

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 of 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 Government, 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.