such as meetings of the Judicial Conference of the United States or the council meetings of the various circuits where no cases are discussed or no debate is focused and the decisions are administrative or quasi-legislative matters.

Do you think it would help the process at all if some sort of sunshine laws were applicable in this specific area of the judiciary?

Judge O'CONNOR. Senator DeConcini, you mean concerning only the conference matters, or the rulemaking function, or policymaking functions?

Senator DECONCINI. Yes.

Judge O'CONNOR. I really do not know whether sunshine laws would be helpful in that regard or not. I have not had information as yet on the extent to which opening the meetings has been productive or nonproductive. I can speak only from my experience as a legislator in which I did support open meeting laws in Arizona and operated extensively in the public sector under those laws and have found it satisfactory. I have not had experience at the judicial level with that application.

Senator DECONCINI. Do you think it is worthy of some consideration by the judiciary and some debate within the judiciary?

Judge O'CONNOR. Senator DeConcini, that is not inappropriate at all to expect it to be discussed and considered.

Senator DECONCINI. Judge O'Connor, I want to thank you again for your fine testimony the last 2 days.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Thank you.

Senator Simpson was next, but he is not here. Senator Leahy, the distinguished Senator from Vermont, is next.

JUDICIAL ACTIVISM

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate the opportunity to be here as I mentioned before.

As I think some of us have mentioned to Judge O'Connor, unlike the chairman, for some of us this is the first time that we have been present at the confirmation hearings of a Supreme Court Justice. That is only one small reason for the good attendance by Senate standards at these hearings. I think Judge O'Connor's personality and abilities are the main reason. I am glad we have had this opportunity.

Judge, I would like to follow up on a point raised earlier this morning by Senator Specter.

In *Brown* v. *Board of Education* I suppose we go back and forth on the question of whether we were trying to determine judicial activism, whether it is a question of judge-made law or simply further research into the old law—why we have *Brown* v. *Board of Education* as law today and not *Plessey* v. *Ferguson.*

I would just read from one part of *Brown* v. *Board of Education* because I quite frankly had not read it since law school days and went back and reread it. That is the part in the Chief Justice's decision where he says,

* * * in approaching this problem we cannot turn the clock back to 1868 when the amendment was adopted or even to 1896 when *Plessey* v. *Ferguson* was written. We must consider public education in the light of its full development and its present

place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

I state that simply—and I do not mean to get back into the whole debate on it all over again—because in my mind it appears more that the Court in effect was making law rather than simply finding some new interpretation of the Constitution.

Judge O'CONNOR. Senator Leahy, the Court did hold ultimately that separate educational facilities in the public school system were inherently unequal under the equal protection clause.

The Court did, of course, ask for extensive historical research and data in connection with its study of the problem.

In its written opinion you are correct in stating that the Court did not particularly refer to the historical analysis in reaching its decision. However, the effect of it is to determine that the equal protection clause meant what it says and that separate is not equal.

I suppose that most students of the law today would agree that that was an appropriate interpretation of that language.

To an extent, and certainly in its famous footnote, it referred to matters that traditionally are not referred to by the Court in reaching those solutions, and that of course was the subject of a lot of attention at the time.

Senator LEAHY. Of course what is judicial activism to some may probably be strict constructionism to another.

I recall probably one of the most memorable days I spent in law school, and that was the day I was selected to have lunch with Hugo Black.

Hugo Black was seen by many people certainly as a judicial activist. I recall him saying—I recollected it I believe this morning when Senator Mathias mentioned him—his views of the first amendment.

He said,

The First Amendment says there should be no abridgement on the right of free speech, and I read that as a strict constructionist meaning there should be no abridgement on the right of free speech.

He was adamant on that.

In applying that standard of course in some of the decisions he wrote he was accused of judicial activism.

In a decision that your immediate predecessor, Justice Stewart, wrote in 1972—he said, quoting *United States* v. *Bass,*

Unless Congress conveys its purpose clearly it would not be deemed to have significantly changed the Federal/State balance. Congress has traditionally been reluctant to define as a Federal crime conduct readily denounced as criminal by the States. We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between Federal and State criminal jurisdiction.

I would assume that that would be along the lines—without going into that particular case—of how you feel a Justice should approach a case involving judicial construction and federalism?

Judge O'CONNOR. I think that was an appropriate statement, Senator Leahy.

Senator LEAHY. The reason I mentioned the difficulty is that in that same case Justice Douglas dissented—and here is somebody who is seen very much as an activist—where he said,

> The Court today achieves by interpretation what those who were opposed to the Hobbs Act in this case were unable to get Congress to do.

He was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, who were all convinced that Congress had intended to usurp the power of State government to prosecute violence committed during a lawful labor strike in this particular case.

I am a former prosecutor, and I think Justice Stewart was correct. I agree with his statement. He strictly construed the statute and deferred to State authorities to prosecute acts of labor violence.

Our distinguished chairman of course has been here much longer than I have. He now feels that we need legislation that would make labor violence a crime to be handled by Federal authorities. So the issue can go back and forth. I am not really looking for an answer. I am just saying that we can make a bad mistake, and those who report on these hearings can make a bad mistake by trying to fit any one case or any one Justice into a one-line definition. I think you would agree on that.

Judge O'CONNOR. Yes; I would. I would also simply comment that Congress can be very helpful of course to the courts if it indicates what its intention is when it passes legislation as to whether it intends to preempt State jurisdiction or not. Sometimes those direct expressions can be most useful to the courts.

RIGHT TO PRIVACY

Senator LEAHY. I could not agree with you more. I think we make a bad mistake in the Congress where, in trying to get legislation through that everyone can rally around, we make it sometimes either too bland or too nonspecific, and then we pass it on to the regulators for applicable regulations. They have little to guide them. You put one more layer in there, and everyone sits back comfortably thinking that at some time or another some advocate for one side or another will bring it before the Court for the Court to work it out. That is a bad situation.

I know that there are areas where we will continue to have regulation and litigation. I know of your own fights in Arizona for tough antipollution controls, which bring about regulations and litigation, but it is a price that society should be willing to pay.

The Constitution does not speak of a right to privacy, but lately the question of a right to personal privacy comes up in opinions more and more. Do you have any views on that right within the Constitution?

Judge O'CONNOR. Senator Leahy, you are correct that the Constitution does not mention the right to privacy directly. The Constitution has been interpreted though by the Court as carrying with it a penumbra of rights under the Bill of Rights, and within that doctrine the Court, I think in *Griswold* v. *Connecticut,* first addressed directly and recognized a right of privacy. That was the case involving the right to sell or possess contraceptive devices in that State and overturned a State statute prohibiting that.

The right to privacy has been recognized again by the Court in several other cases, one involving the possession I believe of some obscene material among other things.

The Court seems to have established that there is such a right.

Senator LEAHY. How do you feel on that?

Judge O'CONNOR. I accept the fact that the Court has established that.

The ninth amendment of course refers to a reservation to the people of other rights not enumerated. I do not believe the courts have directly pinned the right of privacy to the ninth amendment by any means; but it is simply a reference or an acknowledgement, if you will, in the Constitution that people do have certain other rights that are not enumerated.

WILLIAM AND MARY ARTICLE

Senator LEAHY. Reference was made once more to the William and Mary article. Just as a matter of curiosity, how did you come to write that article?

Judge O'CONNOR. I am beginning to wish, Senator Leahy, that I never had. [Laughter.]

However, the William and Mary Law Review in its wisdom was aware that the relationship of our dual system of State and Federal courts and their workings is an unusual one in terms of the international field—other nations do not have such systems—and that inherent in such a dual system are certain areas of concern and interrelationship that is of interest at least to those in the system.

The Law Review decided to invite some noted legal scholars to write some major papers on the subject and then decided to invite several Federal and State court judges to participate in the seminar and in the panel discussion and to make remarks.

That sounded to me like it would be fine—as a State court judge I would be happy to participate—and after I said fine I learned that they would like an article in addition. That is how the article came about.

Senator LEAHY. Judge O'Connor, I am in one moment going to do something that Senators do only with the utmost reluctance, and that is yield back the balance of time available to us. We do this even with more reluctance if there is a television camera going somewhere.

I will just simply repeat what I said yesterday and what I said earlier when we met in my office: I really do not care whether an appointee to the U.S. Supreme Court is Republican, Democrat, conservative, or liberal. I care about competence, honesty, and integrity. I feel that you have certainly demonstrated that throughout these hearings, and I will very enthusiastically vote for your confirmation.

Judge O'CONNOR. Thank you, Senator.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from North Carolina, Mr. East.

Senator EAST. Thank you, Mr. Chairman.