The CHAIRMAN. Judge O'Connor, the time has now come for you to testify. Will you stand and be sworn?

Raise your right hand.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge O'CONNOR. I do.

The CHAIRMAN. Judge O'Connor, we will now give you the opportunity to present an opening statement if you care to do so.

TESTIMONY OF HON. SANDRA DAY O'CONNOR, NOMINATED TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Judge O'CONNOR. Thank you, Mr. Chairman. I would like to do so, with your leave and permission.

Mr. Chairman and members of the Senate Judiciary Committee, I would like to begin my brief opening remarks by expressing my gratitude to the President for nominating me to be an Associate Justice of the U.S. Supreme Court, and my appreciation and thanks to you and to all the members of this committee for your courtesy and for the privilege of meeting with you.

As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, and I happily share the honor with millions of American women of yesterday and of today whose abilities and whose conduct have given me this opportunity for service. As a citizen and as a lawyer and as a judge, I have from afar always regarded the Court with the reverence and with the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines will always be honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the U.S. Supreme Court that we all turn when we seek that which we want most from our Government: equal justice under the law.

If confirmed by the Senate, I will apply all my abilities to insure that our Government is preserved; that justice under our Constitution and the laws of this land will always be the foundation of that Government.

I want to make only one substantive statement to you at this time. My experience as a State court judge and as a State legislator has given me a greater appreciation of the important role the States play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the State and the Federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.

If confirmed, I face an awesome responsibility ahead. So, too, does this committee face a heavy responsibility with respect to my nomination. I hope to be as helpful to you as possible in responding to your questions on my background and my beliefs and my views. There is, however, a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supremv Court decisions presenting issues which may well come before the Court again. To

do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter. This would result in my inability to do my sworn duty; namely, to decide cases that come before the Court. Finally, neither you nor I know today the precise way in which any issue will present itself in the future, or what the facts or arguments may be at that time, or how the statute being interpreted may read. Until those crucial factors become known, I suggest that none of us really know how we would resolve any particular issue. At the very least, we would reserve judgment at that time.

On a personal note, if the chairman will permit it, I would now like to say something to you about my family and introduce them to you.

The CHAIRMAN. I would be very pleased to have you introduce the members of your family at this time, Judge O'Connor.

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

By way of preamble, I would note that some of the media have reported correctly that I have performed some marriage ceremonies in my capacity as a judge. I would like to read to you an extract from a part of the form of marriage ceremony which I prepared:

> Marriage is far more than an exchange of vows. It is the foundation of the family, mankind's basic unit of society, the hope of the world and the strength of our country. It is the relationship between ourselves and the generations which follow.

This statement, Mr. Chairman, represents not only advice I give to the couples who have stood before me but my view of all families and the importance of families in our lives and in our country. My nomination to the U.S. Supreme Court has brought my own very close family even closer together, and I would like to introduce them to you, if I may.

My oldest son, Scott, if you would stand, please.

The CHAIRMAN. Stand as your names are called.

Judge O'CONNOR. Scott graduated from Stanford two years ago. He was our State swimming champion. He is now a young businessman, a pilot, and a budding gourmet cook.

Now my second son, Brian, is a senior at Colorado College. He is our adventurer. He is a skydiver with over 400 jumps, including a dive off El Capitan at Yosemite last summer. I look forward to his retirement from that activity [laughter] so he can spend more time in his other status as a pilot.

Now my youngest son, Jay, is a sophomore at Stanford. He is our writer, and he acted as my assistant press secretary after the news of the nomination surfaced and did a very good job keeping all of us quiet. If I could promise you that I could decide cases as well as Jay can ski or swing a golf club, I think that we would have no further problem in the hearing.

Finally, I would like to introduce my dear husband, John. We met on a law review assignment at Stanford University Law School and will celebrate our 29th wedding anniversary in December. John has been totally and unreservedly and enthusiastically supportive of this whole nomination and this endeavor, and for that I am very grateful. Without it, it would not have been possible.

I would like to introduce my sister, Ann Alexander, and her husband, Scott Alexander. They live in Tucson, and are the representatives of my close family at this hearing.

Thank you, Mr. Chairman and members of the committee. I would like to thank you for allowing me this time and this opportunity. I would now be happy to respond to your questions.

The CHAIRMAN. We will now have questioning of the nominee by members of the committee. I presume before we go into this, the members of the committee who accompany you there will prefer to return to their seats or elsewhere.

There will be two rounds of questions of 15 minutes each by the respective members of the committee; then, possibly it may be necessary to go a little further.

Judge O'Connor, the chairman will begin by propounding certain questions to you. We have a timing light system here, which will confine each member to 15 minutes. When the light turns yellow, it means we have 1 minute left; when it turns red, it means the time is up and the gavel will fall at that time.

EXPERIENCE IN ALL THREE BRANCHES OF GOVERNMENT

Judge O'Connor, you have been nominated to serve on the highest court in our country. What experience qualifies you to be a Justice of the U.S. Supreme Court?

Judge O'CONNOR. Mr. Chairman, I suppose I can say that nothing in my experience has adequately prepared me for this appearance before the distinguished committee or for the extent of the media attention to the nomination. However, I hope that if I am confirmed by the Senate, and when the marble doors of the Supreme Court close following that procedure, that my experience in all three branches of State government will provide some very useful background for assuming the awesome responsibility of an Associate Justice of the U.S. Supreme Court.

My experience as an assistant attorney general in the executive branch of State government and my experience as a State legislator in the Arizona State Senate and as senate majority leader of that body, my experience as a trial court judge in the Superior Court of Maricopa County and my experience as a judge in the Arizona Court of Appeals in the appellate process, have given me a greater appreciation for the concept and the reality of the checks and balances of the three branches of government. I appreciate those very keenly.

My experience in State government has also given me a greater appreciation, as I have indicated, for the strengths and the needs of our federal system of government, which envisions, of course, an important role for the States in that process.

My experience on the trial court bench dealing with the realities of criminal felony cases and with domestic relations cases and with general civil litigation has taught me how our system of justice works at its most basic level.

I hope and I trust that those experiences are valuable ones in relation to the work of the U.S. Supreme Court as the final arbiter of Federal and constitutional law as it is applied in both the State and the Federal courts throughout the Nation.

The CHAIRMAN. Judge O'Connor, the phrase "judicial activism" refers to the practice of the judicial branch substituting its own policy preferences for those of elected Representatives. Would you comment on this practice in the Federal courts and state your views on the proper role of the Supreme Court in our system of government?

Judge O'CONNOR. Mr. Chairman, I have of course made some written comments about this in the committee's questionnaire, and in addition to those comments I would like to say that I believe in the doctrine and philosophy of the separation of powers. It is part of the genius of our system.

The balance of powers concept and the checks and balances provided by each of the three branches of Government in relation to each other is really crucial to our system. In order for the system to work, it seems to me that each branch of Government has a great responsibility in striving to carry out its own role and not to usurp the role of the other branches of Government.

Certainly each branch has a very significant role in upholding the Constitution. It is not just the judicial branch of Government that has work to do in upholding the Constitution. It is indeed the Congress and the executive branch as well.

It is the role and function, it seems to me, of the legislative branch to determine public policy; and it is the role and function of the judicial branch, in my view, to interpret the enactments of the legislative branch and to apply them, and insofar as possible to determine any challenges to the constitutionality of those legislative enactments.

In carrying out the judicial function, I believe in the exercise of judicial restraint. For example, cases should be decided on grounds other than constitutional grounds where that is possible. In general, Mr. Chairman, I believe in the importance of the limited role of Government generally, and in the institutional restraints on the judiciary in particular.

PERSONAL AND JUDICIAL PHILOSOPHY ON ABORTION

The CHAIRMAN. Judge O'Connor, there has been much discussion regarding your views on the subject of abortion. Would you discuss your philosophy on abortion, both personal and judicial, and explain your actions as a State senator in Arizona on certain specific matters: First, your 1970 committee vote in favor of House bill No. 20, which would have repealed Arizona's felony statutes on abortion. Then I have three other instances I will inquire about.

Judge O'CONNOR. Very well. May I preface my response by saying that the personal views and philosophies, in my view, of a Supreme Court Justice and indeed any judge should be set aside insofar as it is possible to do that in resolving matters that come before the Court.

Issues that come before the Court should be resolved based on the facts of that particular case or matter and on the law applicable to those facts, and any constitutional principles applicable to those facts. They should not be based on the personal views and ideology of the judge with regard to that particular matter or issue.

Now, having explained that, I would like to say that my own view in the area of abortion is that I am opposed to it as a matter of birth control or otherwise. The subject of abortion is a valid one, in my view, for legislative action subject to any constitutional restraints or limitations.

I think a great deal has been written about my vote in a Senate Judiciary Committee in 1970 on a bill called House bill No. 20, which would have repealed Arizona's abortion statutes. Now in reviewing that, I would like to state first of all that that vote occurred some 11 years ago, to be exact, and was one which was not easily recalled by me, Mr. Chairman. In fact, the committee records when I looked them up did not reflect my vote nor that of other members, with one exception.

It was necessary for me, then, to eventually take time to look at news media accounts and determine from a contemporary article a reflection of the vote on that particular occasion. The bill did not go to the floor of the Senate for a vote; it was held in the Senate Caucus and the committee vote was a vote which would have taken it out of that committee with a recommendation to the full Senate.

The bill is one which concerned a repeal of Arizona's then statutes which made it a felony, punishable by from 2 to 5 years in prison, for anyone providing any substance or means to procure a miscarriage unless it was necessary to save the life of the mother. It would have, for example, subjected anyone who assisted a young woman who, for instance, was a rape victim in securing a D. & C. procedure within hours or even days of that rape.

At that time I believed that some change in Arizona statutes was appropriate, and had a bill been presented to me that was less sweeping than House bill No. 20, I would have supported that. It was not, and the news accounts reflect that I supported the committee action in putting the bill out of committee, where it then died in the caucus.

I would say that my own knowledge and awareness of the issues and concerns that many people have about the question of abortion has increased since those days. It was not the subject of a great deal of public attention or concern at the time it came before the committee in 1970. I would not have voted, I think, Mr. Chairman, for a simple repealer thereafter.

The CHAIRMAN. Now the second instance was your cosponsorship in 1973 of Senate bill No. 1190, which would have provided family planning services, including surgical procedures, even for minors without parental consent.

Judge O'CONNOR. Senate bill No. 1190 in 1973 was a bill in which the prime sponsor was from the city of Tucson, and it had nine other cosigners on the bill. I was one of those cosigners.

I viewed the bill as a bill which did not deal with abortion but which would have established as a State policy in Arizona, a policy of encouraging the availability of contraceptive information to people generally. The bill at the time, I think, was rather loosely drafted, and I can understand why some might read it and say, "What does this mean?"

That did not particularly concern me at the time because I knew that the bill would go through the committee process and be amended substantially before we would see it again. That was a

rather typical practice, at least in the Arizona legislature. Indeed, the bill was assigned to a public health and welfare committee where it was amended in a number of respects.

It did not provide for any surgical procedure for an abortion, as has been reported inaccurately by some. The only reference in the bill to a surgical procedure was the following. It was one that said:

> A physician may perform appropriate surgical procedures for the prevention of conception upon any adult who requests such procedure in writing.

That particular provision, I believe, was subsequently amended out in committee but, be that as it may, it was in the bill on introduction.

Mr. Chairman, I supported the availability of contraceptive information to the public generally. Arizona had a statute or statutes on the books at that time, in 1973, which did restrict rather dramatically the availability of information about contraception to the public generally. It seemed to me that perhaps the best way to avoid having people who were seeking abortions was to enable people not to become pregnant unwittingly or without the intention of doing so.

The CHAIRMAN. The third instance, your 1974 vote against House Concurrent Memorial No. 2002, which urged Congress to pass a constitutional amendment against abortion.

Judge O'CONNOR. Mr. Chairman, as you perhaps recall, the *Rowe* v. *Wade* decision was handed down in 1973. I would like to mention that in that year following that decision, when concerns began to be expressed, I requested the preparation in 1973 of Senate bill No. 1333 which gave hospitals and physicians and employees the right not to participate in or contribute to any abortion proceeding if they chose not to do so and objected, notwithstanding their employment. That bill did pass the State Senate and became law.

The following year, in 1974, less than a year following the *Rowe* v. *Wade* decision, a House Memorial was introduced in the Arizona House of Representatives. It would have urged Congress to amend the Constitution to provide that the word person in the 5th and 14th amendments applies to the unborn at every stage of development, except in an emergency when there is a reasonable medical certainty that continuation of the pregnancy would cause the death of the mother. The amendment was further amended in the Senate Judiciary Committee.

I did not support the memorial at that time, either in committee or in the caucus.

The CHAIRMAN. Excuse me. My time is up, but you are right in the midst of your question. We will finish abortion, one more instance, and we will give the other members the same additional time, if you will proceed.

Judge O'CONNOR. I voted against it, Mr. Chairman, because I was not sure at that time that we had given the proper amount of reflection or consideration to what action, if any, was appropriate by way of a constitutional amendment in connection with the *Rowe* v. *Wade* decision.

It seems to me, at least, that amendments to the Constitution are very serious matters and should be undertaken after a great deal of study and thought, and not hastily. I think a tremendous amount of work needs to go into the text and the concept being

expressed in any proposed amendment. I did not feel at that time that that kind of consideration had been given to the measure. I understand that the Congress is still wrestling with that issue after some years from that date, which was in 1974.

Thank you, Mr. Chairman.

The CHAIRMAN. Now the last instance is concerning a vote in 1974 against a successful amendment to a stadium construction bill which limited the availability of abortions.

Judge O'CONNOR. Also in 1974, which was an active year in the Arizona Legislature with regard to the issue of abortion, the Senate had originated a bill that allowed the University of Arizona to issue bonds to expand its football stadium. That bill passed the State Senate and went to the House of Representatives.

In the House it was amended to add a nongermane rider which would have prohibited the performance of abortions in any facility under the jurisdiction of the Arizona Board of Regents. When the measure returned to the Senate, at that time I was the Senate majority leader and I was very concerned because the whole subject had become one that was controversial within our own membership.

I was concerned as majority leader that we not encourage a practice of the addition of nongermane riders to Senate bills which we had passed without that kind of a provision. Indeed, Arizona's constitution has a provision which prohibits the putting together of bills or measures or riders dealing with more than one subject. I did oppose the addition by the House of the nongermane rider when it came back.

It might be of interest, though, to know, Mr. Chairman, that also in 1974 there was another Senate bill which would have provided for a medical assistance program for the medically needy. That was Senate bill No. 1165. It contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of the mother, or where the pregnancy had resulted from rape, incest, or criminal action. I supported that bill together with that provision and the measure did pass and become law.

The CHAIRMAN. Thank you. My time is up. We will now call upon Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

JUDICIAL ACTIVISM

Judge, it is somewhat in vogue these days to talk about judicial activism and judicial intervention, usurpation of legislative responsibility and authority, et cetera.

When those terms are used, and they are—although the chairman did define his meaning of judicial activism—I suspect you would get different definitions of judicial activism from different members of the committee and the academic and judicial professions. One of the things I would just like to point out as this questioning proceeds is that judicial activism is a two-edged sword.

There is the instance where the judiciary determines that although there is no law that the Congress or a State legislature has passed on a particular issue, that there in fact should be one, and

the judge decides to take it upon himself or herself to, through the process of a judicial decision, in effect institute a legislative practice.

There is also the circumstance where there are laws on the books that the judiciary has, in a very creative vein, in varying jurisdictions and on the Federal bench, constructed rationales for avoiding. However, today when we talk about judicial activism what comes to mind in almost everyone's mind is the Warren Court and liberal activists.

You are about to be confronted, I would humbly submit, by what I would characterize as conservative activists who do not believe they are being activists; who do not believe that they are in fact suggesting that judges should usurp the power of the Congress; who do not believe that they are suggesting that there should be a usurpation of legislative authority when in fact, I would respectfully submit, you will soon find that that is exactly what they are suggesting.

For example, in your William & Mary Law Review article you discussed the role of the State courts relative to the Federal courts and you believe, if I can oversimplify it, that Federal courts should give more credence, in effect, to State court decisions interpreting the Federal Constitution. You seem somewhat worried about the expansion by the Congress of litigation in the Federal courts under 42 United States Code, section 1983, the civil rights statute.

Then you go on to say, "Unless Congress decides to limit the availability of relief under that statute . . .," and you go from there. I am wondering whether or not you would consider yourself as a judicial activist if on the Court you followed through with your belief—as I understand the article—that there is in fact too wide an expansion of access to the Federal courts under the civil rights statute, whether or not you would implement that belief, absent the amendment by Congress of the civil rights statute to which you referred. Would you be an activist in that circumstance, if you limited access to the Federal courts under the civil rights statutes absent a congressional change in the law?

Judge O'CONNOR. Senator Biden, as a judge I would not feel that it was my role or function to in effect amend the statute to achieve a goal which I may feel is desirable in the sense or terms of public policy.

Senator BIDEN. Right.

Judge O'CONNOR. I would not feel that that was my appropriate function. If I have suggested that Congress might want to consider doing something, then I would feel that it is indeed Congress which should make that decision and I would not feel free as a judge to, in effect, expand or restrict a particular statute to reflect my own views of what the goals of sound public policy should be.

Senator BIDEN. I thank you for that answer because I fear that—although it probably would be clarified in subsequent questioning—my fear as this hearing began was that we would confuse the substantive issue of judicial activism, usurpation which should be addressed, and which I think has occurred in many instances, with a rigid view of an ideological disposition of a particular judge. A conservative judge can be a judicial activist. A conservative can be a judicial activist, just as a liberal judge could be a judicial activist.

In trying to examine the criteria which should be useds in terms of fulfilling our responsibility as U.S. Senators in this committee under the Constitution, performing our role of advice and consent, a professor at the University of Virginia Law School summarized what he considered to be some of the criteria. Let me just cite to you what his criteria are:

He says first, the professional qualifications are integrity, professional competence, judicial temperament and legal, intellectual, and professional credentials. Second, he mentions the nominee being a public person, one whose experience and outlook enables her to mediate between tradition and change and preserve the best of the social law and social heritage while accommodating law for the change in need and change in perception. Third, she would in some ways provide a mirror of the American people to whom people with submerged aspirations and suppressed rights can look with confidence and hope.

In a general sense, do you agree with those criteria as set out?

Judge O'CONNOR. Senator, I agree that it is important for the American people to have confidence in the judiciary. It appears to me that at times in recent decades some of that confidence has been lacking. I think it is important that we have people on the bench at all levels whom the public generally can respect and accept and who are regarded as being ultimately fair in their determination of the issues to come before the courts. For that reason, judicial selection is a terribly important function at the Federal as well as the State levels.

Senator BIDEN. Judge, in response to the questionnaire you stated—and I think you essentially restated it to the chairman a moment ago—that judges are "required to avoid substituting their own view of what is desirable in a particular case for that of the legislature, the branch of government appropriately charged with making decisions of public policy."

I assume from that you do not mean to suggest that you as a Supreme Court judge would shrink from declaring unconstitutional a law passed by the Congress that you felt did not comport with the Constitution.

Judge O'CONNOR. Senator, that is the underlying obligation of the U.S. Supreme Court. If indeed the case presents that issue, if there are no other grounds or means for resolving it other than the constitutional issue, then the Court is faced squarely with making that decision.

I am sure that such a decision, namely to invalidate an enactment of this body, is never one undertaken by the Court lightly. It is not anything that I believe any member of that Court would want to do unless the constitutional requirements were such that it was necessary, in their view. I think there have been only, perhaps, 100 instances in our Nation's history, indeed, when the Court has invalidated particular Acts of Congress.

Senator BIDEN. There have been many more instances where they have invalidated acts of State legislatures.

Judge O'CONNOR. Yes, that is true.

Senator BIDEN. The second concern I have with your view of what constitutes activism on the Court and of what your role as a Supreme Court Justice would be is that it seems, from the com-

ments by many of my colleagues on both sides of the aisle over the past several years and the comments in the press, that the Supreme Court should not have a right to change public policy absent a statutory dictate to do so.

I wonder whether or not there are not times when the Supreme Court would find it appropriate—in spite of the fact that there have been no intervening legislative actions—to reverse a decision, a public policy decision, that it had 5, 10, 20, or 100 years previously confirmed as being in line with the Constitution.

A case in point: In 1954, after about 60 years and with no major intervening Federal statute, to the best of my knowledge, the Supreme Court said in *Brown* v. *The Board of Education of Topeka* that the "separate but equal" doctrine adopted in the *Plessy* v. *Ferguson* case has no place in the field of public education.

Here is a case where, as I understand it, there was no intervening statutory requirement suggesting that "separate but equal" be disbanded, and where the Court up to that very moment—with a single exception involving a law student and where that law student could sit, to the best of my knowledge—where the Court had up to that time held consistently that "separate but equal" was equal and did comport with the constitutional guarantees of the 14th amendment, then decided that that is no longer right.

They changed social policy; a fundamental change in the view of civil rights and civil liberties in this country was initiated by a court. It was not initiated by a court, it was brought by plaintiffs, but the action of changing the policy was almost totally at the hands of the Supreme Court of the United States.

I wonder, first, whether or not you would characterize that as judicial activism and if so, was it right? If not, if it was not judicial activism, how would you characterize it, in order for me to have a better perception of what your view of the role of the Court is under what circumstances, so that you do not get caught up in the self-proclaimed definitions of what is activism and what is not that are being bandied about by me and others in the U.S. Senate and many of the legal scholars writing on this subject?

Judge O'CONNOR. The *Brown* v. *Board of Education* cases in 1954 involved a determination, as I understand it, by the Supreme Court that its previous interpretation of the meaning of the 14th amendment, insofar as the equal protection clause was concerned, had been erroneously decided previously in *Plessy* v. *Ferguson* so many years before.

I do not know that the Court believed that it was engaged in judicial activism in the sense of attempting to change social or public policy but rather I assume that it believed it was exercising its constitutional function to determine the meaning, if you will, of the Constitution and in this instance an amendment to the Constitution. That, I assume, is the basis upon which the case was decided.

Some have characterized it as you have stated, as judicial activism. The plain fact of the matter is that it was a virtually unanimous decision, as I recall, by Justices who became convinced on the basis of their research into the history of the 14th amendment that indeed separate facilities were inherently unequal in the field of

public education. For that reason it rendered the decision that it did.

This has occurred in other instances throughout the Court's history. I am sure many examples come to mind, and I think by actual count they may approach about 150 instances in which the Court has reversed itself on some constitutional doctrine over the years, or in some instances doctrine or holdings that were not those of constitutional dimension.

Senator BIDEN. If I can interrupt you just for a moment, I think you are making the distinction with a difference, and I think it is an important distinction to be made. I just want to make sure that I understand what you are saying, and that is that, as I understand what you are saying, social changes—the postulates that Roscoe Pound spoke of—those societal changes that occur regarding social mores must in some way, at some point, be reflected in the law. If they are not, the law will no longer reflect the view of the people.

It seems as though we should understand that when in fact the legislative bodies of this country have failed in their responibilities—as they did in the civil rights area—to react to the change, the change in the mores of the times, and see to it that that is reflected in the law, on those rare occasions it is proper for the Court to step in.

As Judge Colin Sites of the third circuit said, "It is understandably difficult to maintain rigid judicial restraint when presented with a citizen's grievance crying out for redress after prolonged inaction for inappropriate reasons by other branches of Government."

Judge O'CONNOR. Well, Senator, with all due respect I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed, and I did not intend to suggest that by my answer but rather to indicate that I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision. I was not intending to suggest that those changes were being made because some other branch had failed to make the change as a matter of social policy.

Senator BIDEN. Yes, I am suggesting that. My time is up. Maybe on my second round we can come back and explore that a little more.

Thank you very much, Judge.

The CHAIRMAN. Thank you.

Senator Mathias.

IMPACT OF LEGISLATIVE BACKGROUND

Senator MATHIAS. Thank you, Mr. Chairman.

Taking up, Judge O'Connor, where Senator Biden left off, I seem to recall that Blackstone—if it is not too conservative to quote Blackstone—once said that the law is the highest expression of the ethic of the Nation. Determining exactly what that law is or what that ethic is is, of course, the job that you will face.

One of the frequent tasks of the Supreme Court is to define the intent of Congress, to define the will of Congress in a given legislative expression. Senator Thurmond has pointed out that you will be the first nominee to the Court in 43 years to have had legislative experience. How do you think your legislative background is going to impact on your approach to this particular aspect of the job of a Justice?

Judge O'CONNOR. Well, I think, Senator Mathias, it would impact in much the same way it has in my role as a State court judge. I do well understand, I think, the difference between legislating and judging.

As a legislator it was my task to vote on public policy issues and to try to translate into statutory form certain precepts that were developed as a matter of social or public policy in ways which would then govern the residents of our State.

As a judge it is not my function to continue to try to develop public policy by means of making the law. It is simply my role to interpret the laws which the legislature has passed, to try to do that in accordance with the intent of the framers.

I have discovered that that is not always easy and that sometimes legislators fail to express their intention as clearly as one might like. Sometimes legislators—because all of us are human—fail to think about another situation that might arise that would be impacted by the legislation. Then the judge is left with the duty of trying to interpret the intent as best he or she can in carrying out the apparent intent of the legislature.

Senator MATHIAS. Well, of course, you are right that legislators—and I bear my full share of the responsibility for this—legislators do not always express in their drafting the precise intent of a given statutory enactment, and that casts upon the court an extra burden, a burden both in volume and in the quality of interpretation of law.

However, beyond that question of draftsmanship there is often some doubt in the minds of legislators as to the constitutionality of an enactment. I am sure this never happens in the Arizona legislature but it does occasionally happen around here, that people will say:

> Well, I am not sure whether this is constitutional or not but I think it is a good idea, and therefore I am going to vote for it because there is always the Supreme Court who will make the ultimate decision about the constitutionality.

Now Chief Justice Burger has written that:

> In the performance of assigned constitutional duties, each branch of Government must initially interpret the Constitution, and the interpretation of its power by any branch is due great respect from the others.

Having in mind the fact that we, as legislators, know that sometimes we make a jump in the dark on the constitutional question, how do you feel about Chief Justice Burger's statement?

Judge O'CONNOR. Senator, I appreciate the problem that you are talking about. Indeed, in the Arizona Legislature it was not uncommon that legislators would say, "Well, we have no idea if it is constitutional. Maybe it is not but we are going to pass it anyway." That, indeed, does then move the question along to the judicial branch ultimately.

I agree with what I understand Justice Berger to be saying, to wit, that each branch of Government including the legislative branch has a responsibility and a role in upholding and understanding the Constitution and in attempting to pass laws, if you will, in compliance with the intent of our Constitution. I referred to that earlier in some remarks I made. I think it is very important that each branch of Government carry out its function in preserving and complying and living within the dictates of the Constitution.

Senator MATHIAS. However, that would not prevent you from functioning with too great a respect for the views of the legislative branch if in fact you clearly felt the legislative branch had acted in either ignorance or in error?

Judge O'CONNOR. That is correct, Senator Mathias. If I were convinced, based on research that I did and the briefs and the arguments in a given case, that a particular enactment was unconstitutional, I would so hold.

CONSTITUTIONAL CONVENTION

Senator MATHIAS. Let me ask you a question that may be a little bit unfair because it is very difficult to recall all the votes that you may have cast in your legislative career. I know I would find it very difficult. However, to the best of your recollection, do you recall any votes in which you called for a constitutional convention to revise the U.S. Constitution in any particular?

Judge O'CONNOR. I am not sure that I do. We dealt over the 5-year interval in the Arizona Legislature with literally thousands of measures, and I have learned to do two things in my public life: One is to have a short memory, and the other is to have a thick skin, and they have stood me in good stead on some occasions. [Laughter.]

However, I cannot recall. I do believe, however, that we have had memorials presented during my time in the legislature which did on occasion call for a constitutional convention to address a particular measure, and I may or may not have had occasion to vote on that. At that time I think it was not generally perceived by people to present the kinds of problems that subsequent analysis by scholars has indicated might be the case if that method were pursued.

Senator MATHIAS. I appreciate that answer. Let me say that I am not so much interested in how you may have voted on any particular such memorial or resolution, as I am in whether or not you have considered that question because it seems to me that that question is one of the great unknowns that faces us today.

We are within a few States of a call for a constitutional convention. There is a great void in constitutional law as to exactly how a constitutional convention would be called, would be assembled, or would operate. Now would it be your view, if a constitutional convention were to be called—the closest call right now is on the question of a balanced budget—whether the convention would be limited to just the subject which was the occasion for the call, or could it become a general constitutional convention as happened in 1787 and look to a general revision of the entire Constitution?

Judge O'CONNOR. Senator Mathias, this is one of the intriguing and great questions of contemporary concern, I would say, because indeed as you have pointed out we are quite close to having a sufficient number of requests for a convention to consider an amendment, that consideration of these matters is now important, I think, to the Congress and to people generally.

As you are no doubt aware, in our Nation's history we have not heretofore used the convention method as a method of amending the Constitution. Therefore, we have absolutely no experience to draw upon other than that convention in which our Constitution was originally drafted.

There are a number of scholarly articles which have been written about the question, and as might be expected, the scholars differ greatly in their view of precisely the question you have asked, to wit, whether the scope of the constitutional convention can be limited or not. I think the American Bar Association did a rather thorough study on the question and reached one conclusion. Professors Gunther and van Alstein and others who have written on the subject have reached differing conclusions.

I think it simply is one of the unanswered questions. Indeed, it is even uncertain, I suppose, whether those questions raise political questions which the Supreme Court would ultimately decide or whether they do not.

Senator MATHIAS. In many respects I think that we could all hope that it will remain an unanswered question, and that you will not have to, in your days in the Court, help to provide an answer because the dangers are very real. However, I really wanted to raise the subject with you and to find out if you were troubled as I am by the possibility of a runaway convention that would go far beyond the mandate of its call.

Judge O'CONNOR. Well, Senator, it does of course pose concerns to many people, and as I have indicated, to the best of my knowledge we have no answers.

INDEPENDENCE OF FEDERAL COURTS

Senator MATHIAS. The power of the Federal judiciary has been a very controversial subject since the founding of the Republic. Thomas Jefferson, among others, was very critical of the authority granted to the Federal courts, and so throughout our history there have been periods of attempts to curb the courts, to limit the jurisdiction of the courts.

It has been suggested that Congress should have the power to overrule the constitutional decisions of the Supreme Court, and various devices to dilute or limit the power of Federal judges, attempts to limit jurisdictions of courts.

What impact do you think that proposals of this sort would have on our system of Federal Government as we have known it in our lifetime?

Judge O'CONNOR. If some of the pending proposals were adopted and jurisdiction were limited, Senator, over a given subject matter.

Senator MATHIAS. Well, let me be a little more specific: What impact on the doctrine of judicial independence would be—what do you think would flow from such decisions?

Judge O'CONNOR. Well, article 3 of the Constitution dealing with the judicial branch provides, of course, that we will have one Supreme Court and such inferior courts as Congress shall from time to time establish. That contemplates, I suppose, the capacity of Congress to determine the extent to which we will have lower Federal courts.

I am sure you are aware, also, that it has been held, I believe in the *Palmore* case, that Congress has power to withhold giving all of the jurisdiction to the lower Federal courts that it has authority to give. Congress has traditionally, I think, acted in the field of determining, for instance, statutes of limitations and length of time within which appeals may be filed, and other procedures which do impact directly on the jurisdiction of the Federal courts in one way or another. These have been traditional exercises of that power.

In section 2 of article 3 dealing with the appellate jurisdiction of the Supreme Court, again the Constitution at least refers to such exceptions and regulations as the Congress may impose, and that has not been tested often in the Nation's history. As you know, I think we have the ex parte *McCardle* case in about 1868, and I am not sure that we have much else in the way of case law defining exactly the contemplated power of Congress in that area.

Senator MATHIAS. That is exactly, of course, the point of my question, that there is a certain constitutional grant of specific authority to Congress to erect the Federal courts and generally to provide the guidelines for their jurisdiction. However, does that grant of constitutional power have to be viewed in context with the other provisions of the Constitution, the Bill of Rights included?

Again to be specific, Justice Brandeis referred to separation of powers, and he said that the doctrine of the separation of powers was adopted not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by the means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

How do you view the independence of the Federal courts as a part of that fabric of constitutional government which has to be respected?

Judge O'CONNOR. I do view the independence of the judiciary as an important aspect of our system of checks and balances. I also believe that it was at least contemplated by the framers of the Constitution, perhaps, that the judicial branch would ultimately be in a position to determine what is the supreme law of the land in the sense of interpreting, if you will, the meaning of the Constitution and interpreting, as needed, enactments of Congress.

Now to the extent that that jurisdiction is removed, that function of the judicial branch, I suppose, is no longer performed, or perhaps it freezes into place previous determinations and they simply remain on the books as the last pronouncements. These are issues, of course, that we have not faced directly.

Senator MATHIAS. I would like to pursue this with you a little but we cannot do it at the present time.

Thank you, Judge.

The CHAIRMAN. Thank you.

We had planned to recess at 12:30 until 2:30. We will still come back at 2:30. However, Senator Simpson has an emergency and he has to catch a plane, so the chairman is going to run on beyond 12:30 in order to accommodate Senator Simpson to propound his questions.

Senator Simpson, we will call upon you at this time. In that way, we do not discommode anybody of his regular place. In other words, we are taking that much time out of our lunch hour.

Senator SIMPSON. I do not think I will take the full 15 minutes.

The CHAIRMAN. That is all right. You go right ahead. We are glad to accommodate you.

Senator SIMPSON. Thank you very much. You certainly have always done that, Mr. Chairman, and I am deeply appreciative of it.

I am not going to get into issues about abortion, which is an anguishing personal decision, and those of us who have made public statements on that issue I think at least consistently try to stay with those public statements. I know that when I explained my position on it, it had very seriously been thought through by me with counsel with my remarkable family of a wife and three children too, so I will not delve into that because it is so critically personal.

I certainly recall very well in my legislative experience dealing with riders on bills. That is quite a process in itself, and especially as a majority floor leader in trying to keep a clean bill floating if one could without getting weighted down with riders, so I understand that one.

The issues of the Constitution are so critical to us all as legislators, and I remember so well so many discussions as we legislated, how someone would rise and say, "You cannot do that. That is unconstitutional." This always used to test us on the floor, and then we would say, "Pass it anyway and let the judge decide." I remember that ploy so well.

I was also interested, as Senator Biden was, in your article in the William & Mary Law Journal. There are, I think, 30 opinions of yours that have been reviewed by the examining authorities. Certainly your public commentaries in that article might be the freshest.

NO FINALITY IN THE CRIMINAL JUSTICE FIELD

Now in that there is one thing that I honed in on because it is of great interest to me, and that is trying to reach what I refer to as the "finality of judgment" in this land. I think your comment was that:

> It is a step in the right direction to defer to the State courts and give finality to their judgments on Federal constitutional questions where a full and fair adjudication has been given in the State court.

I think that that is one of the things that has caused us to have such a general reflection of negativism about Federal and State courts, is a lack of finality in judgment, especially perhaps in the criminal field. I mean, how many times can one go on to exhaust due process. We also find this in an area in which I now have come to have a great interest, in immigration and naturalization mat-

ters, where we have procedures which, when you are through with them all, you can start over, procedures which do not really give confidence in the judicial system.

Anyway, on this issue of finality of judgment, how do we—given the concept that you state and this need for a determination of full and fair adjudication having been provided in the State courts—my question is, I guess, who would then make that determination? Would that then be a determination made by the Supreme Court? Would that be a request for certiorari upon an already burdened court? What might you share with me as to your view on that and how that might be carried out?

Judge O'CONNOR. Well, Senator Simpson, first of all I think it is a serious concern to a lot of people that there is no finality in the criminal justice field to a given decision, even after an appeal has been heard and resolved, long after the conviction in question, and even after one series of post-conviction petitions for relief, there are others that can be followed in an unending series. I think that is one thing that has caused the public to have some concern about the proper function of the judicial system in that area.

Now how we can attack the problem is something that I think has to be considered by both the courts and the Congress in this field because we are talking about the interrelationship between the State court system and the Federal court system as it relates to Federal constitutional issues. Both the State courts and the Federal courts have a role in determining Federal constitutional issues. State court judges take an oath to support the U.S. Constitution just as Federal court judges do, and there is a reason for that, because many of these issues are first raised at the State court level.

To the extent that we want to permit State court judgments to become final on the question, it then becomes a matter in part of how the Federal courts view the question and in part how Congress views it because each can play a role in saying, "Enough is enough." To the extent that a State court has given a full and fair adjudication on a given issue, even though it may involve a Federal constitutional issue, then perhaps we should be more willing at some point to give finality to that State court determination.

I have seen at least evidence in Supreme Court decisions that would indicate a move in that direction, the cases that have said, "All right, in the 4th amendment area, if there has been a full and fair hearing at the State level we will not grant a Federal habeas corpus to review it." Now that was a holding of the U.S. Supreme Court, in effect.

In addition, Congress could review it. Certainly the present structure requires the Supreme Court to take appellate jurisdiction of certain holdings, and perhaps the Congress would consider making that not mandatory in the future but consider at least whether that should be handled much like other petitions for certiorari are handled. Therefore, I think in response really that both the courts and the Congress could have a role.

Senator SIMPSON. That is of interest to me, I guess because it has piqued my interest as to how we might go about it legislatively, and I guess we will try to look into—and this does not have anything to do with your new duties—but whether there are other

methods short of an appeal to the Supreme Court to do this, other than bringing us back virtually to the same position we are in right now with regard to the ready access to the Federal courts through the one instance of the section 1983. Therefore, that is that, and I can visit with you later on that, and I shall.

There was a second point about your article which was thought-provoking to me, and that was a suggestion of a repeal of the Federal statute which would allow attorneys costs to be paid to successful plaintiffs in civil rights cases. In dealing with that, I have I guess a concern as to whether that might not deny access to the courts for some individuals with valid complaints but with, of course, the financial inability to proceed or obtain legal assistance.

Is there any middle ground, in your mind, short of total repeal of that provision that might be acceptable, some modification that would address that issue without cutting off the rights of a potential litigant?

Judge O'CONNOR. Senator Simpson, yes, and I think the point is well-taken. Obviously there are people whose rights have been abused or deprived in some fashion who are entitled to bring suit, and who if they do not have the means to do it need a provision whereby they can recover attorneys fees, else they are not likely to get the kind of legal advice that would be required to get them relief. Therefore, it is understandable that some provision be there.

I think in the article I mentioned that other avenues could be explored short of a total repealer, and so it is not inappropriate then for Congress to look at those provisions in section 1988 and see whether some limitations are appropriate, whether a different set of guidelines to the courts in allowing for attorneys fees would be helpful, something that might discourage the specious claim and the unwarranted one but not ever preclude the valid claim that might be made by the indigent claimant.

Senator SIMPSON. Well, certainly those are some of the problems with any type of public defender system or public prosecutor system, and that is an unfortunate opportunity viewed in some of the minds of my brethren—in my other life I was an attorney—who view that as an ability to raid the treasury of a State or the Federal Treasury.

Finally, just one other question that has to do with what Senator Mathias was referring to, and I guess just a wrap-up in that area with regard to your extensive experience at the State level. I think you bring to the bench or will bring to the Supreme Court Bench a fresh perspective on Federal and State relations which I think has been shunted somewhat in the last two or three decades because simply there is no information to be put into the Supreme Court by those who sit on the Supreme Court, a States' voice issue, if you would.

If I might just ask for you to give me a brief summary as to what general improvements you might see in Federal-State judiciary relationships, what do you see as desirable, and do you see yourself as having a role in bringing that about and bringing it to fruition?

Judge O'CONNOR. Well, Senator, speaking to the last first, I am interested in judicial administration. I have not, of course, had experience in the Federal system, and I have a great deal to learn with regard to the Federal bench and its system.

Certainly I hope that we can always recognize the very great importance that the State court system has in our overall system of justice in this country. Indeed, the vast number of all criminal cases and all other cases, for that matter, are handled in the State court system. That is the system that is doing the bulk of the work, even though I know that you here in the Senate are hearing a great deal about the great pressures that are being experienced in the Federal courts due to their increase in business. However, if you look at it overall it is the State courts that are handling such great bulk of our work.

It is important that those courts function well, that they have capable jurists, that they have an opportunity for training, and I believe in good training of judges. It is possible to go to school and learn something about being a judge, and we have programs like that that are available. They are good programs and merit support.

We have to be mindful of the interrelationship of the State and Federal courts, and I hope give some finality where it is possible to State court decisions, even in the Federal area. That is one of the points that we just discussed, so I think there are ways to improve it. Indeed, the occasion for that issue of the William & Mary Law Review to which you refer was an interesting one which brought together representatives of both the State and the Federal court systems to give an overall view of the problems of the interrelationships and to make some suggestions.

Senator SIMPSON. Well, to me it is an exciting prospect that you bring that additional dimension, which is not really discussed greatly but I think is very important.

Mr. Chairman, thank you for being very gracious to me in recognizing a special problem I have, and I appreciate that very much.

Thank you, Judge.

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

[Whereupon, at 1:55 p.m., the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

After the gavel raps, the press and photographers will withdraw.

Senator Kennedy?

DISCRIMINATION EXPERIENCE

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

Judge O'Connor, I do not think that there is any question in the minds of millions of Americans that your nomination represents a great victory for equality in our society, and millions of Americans obviously are looking to you with a rightful sense of pride. You have had a long and distinguished legal career.

I would like to ask you whether you have experienced discrimination as a woman over the period of that career and, if so, what shape or form that has taken.

Judge O'CONNOR. Senator Kennedy, I do not know that I have experienced much in the way of discrimination. When I was admitted to law school I was very happy that I was admitted to law school at a fine institution. My only disappointment I think came

when I graduated from law school at Stanford in 1952 and looked for a position in a law firm in the private sector. I was not successful in finding employment at that time in any of the major firms with whom I had interviewed.

However, I did then find employment in the public sector. I became a deputy county attorney in San Mateo County, Calif. It was my experience at that time that in the public sector it was much easier for young women lawyers to get a start. It was a happy resolution for me in the sense that I really spent the bulk of my life in the public sector. Therefore, that start turned out to be very beneficial.

DISCREPANCY IN PAY

Senator KENNEDY. You were active in several efforts in Arizona in the State senate to revise employment, domestic relations, and property laws which discriminated against women. I think at that time you pointed out the sharp discrepancies between the pay which men and women often receive for similar work.

As you may have seen, recently there was a report by the EOC about the continued aspects of job discrimination on the basis of sex, and the pay discrepancy is still widespread. Do you find that it is still widespread? Is this a matter of concern to you?

Judge O'CONNOR. It has always been a matter of concern to me. I have spoken about it in the past and have addressed the fact that there does seem to be a wide disparity in the earnings of women compared to that of men.

We know that perhaps a portion of that is attributed to the fact that women have traditionally at least accepted jobs in lower paying positions than has been true for men, and that may be a factor.

When I went to the legislature in Arizona we still had on the books a number of statutes that in my view did discriminate against women. Arizona is a community property State, and the management of the community personal property was placed with the husband, for example. These were things that had been in place for some years. I did take an active role in the legislature in seeking to remove those barriers and to correct those provisions.

Senator KENNEDY. From your own knowledge and perception, how would you characterize the level of discrimination on the basis of sex today?

Judge O'CONNOR. Presently?

Senator KENNEDY. Yes.

Judge O'CONNOR. I suppose that we still have areas from State to State where there remain some types of problems. We know that statistically the earnings are still less than for men. I am sure that in some cases and some instances attitudes still have not followed along with some of the changes in legal provisions.

However, it is greatly improved. It has been very heartening to me as a woman in the legal profession to see the large numbers of women who now are enrolled in the Nation's law schools, who are coming out and beginning to practice law, and who are serving on the bench. We are making enormous changes. I think these changes are very welcome.

Senator KENNEDY. In your response to the committee's questionnaire—I think it is question No. 2—you gave an extensive answer that mentions your concern and involvement in efforts to provide greater equality for women and for many other groups. You specifically mention the legal aid for the poor. You mention the rights of institutionalized persons. You refer to religious nondiscrimination. You mention native Americans. You mention the mentally ill.

However, you do not mention two of the most obvious groups who also have suffered from injustice and inequality; that is, black Americans and Hispanic Americans. I wonder if you briefly would discuss your perception of the degree to which black Americans or Hispanic Americans are denied equality in our society.

Judge O'CONNOR. A great deal of the concern that has been expressed through the courts and in legislation and otherwise in our Nation has been obviously over the situation of blacks. This perhaps has been the worst chapter in our history and one in which great effort has been undertaken to try to correct it.

In our community in Phoenix the black population is basically small, relatively speaking. On the other hand, the Hispanic population in our community is rather large, and it is one which of course is a concern to all of us.

I frankly feel that Arizona has been greatly blessed, Senator Kennedy, with a cultural diversity that we have in that State. I have regarded the Hispanic heritage which we have enjoyed and the Indian American population which we have in Arizona as being one of the great blessings of that State. I think our State at least seems to be working well in relation to trying to eliminate vestiges of discrimination.

Senator KENNEDY. Is it your sense that as a result of continuing discrimination that exists in our society that one of the important priorities is a vigorous enforcement of the civil rights laws that prohibit discrimination?

Judge O'CONNOR. Yes. I think that enforcement of those laws which the Congress has seen fit to enact is a very necessary part of the obligation of both the executive and the judicial branches insofar as those things come before them.

I am sure you recognize that in the case of the judicial branch it does not reach out to seek matters; rather, it receives those cases and controversies that come before it.

Senator KENNEDY. Is there anything special in your background that would indicate a special commitment to equal justice for these two groups? I know that you received some civic awards and have been involved in various societies.

Judge O'CONNOR. Yes.

Senator KENNEDY. I am interested in whether there is anything you would like to mention for the record that would show involvement and personal commitment in these areas.

Judge O'CONNOR. In response to the question I have listed a number of activities in which I personally have been concerned and which are addressed to the attention of the disadvantaged in our society. It has been my effort as a legislator and as a citizen to give my attention to these things. I would expect to always have that concern.

Senator KENNEDY. As you can tell, we are moving from area to area quite quickly in order to cover as much ground as possible. Hopefully, we will be able to come back to some of these questions.

However, in this first round of questions I want to come back to an area which some of my colleagues have talked about. That is the issue of judicial activism. There was some exchange about that during the course of the questioning earlier today.

Some years ago at Justice Stevens' confirmation hearing when I asked him about his view about judicial activism, he commented on the issue. I would like to read it very briefly and then perhaps get your reaction. Perhaps it summarizes or states your view or maybe you would like to make some additional comment.

I quote:

> I think as a judge of course one must decide the cases as they come. One does not really get the opportunity to address the problem in society at large. In a particular case if he has a particular violation of a serious magnitude that gives rise to an extreme remedy, a district judge at his discretion may feel that the way to solve this particular problem is to take some extreme remedial action which would not normally be appropriate, and then the question on appeal is whether he has abused his discretion. Normally one does not find an abuse of discretion. There are many, many cases in which such affirmative remedies are found to be appropriate and would be sustained on appeal.

This is what effectively Justice Stevens told us at his confirmation hearing. I wonder whether you agree with his observation that there are cases where judicial activism in that sense is appropriate as part of a judge's duty.

Judge O'CONNOR. I think we are all aware of school desegregation cases, for example, in which it has become the role and function of the Federal district courts to review the factual situation, and where it has found an intentional or purposeful policy of segregation within the public schools to direct appropriate remedial action if that action is not forthcoming from the school districts or school district itself.

In that connection, the court has on occasion entered a variety of orders for corrective action. I think Justice Stevens has observed correctly that it then becomes the function ultimately of the Supreme Court if an appeal or review is sought to review the action of the Federal district court to see whether any of those orders of the court have amounted to an abuse of discretion.

In that particular area, as you are aware, the Supreme Court has upheld, for example, in the *Swan* v. *County Board of Mecklenberg* case a variety of remedial actions as being possible in the case of the purposeful or intentional policy of segregation.

Senator KENNEDY. That might also include reapportionment cases where there is State or local prison or hospital discrimination as well?

Judge O'CONNOR. There is a variety of cases in which the Federal district court enters orders that might be regarded as affirmative in nature.

Senator KENNEDY. That is effectively to vindicate constitutional rights of the individuals or inmates or patients? That would be, I imagine, the justification for such intervention, would it not?

Judge O'CONNOR. This has occurred.

Senator KENNEDY. In some earlier questions—I think by the chairman—you were asked your position on birth control and abor-

tion. Have your positions changed at all over the years or are they the same as indicated in your votes and statements or comments?

Judge O'CONNOR. I have never personally favored abortion as a means of birth control or other remedy, although I think that my perceptions and my knowledge of the problems and the developing medical knowledge, if you will, has increased with the general explosion of knowledge over the past 10 years. I would say that I believe public perceptions generally about this particular area and problem have increased greatly over the past 10 years. I would have to say that I think my own perceptions and awareness have increased likewise in that interval of time.

Senator KENNEDY. Does that mean your position has altered or changed or just that you have developed a greater understanding and awareness of the problem?

Judge O'CONNOR. The latter I think, Senator, is what I was trying to express.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Laxalt?

EXCLUSIONARY RULE

Senator LAXALT. Thank you, Mr. Chairman.

You have discussed at length judicial activism, social philosophy, and so forth. I think I will spare you that for the next several moments and inquire into something that I deem to be very relevant for any judicial position, particularly the highest court—that is your legal philosophy.

We deal from time to time in this committee in the whole area of criminal law. I have been struck by the broad range of experience that you have had in this area as a judge, and most particularly with some of your rulings.

I would like to ask you about the exclusionary rule, if I may. You have touched on that in a couple of the cases that you have had.

Of course, with a dramatically increasing crime rate and an even greater rise in the number of violent crimes, increasing attention has been given to the laws governing law enforcement. Many of us on this committee happen to believe that perhaps some of the problems we have in connection with crime are procedural.

On that particular matter, in *State* v. *Morgan*—and I am sure you remember that—you ruled that the defendant had waived her right to appeal on the failure to exclude as "fruits of the poisoned tree evidence alleged to have been procured illegally." I agree totally with that result.

As a matter of policy, do you believe that the exclusionary rule may be too narrow, overprotecting the rights of defendants while impeding the ability of the law enforcement people to enforce the law? I am talking about as a matter of general legal philosophy.

Judge O'CONNOR. Senator Laxalt, the exclusionary rule, of course, is one that has caused general public discontent on occasion with the function of the criminal justice system, to the extent that perfectly valid, relevant evidence is excluded solely on the basis that it was obtained in violation of some occasionally technical requirement.

I am sure that none of us would feel that a policy of encouraging the gathering of evidence by peace officers by the use of force, threats, or conduct of that kind is one which the courts would want to condone. On the other hand, we are seeing a number of cases today where the lower Federal courts are beginning to look at the exclusionary rule and the specific factual situation in that case—for example, in the case of evidence obtained by a peace officer in the mistaken belief that he held a valid warrant or evidence obtained in the mistaken belief that a particular case that had been previously decided was still valid law and it is subsequently overturned. We have seen examples in the Federal courts where under those circumstances the exclusionary rule is no longer being applied.

Senator LAXALT. Do you agree with that result? Do you agree with that construction?

Judge O'CONNOR. Let me say, first of all, that some of those things are going to come before the Supreme Court, Senator Laxalt. I certainly would not want to be accused of prejudging an issue that will come before the Court, as indeed I think that this one will.

I simply would like, if I may, to point out what I see as some trends and make some other observations about it.

There are other instances where peace officers who are acting in good faith, but in a mistaken belief as to the existence of certain facts, have taken evidence. We have instances, for example, in the fifth circuit where the fifth circuit has taken the position that that kind of a good faith mistake will not give rise to the application of the exclusionary rule to exclude the evidence. That has not been either approved or disapproved I believe by the U.S. Supreme Court. It is very likely to come before the Court.

As you point out, I have had a good deal of experience at the trial court level and some at the appellate court level with the application of the rule. It is in fact I think a judge-made rule as opposed to one of constitutional dimensions, as I understand it. As a result, the Supreme Court presumably could alter that judge-made rule without doing violence to some constitutional provision or principle.

There have been expressions by several of the sitting Justices that they would like to reexamine that. I think that the rule may well come before the Court and could well be the subject of a reexamination.

Senator LAXALT. Do you think then that there may be a solution in this general area within the judicial system rather than our having to deal with it here legislatively?

Judge O'CONNOR. May I say in response that I had perhaps one of the most unfortunate cases that I had in my years on the trial bench that involved a necessity to apply an exclusionary rule that was the result solely of congressional action, not court action at all. That was an application of one of the provisions of the Uniform Crime Control and Safe Streets Act that required the exclusion in court of evidence obtained that had been overheard on a telephone exchange. In the particular case I had it involved a murder which happened to be overheard by a telephone operator, and that evidence could not be entered. Now that ruling was mandated not by

any court action because we were not dealing with peace officers but private individuals. This was something imposed by Congress.

Yes, I think Congress already has enacted laws that affect this and it might want to consider itself some of those aspects.

FEDERAL COURT JURISDICTION

Senator LAXALT. Thank you very much.

Let's talk for a moment or two about Federal court jurisdiction. As you know, we have many social areas in which there is deep division in connection with the principle and certainly in connection with its application.

I think due in great part to the excesses of this Congress in conferring jurisdiction we now have a lot of judges actively engaged in operating prisons, school systems, and the rest, to their chagrin. I communicate with them frequently, and they would rather not be in the business. They would rather be in the business purely of being good judges sitting in their courtrooms or in their chambers rather than having to bother with these other institutions.

Added to all that, of course, we have the problem of our so-called social reforms traditionally enacted in which many feel that the courts did not belong to begin with, but that is the fact. I speak particularly of items such as right to life, abortion, and busing. We deal with that day in and day out. We are going to have a cloture vote on busing tomorrow on the floor.

In order to "obviate" or "circumvent," if that is the proper word, the judicial decision emanating from the highest Court, in the constitutional nature, of course, logically you approach it by way of constitutional amendment, which is a very, very difficult process, first of all, in getting it through the Halls of Congress and then securing ratification out beyond.

Recently there has been some thinking, shared by some of my colleagues on this very committee, that perhaps the way to attack that problem would be to utilize the general power of the Congress constitutionally to limit the jurisdiction of the Federal courts, so that by statute this Congress could define guidelines to exclude the Federal courts from acting in certain areas such as abortion and busing.

May I have from you, if you have had any opportunity to focus on this, your thinking as to what constitutional limits there are upon us as a Congress to limit Federal court jurisdiction?

Judge O'CONNOR. I touched on that briefly this morning, Senator Laxalt.

Senator LAXALT. I know you did.

Judge O'CONNOR. I would review briefly some of those thoughts with you.

You have two separate questions. One is the jurisdiction of the lower Federal courts. That, of course, invokes article 3, section 1. Then we have the appellate jurisdiction of the Supreme Court with article 3, section 2, powers of Congress to regulate, if you will, the appellate jurisdiction of the Supreme Court.

In neither instance do we have much in the way of case law to examine to guide us with respect to the role of the Congress in this

area. Certainly to the extent that the judicial branch of Government is supposed to be the ultimate source of determining what is the supreme law of the land, if you will, and the source of resolving conflict among the several Federal courts of the land, and indeed the State courts insofar as their addressing Federal questions is concerned, then we look to the Supreme Court for the capacity to resolve those issues.

To the extent that that capacity were to be withdrawn by the Congress, then it might result in a greater diversity of holdings at the Federal lower court levels or among the State courts. This raises certain policy considerations that I am sure would be of concern to the Congress.

To the extent that a jurisdiction were to be removed, assuming that it can validly be removed, it would leave in place, I suppose, those holdings and doctrines that had already been established by the Supreme Court prior to any removal of jurisdiction of that area.

Now, as I indicated earlier, I think that some of the constitutional scholars who have examined this question are in doubt as to whether indeed it is valid constitutionally for Congress to remove jurisdiction, for instance, of a particular subject matter as opposed to the type of limitation that has heretofore been utilized.

Therefore, to a degree these questions are not answered, although with respect to the appellate jurisdiction of the Supreme Court the *Ex parte McCardle* case in the 1800's upheld as valid a removal by the Congress of the appellate jurisdiction of the Supreme Court in habeas corpus appeals. That affected a pending case before the Court, as a matter of fact.

Not much more is known really about the possibilities. I would say there are some unanswered questions pertaining to these proposals.

Senator LAXALT. What you are saying in effect is, as you indicated, that there really are not any precedents to guide us casewise. If this Congress should see fit in its wisdom, or lack thereof, to move forward in these areas, it is pretty much an open question for later resolution, probably by the Supreme Court itself.

Judge O'CONNOR. Possibly; other than in *Ex parte McCardle* and the *Klein* case, and so forth.

Senator LAXALT. Yes.

How are we doing on time, Mr. Chairman?

The CHAIRMAN. You have a little time left.

STARE DECISIS

Senator LAXALT. All right. I will get into one other area if I may then, Judge. That is the area of stare decisis.

I feel—and I think most lawyers do—the stability of the judicial system rests principally on adhering to precedent. You are going to be presented with that sitting on the Supreme Court I suppose in a greater proportion than you have even been presented with it in the trial court and the appellate court.

Justice Brandeis wrote: "Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right."

May I have your views on this very important principle? I am sure you are familiar with the Justice's observation on stare decisis.

Judge O'CONNOR. Yes, I am, Senator Laxalt.

Senator LAXALT. May I have your views.

Judge O'CONNOR. Stare decisis of course is a crucial question with respect to any discussion of the Supreme Court and its work. I think most people would agree that stability of the law and predictability of the law are vitally important concepts.

Justice Cordozo pointed out the chaos that would result if we decided every case on a case-by-case basis without regard to precedent. It would make administration of justice virtually impossible. Therefore, it plays a very significant role in our legal system.

We are guided, indeed, at the Supreme Court level and in other courts by the concept that we will follow previously decided cases which are in point. Now at the level of the Supreme Court where we are dealing with a matter of constitutional law as opposed to a matter of interpretation of a congressional statute, there has been some suggestion made that the role of stare decisis is a little bit different in the sense that if the Court is deciding a case concerning the interpretation, for example, of a congressional act and the Court renders a decision, and if Congress feels that decision was wrong, then Congress itself can enact further amendments to make adjustments. Therefore, we are not without remedies in that situation.

Whereas, if what the Court decided is a matter of constitutional interpretation and that is the last word, then the only remedy, as you have already indicated, is either for an amendment to the Constitution to be offered or for the Court itself to either distinguish its holdings or somehow change them.

We have seen this process occur throughout the Court's history. There are instances in which the Justices of the Supreme Court have decided after examining a problem or a given situation that their previous decision or the previous decisions of the Court in that particular matter were based on faulty reasoning or faulty analysis or otherwise a flawed interpretation of the law. In that instance they have the power, and indeed the obligation if they so believe, to overturn that previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation.

What I am saying in effect is, it is not cast in stone but it is very important.

Senator LAXALT. It is still a highly persuasive consideration as a matter of principle.

Judge O'CONNOR. Very.

Senator LAXALT. That is all I have for now, Judge. Thank you very much.

Mr. Chairman, I waive the balance of my time, whatever it is.

The CHAIRMAN. Thank you very much.

Senator Byrd is next. I do not believe he is here.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have appreciated the answers you have given here today. I think you have acquitted yourself very well up until

now. I fully expect that you will do so not only the remainder of these hearings, but also as a Justice of the U.S. Supreme Court.

Let me just ask one question following up on Senator Laxalt's questioning. I think he asked some very intelligent questions pertaining to judicial philosophy and some of your beliefs.

To pursue his question briefly, how should judges resolve conflicts between precedent or stare decisis and what they perceive to be the intent of the framers of the Constitution?

Judge O'CONNOR. These are very difficult issues for the Court. Obviously the Constitution is the basic document to which the Justices must refer in rendering decisions on constitutional law. In analyzing a question the intent of the framers of that document is vitally important.

Now what does one do as a Justice on that Court faced with a situation in which the Supreme Court itself previously has determined that the Constitution in a given area means a certain thing and that was the intent of the framers and that is the holding of the Court; yet a subsequent Justice believes that interpretation was erroneous and, indeed, that was not the intent of the framers at all but something else was intended? What does that Justice do?

I think we have an example of that kind of situation in the *Brown* v. *Board of Education* case where the then-sitting Justices in 1954 became persuaded that their brethren years previously when *Plushy* v. *Fergusen* and its progeny were decided had incorrectly interpreted the 14th amendment and the intent of the framers of the 14th amendment. They cast their vote and decision to alter that interpretation.

Therefore, it can occur and that is the process that unfolds, although I am sure that in each instance it is a very significant thing for a Justice to overturn precedent, particularly that of long standing.

Senator HATCH. In his famous dissent in *Plushy* v. *Fergusen,* which you mentioned, in 1893 Justice Harlan referred to our Constitution as a colorblind constitution. Would you agree with this characterization?

Judge O'CONNOR. I am aware that Justice Harlan has taken that view, and several other Justices have likewise so characterized it.

On the other hand, we have decisions outstanding of course in the affirmative action area which would indicate that it is not in the view of at least some of the decisions a purely colorblind decision, but that indeed some form of affirmative action is possible in certain areas. Therefore, it is difficult for me to characterize what the Court has done in that respect. I think in some areas it has not applied Justice Harlan's view at this point anyway.

Senator HATCH. Where would you stand on that issue?

Judge O'CONNOR. I am sure that these questions, Senator Hatch, are going to come back before the Court in a variety of forms. I do believe that litigation in the area of affirmative action is far from resolved, as I see it, and that we will continue to have cases in this area. I think it would be inappropriate for me to indicate my specific holding should that matter come before the Court, which I think it will.

FOURTEENTH AMENDMENT

Senator HATCH. I may come back to that issue.

Recent scholarly works with regard to the doctrine of incorporation, including Raoul Berger's famous work, "Government by Judiciary," soundly refute the notion that the authors of the 14th amendment intended to make the Bill of Rights applicable to the States.

Do the Constitution's words and phrases require the first eight amendments to be applied to the States themselves? Is there any justification for that in the legislative history of the 14th amendment?

Judge O'CONNOR. I have not made an indepth study at this point of that legislative history such as you would want to do before casting a deciding vote on a case. I am aware of Raoul Berger's article. In fact, I have read it, and I have read other scholarly works that address themselves to the intent of the drafters of the 14th amendment.

In fact, I think probably there is some difference of opinion which was expressed by the drafters of that 14th amendment at the time. I think Justice Black placed his reliance, for example, on the comments of one or two of those drafters. Mr. Raoul Berger would have felt that those comments were not particularly appropriate.

I am aware of the controversy about the question. We do know, of course, that at this point the Court has held that many of the first 10 amendments are indeed incorporated into the 14th amendment by virtue of its provisions.

TENTH AMENDMENT

Senator HATCH. In regard to the 10th amendment, it discusses "reserved powers." In your opinion what is still reserved to the States?

Judge O'CONNOR. I suppose the 10th amendment was thought by many for some time to be of virtually no further application. We heard very little about it for a long time.

Then I think it gained a lot of notoriety at the time that the Supreme Court handed down its decision in the *Ussury* case, in which basically the Court said that the 10th amendment prohibited the Congress from applying its powers and wage standards to that of State and local employees and held that in that instance it was a violation of the 10th amendment because it affected the States in their role as States.

The attention given the 10th amendment did not last too long I guess because in a succeeding case or two, the *Hodell* case for one, we had occasion to look at some additional enactments of Congress, specifically pertaining to surface mining I believe. The Court did not apply the 10th amendment to invalidate those as they applied to the States, but indeed determined that in those instances Congress really was addressing its attention to private business rather than the States as States.

Therefore, the 10th amendment has had perhaps not a great deal of attention, if you will, in the cases. While we have isolated

holdings that have relied on it, we cannot point to any great bulk of authority.

Certainly this has been a great concern to the States because States feel that it is out of the States that the Federal Government grew; that the Federal Government did not create the States but the States formed together to create the Federal Government, and indeed that they did maintain and retain very significant rights.

I could only conclude that perhaps we have not seen the last of the litigation concerning the 10th amendment.

Senator HATCH. You are correct that the Court in the *Usery* case cited the 10th amendment with the proposition that State government employees are beyond Federal Government control for some purposes. I think that was a landmark decision.

Do you think that this is a reinvigoration of the 10th amendment, and really should *Usery* be used as a precedent for future rulings by the Court in your opinion?

Judge O'CONNOR. I am sure that will be cited by many as precedent for future holdings and already has been cited. The extent to which the Court will continue along that path I would say is somewhat uncertain.

STATUTORY INTENT

Senator HATCH. I have been concerned, as you know, about the doctrine of preemption. Under that particular doctrine I think too often the Federal courts have been willing to imply that Congress intended to preempt the whole field of regulation when Congress has not conclusively spoken at all.

Where Congress is silent, when should courts imply a Federal preemption? What limits are there on the use of this doctrine, which I believe is an insidious doctrine?

Judge O'CONNOR. I suppose this involves basically questions of interpretation of statutory intent—the intent of Congress, if you will. There are a number of cases on the books, as you have correctly pointed out, where the courts have determined in essence that Congress has occupied the field fully and therefore the States may no longer exercise any jurisdiction in that particular area.

This, of course, is a matter that has to be addressed on a case-by-case basis. I think quite properly the Court would want to look in each instance at the particular enactment or enactments of Congress that are being said to have occupied the field.

USURPATION OF STATES POWER

Senator HATCH. As you know, I believe the Supreme Court has continually usurped the power of the States and, frankly, has continually invaded the power of the States. It seems to me this is a question you are going to have to be faced with many times in the future as a Supreme Court Justice.

Judge O'CONNOR. I would assume that is true. In approaching problems of statutory interpretation and intent, it has been at least my practice until now, to examine very carefully the legislative history and the language of the particular statute in determining what Congress does intend.

Of course, Congress can be very helpful in that regard by making clear expressions of what it intends. Perhaps it could be therapeutic to consider an expression in the congressional enactment itself that Congress does not intend that this be regarded as occupying the entire field that otherwise States could occupy themselves, or something of that sort.

Senator HATCH. Of course, you know Congress has almost always been necessarily vague. We are not known for legislative draftsmanship in Congress although we should be.

Let me say this to you: During the legislative debate concerning the Civil Rights Act of 1964 many of the proponents said that act would never be used to establish quotas. Yet, in fact, there are many in our society today who feel that is exactly what we have done through the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission. Maybe we will get into that in the next round of questions.

Let me ask you this: The Supreme Court recently upheld a Utah statute requiring parental consent for abortions performed on minors. How would you draw the line between the role of a parent, and a family, and the right to an abortion? If parents have the right to give consent, how about the father of the child? Do you see any inconsistency in giving parents the right to consent but denying the similar protection or privilege to the father of the child?

Judge O'CONNOR. Senator, my recollection of the Utah statute is that it was not one that provided for parental consent but rather for notification to the parents without a consent aspect. In fact, I think that the Supreme Court in an earlier decision had held that a statute from another State which required parental consent for a minor to obtain an abortion was invalid.

I think the more recent case from Utah involved notification to the parents and involved a minor who had not alleged that she was of sufficient maturity, or whatever it was, to make up her own mind or to decide. The Court upheld that particular Utah statute and has drawn a distinction between that and its earlier holdings. I think the Court also has invalidated a requirement in State law that the natural father consent as well.

EXEMPTING WOMEN FROM COMBAT DUTY

Senator HATCH. Let me ask one more question.

You served on DACOWITS, which was the Defense Advisory Committee on Women in the Services, a committee formed by former Secretary of Defense George Marshall in the 1950's to make recommendations on the role of women in the military. One of the recommendations was the right to go into combat ought to be granted to women or at least the law should be removed exempting women from combat duty.

As I understand it, the records in fact show that you exercised leadership in attempting to remove all barriers to the assignment of women to combat vessels. I do not know whether you would be influenced by that fact in reviewing congressional statutes on this subject and the principles the Supreme Court has laid down recently. Do you have any position on that particular matter at this time?

Judge O'CONNOR. Senator, if I could correct some of the statements on that——

Senator HATCH. Yes.

Judge O'CONNOR. I did, indeed, serve on the Defense Advisory Committee on Women in the Service for an interval of time by Presidential appointment. That commission did have occasion to consider a variety of the statutes and regulations governing women in the service.

As you know, the Defense Department had established as a policy that a certain number of women would be admitted in the military service and would serve in the various branches of that service. The DACOWITS commission really was asked then to look into the role of these women and make appropriate recommendation.

During my service on it I did offer suggestions which were adopted by the group and which subsequently were adopted by Congress asking that the statutory definitions, if you will, of combat be reexamined so that we could be more specific as to what jobs and tasks it is that women may appropriately perform and what they may not.

Let me give you an example. At the time that my motion was made women were totally prohibited from serving on ships other than hospital or transport ships. It made no difference whether it was a ship that was in a peacetime mission during peacetime or some other task that did not involve combat at all in the sense that we knew it. It simply was a total prohibition of service by these women on anything but a hospital and transport ship at the same time that the Navy was admitting women to the service and making promotions on the basis of any service that they could have on a ship at sea, so their opportunities were being restricted.

It was suggested that Congress reexamine this prohibition and look instead at the particular mission to be performed and the particular capability of the person to be assigned. That was done. The total prohibition was removed.

I also recommended that the Defense Department and Congress reexamine some of the definitions of combat to make sure that women were not being unnecessarily precluded from appropriate tasks. For example, if we live in an age where we have missile warfare and the task to be performed is one of being engaged in a missile silo in plugging in certain equipment, is that combat—far from the jungles of Vietnam, but rather in the safety of the missile silo? Some of the existing definitions had that effect. It was our suggestion that they be reexamined on a more specific basis. Indeed, that process occurred.

I did not serve on DEACWIS at the time when any recommendation was made to remove totally the prohibition against combat for women.

Senator HATCH. I notice my time is up. Thank you, Mr. Chairman.

ANTITRUST EXPERIENCE

The CHAIRMAN. Senator Metzenbaum?

Senator METZENBAUM. Judge O'Connor, I wonder if you would be good enough to tell the committee if you have had any involvement with antitrust issues in your public career.

Judge O'CONNOR. Very little; let me tell you the extent of it, if I may.

When I was in the State legislature I did sponsor and succeed in having passed in Arizona a State antitrust act which was patterned after the Sherman Act. I had occasion as a trial court judge to hear one or two actions, or at least portions of them, which were brought under that act. That is pretty much the extent of it, which is not great experience.

Senator METZENBAUM. As you know, the Supreme Court does become the final arbiter of what the antitrust laws of our country are.

Judge O'CONNOR. Right.

Senator METZENBAUM. In the landmark *Alcoa* case, Judge Learned Hand wrote a decision that really set out what I believe to be crucial: The whole question of small business and small business being vital to the free enterprise system's being able to operate.

He stated:

> Throughout the history of these antitrust statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake and in spite of possible cost an organization of industry in small units which can effectively compete with each other.

That Judge Hand decision has often been quoted by the Supreme Court. Do you have any difficulty in sharing that view?

Judge O'CONNOR. Senator Metzenbaum, I really do not know what current decisions are pending in the Federal courts in this area. Certainly I recognize that the object of the Sherman Act was to reduce or eliminate monopolies. To that extent, of course it has the effect of encouraging competition and encouraging smaller units to be in operation.

Senator METZENBAUM. Let me change to another subject for a moment.

During the last session of Congress we removed impediments to Federal court consideration of all Federal questions regardless of the amount in controversy. That was my bill, as a matter of fact.

In your William and Mary article, at page 810, you seem to think that was a bad idea. I just want to get a reading from you as to whether my reading of your writings is correct in view of the fact that repeal of the $10,000 requirement was predicated on the assumption that the smallest litigant was every bit as much entitled to have his or her day in court as the largest litigant, and that the $10,000 requirement no longer made good sense.

On the other hand, you in your article seemed to be criticizing the repeal. You say, "In fact, however, Congress appears to have moved recently to open further the Federal jurisdictional doors." Then you talk about the limitation of the $10,000 amount in controversy.

That concerns me because to me access to the courts, regardless of the economic status of the individual or the size of the case, is a matter of great moment. I would like to be certain that I am interpreting your writings correctly.

Judge O'CONNOR. I agree with you that access to the courts is vitally important to people regardless of their economic status. The point I was making I think in the article was simply that we have two sets of courts extant in our country. We have State courts and we have Federal courts.

It is my belief that we have certain problems in trying to manage the interrelationship between these two court systems. In fact, I think we are the only country in the world that operates parallel court systems, the Federal court system and a State court system. Of necessity, we have certain problems inherent in the maintenance of these two systems.

People have access now to the State courts for resolution of Federal constitutional issues. That is the point. The Federal issues can be resolved and are being resolved at the State level.

What I was examining here in the article are the trends that I saw in the extension of jurisdiction, if you will, at the Federal level. With all of the problems we have of crowded Federal courts, the need for more judges, and the great problems we have, then what is the trend to expand jurisdiction when these same problems can be heard at the State level?

If they are not satisfactorily resolved at the State level, of course there is a right to go forward and have them resolved at the Federal level if they involve Federal questions. However, if we can have a strong State court system, I would assume that these rights can be properly and fairly addressed at that level. That was the thrust of my concern.

Senator METZENBAUM. Notwithstanding the fact that the Judicial Conference of the United States supported Federal court jurisdiction for all cases arising under a Federal statute or the Constitution, you still feel that it would be more advisable to deny jurisdiction to those who want to use the Federal court system for cases involving amounts less than $10,000?

I should say that there is obvious discrimination between the rich and the poor. For example, if an individual is claiming rights under the Federal Social Security Act, isn't he entitled to a Federal forum regardless of the size of his claim?

What would the average citizen conclude about the fairness of our judicial system if, as Prof. Charles Alan Wright put it, they are denied access to the Federal courthouse because they "cannot produce the $10,000 ticket of admission"?

Judge O'CONNOR. Senator, of course that is a concern, but I think it needs to be viewed in the context of having a strong and capable State court system that can hear and resolve many of these same problems. That was simply the thrust of my comments.

Obviously it is a matter for this Congress to debate and consider. There are opposing policy considerations in place. However, to the extent that you truly feel that a litigant can and does obtain a fair and full resolution of a problem within the State court system, then perhaps to that extent you would feel that we have provided an appropriate remedy and resolution.

It simply is a matter of whether you want in all aspects both systems to be handling every problem or whether you want the Federal courts to exercise more limited jurisdiction, if you will.

ALLOWANCE OF ATTORNEYS' FEES

Senator METZENBAUM. Judge, you suggested congressional action to limit the use of section 1983, which could be accomplished by directly or indirectly limiting or disallowing recovery of attorneys' fees. Would you expand upon that?

It seems to me that if either the court inherently has that right to grant attorneys' fees or if the Congress has given it that right, and if the litigant has no other way of providing himself or herself with access to the courts, that is a very discriminatory kind of approach to the law. It concerns me very much. It concerns me that that would be the position of a member of the Supreme Court.

Judge O'CONNOR. Senator, I am not suggesting that the Court itself should draw those distinctions. Indeed, I think it is a subject of appropriate congressional inquiry. We are dealing here with an act of Congress in section 1983 and in section 1988.

Obviously someone who is poor, who has no other right of access to the Court, who cannot afford an attorney, and who has a valid claim should be entitled to pursue that claim and should have some avenue of relief ultimately in recovery of attorneys' fees. That is not inappropriate.

However, to the extent that the act is being used, if you will, in ways in which you and Congress did not originally envision, if that be the situation, and if you feel that the act in fact is being abused in some areas, then obviously it is within the prerogative of Congress to affect the extent of the use of it by altering or changing the extent to which recovery is going to be allowed for attorneys' fees.

Certainly the expansion of the use of section 1983 has been very great. Perhaps it is being used today in a manner which originally was not envisioned by those who drafted it. I do not know that and I would want to do more extensive research, but that is entirely possible.

Senator METZENBAUM. Certainly it is used more extensively than it was when originally drafted. It is an act of 1871. It is the basic civil rights act. It is the Ku Klux Klan Act of 1871.

Certainly in changing times it is being used more extensively. However, the fact is that the attorneys' fees that are being allowed do not reflect any abuse because they were actually allowed by a court. The Court would not have allowed them presumably if there were no merit to the allowance of those fees.

Yet you suggest in the William and Mary article that there be a legislative proscription with respect to the allowance of attorneys' fees in civil rights cases.

I have difficulty following that line of thinking. Even though it is used far more extensively and would of course be more extensive than in 1871, if you disallow that you do two things: You deny the litigant in a civil rights case the right to recover legal fees when he or she has no other place to turn to, and you also deny by your suggestion of the $10,000 limit the litigant access to the Court.

I find that the convergence of these two creates a situation that I think would, at least on its face, appear to be discriminatory against civil rights litigants as well as the poor and those who have difficulty in providing for themselves with attorneys.

Judge O'CONNOR. Indeed, Senator, if the Congress felt that the civil rights litigation were the appropriate role and function for section 1983 cases it could restrict the application accordingly.

I think you are aware that, in fact, what has happened is that the Court has extended it far beyond civil rights cases and has applied it to virtually any violation of any Federal law. This is a far cry, I assume, from what was intended perhaps at the time that it was drafted. At least that is arguable.

Certainly what was being suggested in the article is that Congress take a look at this and, in fact, determine if that is the intent of the Congress and if it is being used in the manner that Congress feels is appropriate and proper.

To the extent that it is, then allowance of attorney's fees seems eminently appropriate. To the extent that it is not, of course Congress in its wisdom might see fit to make changes.

Senator METZENBAUM. As a matter of fact, the article indicates a conclusive point of view; and that is that such a move would be welcomed by State courts as well as State legislatures and executive officers and then goes on to refer to the fact that the Congress indeed has moved in the opposite direction to open the courts to more access.

I am frank to say that that attitude is a matter of concern to me—denial of access to the courts and denial of an opportunity to be represented by counsel who in turn would be paid, provided that the litigant was awarded fees by the court. It provides some concern for this Senator.

Judge O'CONNOR. Again, Senator, I would like to point out that that article in no way suggested that anyone should be deprived of a judicial forum for airing his or her grievance.

I think the thrust of the article was that we have two parallel court systems and it is really a question of choice: Should the litigants be encouraged to direct their inquiries and their remedies be sought initially through the State court system, or do we want to channel everything to the Federal courts?

Speaking as a State court judge, it was my view that perhaps we could safely encourage wider use of the State court system—that it was not necessary at every level and in every instance to have the choice, if you will.

That was simply a point of view being suggested from the perspective of one who has been involved in a State court system. That of course is a matter for Congress in its wisdom to debate.

Senator METZENBAUM. They have the choice, and they would lose the choice under your article. I hope they do not.

Judge O'CONNOR. But not their remedy or a forum.

Senator METZENBAUM. Not their remedy, but no choice of forum.

I think my time has expired, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Dole?

DIVERSITY JURISDICTION

Senator DOLE. Thank you, Mr. Chairman.

I have one or two followup questions, one based on the same article on diversity that was alluded to by the distinguished Sena-

tor from Ohio, Senator Metzenbaum, in which you did indicate, as I understand it, that you favor the elimination of restriction of diversity jurisdiction as a ground for bringing a suit in Federal court.

My only question in that regard would be: What would you recommend to States to accommodate their increased caseloads if that in fact were done?

Judge O'CONNOR. Senator Dole, I do not think that my suggestion was conclusive in that regard. I simply offered that again as something which I think is appropriate for Congress to consider as it considers how to deal with the increasing caseload of the Federal district courts.

Obviously, to the extent that the diversity jurisdiction is reduced or eliminated, it will impact upon the State courts.

We do have some jurisdictions—and I think perhaps Los Angeles County is one—where there is a shorter time to get to trial in the Federal courts than there is in the State courts. Lawyers and litigants in that community would be particularly unhappy with that kind of a change.

So these raise very serious questions obviously, and that is probably why so little action has been taken over so long a time.

There are diverse views on it, and it is a very thorny issue, but I do think it legitimately is one of the things that Congress should be considering as it addresses this whole problem of State and Federal courts.

Senator DOLE. I have another question with reference to the same comment:

One of the traditional arguments for retaining diversity as a basis for Federal jurisdiction has been the fact that the State courts might have a bias in the favor of litigants who are also citizens of that State. Do you have any recommendations as to how we might address that problem if we abolish diversity?

Judge O'CONNOR. Senator, I certainly have not had experience in other States, but in our State it has not been my experience that that is the case—that a litigant need to be concerned about how long he or she has been a resident of that State or in fact whether he is a resident at all. In fact, I believe that justice is being administered very evenhandedly with regard to that, so I am not sure that that continues to be a valid concern in today's world.

APPLICATION OF EXCLUSIONARY RULE

Senator DOLE. Senator Laxalt and maybe others earlier today discussed the exclusionary rule. I want to follow up.

What is your opinion of whether or not the exclusionary rule should be applied to cases where law enforcement officers have committed technical violations of law which do not affect an individual's constitutional rights?

Judge O'CONNOR. These are among the examples that I referred to when I said a number of courts around the country within the federal system are beginning to approach the exclusionary rule in a different way and to eliminate, if you will, from the application of the rule the so-called technical violation.

We have not seen a full resolution of that approach yet by the U.S. Supreme Court, but there is every indication that perhaps some of those issues will again be addressed by that Court.

Senator DOLE. It would seem to me that, as you have indicated, based on maybe an invalid warrant or a misunderstanding of the facts, if it does not violate one's constitutional rights then I think we need to take a look at that aspect of it.

We used to talk about strict constructionists around here—it has been some time. I do not quite remember when that was, come to think of it, but what does that term mean to you? It was one that was widely discussed. I think it is well understood by those on the judiciary. Do you have any definition of that term?

Judge O'CONNOR. Well, I suppose, Senator Dole, to me it might mean someone who appreciates the difference between the policy-making functions of the legislative body and the judicial role of interpreting and applying the law as made by the legislative body; in other words, the difference between making the law and interpreting it.

Senator DOLE. You come down on the side of the interpreters, as I recall your statement and other statements that have been made?

Judge O'CONNOR. I have expressed the position that I know well the difference between the role of the legislator and the judge, and I understand the proper role of the judge as being one of interpreting the law and not making it, if you will, in very simplistic terms.

Senator DOLE. I agree with that. We supposedly make the law. We wonder sometimes if we do it effectively, but we have seen the Court also make law, and I think that has been the concern of many. I know it has been a concern of many on this committee when they talked about judicial restraint or judicial activism. Your view of that term would be in accord with the one I believe is the correct one.

Senator Mathias in his first round of questions asked about your views on the power of the Federal judiciary. Of course, we do limit judicial independence in many ways in Congress, whether it is through the appropriation process, the appointment of judges, oversight on appointments, or impeachment.

As Congress employs these powers granted to it under the Constitution, it frequently has an impact upon Court decisions.

My question would be: To what extent, in your view, should the Court as it sits be cognizant of public and congressional sentiment on issues before the Court?

Judge O'CONNOR. Senator, it seems to me that properly the Court would have to be considering really only the facts of the particular case and the law applicable to those facts.

It would seem to me rather a dangerous process in general, if you will, to go outside the record and outside the law for guidance in determining how a given matter should be handled or addressed.

I suppose that is why we strive to have judicial independence—so that cases are not based on current perception of outside activity but rather on the matters that appropriately come to the attention of the courts.

Senator DOLE. Rather than what may be the issue of the day before the Congress, whether it is busing or whether it might be some other issue. I think busing has been discussed. That is only

one of the issues where Congress, I think, sometimes felt that the Court had a hearing problem. We sometimes believe in this branch that the Court—maybe properly so—is oblivious to what happens in the outside world.

Judge O'CONNOR. Senator, I am sure that through the arguments of counsel and through the brief-writing process and the citation of appropriate authority the Court is never totally oblivious to what is going on. I have to assume that the litigants themselves are making known to the Court through the briefs and the arguments the realities of life.

It is just that I do not think the Justices on their own—or judges anywhere for that matter—should be in the process of going outside that judicial process for guidance in reaching decisions.

Senator DOLE. Senator Thurmond in his questions asked you three specific questions with reference to votes on abortion while a member of the Senate in the State of Arizona. You also mentioned your sponsorship of Senate bill 1165.

Is it fair to ask whether or not that particular legislation accurately represents your view on abortion? As I recall, in summarizing what Senate bill 1165 entailed, it was that no payment benefits be made unless the mother's life was threatened.

Judge O'CONNOR. In Senate bill 1165 I was not the drafter of the bill; it was the State medicaid bill.

The leadership had assigned the subject of Arizona's role in the field of medical care to the poor to a citizens' committee.

As I recall, Dr. Merlin Duvall headed up that committee at the time. He later became the dean of Arizona's medical school.

The committee, in any event, recommended the adoption of this particular bill; and it included that provision in it concerning the use of public funds; and I supported the bill and its provisions.

Senator DOLE. And that bill did become law?

Judge O'CONNOR. Yes, it did. It was never funded thereafter for the medicaid function. It is still on the books today.

Senator DOLE. But is it fair to conclude that that might reflect your views on that issue?

Judge O'CONNOR. Yes, Senator, it reflected my views on that subject when I voted for that measure.

Senator DOLE. What about today?

Judge O'CONNOR. Yes—in general substance, yes.

Senator DOLE. Senator Metzenbaum also discussed the question of disallowing attorney's fees in certain areas brought under 42 U.S.C. 1983. I think you have addressed that question.

If the legislative reforms which were mentioned in the William & Mary article in civil rights suits are heard in State as opposed to Federal courts, would there be any danger of plaintiffs being victims of bias or prejudice—if they are limited to State courts rather than Federal courts? Is that a problem as you see it?

Judge O'CONNOR. It is a potential problem; and to the extent that it is there has to be a means for eventually removing the issue, if that occurs, to an appropriate forum where it would not be a problem.

Senator DOLE. Thank you, Mr. Chairman.

Thank you, Judge.

The CHAIRMAN. Thank you.

Senator DeConcini?

EXCLUSIONARY RULE

Senator DeConcini. Thank you, Mr. Chairman.

Judge O'Connor, we have had some discussion today on the exclusionary rule—something that is being focused on by this committee. I wonder if you could comment on a decision that has already been handed down by the Supreme Court in 1971—the *Bivins* decision?

I do not expect you to give us any insight—because I do not think you could fairly do that—on how you would vote on it, and I am not asking that question, but I want to quote from that decision.

Chief Justice Burger declared:

> I see no insurmountable obstacle to the elimination of the suppression doctrine—the exclusionary rule—if Congress would provide some meaningful and effective remedy against unlawful conduct by governmental officials.

My question is, Do you generally agree that it is an area that Congress properly, or any legislative body, could delve into and make changes as far as the suppression doctrine is concerned?

Judge O'Connor. Senator DeConcini, if I understand what you were reading correctly from Justice Burger, it was the suggestion that indeed Congress could appropriately provide a remedy to a citizen from whom evidence had been illegally taken by way of a civil damage action, for example, against that individual.

As I recall, the *Bivins* versus six unknown agents case actually held that indeed there is a cause of action against the peace officer who unlawfully violates someone's fourth amendment rights.

So I understand that that cause of action exists today by virtue of that decision, and I think the Justice was perhaps talking about Congress implementing some kind of remedy. I do not know that he was talking about an enactment to eliminate the doctrine, and I would hesitate to express a view on that.

Senator DeConcini. Do you think it is a proper area, Judge O'Connor, for Congress to delve into and consider; and maybe if they come to the conclusion, do you have any problem with Congress altering the present Supreme Court decision on the exclusionary rule? That is really my question.

Judge O'Connor. I do not know, Senator DeConcini, whether it would be valid for Congress to simply by congressional enactment eliminate this judge-made rule—I cannot say—but I can, I think, safely say that I understand it is not a constitutional doctrine which has been invoked; it has really been a judge-made rule.

Certainly the study of Congress about the problem, and the consideration of it, and the factfinding process that goes on are of great benefit, I would say, to all of us including the courts as the courts reexamine the problem.

It cannot hurt, and it could certainly help to have a great deal of examination of the problems that have ensued and from factfinding.

Senator DeConcini. Judge O'Connor, my research indicates that probably the paramount reason for the exclusionary rule to exist

and to be handed down by the Supreme Court was for the purpose of deterrence.

It is also interesting to note that six out of seven extensive studies that have been conducted in the last several years have all come to an easy conclusion, I might say, that it has not deterred the police or other law enforcement officials of abusive or illegal searches and seizures, which draws me to the conclusion that perhaps it is a proper time for Congress to consider some other remedy and provide some statutory area where the exclusionary rule might at least be modified.

Be that as it may, I believe we will address that problem here.

Your article that is constantly referred to in the William & Mary Law Review is one of the finest works that I have had the pleasure of reading.

I gather from it—obviously—that you feel the State courts ought to play a greater role in the whole judicial area, perhaps providing a little less pressure on the Federal judiciary.

Let me ask you this: What do you think is the proper role for the Federal Government as far as encouraging the State court system to conduct and accept a greater role? In addition to limiting some of the jurisdictional areas that you touch on in your article, do you feel that financial assistance, or educational programs, or training for judges or prosecutors or law enforcement officials; or do you have any thoughts on that subject?

JUDICIAL TRAINING PROGRAMS

Judge O'CONNOR. I do, Senator. In addition to the adjustments, as you mentioned, of any jurisdictional aspects that would encourage the State court systems to operate, it seems to me that judicial training programs are really of enormous benefit to State court judges, as I am sure they are to Federal judges. I am a believer and a supporter of those programs.

Naturally, they cost money; and for the judges to attend them some help is needed, whether it be at the State level or with other assistance.

Likewise, training programs are vitally important in the criminal justice system for the prosecutors and defense counsel.

Our legal system works at the trial level and the appellate level only to the extent that we have capable lawyers representing both sides of the questions. It does not work or function very well if one side is poorly represented in the case before the court.

Certainly, to the extent that we want the criminal justice system to operate well, I think it is vitally important that we have skilled prosecutors as well as skilled defense counsel, and that takes training.

These are young people for the most part, and you have to give them training as a substitute, if you will, for years of experience.

Senator DECONCINI. Judge O'Connor, can I take it that you do not have any philosophical problem with the Federal Government participating in some educational program, obviously subject to the ability of the Government to pay its bills—which has not been very outstanding in the past number of years—but it does not trouble you if there is assistance, from the standpoint of education and

training, offered by Federal programs—if there happen to be some good ones left?

Judge O'CONNOR. No, I cannot say that it does.

PERSONAL PHILOSOPHY OF ABORTION

Senator DECONCINI. Returning to the subject—and I am sure it probably will never end—of abortion, you have expressed your views a number of times here today and just now with Senator Dole. I wonder if you could share with us for just a few minutes not the voting record—I know you have had no judicial decisions on the subject matter that we could find—but your personal philosophy or feeling as to abortion so the record would be clear today?

Judge O'CONNOR. OK, Senator. Again let me preface a comment by saying that my personal views and beliefs in this area and in other areas have no place in the resolution of any legal issues that will come before the Court. I think these are matters that of necessity a judge must attempt to set aside in resolving the cases that come before the Court.

I have indicated to you the position that I have held for a long time—my own abhorrence of abortion as a remedy. It is a practice in which I would not have engaged, and I am not trying to criticize others in that process. There are many who have very different feelings on this issue. I recognize that, and I am sensitive to it.

But my view is the product, I suppose, merely of my own upbringing and my religious training, my background, my sense of family values, and my sense of how I should lead my own life.

Senator DECONCINI. Judge O'Connor, along that line I have one last comment about it. This is not something that has come upon you in the last year or two or the last 6 or 7 weeks; this is a commitment and a feeling that you have had for a long period of time, I assume from the answer to the question.

Judge O'CONNOR. I have had my own personal views on the subject for many years. It is just an outgrowth of what I am, if you will.

Senator DECONCINI. Thank you. I appreciate that response in depth regarding your own personal background.

I regret to some extent that it is necessary to delve into that, but I believe—as you can appreciate here—it is a sensitive subject among many Members on the many sides of this issue. I think it is very important that it be laid out clearly and precisely, and I think you have done just that.

JUDICIAL DISCIPLINE

To turn to another subject, one of great concern to me, Judge—many references today have been stated about the uniqueness of the status of a Federal judge, including a Supreme Court Justice, mainly that you will serve on the Court for your life.

The Constitution provides a mechanism by which the Legislative branch of Government may remove Federal judges, and I refer of course to the impeachment process.

As a practical matter, impeachment has been used only infrequently because of its cumbersome nature; plus, there has been

virtually total lack of supervision over Federal judges and the Federal bench.

A number of highly respected constitutional scholars has argued that the impeachment mechanism is a corollary to the separation of powers in the sense that the extraordinary procedure must be established when one branch of Government seeks to remove members of another branch of Government.

However, this formulation leaves open the issue of whether or not it is constitutionally tolerable to allow for some sort of mechanism wholly within the judicial branch itself that would enable Federal judges to discipline and maybe even remove errant or mentally disabled colleagues.

It is manifestly unfair to the citizens of this country, it seems to this Senator, to allow incompetent or alcoholic judges to continue to hear cases.

Do you believe, Judge O'Connor, that there would be a proper procedure or mechanism that could be set up constitutionally?

I might add that some of your soon-to-be colleagues on the Bench have expressed positive views in this regard and one or two of them some negative views.

I am interested in your overall position regarding judicial discipline and whether or not a mechanism, in your judgment, might be created within the Judiciary.

Judge O'CONNOR. Let me speak from my experience at the State level. Of course, as a State court judge I have been subject to periodic review by the electorate; and that is a process that has certainly not distressed me at all. I think it has been satisfactory and indeed helpful to know how you are viewed by the citizens for your performance.

In our State we also have a system that incorporates a commission which is charged under our State constitution with review of the capacity of any judge who is alleged to be incapacitated from service and who should be removed or disciplined in some fashion.

I think that that commission has worked well within our State, and I think it is appropriate and useful.

Whether it would work equally well at the Federal level I am not in a position to say because of course I have not been involved at that level.

Whether it raises constitutional problems is a matter that would have to be reviewed from the standpoint of reviewing a particular proposal, listening to the arguments, and so forth.

But speaking just in terms of my own personal experience, that kind of a system has worked satisfactorily in Arizona.

Senator DECONCINI. Most States have adopted such a system in some manner or another, and Arizona—I cannot remember when it was adopted. You may have been in the legislature when that occurred.

Judge O'CONNOR. I was—yes.

Senator DECONCINI. And you were probably a supporter of that legislation?

Judge O'CONNOR. I was—yes—and I have watched its operation and have felt that it was sound.

Senator DECONCINI. The question that comes, of course, is the one you touch on: The constitutionality—something extremely sensitive.

We have had testimony here on the Judicial Tenure Act which has passed both Houses and been enacted, not nearly as restrictive as I would have liked to have seen it, being one of the cosponsors, but certainly a beginning, endorsed by the Chief Justice of the Supreme Court and providing for some procedure to handle complaints within the various circuits and then some procedure to take those complaints further up if there was some merit.

That particular legislation excluded the Supreme Court from its consideration.

History shows us that impeachment procedures are really impractical today, and the struggle that a legislator has—and you might have had the same struggle when you were in the State senate—is how do you attempt to provide the citizens with some way to have a grievance heard when there is indeed a judge.

There have been a number of instances written about, a number of instances provided before our committee when we had this bill—the Judicial Tenure Act—before us last Congress, where indeed there was no question but that the judge was misbehaving under the good behavior clause and there really was no way except through peer pressure.

I take it from your answer that you are committed on the State and your experience is that it is very positive and that barring constitutional prohibitions you are not adverse, at least philosophically, to an approach on the Federal level.

Judge O'CONNOR. That is correct, Senator. My experience at the State level with it has been a positive one.

The concern that I hear people generally express is that as our society has grown so large and as people feel that they are faced with some kind of faceless bureaucracy in the Executive branch and with a tenured Judiciary, if you will, which is not subject to review on the other hand, it can be a sense of frustration for the common citizen. I can well appreciate the concerns that have caused consideration to be given to the problem.

How it will work in practice and whether there are any constitutional problems with what Congress has proposed I am refraining from suggesting.

Senator DECONCINI. I thank you, Judge O'Connor.

Mr. Chairman, might I suggest a short break sometime this afternoon at the appropriate time?

The CHAIRMAN. We plan to stop at 5, but if Judge O'Connor would like to have a break before then we would be pleased to allow it.

Judge O'CONNOR. Mr. Chairman, it is fine with me for you to continue—as you wish.

The CHAIRMAN. You prefer to continue?

Judge O'CONNOR. That is fine with me, Mr. Chairman—at your pleasure.

The CHAIRMAN. The judge says she does not need a break. [Laughter.]

Senator DECONCINI. Mr. Chairman, I just want to be sure you are taking care of her.

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.

Let me cut through this gordian knot and get to the heart of one issue which has been alluded to before—there is no question about it; namely, this very difficult, hotly debated issue of abortion in the United States.

I wish to say again that I do not think it is the sole test for qualification. I do not think it is the only thing that ought to be pursued, nor has it been the only thing that has been pursued, but certainly it is fair game as a part of a whole panoply of items—concept cases—that we might pursue.

As I understand, Mrs. O'Connor, your basic personal position on this issue of abortion—just stating your personal values—is that abortion on demand as a form of birth control—you are personally opposed to that? Is that correct?

Judge O'CONNOR. Yes, Senator.

Senator EAST. Let me then follow up with this question: It has sometimes been said that most people personally oppose abortion as a form of birth control—that the real division is between those in the public arena who might wish to do something about it and those who would choose to do nothing about it.

As regards that particular division, what do you think would be an appropriate public policy position as far as dealing with the subject of abortion on demand as a form of birth control is concerned?

Judge O'CONNOR. Senator, I really do not know that I should be in the business of advising either this Congress or State legislators with regard to what their present posture should be in developing public policy.

I feel that it is a valid subject for legislative action and consideration, and certainly this Congress and your subcommittee have been deeply involved and engrossed in dealing with this precise area and determining to what extent this Congress should take certain action.

I appreciate that and appreciate that effort. It certainly is an appropriate role for the Congress. I just do not think that it is a proper function for me to be suggesting to you what you ought to be doing.

Senator EAST. Fine. I appreciate your concise and candid answer.

Let me pursue then this point: I gather what you are saying is that you do feel that it is fundamentally a legislative function to deal with the public policy question of how one copes with abortion on demand as a form of birth control. You would look upon that in a separation of power context, at the Federal level at least, as being in the domain of congressional action as opposed to the other two branches of the Government? Would that be correct?

Judge O'CONNOR. Senator, I would, subject only to any constitutional restraints which might exist. That is not to say that it should not also be the subject of State legislative consideration.

Senator EAST. I think, just parenthetically, on your latter point it is valid—that initially this was fundamentally a State function—to deal with the question of abortion. It was certainly so envisioned by the framers and certainly so envisioned by any reasonable interpretation of the Constitution. I appreciate your candor on that, Mrs. O'Connor.

Let me proceed with this question if I might: I would like to get your reaction to this particular statement by Justice White as a dissenter in *Roe* v. *Wade* in which Justice Rehnquist joined him. This is what they had to say about the majority opinion in that case *Roe* v. *Wade*—of 1973, which candidly is considered by many, even those who have differing views on the abortion issue, as probably the most glaring and flagrant example we have of judicial usurpation of congressional or—as you rightly put it—State policy-making function.

I would appreciate your reaction to this statement. Again, I am quoting directly from Justices White and Rehnquist. They say: "As an exercise of raw judicial power the Court perhaps has authority to do what it does today, but in my view"—Justice White, Rehnquist agreeing—"its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court."

Does that sound to you like a good statement of your judicial philosophy and a pertinent one as regards—yes, candidly—the specific issue of dealing with abortion on demand in the public arena?

Judge O'CONNOR. Senator East, I have read, of course, the dissent in *Roe* v. *Wade,* and I have read at least several scholarly articles criticizing that decision and have attempted to do a good deal of reading on the subject.

I am well aware of the criticisms that are leveled in those dissenting opinions of Justices Rehnquist and White, as I am of the other criticisms that have been raised.

For me to join in that criticism would be perhaps perceived as an improper exercise of my function right now, as a nominee to the Court, for the simple reason that I suspect we have not seen the last of that doctrine, or holding, or case, and that indeed we are very likely to have the matter come back before the Court in one form or another.

At least many who are dissatisfied with the opinion have expressed that one of the things that should be done is that the Court should be asked to reconsider that very holding, in which case consideration of the views expressed in the dissent as well as the majority and the other criticisms that have been raised and the comments pro and con would be very important and would become a part and parcel of the arguments to be considered when that case is reconsidered.

Senator EAST. I can certainly appreciate your desire not to speculate on hypothetical cases in the future, let alone certainly any existing pending case; but in terms of getting a feel for your fundamental judicial philosophy beyond generality, certainly to comment upon already decided cases and doctrines emanating out of them would be very appropriate in the confirmation hearing process.

This is not of course to be interpreted—and I would so publicly state—that you are promising to vote a certain way on a given speculated set of facts or a hypothetical case in the future.

I am asking really simply whether you think that specific statement is a reasonably valid one in terms of your understanding of this very significant and very profound case that not only deals with a very important issue but deals with the very fundamental

question that we are after this whole hearing—namely, the judicial philosophy of you as the nominee.

Judge O'CONNOR. I appreciate that. My concern is simply that which was felt, I suppose, by Justice Harlan when he was asked about the steel seizure cases which had been recently handed down and other nominees who have been asked about their views on the merits or lack thereof of recent decisions before their nomination and their similar reluctance to directly respond.

I understand your concern, and I appreciate it; I think it is appropriate. It is just that I feel that it is improper for me to endorse or criticize that decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts.

I do not think we have seen the end of that issue or that holding, and that is the concern I have about expressing an endorsement or criticism of the holding.

With respect to my judicial philosophy, I certainly feel comfortable in discussing that with you and in indicating how I would be inclined to approach a problem or a case.

I have tried to indicate today that I have attempted to view the role of the judge as appropriately one of judicial restraint in deciding those cases that come before the court on appropriately narrow grounds and resolving issues based on my understanding of the constitutional doctrines which are being invoked.

Senator EAST. Again, I appreciate your candor and your forthrightness. I suppose the frustration—maybe it is somewhat unique, though not at all for a moment reflecting adversely in terms of your qualification or potential service on the bench—is that frequently with nominees there would be, let us say, an extensive record in terms of their background on major substantive questions whereby we would not have to perhaps probe as deeply in a confirmation hearing because we would have a rather extensive written record.

It seems to me if we get a nominee where that is not necessarily so, because of your great work at the State level, we have somewhat of a heightened responsibility to pursue your attitudes.

For example, I would if time would allow—and it has run out on me—one might inquire as to your general feelings on the rights of women and how that might be reflected in the public policy arena; or the rights of minorities—blacks, for example—and how that might be reflected in the public policy arena; or your attitude on the death penalty and how that might be reflected in the public policy arena.

So it is in that spirit that I inquire about it and do agree that I pressed the point to that extent simply because of the dearth of information on the record. Perhaps in my next 15 minutes I can pursue this issue a bit further.

Thank you, Mr. Chairman. I appreciate that my time has run out.

The CHAIRMAN. Thank you.

Senator Baucus?

LIMIT SUPREME COURT JURISDICTION OVER CONSTITUTIONAL ISSUES

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I would like to touch upon a subject that has been addressed by most Senators this morning and this afternoon—namely, what the proper congressional or Presidential response should be when there is profound disagreement with a Supreme Court interpretation of the Constitution.

The classic traditional response has been for Congress and the States to attempt to amend the Constitution through the amendment process.

Another remedy of course would be for the President to try to appoint nominees who were in accordance with the public's view of the issue.

A third approach would be for Congress to attempt to impeach a nominee. Additionally, Congress might try to override the Supreme Court by statute—albeit *Marbury* v. *Madison* would pose a problem.

A final solution—which has been the subject of discussion in this body in the last couple of years would be for the Congress to try to limit Supreme Court jurisdiction of the particular constitutional issue.

Earlier this morning you discussed with Senator Laxalt and another Senator on this committee the *McCardle* and the *Klein* cases and how the precedents in this area have been ambiguous. Furthermore, those cases were decided many years ago anyway.

My question is: As a matter of public policy—as Sandra Day O'Connor, private citizen—what is your view as to whether Congress should attempt to limit Supreme Court jurisdiction over constitutional issues?

Judge O'CONNOR. Senator, I really would feel constrained about giving you my armchair advice on how you should handle these things that are before you.

Senator BAUCUS. Excuse me. I am not asking for you to advise us on how to handle it. I am asking you as an individual citizen what your personal view is.

Judge O'CONNOR. When I was in the State legislature, Senator Baucus, we had occasion to consider a particular proposal—a memorial to Congress asking in that instance that an amendment be constructed to remove jurisdiction of the Supreme Court over a certain subject matter.

I did not support that memorial for the stated reason that I did not feel, as a State legislator at that time, that I wanted to recommend that the jurisdiction of the Supreme Court be limited by subject matter in that fashion.

That was my own response as a State legislator when I had occasion to consider that question. I was concerned that if it started in one area I did not know where it would end and that we could be left without a court to determine the final state of the law in that or other areas.

Senator BAUCUS. Is that still your present view?

Judge O'CONNOR. Senator Baucus, it would be representative of some of the questions and concerns which I would want to address

if I were to consider that question as a legislator or Congressman today.

Senator BAUCUS. What are some of the public policy considerations that come to mind on this issue?

Judge O'CONNOR. That which I have indicated—to wit: I believe it was contemplated by the framers of the Constitution that the judicial branch, and acting through the Supreme Court ultimately, would determine the final meaning, if you will, of the Constitution and of Federal law and would resolve conflicts on the Federal law which arose in the other Federal courts.

To the extent that such power is removed by removing appellate jurisdiction of the Court, then it would have the potential effect at least of leaving unresolved those differences that might arise among the several Federal courts and among the State courts, and it would also have the potential effect in any event of leaving in place any of the decisions which had previously been handed down and which gave rise to the concern in the first place.

Senator BAUCUS. So one potential danger would be that the 50 States could have 50 different interpretations of the first amendment—of free speech or free press. That would be one unfortunate result that might occur—is that correct?

Judge O'CONNOR. I think that is probably exaggerated because I have to assume that even if jurisdiction were presently removed over an area we would still have in place those decisions that had previously been handed down. So it is not as though it would be leaving everyone to write on a new slate, if you will.

Senator BAUCUS. But if Congress removed Supreme Court review, wouldn't Congress really be winking at the State courts and saying, "States, go ahead and rule your own way because there is no other body to override any decision you might make"?

Judge O'CONNOR. These are among the questions that I think have to be asked and addressed when we consider proposals of the kind which you describe.

CONSTITUTIONAL AMENDMENT PROCESS

Senator BAUCUS. Do you think that the constitutional amendment process works?

Judge O'CONNOR. Well, it has worked of course about 26 times, and at least we have that many on the books. Some others have been proposed which were not approved.

Senator BAUCUS. But do you think that the process is too cumbersome or too laborious to address unpopular Supreme Court decisions?

Judge O'CONNOR. Senator, there have been several instances in the history of our Nation where Congress has attacked a particular holding of the Court by means of offering a constitutional amendment, and it has been successful to the extent that amendments have in fact been adopted.

For example, the income tax amendment was really in reaction to a holding of the Supreme Court.

So I guess I have to respond that it can achieve the stated goal.

Senator BAUCUS. That is correct. It is my understanding, too, that in that case Senator Robert Taft argued against any attempt

to limit Supreme Court jurisdiction on that issue because he felt it better to address it by constitutional amendment—which was ultimately accomplished by the 16th amendment.

I raise the question because, during the debate on whether or not Congress should limit Supreme Court jurisdiction, those who favor such legislation argue that the constitutional amendment process is too cumbersome and too laborious.

I again ask you whether in your view you think the process is too laborious or too cumbersome or whether it works well. Do you think it is well designed as it is, or does Congress need the additional tool of limiting Supreme Court jurisdiction?

Judge O'CONNOR. The amendment process takes varying amounts of time to accomplish and various amounts of effort to achieve.

Our most recent example is with the 18-year-old voting amendment. It did seem to take particularly long before that process was completed.

We have a number of other amendments in our Nation's history which did not take long to complete. Others have taken much longer and have been much more complex, in terms of dealing with them.

So I think it just depends on a case-by-case basis with the particular subject in mind whether the amendment process is the appropriate one to consider.

There is another means, of course, of resolving issues which the Supreme Court has addressed and which many find to be unsatisfactory; and that process involves asking the Court by means of other cases to reconsider or distinguish the holdings which were found to be unfortunate. This is another way in which, over time at least, changes in unpopular decisions, if you will, have been modified.

Senator BAUCUS. I take it from an earlier answer you gave to another member of this committee that the Court should not be influenced by attempts in Congress to limit its jurisdiction or by what it reads in the newspaper but more influenced by the briefs and oral arguments of the cases before it?

Judge O'CONNOR. It does seem to me that the Court should make its decisions based on legal principles and not on its assessment of outside opinion, if you will.

It seems to me that the Court should review the facts of the particular case and consider the arguments that are raised, which may indeed be reflective of public concern, but should consider those arguments in the proper setting within the framework of the Court itself and within the framework of the oral arguments and the briefing that is done on the cases.

PUBLIC CONFIDENCE OF SUPREME COURT

Senator BAUCUS. Thank you.

I would like to turn to a second subject. According to a Louis Harris poll, in 1966, 51 percent of the American public had a great deal of confidence in the Supreme Court. In 1980, 27 percent of the American public expressed a similar confidence—a drop from 51

percent to 27 percent in 14 years. What, in your view, explains that drop?

Judge O'CONNOR. I am not sure that I can explain it. I suppose that a portion of it would have to be reflective of public perceptions of the results of particular decisions which have been widely publicized and would cause concern.

Perhaps it is a reflection, if you will, of the manner in which the Court has been treated in some form in the media; I do not know.

Perhaps we have more public discussion of the Court, or perhaps we have less. I am not sure which aspects have led to the change in the polls.

SUPREME COURT PRESS CONFERENCES

Senator BAUCUS. Do you think the Court should have press conferences?

Judge O'CONNOR. Do I think they should as a general rule have press conferences?

Senator BAUCUS. Yes.

Judge O'CONNOR. As a personal view only, I probably do not think that that is a good plan.

The Court does attempt to speak by explaining its reasoning and rationale in the published opinions that it issues, and the hope at least is that in that process the reasons will be sufficiently expounded.

EPITAPH

Senator BAUCUS. Finally—I told you I would ask you this question, which is: How do you want to be remembered in history?

Judge O'CONNOR. The tombstone question—what do I want on the tombstone? [Laughter.]

Senator BAUCUS. Hopefully it will be written in places other than on a tombstone.

Judge O'CONNOR. I hope it might say, "Here lies a good judge."

Senator BAUCUS. What does that mean to you? Do you want to be known as the first woman judge or the judge from the West, the judge who upheld civil liberties—just what does that mean to you?

Judge O'CONNOR. If I am confirmed I am sure that I would be remembered, no doubt, as the first woman to have served in that capacity; and I hope that in addition if I am confirmed and allowed to serve that I would be remembered for having given fair and full consideration to the issues that were raised and to resolving things on an even-handed basis and with due respect and regard for the Constitution of this country.

I would hope that on occasion my opinions could reflect clarity of thought and of word and be a reflection of the appropriate values and analysis that I think is merited of these constitutional issues to come before the Court.

Senator BAUCUS. Are there any institutional changes that you think should be made within the Court?

Senator BIDEN. You might as well let them know before you get there. [Laughter.]

Judge O'CONNOR. As the newcomer on the block I would hesitate to offer all those opinions. It would probably be inappropriate.

I am aware though that the Court has a greatly increasing caseload, and this is a concern I am sure because there are ever more decisions that have the potential for review and that need review, and the Court is limited by sheer virtue of numbers and hours in what can be done; this is a concern.

Senator BAUCUS. What in your view will be the most difficult question the Court will face in the next 25 years—the death penalty? Abortion? What will it be?

Judge O'CONNOR. I do not think I can answer that. It hears all the major issues of the day in one way or another. Most of those land before the Court, and it ultimately addresses most of those grave and serious concerns that this Nation faces in one form or another. I would not know which of those on reflection would turn out to be the most significant.

Senator BAUCUS. Thank you very much.

The CHAIRMAN. Judge O'Connor, I am sure you would agree that our constitutional form of government is probably the greatest form of government in the world. Many people feel that the Constitution is the greatest document ever written by the mind of man for the governing of a people.

In view of that I guess a good epitaph for a judge would be, "Here lies a judge who upheld the Constitution."

Judge O'CONNOR. I think that would be very apt, Mr. Chairman.

The CHAIRMAN. Thank you very much.

In view of that I think we can now recess, as we planned to, until 10 o'clock tomorrow morning.

[Whereupon, at 5:10 p.m., the hearing was recessed, to reconvene on Thursday, September 10, 1981, at 10 a.m.]

[Biography of Sandra Day O'Connor follows:]

BIOGRAPHY OF SANDRA DAY O'CONNOR

Birth: March 26, 1930; El Paso, Texas.
Legal residence: Arizona.
Marital status: Married; John Jay O'Connor III; 3 children.
Education: Stanford University; 1950, A.B. degree; 1952, LL.B. degree.
Bar: 1952, California; 1957, Arizona.
Experience: 1952-53, Deputy county attorney, San Mateo County, Calif.; 1954-57, Civilian attorney, Quartermaster Market Center, Frankfurt/Main, W. Germany; 1958-60, Private practice, Maryvale, Ariz.; 1961-64, Homemaker and childcare; 1965-69, Assistant attorney general, State of Arizona; 1969-75, State Senator, Arizona State Senate; 1975-79, Judge, Maricopa County Superior Court; 1979-present, Judge, Arizona Court of Appeals.