The CHAIRMAN. Senator Simpson had his round before lunch, so we now come to Senator Leahy.

JUDGE-MADE LAW

Senator LEAHY. Thank you, Mr. Chairman.

I commend my colleague from Arizona for making sure that all Arizonans are taken care of in the chamber.

Judge O'Connor, I apologize for being a couple of minutes late this afternoon. I came in as you were responding to a question from Senator Laxalt. It was concerning the exclusionary rule. We have had a great deal of discussion already this afternoon on that.

You distinguished a judge-made rule from one of constitutional dimension. If you have a judge-made rule on a constitutional issue, is that not of constitutional dimension? I do not understand the distinction.

Judge O'CONNOR. Of course there are constitutional implications. Under the fourth amendment we cannot of course violate the search and seizure provisions of that amendment, and that amendment is applicable to the States under the 14th amendment.

What I was referring to by the judge-made portion of the rule is simply the effect, if you will, of the utilization in court of evidence which has been obtained in that fashion—illegally obtained, if you will—as opposed to, for instance, the securing of a confession by force, which raises I think very different problems.

Senator LEAHY. In effect, using the exclusionary rule to bar a confession—are we now at a constitutional level or are we at a judge-made level? I still do not understand the distinction, Judge.

Judge O'CONNOR. Senator, we of course are dealing with the Constitution when we talk about search and seizure questions; but the rule which the Court applied on the utilization of the evidence is one which the courts really developed themselves and developed initially to apply in the Federal courts and then subsequently carried over for application to the State courts.

It is that to which we commonly refer, I think, when we talk about the exclusionary rule.

Senator LEAHY. What about the exclusion of an unconstitutionally obtained confession or any of the evidence that might be obtained from that? Is that also within that parameter, would you say?

Judge O'CONNOR. Perhaps, Senator. In discussing the question earlier—and perhaps you were not here—I indicated that the concern that has been expressed by some for reexamination of the exclusionary rule has not been heard, at least by me, to encompass such matters as the confession obtained by force, trickery, or something of that sort.

The Federal courts that have been discussing and indeed holding that the exclusionary rule does not apply in certain instances have been addressing themselves to the so-called good faith exception, if you will—either the technical error made by the police officer, or the error made by him when he assumes he has a valid warrant and does not, or when he assumes he is operating under a particular case holding which in fact has been overturned, and another

type of good faith exception which relates to the officer's understanding of the particular facts involved.

These are areas in which I have noted that Federal courts have begun to talk about changes or exceptions to the exclusionary rule.

Senator LEAHY. You see such changes as being judge-made law?

Judge O'CONNOR. Yes.

Senator LEAHY. The potential for such changes being judge-made law?

Judge O'CONNOR. I think that I could probably characterize them as such.

Senator LEAHY. Senator Biden asked you a question about *Brown* v. *The Board of Education.* It was on the subject of judicial activism, a term that I guess means many things to many people.

You said that it did not create new social policy by the Court but was simply the Court reversing a previous holding based on new research, but that new research was not any new research into the Constitution or into the law, was it? Was not that new research rather the effects of segregation on minorities? It certainly was not into congressional debates over the 14th amendment.

Judge O'CONNOR. Senator, I think there was an element indeed of the examination of the intent of the drafters of the amendment. I am sure that particular case was impacted also by perceptions of the social impacts in that particular instance.

Senator LEAHY. But there is no new knowledge of the law in that regard?

Judge O'CONNOR. What I was trying to say was that in some cases in which our Court has reached a contrary result after a period of years to a previous decision they do so occasionally based on a reexamination of the legislative history and of the intent of the framers in an effort to determine whether the prior determination was correct.

I am sure we do not have much new evidence to be examined, but perhaps people are examining in some instances more thoroughly the evidence that we do have.

Senator LEAHY. But did we not end up with a new social policy with very far-reaching implications?

Judge O'CONNOR. I think in that instance we did—yes.

Senator LEAHY. And could that not be considered either judicial or social activism?

Judge O'CONNOR. I think it was so considered and still is so considered by many.

Senator LEAHY. How do you consider it?

Judge O'CONNOR. Senator, I consider it as an accepted holding of the Court. I was not there in 1954; and I did not participate in the debate, and the hearings, the briefings, and the arguments; and I cannot tell you all that went into the making of that decision.

Certainly it overturned a precedent of long standing, and it did so on the basis of a decision by a very substantial majority—8-1, as I recall—that the previous understanding of the 14th amendment was a flawed understanding.

REFLECTION OF POPULAR SENTIMENT

Senator LEAHY. Do you feel that that decision can stand as a correct interpretation of the Constitution and not simply a reflection of popular sentiment of the time?

Judge O'CONNOR. Well, it has stood since 1954 and apparently is well entrenched.

Senator LEAHY. The reason I ask that is that the Republican platform on which the President ran last year talks about appointment of judges who reflect popular sentiment and respect for the sanctity of human life and tends to be the main criterion for picking judges.

Do you feel that is a somewhat narrow criterion on which to pick judges? Would you use a different one?

Judge O'CONNOR. Senator, I think we need to use every possible evaluation of a potential judge in an effort to place very well qualified people on the bench. It seems to me that we want to consider all aspects of the individual's character and ability.

Senator LEAHY. Would you put as a primary consideration a judge who would reflect popular sentiment?

Judge O'CONNOR. Senator, I would like to think that the individual characteristics of the person, the capability, the judicial temperament, and the judicial capacity would be critically important.

Senator LEAHY. Do you feel that a judge should feel perfectly able and willing to fly totally in the face of popular sentiment if the judge felt that that was the only way to reflect the law?

Judge O'CONNOR. If that is necessary. I think judges must be prepared to act with courage.

Senator LEAHY. Do you feel that a judge should feel perfectly prepared to fly in the face of popular sentiment if the judge was convinced that in so doing the judge was upholding the law?

Judge O'CONNOR. Senator, I think we have to approach each case on the basis of the facts of the case and the law applicable to it; and we consider the case as judges in the context of the case which has come before us—the factual record—the briefs that have been filed, and the arguments of counsel.

I do not think that judges are permitted to go outside the record in resolving the issues to come before the judge.

Senator LEAHY. Albeit a judge does not live isolated in some type of a never never land. Judges do read newspapers, do see the news, do live as members of the community and should——

Judge O'CONNOR. I hope so.

Senator LEAHY [continuing]. In each one of those instances, or else we have a lifeless judiciary.

A judge can well be aware of what might be popular sentiment of the time. If a judge feels, however, that the popular sentiment does not reflect the law and must rule on an issue where the law is, in that judge's estimation, contrary to popular sentiment, is there any question where the judge has to go?

Judge O'CONNOR. Not in my mind. I think the judge is obligated to apply the law as the judge understands it to be.

Senator LEAHY. Thank you.

What do you feel are the most important criteria in picking a judge? I ask you that question because I would assume that that

would be also reflective of your own concept of judicial temperament.

Judge O'CONNOR. I think we have to examine the person's overall character, integrity, capacity, experience, training, and performance.

Senator LEAHY. The William & Mary article—incidentally, the William & Mary Law Review has never gotten so much publicity in 1 day's time. Right now there are dozens and dozens of law schools who wish that their law review editors had had the foresight to ask you to write for them. [Laughter.]

You suggest in that article that in the next decade there will probably be significant traditional State court variations in cases involving the issue of illegal searches and seizures under the fourth amendment.

You also say that, assuming the State courts are providing a full and fair opportunity for the claims to be raised and the Federal habeas corpus review is unavailable, the State courts are more likely than their Federal counterparts to reach widely varying results on search and seizure issues.

Does that present some danger to the notion of a single constitution? Cannot States create a kind of balkanization of constitutional rights, almost?

Judge O'CONNOR. That is an ultimate danger if there is no final review mechanism. That is correct.

Senator LEAHY. How do you feel, on the question of final review—obviously the U.S. Supreme Court is not in a position to review every single case from every single State court—of the great number of cases that might present a constitutional issue?—obviously, a matter of concern to a lot of people.

There have been discussions of an intermediate appellate court—a super court of appeals—beyond the normal courts of appeals. How do you feel about that?

Judge O'CONNOR. I know there is discussion of that. In fact, unless I am mistaken, Senator Heflin on this committee has taken a major role in discussions of that, among others.

Justice James Duke Cameron, a former chief justice of the Arizona Supreme Court, has just released an article on the same subject, as a matter of fact.

There is wide discussion of the possibility of establishing a national court of appeals to sit somewhere between the Supreme Court and the various Federal courts of appeal.

I think there are many variations of that court being discussed—many possibilities. There are both pros and cons to having that development occur, and I am sure that you have undoubtedly participated in some of the hearings and are in the process of being informed about those proposals.

I do not have a fixed view on whether that would be desirable, or if it were the form which it should take.

I know that some discussions have suggested they should just deal with criminal law. Others have taken a broader view. Some have suggested that the referrals should all be made to the court from the Supreme Court. Others make different suggestions.

There is such variety in the proposals that I have heard that it is really hard to know which ones are being seriously considered, but

I think it is appropriate for the Congress to air these possibilities and to hear from as many people as it can on the subject to determine whether there is any consensus that that would be a step in the right direction.

Senator LEAHY. Thank you, Judge. I appreciate your openness and candor before the committee today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator East?

Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I greatly admire your fortitude here. This is an exquisite form of torture, I think. The Senators, you will note, come and go at their leisure; and we expect the witness to sit here and endure this. I was greatly impressed with your willingness to continue even when our distinguished chairman gave you the opportunity of opting out for a while.

I appreciate the great frustration that you feel in this; and I think Senators do, too—that we are never able to explore things in the depth that we would like to and to the extent that we would like to.

I guess it inheres to things human that you have time limitations, and so we all have 15 minutes and come back for another 15.

I would then like to have it understood that I am trying to get to the heart of what I think are some critical matters, not that these matters that I wish to raise are necessarily the sole litmus test for qualification, but because of the time limitations under which we all work we must single out a few things to make a point or two on and see, when we put it all together, if we have probed to some depth and substance. I would at least like in my own small way to try to contribute to that end.

SEPARATION OF POWERS

You have stated your general judicial philosophy as regards separation of power, which I think was well stated. You have certainly given us some indication of your conception of federalism, which I again think was well stated.

It does seem to me that it is appropriate to pursue certain substantive areas that would reflect upon your basic values on certain subjects because—to be candid—even though we talk about a rigid separation of policymaking and judicial interpretation of the law, we all know in the real world of the Supreme Court that, for good or for ill, the decisions of the Supreme Court have enormous policy implications. That has been true since *Marbury* v. *Madison,* and one could think of many classic cases illustrating the point you have discussed—*Brown* v. *The Board, Plessey* v. *Ferguson, Dred Scott,* ad infinitum—the enormous policy impact the Supreme Court has.

Hence, the basic fundamental values on certain crucial items that respective Justices have to me do become critical factors to consider because we are not working in a vacuum today; you will not work in a vacuum once you are appointed to the U.S. Supreme Court, assuming that things continue to move in that direction.