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

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