whole subject of congressional veto or whatever terminology you might want to use—the whole process by which Congress could have some sort of check on the administrative agencies as a follow-up of the delegation of legislative authority, and not as a congressional control over administrative decisions that are constitutionally within the realm of the President. I think that that is a differentiation that we must make.

I would like to have your opinion on congressional control or review over the delegation of a legislative authority.

Judge O'CONNOR. Senator Grassley, I know that that is a topic of great interest presently in the Congress. Several proposals are being made for a legislative veto in one form or another.

These proposals are being aired in various forms at the State level also. I understand they have actually been adopted in a number of States in one form or another.

I had no experience in Arizona with a legislative veto, if you will, because during my years there no such proposal was adopted. So I have had no personal experience at all with it.

As it has been discussed and considered in the Congress some have expressed concern about the separation of powers concept and the extent to which Congress should have veto power, if you will, over administrative agency regulations after those regulations have been adopted.

These are really unanswered questions in two ways: One, the Congress has not adopted such a provision yet really; and, two, the courts have not had a chance to review them in respect to the allegation of separation of powers.

It strikes me that Congress has a very effective power irrespective of any legislative veto provision that it might want to adopt, and that is the power to take a look at the administrative regulations which the particular agency has adopted, and if Congress feels that that agency has gone beyond the scope of the intended authority of Congress, Congress has the power to directly legislate in such a fashion as to make clear that it was not intended to have that power and to effectively by direct enactment curtail that kind of power. So I assume that that is a very direct means which Congress can also use.

Senator GRASSLEY. That would not be included in one of the instruments though because that is just a natural response and obviously a constitutional response.

Judge O'CONNOR. Yes.

Senator GRASSLEY. Legislation amending existing statutes would be the sort of instrument—and I use that term very generally—that would be considered and is being considered by the Congress.

How would you view something beyond what we know and understand we can do presently under the Constitution?

Judge O'CONNOR. Senator Grassley, I wish I could give you a more definitive response, but my experience with it is limited, and I do not believe the court has had a chance to rule on it, so I cannot speak from that viewpoint.

I assume that a lot of questions are being addressed by the Congress as they consider these proposals. For instance, if the reviewing body is less than the entire body of Congress; if it is confined for instance to a designated group within one branch—either the Senate or the House—then you run into questions of bicamerality.

Senator GRASSLEY. That is true.

Judge O'CONNOR. If it is less than a whole body, what do you do with that?

Senator GRASSLEY. You do not need to go into those details. Maybe I can make it easier for you by asking if there is anything in the concept that you find abhorrent to you personally from your legal experience, from your being a legislator, or as you have an understanding of the Constitution today.

Judge O'CONNOR. Senator Grassley, I would only say that there may be basic issues of separation of powers involved in a particular

enactment, but I would certainly want to look at the particular enactment that was produced before formulating any conclusion and would also want to have the benefit of briefs, arguments, and discussion.

Senator GRASSLEY. On another point—and this again has been asked by one or two other Members but not quite in the way that I am asking it—the Court has recently required that the plaintiffs in civil rights litigation specifically demonstrate how it is they have been discriminated against before the burden of proof shifts to the defendants.

Previously the plaintiff was only required to make the allegation of discrimination and then the defendant had to rebut that allegation.

Would you favor placing a stricter burden on the plaintiff?

Judge O'CONNOR. Senator Grassley, I do not know that I have reviewed the decision adequately enough to know precisely what standards are being employed.

I would look initially I think at the statutory provision involved—if it is a proceeding under title 7, title 6, or whatever it is—and determine the intent as expressed by Congress in reviewing such a matter. Then I would certainly want to look at the precedent established in the cases.

If the precedent is established as you say quite firmly with respect to that provision, then that would of course be very significant.

Senator GRASSLEY. Again there has been reference made by several members of the committee to the recent Law Review article that you wrote from the perspective of a State court judge.

In my reading of that, as I had done previous to my private meeting with you, I got the impression that you would look favorably upon returning to the State court exclusive jurisdiction in some matters which involve Federal constitutional questions.

Is my impression correct, and over what matters do you believe only State court review is necessary?

Judge O'CONNOR. Senator Grassley, I do not think I ever expressed the view that State jurisdiction should be exclusive on Federal questions. Indeed it cannot be under our constitutional system. But I did feel that there are many instances in which a full and fair hearing of a Federal issue can be had at the State level.

In those instances perhaps we already have seen indications that when that is the case perhaps the Federal courts will decline the granting of a further review other than a review to determine whether there was a full and fair hearing granted at the State level. Those types of trends seem to me to be healthy.

Senator GRASSLEY. That was obviously written during your present position on the court of appeals. How do you view your consideration of that article and specifically this point now that you are being considered for the Supreme Court?

Judge O'CONNOR. Senator Grassley, that remains to be seen. I was asked that question, I think, by someone when I spoke at the seminar and was asked, "Well, I wonder after years of experience on a Federal bench if you would view the thing in the same light?"

I can only say to you that if given that opportunity I would be happy to report back. [Laughter.]

Senator GRASSLEY. Do you feel your attitude toward the State court system has been affected by the fact that you became a State court of appeals judge after having been a State trial judge?

Judge O'CONNOR. Senator Grassley, I do not think that it altered my perceptions of the capacity of the State court system to consider certain questions. I would say it reinforced those views.

Senator GRASSLEY. Mr. Chairman, I yield back the remainder of my time.

The CHAIRMAN. Thank you.

Senator Denton is next. He had to go to the White House, and so we have agreed on account of that emergency for him to question in the morning on his second go-round.

Senator Specter, we have now reached you.

LENGTHY COURT DELAYS

Senator SPECTER. Thank you, Mr. Chairman.

Judge O'Connor, in light of the hardship on litigants occasioned by lengthy court delays do you believe it would be useful to limit the time that appellate courts could take to decide cases, along the lines of the Federal Speedy Trial Act for criminal cases?

Judge O'CONNOR. Senator Specter, that is a difficult question in a sense. I am extremely concerned about the length of time that it takes to get civil litigation concluded.

Certainly at the appellate level some cases require a great deal more work and study than others. At the appellate level some cases take longer time within which to gain a consensus than do others. This is a natural part of the process, and so a time limit that would be quite suitable for a run-of-the-mill case for which there are no unusual difficulties and no unusual disagreement among the Justices would not pose particular problems. On the other hand, some other cases could pose problems.

State legislatures have occasionally addressed this problem. Indeed, the legislature in Arizona has and has mandated that judges may not receive their paychecks unless work is completed within a certain amount of time, granted certain exceptions however at the appellate level.

Senator SPECTER. What is the result then of withholding pay?

Judge O'CONNOR. I do not recall any checks having been withheld. Whether that is because the work is done or it is not being enforced I could not tell you.

Senator SPECTER. Is there any realistic way that the Congress could act to limit the courts from writing such long opinions?

Judge O'CONNOR. Senator Specter, I wish there were. I think that we can do a good job in general with less verbiage. At least that is my belief. It is my hope that I would be able to do that. Time will tell.

Senator SPECTER. In dealing with the complexities of the cases, the Supreme Court limits the length of briefs and limits the time for litigants to make their arguments. Why would it not be equally possible to limit the length of court opinions or the length of time that the courts could spend? They deal with the same case in terms of complexity.

Judge O'CONNOR. Senator Specter, I am sure that we would hear if we were to consult with others the fact that some cases require more words to explain than others, some issues are more complex, in some cases the court has to address more issues which have been raised by the litigant, and it obviously takes more words and more paper to do that.

Just speaking in broad generalities, I tend to favor, if you will, brevity but not at the expense of clarity or not at the expense of a failure to analyze or expound on the necessary issues. That is terribly critical.

I am sure litigants would rather have an extra page of paper, if that is what it took, to deal with a specific issue than to have some arbitrary limit on the length.

But just speaking in general terms, I think brevity can be a virtue and dealing with matters expeditiously is clearly a virtue.

Senator SPECTER. Our research has shown that you have not written any dissenting or concurring opinions. Is that accurate?

Judge O'CONNOR. No; Senator Specter, it is not. In the sense of the published opinions it is possible that that is the case, but I have participated on my panels in the court of appeals in many cases, and there have been at least some occasions in which there has been a dissent or a concurring expression by me. Whether it was in a memo decision or decisions I am not sure.

MULTIPLE OFFENDER STATUTES

Senator SPECTER. Judge O'Connor, do you think it wise, as many States have done under multiple offender statutes, to give the trial judge the discretion to impose a life sentence on a person convicted of four major felonies such as robbery, rape, burglary, arson, or drug selling?

Judge O'CONNOR. Do I think that is an appropriate sentence possibility?

Senator SPECTER. Yes; do you think it is wise to give a trial judge the discretion to impose a life sentence for the so-called career criminal defined under many multiple offender statutes as a person who has committed three or perhaps four major felonies among the ones I enumerated?

Judge O'CONNOR. Senator Specter, without expressing any opinion on the eighth amendment implications, if any, I am generally in favor of giving trial judges discretion to impose lengthy sentences if necessary, including up to life sentences, for repeat offenders. That concept seems to me to be generally a valid one.

It has been my observation that a life sentence can be a lot shorter in actuality than a lengthy term of years. Be that as it may, I think discretion is appropriate.

MANDATORY LIFE SENTENCE

Senator SPECTER. When I asked you this morning about the death penalty you commented in addition that you were opposed to mandatory sentences. What would your objection be, if any, to having a mandatory sentence of life in jail for someone who is established as a career criminal—a repeater of violent crimes—by

a standard of having committed three or four major felonies such as rape, robbery, burglary, or drug sales?

Judge O'CONNOR. Senator Specter, this morning in response to your question on the mandatory sentence I indicated that I had voted against a mandatory death penalty statute in Arizona; and that was not intended by me to be an expression of the view that I am opposed to a legislative body mandating certain narrow ranges of sentence for all other crimes. I did not really address that subject, and you now are.

I think that certainly the legislature has a prerogative—a very great prerogative—in the area of determining the range or appropriate sentence for criminal behavior. In fact, I can think of no more frequently exercised topic of discussion and action for State legislative bodies than in that very area.

It is not inappropriate in my view that a legislative body might determine that there are certain very closely defined limits for sentencing of repeat offenders.

Senator SPECTER. Do you agree with the feelings of many of us who have been active in law enforcement that as a generalization judges do not impose sufficiently long sentences for violent criminal repeaters?

Judge O'CONNOR. Senator Specter, it is hard to generalize on that. There is no doubt that the criticism perhaps can be made of some judges with some sentencing patterns.

The public has often been dismayed at the sentencing habits of individual judges. These are very individualized matters, of course, because each defendant in being dealt with by the court at the time of sentencing presents a different set of circumstances as to background, age, and circumstances of the offense, and so forth. It is a very individualized matter.

The expression of the public sentiment and disappointment about judges' sentencing patterns has resulted in some States, such as Arizona, in the adoption of an entirely new sentencing structure in Arizona and in the production of an entirely revised criminal code. The result of that effort was to closely restrict the discretion of judges in sentencing.

To an extent, that effort of the legislature has been frustrated in large measure by the fact that there is not prison space and that the sentences that are mandated and handed down are not served.

So it has been, I am sure, a continuing frustration both to the citizens and the legislators.

FEDERAL AND STATE JUDGE SALARIES

Senator SPECTER. Judge O'Connor, do you believe that there is a real danger to the quality of the Federal bench posed by resignations because of low pay?

Judge O'CONNOR. Senator Specter, this has occurred of course. It has occurred at the Federal level—I have read of instances—and it has occurred at the State level. I am aware of a number of those instances.

I may say that the pay of State judges generally is substantially lower on the average than that of the Federal judges. So if there is a problem at the Federal level it is even more acute at the State

level, and it is and should be a matter of concern to people generally to see that judges receive adequate salaries in my view, sufficient to attract competent people to the bench and hold them.

Senator SPECTER. In a day with so many very deep Federal cuts in so many programs—social programs and perhaps now defense—is it appropriate to raise Federal judges' salaries to offset a significant threat being posed to an inadequate Federal judiciary by current wage levels? This is a question consistently before the Congress.

Judge O'CONNOR. Senator Specter, it seems to me that the Congress has to consider seriously the plight of all officers and employees who are serving at fixed salaries in a period of heavy inflation. It seems to me that that is absolutely crucial that those factors be considered in determining what is appropriate.

Senator SPECTER. Are you familiar with the Supreme Court decision, *United States* v. *Will*?

Judge O'CONNOR. That is the salary case, Senator Specter?

Senator SPECTER. Yes.

Judge O'CONNOR. Yes—generally I am.

Senator SPECTER. That case posed a situation where for four pay periods the U.S. Supreme Court decided, in favor of judges, to raise the compensation for Associate Justices from $72,000 to $88,700, circumventing what is customarily the congressional prerogative to establish compensation for Federal judges and did so on the very narrow ground that where cost-of-living adjustments had been passed by the Congress and in 1 year the President acted to rescind it on September 30, and in another year the President acted to rescind it on the morning of October 1. The Supreme Court of the United States said that where the year had started and the cost-of-living adjustment had gone into effect rescinding it would be a violation of the constitutional prohibition against diminishing the salary of a judge in a term of office.

I think there are many of us who felt that whatever case there was to be made for increases in compensation, including Federal judges, it was a matter that ought to come through the Congress, as with all other Federal employees, as opposed to having the U.S. Supreme Court itself take the bull by the horns, so to speak, and give themselves that kind of a pay raise.

I think that is a case which is not likely to come back, at least in that form, so perhaps that is one where I might appropriately ask if you agree with that specific decision.

Judge O'CONNOR. Senator Specter, I frankly did not study that decision at all. It was not of that great a concern to me because I little expected that I might some day be sitting on that court.

Senator SPECTER. Well, the case may have some extra significance soon.

There has been a fair amount of comment about the desirability of letting the public have a greater understanding of the work of the U.S. Supreme Court, and there has been a popular book written recently, "The Brethren", which perhaps had as sources of information disclosures by employees of the Supreme Court Justices.

Would you consider restricting in anyway your law clerks, your secretaries, or anyone under your direct control from making any such disclosures to journalists?

Judge O'CONNOR. Senator Specter, I do not know whether I would or not. I certainly would instruct employees that they must maintain the strictest confidence concerning pending matters before the Court. That seems to me absolutely crucial and vital. I think little is to be gained by anything less than a very firm policy in that regard.

No doubt other matters such as personalities or the general way in which the business of the Court is conducted are matters which will always be discussed to an extent by those who have knowledge of those aspects.

DIVERSITY IN SUPREME COURT APPOINTMENT

Senator SPECTER. Let me skip quite a number of questions since my time is almost up and ask you one final question, Judge O'Connor. Do you think there is any basis at all for appointing a Supreme Court Justice with a view to diversity on account of sex, race, religion, or geography; or would you think it preferable to appoint the nine most qualified people that could be found for the job, even if they all came from Stanford in the same year and lived in Arizona?

Judge O'CONNOR. Senator Specter, that would undoubtedly guarantee quality if that were to be the case.

[Laughter.]

Senator SPECTER. It might also, in the process, eliminate the potential conflict of interest issue which was raised by Senator Biden with respect to Mr. O'Connor.

Judge O'CONNOR. Very possibly.

Senator SPECTER. Do you think though that there is any realistic basis to look for diversity—more than one woman; perpetuating, if I may say, a black seat on the Supreme Court; or seeking geographical balance in the appointments to the Court?

Judge O'CONNOR. Senator, I think the Court traditionally has reflected some effort to achieve diversity. Anyone who is skilled in the political arena knows that it is often desirable for political reasons to see that diversity in any given body in which the appointment process is being exercised reflect a certain amount of diversity. I would expect the political process to always take that into account to some extent.

At the same time, I think it is quite possible, even though one might want to have diversity, whether it is of geography, race, or sex, to all select people of competence, ability, and quality, because I think people of that capacity abound in all races, in both sexes, and in all parts of the country.

Senator SPECTER. Judge O'Connor, I started this morning by complimenting you on your tour de force of yesterday and I would add to that my compliment for today.

In the interest of hearing the balance of the witnesses who will be coming forward I will refrain from making any commitment as to my own vote, but that is the only reason.

Judge O'CONNOR. Thank you.

Senator SPECTER. Thank you very much, Mr. Chairman.

The CHAIRMAN. I have a letter addressed to me as chairman of the Judiciary Committee, from Congressman Bob Stump of Arizona. It is a very complimentary letter about you, Judge O'Connor. Without objection, we will place this in the record.

Judge O'CONNOR. Thank you, Mr. Chairman.

[Material follows:]

BOB STUMP
3D DISTRICT, ARIZONA

211 CANNON BUILDING
WASHINGTON, D.C. 20515
(202) 225-4576

DISTRICT OFFICE
5001 FEDERAL BUILDING
PHOENIX, ARIZONA 85025
(602) 261-6923

Congress of the United States
House of Representatives
Washington, D.C. 20515

ARMED SERVICES COMMITTEE

PERMANENT SELECT
COMMITTEE ON INTELLIGENCE

VETERANS' AFFAIRS
COMMITTEE

September 9, 1981

Senator Strom Thurmond
Chairman, Judiciary Committee
2226 Dirksen Building
Washington, D.C. 20515

Dear Mr. Chairman:

It is my pleasure to recommend to you Judge Sandra O'Connor, of the Arizona Court of Appeals, for confirmation as a Justice of the United States Supreme Court. She is emminently qualified for that position, both through intellect and disposition.

Judge O'Connor and I served together in the Arizona State Senate on opposite sides of the aisle. At one point, she was majority leader while I was minority leader. Perhaps adversaries have the best opportunity to appraise their opponents. Based on that experience, I can make the following observations.

She has a consistent and coherent conservative philosophy of government and of law. Her decisions are grounded in principle and her approach is precise, with attention to detail. The effect is that those who deal with her know where she stands.

She is fair. The power of the majority can tempt some to take unfair advantage of their adversaries. As majority leader Judge O'Connor did not abuse that power. We were given the greatest possible latitude for making our case on any issue. The result was that all parties got a fair hearing in debate. I believe the quality of the laws enacted was improved.

Her attention to the details of statute drafting was such that no point of grammar or punctuation was too small to consider. She understood that failure to attend to such details often resulted in statutes that lacked clarity. She knew that imprecise statutes often lead Courts to substitute their policy judgement for that of the legislature. She believes very strongly that the legislature is the proper forum for policy debate and determination. Her sense of responsibility told her that anything less than the best legislative job was a potential abrogation of power to the Judiciary, which was unintended by the Constitution.

Her intellect is incisive. She is not led astray by irrelevancies. These qualities will help her decide which of todays many complex legal issues deserve the attention of the Supreme Court.

Mr. Chairman, you can expect Judge O'Connor to settle for no less than the best from our Courts. I suggest that we can ask no more than that. Judge O'Connor's record and reputation is her best recommendation, but I am happy to add my name to the long list of those who support her confirmation.

Sincerely,

BOB STUMP
Member of Congress

BS:bd
cc: Members of the Judiciary Committee

The CHAIRMAN. I have a letter from Senator Gordon Humphrey requesting that you answer certain questions. I would turn that over to the staff. If you could answer those by tomorrow it would be appreciated.

[Material follows:]

September 11, 1981

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In his letter of September 9, 1981, Senator Humphrey sets forth the following questions:

1. Do you believe that all human beings should be regarded as persons for the purposes of the right to life protected by the Fifth and Fourteenth Amendments?

2. In your opinion, is the unborn child a human being?

3. What is your opinion of the decision of the Supreme Court in the 1973 abortion cases, Roe v. Wade and Doe v. Bolton?

4. Do you believe the Constitution should be interpreted to permit the states to prohibit abortion? If your answer is yes, are there any types of abortions where you think the Constitution should be interpreted so as not to allow such prohibition?

5. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child has an abortion performed on her?

6. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is sterilized?

7. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is given contraceptives by a third party?

The first and second questions concern the definition of human life and the legal consequences which attach to that definition. Congress is currently considering proposals directly addressed to these issues. Questions concerning the validity and effect of these proposals, if any are passed, might well be presented to the Supreme Court for decision.

A nominee to the Court must refrain from expressing any view on an issue which may be presented to the Court. A federal judge is required by law to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455; see Code of Judicial Conduct, Canon 3C. If a nominee to the Supreme Court were to state how he or she would rule in a particular case, it would suggest that, as a Justice, the nominee would not impartially consider the arguments presented by each litigant. If a nominee were to commit to a prospective ruling

in response to a question from a Senator, there is an even more serious appearance of impropriety, because it may seem that the nominee has pledged to take a particular view of the law in return for the Senator's vote. In either circumstance, the nominee may be disqualified when the case or issue comes before the Court. As Justice Frankfurter stated in Offutt v. United States, 348 U.S. 11 (1954), a core component of justice is the appearance of justice. It would clearly tarnish the appearance of justice for me to state in advance how I would decide a particular case or issue.

Other nominees to the Supreme Court have scrupulously refrained from commenting on the merits of recent Court decisions or specific matters which may come before the Court. Justice Stewart, for example, declined at his confirmation hearings to answer questions concerning Brown v. Board of Education, noting that pending and future cases raised issues affected by that decision and that "a serious problem of simple judicial ethics" would arise if he were to commit himself as a nominee. Hearings at 62-63. The late Justice Harlan declined to respond to questions about the then-recent Steel Seizure cases, Hearings at 167, 174, and stated that if he were to comment upon cases which might come before him it would raise "the gravest kind of question as to whether I was qualified to sit on that Court." Hearings at 138. More recently, the Chief Justice declined to comment on a Supreme Court redistricting decision which was criticized by a Senator, noting, "I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit." Hearings at 18.

Questions three and four directly raise the issue of the correctness of particular Supreme Court decisions. In Roe v. Wade and Doe v. Bolton the Supreme Court held that states may not prohibit abortions during the first trimester of pregnancy. Questions related to the issues reached in these decisions may come before the Court, and the Court may also be asked to reconsider the decisions themselves. For the reasons I have stated in this letter as well as in my testimony before the Senate Committee on the Judiciary, it would therefore be inappropriate for me to answer questions three and four.

The fifth question concerns the constitutional validity of a law requiring parental consent prior to the performance of an abortion on an unmarried, unemancipated minor child. Several state statutes dealing with this subject have come before the Court and have resulted in sharply divided decisions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court ruled unconstitutional a statute requiring parental consent before an unmarried person under 18 could obtain an abortion. The Court specifically noted, however, that it was not ruling that every minor was capable of giving effective consent, simply that giving an absolute veto to the parents in all cases was invalid. In Bellotti v. Baird, 443 U.S. 622 (1979), the Court struck down a statute which required parental or judicial consent prior to the performance of an abortion on an unmarried minor. The Court failed to agree on a majority rationale. Just last Term, however, in H.L. v. Matheson, 101 S.Ct. 1154 (1981), the Court upheld a Utah statute requiring notification of parents prior to an abortion, at least as the statute was applied to an unmarried, unemancipated minor who had not made any claim as to her own maturity. These decisions indicate that the area is a particularly troublesome one for the Court, and also one in which future cases can be expected to arise.

The Supreme Court has recognized that "the parents' claim to authority in their own household is basic in the structure of

our society." Ginsberg v. New York, 390 U.S. 629, 639 (1958) (plurality). My sense of family values is such that I would hope that any minor considering an abortion would seek the guidance and counseling of her parents.

The sixth question concerns the constitutional validity of a law requiring parental consent before an unmarried, unemancipated minor child is sterilized. Once again I would hope that any minor considering such a drastic and usually irreversible step would seek the guidance of his or her parents and family. It would be inappropriate for me, however, to express any view in response to a specific question concerning the legality of a parental consent law, because the whole area of the constitutionality of statutes requiring parental consent is in a stage of development and because such statutes are likely to be presented to the Court for review. My hesitation is also based on the fact that I have not had the benefit of a specific factual case, briefs, or arguments.

The final question concerns the constitutional validity of a law requiring the consent of parents before an unmarried, unemancipated minor child is given contraceptives by a third party. In Carey v. Population Services International, 431 U.S. 678 (1977), the Court struck down a law making it a crime for anyone to sell or distribute nonprescription contraceptives to anyone under 16. The case, however, did not involve a parental consent requirement; indeed, Justice Powell found the law offensive precisely because it applied to parents and interfered with their rights to raise their children. Id. at 708 (concurring opinion). A three-judge district court found a state law prohibiting family planning assistance to minors in the absence of parental consent unconstitutional as interfering with the minor's rights, T.H. v. Jones, 425 F.Supp. 873, 881 (Utah 1975), but when the case reached the Supreme Court it was affirmed on other grounds, 425 U.S. 986 (1976). The constitutional question is therefore still open, and I must respectfully decline any further comments for the reasons set forth previously.

Mr. Chairman, I appreciate the opportunity to set forth my views on these matters in response to Senator Humphrey's letter.

Sincerely,

Sandra Day O'Connor

Sandra Day O'Connor

The CHAIRMAN. Senator Biden has asked for a special concession of 3 more minutes.

Senator BIDEN. Thank you, Mr. Chairman.

Judge, I want to just cover one area that, although I had to be out of the room for about an hour and a half, I do not think was covered. That was relating to court procedure in standing.

In deciding whether standing exists or whether a class action would properly lie, should a Supreme Court Justice take into account his or her belief, assuming that it is held by that Justice, that the courts are too congested and that the dockets are too crowded when determining whether or not standing exists or whether or not a class action properly lies?

Judge O'CONNOR. Senator Biden, I have not had to address this question. As a judge, it seems to me that primary in determining whether to decide that a given case is a justiciable case would be perhaps factors other than court congestion—the importance of the issue, the posture in which the case is, the other factors that one normally considers.

Senator BIDEN. I would hope that that would be the case. Although the courts clearly are congested in many areas and although the dockets are sometimes too crowded, it seems to me that the ability to have access to justice should not be precluded as a consequence of the inability of either the judiciary and/or the legislative body to make accommodations for access to justice.

I would hope that as a Justice you would not make as part of your decision whether or not to preclude access the fact that it was crowded—in other words, "You came too late, fella—sorry—even though you have a justiciable case." I would hope that would be your position, as you stated.

I have no further questions. Thank you very much for your comments.

Judge O'CONNOR. Thank you.

The CHAIRMAN. Senator East, did you have any further questions?

Senator EAST. No, thank you, Mr. Chairman.

The CHAIRMAN. That concludes with you this afternoon, Judge O'Connor. We have some other witnesses, so we are going to go ahead. I want to be sure we finish tomorrow, if possible, by 1 o'clock.

Judge O'CONNOR. Thank you.

Senator BIDEN. You are welcome to stay.

Judge O'CONNOR. Thank you, Senator Biden.

The CHAIRMAN. Thank you.

Judge O'CONNOR. With the permission of the Chair then, thank you, Mr. Chairman. I shall withdraw.

The CHAIRMAN. Now we have a panel consisting of the Honorable Tony West, the Honorable Donna Carlson West, and the Honorable Art Hamilton, members of the Arizona House of Representatives.

If you folks would come up, we would be glad to hear from you at this time.

Please stand and raise your right hands. I will now swear you in. Do you swear that the evidence you will give in this hearing will