

Senator DENTON. In other words, you would not want them to be in a position to be shot?

Judge O'CONNOR. To be captured or shot? No, I would not. [Laughter.]

Senator DENTON. Well, it may astound this audience, but at the Naval Academy not too many months ago there were young ladies standing up and demanding to be placed in just that position, and saying that that was their right to do so because they were accepted into the Naval Academy, so it really is not all this laughable, you know. I am glad to hear that is your opinion, Judge O'Connor.

Yesterday in describing yourself as a judge, you said that two of the characteristics that have stood you in good stead over the years are a short memory and a tough skin.

I see my time is up. I will be asking you something about the Starr memorandum in the next session. I thank you very much, Judge.

The CHAIRMAN. The Senator from Pennsylvania, Mr. Specter.

#### DEATH PENALTY

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

Judge O'Connor, I compliment you on your tour de force of yesterday. I think that indirectly you have answered a number of questions, with respect to capability, by the preparation and legal skill that you have demonstrated with your answers, and with respect to your temperament, your good health, and stamina.

Did you have occasion while in the Arizona Senate to vote on the death penalty issue?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes, I did, I think more than once.

Senator SPECTER. How did you vote?

Judge O'CONNOR. Mr. Chairman, Senator Specter, after the *Furman v. Georgia* case, which basically overturned a good many State death penalty statutes for all practical purposes, Arizona along with other States engaged in an effort to reexamine its statutes and determine whether it was possible to draft a statute which would be upheld by the Supreme Court in the wake of *Furman v. Georgia*.

I participated rather extensively in that effort, in a subcommittee which actually put together the language that was ultimately adopted in the State legislature for reenactment of the death penalty in Arizona. I voted for that measure after it was drafted and brought to the floor. I subsequently had occasion to, in effect, apply it as a judge in the trial court in Arizona in some criminal cases.

I had previously participated in a vote on another death penalty bill that I recall that may have come about before the one in the wake of *Furman v. Georgia*, and that was a proposal to enact some mandatory penalties in certain situations. My recollection is that I voted against that proposal.

Senator SPECTER. Have you changed your views since you voted in favor of the death penalty?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I felt that it was an appropriate vote then and I have not changed my view.

## PRETRIAL BAIL

Senator SPECTER. Judge O'Connor, have you had occasion to set pretrial bail?

Judge O'CONNOR. Mr. Chairman, Senator, yes, I have; not often, but I have.

Senator SPECTER. In the setting of pretrial bail, did you consider the dangerousness of the defendant or did you limit your consideration to his likelihood of appearing at trial?

Judge O'CONNOR. Mr. Chairman, Senator, the circumstances in which I was called upon to set bail all related to some murder charges in which, under Arizona's statutory provision, the judge also considers, if you will, the nature of the evidence against the defendant and other factors in setting bail.

I am aware of the current discussion that is going on at the Federal level generally about whether dangerousness should be considered as a factor, and indeed whether it can be under the eighth amendment and the prohibition against excessive bail.

Senator SPECTER. When you set the bail, did you consider the issue of dangerousness to the community in your evaluation of the bail?

Judge O'CONNOR. Mr. Chairman, Senator, only indirectly, I suppose, because what I was considering was the fact that it was a death case and the extent of the evidence which had been obtained. Upon the strength of that, the bail was determined, so indirectly dangerousness perhaps was a factor.

## PREVENTIVE DETENTION

Senator SPECTER. Judge O'Connor, what are your philosophical views about bail and preventive detention as that concept may conflict with the presumption of innocence in criminal trials?

Judge O'CONNOR. Mr. Chairman, Senator, these matters are certainly presently being debated and considered here, I believe, as well as in the courts. Unless I am mistaken, there is a case now awaiting action at the U.S. Supreme Court on a petition for certiorari, possibly, from the District of Columbia area involving the validity of the District of Columbia amended bail statute. Therefore, I would be reluctant to indicate a particular view on the validity of that but I would indicate to you my broad personal concern as it reflects upon individual liberty.

It seems to me that all of us come to the judicial system encumbered, if you will, by our previous known activities. If people have been previously convicted of offenses and these convictions are known, or if for example someone has been charged with an offense and released on bail and then charged again with another offense and these factors in the record are known, these things perhaps—speaking purely as a matter of personal belief and not as a reflection on the legal issues involved—possibly merit consideration in the determination of bail.

## FUNDING FOR JUVENILE CRIME

Senator SPECTER. Judge O'Connor, with admittedly limited resources available, what priority would you personally assign to

funding for juvenile crime prevention as contrasted with other aspects of the criminal justice system?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I would assign a high priority to that particular area. One reason I would do so is because the great bulk of crime is committed by people who are very young and it seems to me that we need to concentrate our efforts on that particular age group. If there is something we can do at an early age to discourage a criminal career, it is all-important, because I think the public is very, very distressed with the extent of crime in this country. Indeed, I regard it as one of the most serious problems that we have in this Nation and I would like to see effort devoted to prevention of crime at an early age.

#### LIKELIHOOD OF REHABILITATION

Senator SPECTER. Does your experience in the criminal court suggest to you that there is a better likelihood of rehabilitation among juvenile offenders?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes. I think the earlier you reach an offender, the first time something happens if something effective can be done you have a better chance of stopping a subsequent repetition of that offense.

Senator SPECTER. Judge O'Connor, do you think that it is appropriate for Supreme Court Justices to be advocates for social reform, as Chief Justice Burger has been for improvements in the correctional and prison system?

Judge O'CONNOR. Mr. Chairman, Senator Specter, it does seem to me that the Chief Justice has a significant role to play in expressing views on the administration of justice and on matters closely related thereto. It seems to me that that is something that all of us in this Nation can value and can benefit from.

Senator SPECTER. Do you think it appropriate for Supreme Court Justices to participate in other activities, as Chief Justice Warren did on the Warren Commission, or Justice Roberts did on the Pearl Harbor Commission, or Justice Jackson did at Nuremburg?

Judge O'CONNOR. Mr. Chairman, Senator Specter, that bothers me somewhat. I just wonder how there is time to do anything like that. As I view the work of the Court, I wonder that there is time to eat much less engage in a lot of other outside activities.

#### LIMITED JURISDICTION

Senator SPECTER. Judge O'Connor, if the Congress can limit the jurisdiction of the Supreme Court on constitutional issues, as you say *ex parte McCardle* suggests, how can the U.S. Supreme Court maintain its role as the final arbiter of the Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I do not think that I have suggested that that line has been finely drawn by the Court. It has not been reexamined, really, since *ex parte McCardle*, and I did not mean to suggest or imply that that is a fixed, final position because that issue is very likely to be addressed.

However, I have also expressed yesterday my concerns that to the extent that the Supreme Court lacks appellate jurisdiction to resolve some area of the law, then we no longer would have a capacity within the Federal judicial system to have that Court

determine, indeed, what is the proper interpretation of a particular provision, or the law in the area from which its jurisdiction has been taken. This of course should be a concern to people in reviewing proposals for deprivation of jurisdiction.

Senator SPECTER. Well, in your testimony yesterday you left open that aspect of an interpretation of *ex parte McCordle*. My question to you is, how can the jurisdiction of the Court be limited on constitutional issues, given the Court's responsibility under the Constitution? Is there anything that is an open issue there to be decided?

I am not asking you for a preview on your judgment. I am asking you, if there is any justiciable issue there? Is it not plain that the Court must retain jurisdiction over constitutional issues and that the Congress cannot possibly eliminate that jurisdiction if we are to preserve the role of the U.S. Supreme Court on constitutional issues?

Judge O'CONNOR. Well, Mr. Chairman, Senator Specter, these are the concerns that I have tried to express that I think have to be considered, of course, in connection with any discussion of the limitation of the Court's jurisdiction. My effort was simply to point out that we really do not have much to look at after *ex parte McCordle*, which was a case which did uphold, as you know, the withdrawal of jurisdiction of the Supreme Court from considering appeals in habeas corpus matters. That affected a pending appeal. The Court simply upheld that particular exercise, and we have very little since then.

As I tried to explain, I think the constitutional scholars who have written on this subject have come to different conclusions as to the extent to which subject matter jurisdiction can be removed.

Senator SPECTER. Judge O'Connor, is it not inevitable for the Supreme Court to be influenced, at least to some extent, by considerations of social policy when the Court interprets the U.S. Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, in one sense we are all the product certainly of our experiences. People assume the role of judge encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.

However, the framework within which a given case is decided should, in my view, be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.

Senator SPECTER. I thought the questioning and your responses yesterday on *Brown v. Board of Education*, *Plessy v. Ferguson*, and the exclusionary rule were very enlightening, so I took occasion last evening to go back and reread *Brown*. I would disagree respectfully with your suggestion that the Court in *Brown* rested on a more intensive look at the origin of the 14th amendment. Without citing the direct language, I think the holding is very plain that the Court was looking to the effect of segregation on public education.

With respect to the exclusionary rule and what you described as a judge-made rule, *Mapp v. Ohio* was based on constitutional grounds and I think explicitly by the holding.

When you consider the intervention of the Supreme Court in the criminal field starting with *Brown v. Mississippi* and its prohibition against forced confessions, which neither the legislature of Mississippi or the Congress of the United States had addressed—I am just wondering if under your interpretation of “strict construction” you would not agree that there is an avenue and an opening where even the most strict constructionists would look to social policy in the decisions of the U.S. Supreme Court in meeting issues to which the Congress or State legislatures have not directed their attention?

Judge O’CONNOR. Mr. Chairman, Senator Specter, I simply would acknowledge that to a degree that has occurred.

Senator SPECTER. Don’t you think it is proper—if you take a strict constructionist like Justice Harlan in *Brown v. Board of Education*, and we could give a lot of other examples—that however strict a constructionist may be, there is some latitude appropriately to consider public policy or social policy in interpreting the Constitution?

Judge O’CONNOR. Mr. Chairman, Senator Specter, it is a factor in the sense that it is properly brought before the Court, and I have indicated to you that I think in the presentation of cases these matters are brought very poignantly to the Court through the briefs and through the arguments. To that extent, obviously, they are considered in that sense but by an appropriate mechanism, I suggest to you.

The suggestion that the Court should look outside the record in the presentation of the case in an effort to establish or consider social concerns or values, is what I have indicated I think would be improper in my view.

Senator SPECTER. Thank you very much, Judge O’Connor. Thank you, Mr. Chairman.

#### PRAYER IN PUBLIC SCHOOLS

The CHAIRMAN. Thank you.

We shall now begin the second round of questions.

Judge O’Connor, I shall propound certain questions to you but I want to make it clear that if you feel that any of these questions would impinge upon your responsibilities as an Associate Justice of the Supreme Court, then you say so after the question is asked and before any answer is expected.

Judge O’Connor, the first amendment forbids the establishment of a State religion. The first amendment also prohibits interference with the free exercise of religion. This second prohibition is often overlooked. Please share with us your views on the free exercise clause as it relates to, first, prayer in public schools.

Judge O’CONNOR. Mr. Chairman, as you know the Court has had occasion in several instances to consider the State action, if you will, in connection with prayer in the public school system. The Court has basically determined that it is a violation of the first amendment, both the establishment and free exercise clause, to