

State and Federal relationship. So these issues will be debated fully here and explored from a policy standpoint.

With regard to the 10th amendment, to the extent that the regulations I suppose are directed or the Federal statutes, if you will, are directed toward the activities of private business as opposed to the activities of the States as States, the most recent pronouncements indicate that the 10th amendment would not be considered as a bar.

So I do not know that we can look to that for guidance in the extent to which the Federal Government is properly regulating activity of private business within the States in this developing field.

Senator BAUCUS. I guess my question really is what you see in the Constitution that enables States to control the development of their own resources as opposed to provisions in the Constitution which allow the Congress to limit State control over resource development. Unfortunately my time is up, so we cannot pursue this any longer.

I want to close, though, by saying that this is probably the last time you and I are going to have to chat publicly over these matters. I think you have been an excellent witness.

There is a possibility that you may reappear later after the other witnesses. That has not been finally determined, but in all probability you will not return.

I frankly want to praise you and tell you that I think you have done very, very well. I wish we had more opportunity to discuss more substantively some of the issues that are coming before the Court.

I understand your reluctance to get into some of these matters in great detail. I agree that you should not discuss them publicly more than you have. Your restraint in addressing these questions has caused my admiration for you to increase rather than decrease.

Further, I think it is in large respect your personal views on substantive issues is less important than your competence and your integrity. You have certainly demonstrated the highest integrity and the highest competence in your testimony before us.

I just want to wish you the very best of luck. You are going to have to bear heavy responsibility on the Court. In many ways I envy you. We all send our best wishes with you. Thank you.

Judge O'CONNOR. Thank you very much, Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Iowa, Mr. Grassley.

Senator GRASSLEY. Judge O'Connor, since I tend to look so serious whenever I ask questions I would like to spend just a few minutes being philosophical and commenting in much the same vein as my predecessor, Senator Baucus, has just done.

This may be the last time you and I will have conversations unless, for instance, you would be nominated for Chief Justice some day and come back before the committee.

As I think about the things that I would hope for you, I have to think about the first thing you said to me when we met privately in my office. I was very relieved to have you say it and open up the conversation in that way. You said something to me like, "And

you're a farmer, too." You then went into a discussion of your background, having obviously done your homework about what Chuck Grassley was all about.

That did not mean so much at the time, until I was later visiting with somebody in my home State who said things that were complimentary about you. Although the way I repeat them they may not come out that way, they are intended to be complimentary.

As he was trying to explore with me whether or not you ought to be confirmed—and it was his opinion you should be—he too had read something about your rural background, and that you had worked your way through the legal system and the political system to become what you are today.

He looked upon your appointment as a breath of fresh air. His understanding of your background had a great deal to do with his looking sympathetically and approvingly at your nomination.

I think the implication was that here you are, a person who has been successful, you have come from a rural State with a rural background, and people who have that sort of background cannot be all bad—in fact, your having a rural background could bring a dimension to the Supreme Court that was refreshing to him.

I put together what he said with what you first said to me, and realized that there is something very personal about you, brought out in meetings like this, that cannot help but impress us very much.

I say this now because I am always one to ask questions, never having time at the end of a 15-minute interval for these kinds of comments.

At any rate, this is the way that I have looked at you in the 6 weeks or 2 months that I have had an opportunity to know about you and read about you.

#### LEGISLATIVE VETO

Now I would like to ask you a question that would follow up on what I believe Senator Dole brought up. He was getting into a philosophical discussion with you about whether or not administrative agencies had been delegated too much power by the Congress and the extent to which that delegation ought to be reviewed, and further controlled by Congress.

I would like to ask you somewhat the same question that I asked you in our private conversations in my office—how you look at the whole subject of congressional veto or whatever terminology you might want to use—the whole process by which Congress could have some sort of check on the administrative agencies as a follow-up of the delegation of legislative authority, and not as a congressional control over administrative decisions that are constitutionally within the realm of the President. I think that that is a differentiation that we must make.

I would like to have your opinion on congressional control or review over the delegation of a legislative authority.

Judge O'CONNOR. Senator Grassley, I know that that is a topic of great interest presently in the Congress. Several proposals are being made for a legislative veto in one form or another.

These proposals are being aired in various forms at the State level also. I understand they have actually been adopted in a number of States in one form or another.

I had no experience in Arizona with a legislative veto, if you will, because during my years there no such proposal was adopted. So I have had no personal experience at all with it.

As it has been discussed and considered in the Congress some have expressed concern about the separation of powers concept and the extent to which Congress should have veto power, if you will, over administrative agency regulations after those regulations have been adopted.

These are really unanswered questions in two ways: One, the Congress has not adopted such a provision yet really; and, two, the courts have not had a chance to review them in respect to the allegation of separation of powers.

It strikes me that Congress has a very effective power irrespective of any legislative veto provision that it might want to adopt, and that is the power to take a look at the administrative regulations which the particular agency has adopted, and if Congress feels that that agency has gone beyond the scope of the intended authority of Congress, Congress has the power to directly legislate in such a fashion as to make clear that it was not intended to have that power and to effectively by direct enactment curtail that kind of power. So I assume that that is a very direct means which Congress can also use.

Senator GRASSLEY. That would not be included in one of the instruments though because that is just a natural response and obviously a constitutional response.

Judge O'CONNOR. Yes.

Senator GRASSLEY. Legislation amending existing statutes would be the sort of instrument—and I use that term very generally—that would be considered and is being considered by the Congress.

How would you view something beyond what we know and understand we can do presently under the Constitution?

Judge O'CONNOR. Senator Grassley, I wish I could give you a more definitive response, but my experience with it is limited, and I do not believe the court has had a chance to rule on it, so I cannot speak from that viewpoint.

I assume that a lot of questions are being addressed by the Congress as they consider these proposals. For instance, if the reviewing body is less than the entire body of Congress; if it is confined for instance to a designated group within one branch—either the Senate or the House—then you run into questions of bicamerality.

Senator GRASSLEY. That is true.

Judge O'CONNOR. If it is less than a whole body, what do you do with that?

Senator GRASSLEY. You do not need to go into those details. Maybe I can make it easier for you by asking if there is anything in the concept that you find abhorrent to you personally from your legal experience, from your being a legislator, or as you have an understanding of the Constitution today.

Judge O'CONNOR. Senator Grassley, I would only say that there may be basic issues of separation of powers involved in a particular

enactment, but I would certainly want to look at the particular enactment that was produced before formulating any conclusion and would also want to have the benefit of briefs, arguments, and discussion.

Senator GRASSLEY. On another point—and this again has been asked by one or two other Members but not quite in the way that I am asking it—the Court has recently required that the plaintiffs in civil rights litigation specifically demonstrate how it is they have been discriminated against before the burden of proof shifts to the defendants.

Previously the plaintiff was only required to make the allegation of discrimination and then the defendant had to rebut that allegation.

Would you favor placing a stricter burden on the plaintiff?

Judge O'CONNOR. Senator Grassley, I do not know that I have reviewed the decision adequately enough to know precisely what standards are being employed.

I would look initially I think at the statutory provision involved—if it is a proceeding under title 7, title 6, or whatever it is—and determine the intent as expressed by Congress in reviewing such a matter. Then I would certainly want to look at the precedent established in the cases.

If the precedent is established as you say quite firmly with respect to that provision, then that would of course be very significant.

Senator GRASSLEY. Again there has been reference made by several members of the committee to the recent Law Review article that you wrote from the perspective of a State court judge.

In my reading of that, as I had done previous to my private meeting with you, I got the impression that you would look favorably upon returning to the State court exclusive jurisdiction in some matters which involve Federal constitutional questions.

Is my impression correct, and over what matters do you believe only State court review is necessary?

Judge O'CONNOR. Senator Grassley, I do not think I ever expressed the view that State jurisdiction should be exclusive on Federal questions. Indeed it cannot be under our constitutional system. But I did feel that there are many instances in which a full and fair hearing of a Federal issue can be had at the State level.

In those instances perhaps we already have seen indications that when that is the case perhaps the Federal courts will decline the granting of a further review other than a review to determine whether there was a full and fair hearing granted at the State level. Those types of trends seem to me to be healthy.

Senator GRASSLEY. That was obviously written during your present position on the court of appeals. How do you view your consideration of that article and specifically this point now that you are being considered for the Supreme Court?

Judge O'CONNOR. Senator Grassley, that remains to be seen. I was asked that question, I think, by someone when I spoke at the seminar and was asked, "Well, I wonder after years of experience on a Federal bench if you would view the thing in the same light?"

I can only say to you that if given that opportunity I would be happy to report back. [Laughter.]

Senator GRASSLEY. Do you feel your attitude toward the State court system has been affected by the fact that you became a State court of appeals judge after having been a State trial judge?

Judge O'CONNOR. Senator Grassley, I do not think that it altered my perceptions of the capacity of the State court system to consider certain questions. I would say it reinforced those views.

Senator GRASSLEY. Mr. Chairman, I yield back the remainder of my time.

The CHAIRMAN. Thank you.

Senator Denton is next. He had to go to the White House, and so we have agreed on account of that emergency for him to question in the morning on his second go-round.

Senator Specter, we have now reached you.

#### LENGTHY COURT DELAYS

Senator SPECTER. Thank you, Mr. Chairman.

Judge O'Connor, in light of the hardship on litigants occasioned by lengthy court delays do you believe it would be useful to limit the time that appellate courts could take to decide cases, along the lines of the Federal Speedy Trial Act for criminal cases?

Judge O'CONNOR. Senator Specter, that is a difficult question in a sense. I am extremely concerned about the length of time that it takes to get civil litigation concluded.

Certainly at the appellate level some cases require a great deal more work and study than others. At the appellate level some cases take longer time within which to gain a consensus than do others. This is a natural part of the process, and so a time limit that would be quite suitable for a run-of-the-mill case for which there are no unusual difficulties and no unusual disagreement among the Justices would not pose particular problems. On the other hand, some other cases could pose problems.

State legislatures have occasionally addressed this problem. Indeed, the legislature in Arizona has and has mandated that judges may not receive their paychecks unless work is completed within a certain amount of time, granted certain exceptions however at the appellate level.

Senator SPECTER. What is the result then of withholding pay?

Judge O'CONNOR. I do not recall any checks having been withheld. Whether that is because the work is done or it is not being enforced I could not tell you.

Senator SPECTER. Is there any realistic way that the Congress could act to limit the courts from writing such long opinions?

Judge O'CONNOR. Senator Specter, I wish there were. I think that we can do a good job in general with less verbiage. At least that is my belief. It is my hope that I would be able to do that. Time will tell.

Senator SPECTER. In dealing with the complexities of the cases, the Supreme Court limits the length of briefs and limits the time for litigants to make their arguments. Why would it not be equally possible to limit the length of court opinions or the length of time that the courts could spend? They deal with the same case in terms of complexity.