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