NOMINATION OF SANDRA DAY O'CONNOR

FRIDAY, SEPTEMBER 11, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 1202, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Laxalt, Dole, East, Grassley, Denton, Specter, Biden, Byrd, Metzenbaum, DeConcini, Leahy, and Baucus.

Staff present: Vinton D. Lide, chief counsel; Quentin Crommelin, Jr., staff director; Duke Short, chief investigator; and Candie Bruse, chief clerk.

The CHAIRMAN. The Judiciary Committee will come to order.

The questioning of Judge Sandra O'Connor will resume. Judge O'Connor, I would remind you that you are still under oath.

Judge O'CONNOR. Thank you.

The CHAIRMAN. I shall now call upon the last Senator, I believe, on the second round, the distinguished Senator from Alabama, Mr. Denton.

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

Senator DENTON. Thank you, Mr. Chairman.

Good morning, Judge O'Connor.

Judge O'CONNOR. Good morning.

Senator DENTON. At the outset, let me clear up what amounted to a misunderstanding on my part yesterday. I had questioned you on your personal views on abortion, and you stated during that exchange, "It remains offensive at all levels," and stated that you think it is a problem at any level.

Then I thought I heard you say that you would not be in favor of abortion even to save the life of the mother. After several others had thought the same thing, and then having been questioned by some news people, I did look at the transcript and so forth and find out that that is not what you said.

You actually said: "Would I personally object to drawing the line to saving the life of the mother? No, I would not." You went on to say: "Are there other areas?" Then you said: "Possibly."

Therefore, I would have to withdraw my statement since it was based on error in understanding you. I misunderstood you. I would have to say that it appears that indeed you are not more conservative than I on that issue, and I would remind you that legislatively the Congress has done what it could to outlaw or forbid pay-

ments for Government funding of abortion except to save the life of the mother.

That is where Congress drew the line but we could not go any further than just stop Goverment funding for it. We could not get into the legislation of abortion with respect to the public because we were preempted by a Supreme Court manifestation of judicial activism in the *Roe* v. *Wade* decision. Therefore, there is a real problem of that judicial activism, and I am sure that not all of my colleagues would agree that it is the wrong kind but, nevertheless, there was that example.

Therefore, I have learned that you are less conservative than I, and as I go into the Kenneth Starr memorandum I would refer to a previous statement of yours which said that you felt that your personal feelings should not constitute the basis of decisions made on this matter or any other matter in the Supreme Court, before the Supreme Court, but rather that if there is a constitutional principle which applies, it should be the determining factor.

I submit that in the Declaration we do have the statement, "all men created equal," et cetera, "endowed by their Creator with certain inalienable rights. Among these are life * * *." Then in the Constitution, in the Bill of Rights, article 5, "No person can be deprived of life without due process of law."

Senator East, as you know, has been conducting hearings to determine whether or not a fetus is a person. I agree that that is a very difficult question. I do not agree that it is difficult to determine that it is human life. I believe that that is irrefutable.

I believe that, as I said before, our democracy is predicated on respect, infinite respect, for human life. Socrates, whom we may be proving right these days, has said that a democracy cannot work because sooner or later the people will perceive that they can get their hands in the till; elected officials will cater to that trend, and bankruptcy will result. I think we are on the way to proving that, were on the way to proving that true. We are trying to turn that around.

He also indicated that the majority would crunch the minority in every case in a democracy. By our system we have been proving him wrong so far—and I am justifying why I am going into the Kenneth Starr memorandum and the abortion issue further.

The Judeo-Christian ethic brought compassion into the picture. The ethic did not exist as a religious principle in Socrates' day. He tried to talk about a "one god" thing and they poisoned him because he did not believe in all of the gods being the way to go. Therefore, we do have a substantial portion of the world believing in that God, and among those nations the United States has been one of the more notable.

That ethic of compassion applied to the dog-eat-dog majority rule in the political sense, and the otherwise dog-eat-dog, free-enterprise system, is in my opinion what has gotten us to the point where we have proved Socrates wrong, have made a success out of democracy. To me, compassion is the key to civil rights, to human rights, to caring for the needy, to the survival of a democracy. If you break down compassion, you will find the prefix "com"—with—and the word "passion"—passion for what? Humanity, infinite, godlike humanity.

The human life in the womb is the most needy, most dependent, most helpless minority, for which—for whom, depending on how you want to look at it—we must have compassion. Our real political, economic, military, and psychological problems from my point of view—and I thought of this a great deal in prison and after coming home—all stem from our growing preoccupation—which has been repeated over and over in history—as a nation becomes more preoccupied with luxury than necessity, we have become "me-istic." We have stopped thinking about the other guy as much, our wife or our husband, our brother, our fellow of another color, our colleague of another color.

I believe that abortion is the opposite of compassion for that being which needs it the most. I believe that history will prove that once a nation goes that way, from an ethic like ours, as Nazi Germany did, you immediately get involved with infanticide, euthanasia, genocide, and the whole idea of selective murder. This brings into play the question of the convenience of the existence of that person which is based on human judgment. That is why I feel so strongly about what might be called fetal rights, the right to survival on the part of that human life.

I do not believe, with you, that learning more about fetuses will ever change the fact that there is life there, God-given life which we do not understand, and we do not even know what makes grass grow. How can we get into the process of deciding, for convenience or for money—because that kid is going to cost money if it is born—or embarrassment that we want to spare the 13- or 14-year-old girl—and you have said that you are opposed to it for birth control purposes.

However, I want to know what you meant yesterday when you said, "Are there other areas?"—besides saving the life of the mother—and then you said, "Possibly." I would have to say that that is less conservative than that which Congress has indicated as its collective will, and it leaves me befuddled as to where you are. I feel I have gotten nowhere, in that you have said possibly there are other areas. We could go on for perhaps a month, and if that is all the specific you are going to be, I would not know at all where you are coming from philosophically on that issue.

Judge O'CONNOR. Senator Denton, I believe that I recounted previously for the committee my vote in the legislature on funding in connection with the bill for providing medical care to indigents, where I did support a measure that provided for certain exclusions in addition to what was necessary to save the life of the mother. In that instance it included instances of rape and incest, criminal actions, and I supported that.

Senator DENTON. However, the criminal action—a little baby to be—is not involved in.

Judge O'CONNOR. I simply was trying to indicate, Senator Denton, where I had had occasion to vote as a legislator on the issue. These are very difficult questions for the legislator because, of course, people—many people—share your very eloquent views and your very perceptive views on this most pressing problem.

There are others who, perhaps out of different concerns, might draw the line in some slightly different fashion or indeed in some substantially different fashion, and these are the troubling issues

that come before a legislator when asked to specifically draw the line. I appreciate that problem. I think I can simply indicate to you how I voted at that time on that issue.

Senator DENTON. OK. Well, with respect to some of those votes, then, I would like to go into the document which has become known as the Starr memorandum. I would preface that by a question. You feel abortion is personally abhorrent and repugnant. Would it follow that you believe the unborn ought to be legally protected? If so, how and at what stage of their development?

Judge O'CONNOR. Senator Denton, excuse me. Is that your question?

Senator DENTON. Yes. You have stated that you feel it is personally abhorrent and repugnant, and that it is a legislative matter to deal with it. Do you mean by that that we should legally protect the unborn? If so, how, considering the *Roe* v. *Wade* activism from the judicial branch?

Judge O'CONNOR. Well, Senator Denton, a legislative body at the State level today would be limited in that effort by the limitations placed in the *Roe* v. *Wade* decision. I recognize that. If a State legislature today were to try to draw the lines, it would have to reckon with that decision, which of course places substantial limitations on the freedom of State legislative bodies presently.

Senator DENTON. Until that decision is changed or if something comes up to render it subject to change, it makes your appointment extremely important and your philosophy on that matter extremely important. Therefore, I hope you can appreciate the interest of those tens of millions—and there are tens of millions on the other side—who are interested in your position on that. I am not clear that we have drawn much out. Let me get on this——

Judge O'CONNOR. Senator Denton, I do appreciate the concerns and the strongly held views of so many people on this issue.

Senator DENTON. I understand that.

On July 7, 1981, you had two telephone conversations with Kenneth W. Starr, counselor to the Attorney General of the United States.

Judge O'CONNOR. Excuse me. On what date, please?

Senator DENTON. July 7, 1981, is my information.

Did you state in one or both of those conversations that you "know well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and have never had any disputes or controversies with her"?

Judge O'CONNOR. Senator Denton, I am sure that I indicated that I knew Dr. Gerster. Indeed, she lives in the same community in which I live, the Scottsdale-Paradise Valley area.

Senator DENTON. Yes, and you are acquaintances.

Judge O'CONNOR. We have children who have attended the same school, and I have seen her on any number of occasions.

I had occasion, of course, to see her in 1974 in my capacity as a legislator as well. She at that time was interested in the house memorial 2002, dealing with the question of whether the Arizona Legislature should recommend to the Congress an amendment of the U.S. Constitution as a means of addressing the *Roe* v. *Wade* decision. Dr. Gerster——

Senator DENTON. Excuse me. I do not mean to be impolite but in the interest of trying to stay within the time, the only part of the question that I am—the question deals with whether or not you said that you had never had any disputes or controversies with that leader, Dr. Gerster. Did you say that, because the Starr memorandum is quoted as having had you saying that?

Judge O'CONNOR. Senator Denton, I am sure that I did indicate that and I would like to explain precisely why I said that.

As a legislator, I had many instances in which people would come before the legislature and espouse a particular position with regard to a particular bill. I as a legislator was obligated to listen to those views along with the views of others, and then ultimately cast a vote. My receiving of information of that sort and ultimately casting a vote, even if it were cast in a manner other than that being espoused by the speaker, did not cast me in my view in the role of being an adversary.

I did not feel that in my position as a legislator, that every time I voted against a measure that someone in the public sector was supporting publicly in front of me, that I became an adversary. I was not a leader in connection with the passage or defeat of house memorial 2002. I was a legislator——

Senator DENTON. I understand. I really do understand the thrust of your answer. It does appear, however, that the thrust that one would take from that answer which was quoted is that you and the right-to-life movement leader there really had no disputes on probably that issue. That I think might have been gleaned from that statement. I leave that to speculation. It certainly would have been my inference from it.

Judge O'CONNOR. Well, Senator Denton, I think that it is important to recognize that what I am trying to reflect is that because I may have voted differently than Dr. Gerster would have, had she been a legislator, does not mean that we are adversaries.

Senator DENTON. Yes, I understand. However, there has been much opposition to your nomination and public statements by Dr. Gerster, which probably we will hear some of later, concerning her opposition to many of your past legislative decisions. Therefore, there was an inconsistency, not in what your attitude was or what your statement was but I think with respect to the thrust of what that inclusion in Mr. Starr's report might have been intepreted as meaning.

Did you tell Mr. Starr that you did not remember how you voted on a bill to legalize abortion in Arizona, or that there is no record of how you voted on legislation to legalize abortion in Arizona? I believe we heard you say that you had some difficulty remembering one, and you had to get it out of a newspaper because it was not in the legislative records. Somebody in Arizona has said that that was the equivalent of not remembering how one would have voted on the Panama Canal issue.

Judge O'CONNOR. Senator Denton, as I explained I think in the first day of these hearings, with respect to house bill 20 I frankly had no recollection of the vote. We voted on literally thousands of measures and that bill never went to the floor for a vote. I tended to remember with more clarity those measures which required a vote on the merits on the floor. Committee votes are something

else: Technically speaking, you are not voting on the merits in a committee vote. You are voting to put it out of committee with a certain recommendation.

In the year 1970, as reflected in the newspaper articles which I eventually unearthed, house bill 20 was not a major issue at that time in terms of having much public attention, in terms of having many people at a committee hearing, in any other way. It was simply not a measure that attracted that much attention.

In addition, house bill 20 was destined never to go to the floor in the State senate. I think it was widely known and believed even when it was in committee that it would never emerge from the Republican caucus. The votes were never there. It was a dead bill.

Senator DENTON. Yes. Then it might be relevant to follow up: You stated that some change in Arizona statutes was appropriate, and "had a bill been presented to me that was less sweeping than H.B. 20, I would have supported that. It was not." You broke off, but you meant it was not introduced. Is that correct?

Judge O'CONNOR. That is correct.

Senator DENTON. Can you then remember why you did not support S.B. 216, which was a more conservative bill regarding abortion which was pending in the Senate Judiciary Committee after March 23, 1970, roughly a month before the committee's vote on H.B. 20?

Judge O'CONNOR. Senator Denton, was that Senator McNulty's bill, if you know?

Senator DENTON. The bill provided for therapeutic abortions in cases involving rape, incest, or the life of the mother.

I have just been informed that my time is up.

It was Senator McNulty's bill, yes.

May she finish the answer to this question, Mr. Chairman?

The CHAIRMAN. She may finish the answer to your question.

Judge O'CONNOR. Senator Denton, as I recall that bill it provided for an elaborate mechanism of counseling services and other mechanisms for dealing with the question, and I was not satisfied that the complicated mechanism and structure of that bill was a workable one.

Senator DENTON. OK. Thank you, Judge O'Connor.

With my time up, Mr. Chairman, I would ask unanimous consent that a speech I made on August 26, 1981 delivered in Birmingham, Ala., on the subject of adolescent pregnancy be made a part of the record on this because it deals with the subject.

Sir, I must respectfully submit that, considering the importance of the matters being questioned into, although I am a freshman Senator, relatively inexperienced, I feel quite frustrated that these matters have not been developed in my opinion to the degree required for such an important appointment as a lifetime appointment to the Supreme Court. I just would like to mention that to you at this time as my feeling.

The CHAIRMAN. All Senators had 15 minutes on the first round and 15 minutes on the second round, except Senator Simpson who is not here today for his second round and so waives it, and Senator Heflin who has stated he did not care for a second round, and Senator Robert Byrd, the distinguished minority leader, who has not had either round on account of his duties.

Senator, out of my great respect for you, I will call on Senator Byrd and then come back to you for an extra 15 minutes which will give you three 15-minute rounds, if that is agreeable.

Senator DENTON. It will certainly offer more opportunity, sir.

The CHAIRMAN. Senator Byrd of West Virginia.

Senator BYRD. Mr. Chairman, thank you.

I will be very glad to wait and let the Senator complete his line of questions. I have found that it is very important that a Senator be able to finish his line of questions without interruption. I thank you for allowing me to speak at this time but if the Senator would like to complete his questions, I can wait another 15 minutes. I have very little to say and I can say it in 2 minutes but I would be very happy to wait.

The CHAIRMAN. All right. Senator Denton, we will call on you now and give you an extra 15 minutes.

Senator DENTON. All right, sir. Thank you.

The complicated mechanisms to which you refer, Judge O'Connor, I would not think would be ruled out in view of the complexity of the issue and so forth. I would have thought that you would allow that those complicated mechanisms should be considered—in continuance of your remarks, as we were broken off.

Judge O'CONNOR. Senator Denton, again I would ask you to reflect on the fact that we are talking about the year 1970. That was a time when at least my perception as a State legislator in Arizona indicated that this subject was not the subject of the public attention and concern that it is today.

I did not perceive very much in the way of public support at that time for the invocation of expensive counseling machinery in connection with this area. It is simply something that was basically a new approach being suggested in the legislature and I was not satisfied at that time that that was an appropriate approach.

STARR MEMORANDUM

Senator DENTON. OK. You keep referring to the social awareness, and so forth, and yet I keep remembering your statement about constitutional principle. I believe that upon further reflection on your part you might see a connection, and I believe you may have already begun to see a connection between the constitutional provision for protection of life and due process maybe, and this issue, and certainly the statement in the Declaration of Independence, and so forth.

The Starr memorandum makes no mention at all of your April 23, 1974 vote against a House-opposed right-to-life memorial which called on the U.S. Congress to constitutionally protect the life of the unborn. Was that discussed with Mr. Starr? If not, why not?

Judge O'CONNOR. Senator Denton, I certainly believe that it was. That memorial was the subject of a good deal of concern. Of course, I have not seen the so-called Starr memorandum. I have seen references in the newspaper to it but I did not see it. If I am correct in your date, that is something that occurred after the nomination had been announced, or the selection, rather, had been announced by the President.

Senator DENTON. Well, since this memorandum is such an important issue with so many people and such an important issue bearing on the subject we are discussing, I would ask permission from the chairman to deliver this memorandum—a copy of it, it is relatively brief—to Judge O'Connor, sir, so that she can address——

The CHAIRMAN. The staff will deliver a copy of the memorandum to Judge O'Connor.

Senator DENTON. Mr. Chairman, I would respectfully request that a copy of the memorandum be placed in the record.

The CHAIRMAN. Without objection, it will be placed in the record.

[Material to be supplied follows:]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 7, 1981.

Memorandum for the Attorney General.
From: Kenneth W. Starr, Counselor to the Attorney General.

On Monday, July 6, 1981, I spoke by phone on two occasions with Judge O'Connor. She provided the following information with respect to her public record on family-related issues:

As a trial and appellate judge, she has not had occasion to rule on any issue relating to abortion.

Contrary to media reports, she has never attended or spoken at a women's rights conference on abortion.

She was involved in the following legislative initiatives as a State Senator in Arizona:

In 1973, she requested the preparation of a bill, which was subsequently enacted, which gave the right to hospitals, physicians and medical personnel not to participate in abortions if the institution or individual chose not to do so. The measure, Senate Bill 1133, was passed in 1973.

In 1973, she was a co-sponsor (along with 10 other Senators) of a bill that would permit state agencies to participate in "family planning" activities and to disseminate information with respect to family planning. The bill made no express mention of abortion and was not viewed by then Senator O'Connor as an abortion measure. The bill died in Committee. She recalls no controversy with respect to the bill and is unaware of any hearings on the proposed measure.

In 1974, Senate Bill 1245 was passed by the Senate. Supported by Senator O'Connor, the bill as passed would have permitted the University of Arizona to issue bonds to expand existing sports facilities. In the House, and amendment was added providing that no abortions could be performed at any educational facility under the jurisdiction of the Arizona Board of Regents. Upon the measure's return from the House, Senator O'Connor voted against the bill as amended, on the ground that the Arizona Constitution forbade enactment of legislation treating unrelated subject matters. In her view, the anti-ε ɔrtion rider was unrelated to the primary purpose of the bill, namely empowering the University to issue bonds to expand sports facilities. Her reasons for so voting are nowhere stated on the record.

In 1970, House Bill 20 was considered by the Senate Committee on which Senator O'Connor then served. As passed by the House, the bill would have repealed Arizona's then extant criminal prohibitions against abortion. The Committee majority voted in favor of this pre-*Roe* v. *Wade* measure; a minority on the Committee voted against it. There is no record of how Senator O'Connor voted, and she indicated that she has no recollection of how she voted. (One Senator voting against the measure did have his vote recorded.)

Judge O'Connor further indicated, in response to my questions, that she had never been a leader or outspoken advocate on behalf of either pro-life or abortion-rights organizations. She knows well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and has never had any disputes or controversies with her.

Senator DENTON. If I may, Mrs. O'Connor, I would ask you to read it because I am going to ask if you think that the memoran-

dum could be characterized as a fair representation of your record on the abortion issue.

The CHAIRMAN. Now as I understand, this memorandum was made by Mr. Starr of the Justice Department——

Senator DENTON. Sir, I have no other——

The CHAIRMAN [continuing]. To the Attorney General. It was not made by the witness, Judge O'Connor. I just wanted to get the record straight on that.

Senator DENTON. It appears, sir, the dateline, the heading is "Office of the Attorney General, Washington, D.C., Memorandum for the Attorney General from Kenneth W. Starr, Counselor to the Attorney General." I have no——

The CHAIRMAN. Of course, Judge O'Connor is not responsible for what some member of the Justice Department wrote to the Attorney General.

Senator DENTON. Yes, sir, I totally agree.

The CHAIRMAN. However, we admit the memorandum for such consideration as it deserves.

Senator METZENBAUM. I wonder if the Senator from Alabama could make a copy of that memorandum available to other members of the committee, please.

Senator DOLE. Yes, sir. I have one other here so we could make a copy of it, Mr. Chairman.

The CHAIRMAN. Staff informs me that copies of the memorandum are being made available and will be handed around.

Senator Denton, you may proceed.

Senator DENTON. All right.

Judge O'Connor, as a lawyer, would you say that this memorandum could be characterized as being a fair representation of your record on the abortion issue?

Judge O'CONNOR. Senator Denton, it is somewhat incomplete. It does not reflect my vote in 1974 on the funding of medical care for the indigent, and so forth. I think it is not totally complete on that issue.

Senator DENTON. It has been represented or perceived by many that that memorandum, which many understand to have been the principal input to the President regarding your record, you might say is a bit optimistic from the standpoint of those who are prolife in its characterization of your record. That is why I brought it forward.

Judge O'CONNOR. Senator Denton, I can only comment——

The CHAIRMAN. If you will pardon me just a minute, now, Senator, if you are going to the process by which the President made his selection, that is one thing. The question we are considering here is her fitness for this position. I have no objection if you wish to ask the question but I want to emphasize this: that we, the members of this committee, will determine her fitness for this position and not the method by which the President went about making his selection. That was his business and not ours.

You may proceed.

Senator DENTON. Yes, sir, I totally accept that admonition.

Her statements in the memorandum are relevant to the issue of deciding where she stands or figuring out where she stands on this issue.

The CHAIRMAN. I think you can ask any question as to where she stands on the issues but as to what the President had in mind when he selected her, that is another question. I do not think that would be appropriate, for her to try to interpret or imagine what the President had in mind when he made this selection.

PARENTAL RIGHTS

Senator DENTON. Yes, sir. I do not remember asking her a question on that but I certainly will not.

On the issue of parental rights, there has been only one case in which the constitutional issues involved in parental notification for contraceptive services to minors have been considered. In that case, *Doe* v. *Irwin,* a Federal appeals court held that parents do not have a constitutional right to be notified of their daughter's decision to visit a State-supported family planning clinic, at which place she can be issued the contraceptives and so forth.

Do you believe that the Supreme Court acted properly in allowing this decision to stand by refusing to review the case?

Judge O'CONNOR. Senator Denton, the Court has had several occasions to consider the question of parental consent in the area of abortion or contraceptive availability and so forth. I would have to say that I think the questions in that area are still somewhat in doubt. I do not know that we have perceived the full range of what the Court's ultimate holdings will be.

The Court has indicated in the *Ginsberg* case back in 1958 that the Supreme Court has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society. I think that is an apt expression of the concern that has been expressed in the Court, and certainly the role of family values is very important in this area.

On the other hand, the Court in the *Danforth* case ruled unconstitutional, as you know, a statute requiring parental consent before an unmarried minor could obtain an abortion, but the Court did note in that case that it was not ruling that every minor was capable of giving effective consent, so it left the question very much open.

In the *Baird* case in 1979, the Court struck down a statute which required parental consent prior to the performance of an abortion but the Court did not agree in that case on a rationale, and I do not think we know what that might be. Certainly the *Matheson* case decided last year from Utah, to which Senator Hatch had referred, did uphold a requirement of notification to the parents.

It certainly is my hope that every young person faced with a decision whether to get an abortion, or indeed whether it is appropriate to get birth control supplies, would feel able and willing to discuss that with the parents and get parental guidance. That is my hope.

I know that in fact in some families that kind of relationship between parent and child simply does not exist. I suppose we all realize that that is one of the failings of our current society, that not every family functions in a way that facilitates that kind of communication.

Senator DENTON. However, where the family is in existence and the 13-year-old wants an abortion, would you be in favor of her being required under normal circumstances to have the parents notified, and so forth?

Judge O'CONNOR. Senator Denton, again without expressing a view that could be interpreted as my position on any legal issue that would come before the Court in connection with the subject of how far a statute can go in mandating parental consent, I would simply say that it is my personal view that I would want to have the child consult the parents and have the parents work with the child on that issue.

RIGHTS OF HOMOSEXUALS

Senator DENTON. In reconciliation, a bill which permits a child to go to a place where that procedure would be in effect was passed. Whether or not it is appropriate is going to be another question, so I am happy to hear that you are in favor of that. The other system of doing it gets 10 times as much money as the new one, where they do not have to ask the parent about anything. The parents are not brought in.

Do you believe there are any constitutional limitations on laws which might be passed by a State or the Federal Government forbidding homosexuality, homosexual practices, or limiting the rights of homosexuals because of their sexual deviance? For example, do you believe that Congress has the authority to make rules and regulations which establish that homosexuality is a cause for dismissal from Government jobs requiring security clearance, unless an honorable discharge from the military?

Judge O'CONNOR. Senator Denton, I can only say that the state of the law concerning homosexuality is, in one word, unsettled. I hardly know how to characterize the state of the law in this particular subject.

Back in 1977 in the *Carey* case, the Supreme Court indicated in a footnote that it had not yet definitively answered the difficult question whether and to what extent the Constitution prohibits State statutes regulating private consentual sexual behavior among adults. Then in the *Doe* case in 1976, a three-judge court had initially ruled on the question and then the Supreme Court simply summarily affirmed that lower court decision denying a challenge to a State criminal statute prohibiting sodomy.

Therefore, that is all we know I think at the moment on the Supreme Court holdings in that area. The cases concerning the rights of people who are homosexuals in connection with being deprived of a position as an employee or having custody of children are really very confused on the lower court level. Some of those cases are working their way up to the Supreme Court and, I think, pose some very unsettled questions on which the Court will indeed be asked to rule.

Senator DENTON. Thank you.

How much more time do I have, Mr. Chairman?

The CHAIRMAN. How much more time do you want, Senator? I want to accommodate you.

Senator DENTON. All right, sir.

The CHAIRMAN. Your time is up now but we will give you more time if you want it.

Senator DENTON. Finding out where she stands on other areas where abortion would be permissible than to save the life of the mother is an area of investigation which seems fruitless.

The CHAIRMAN. Would another 15 minutes suffice?

Senator DENTON. I do not know whether another month would do, Mr. Chairman.

The CHAIRMAN. Senator, would another 15 minutes allow you to complete your questioning?

Senator DENTON. Unless Judge O'Connor wishes to expand or describe in some kind of specifics what other areas she thinks abortion is not offensive or should be——

The CHAIRMAN. Senator, suppose we allot you another 15 minutes, which in all gives you a full hour of questioning.

Senator DENTON. Would you care, then, Judge O'Connor, to say anything further about what you mean by other areas in which abortion should be permissible other than to save the life of the mother?

Judge O'CONNOR. Senator Denton, I understand your concerns and frustrations and I hope that you appreciate my concerns and my hope not to prejudge matters that surely are going to come before the Court, if you see fit to confirm me for this nomination. I feel the same sense of frustration in part as you do in having to be somewhat careful about what I say because of the constraints which I feel legitimately exist. I understand your concerns, and I have tried to adhere to that line which has been indicated to me—in my review of previous hearings—has been followed generally by other nominees.

Senator DENTON. Well, as no lawyer, I cannot gainsay your stand that you are prejudicing the situation by giving specific answers on a position regarding your feelings as to the permissibility or morality or whatever of abortion other than to save the life of the mother. However, I will quote from the constitutional lawyer's comments which I have submitted previously for the record, and the chairman graciously, and the other members without objection, permitted.

He says that—

> One thing stands out supremely when a vacancy on the Supreme Court occurs. The replacement should be deliberate, not impulsive. The public interest is not served by a fait d'accompli, however politically brilliant. The most careful probing and the most measured deliberation are what are called for.

He maintains:

> Unhappily, the atmosphere surrounding the nomination to the Supreme Court is one almost of panic. Considering that the liberties of the American people can ride on a single vote in the Supreme Court, any politically or ideologically motivated impatience should be thrust aside and time taken to do the job right. Plainly there is no need for instantaneous confirmation hearings, and the most painstaking effort should be made to fully know the qualifications, including philosophy, of the candidate. My first plea would be, therefore, do not rush this nomination through.

I must admit the chairman has been more than careful to permit in this case all the time he chooses to give to my questioning. The problem is that I do not think I am getting the answers to which the next part of this gentleman's memorandum or paper refers.

He says:

My second misgiving relates indeed to the matter of philosophy. Some zealous supporters of the O'Connor nomination, who themselves have notoriety as ideologues, have made the astonishing statement that on the Supreme Court of the United States ideology does not count. They say, in other words, that it should be of no significance that a candidate would have an actual and proven record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. Those concerns are not dispelled by a recital that the candidate is "personally" opposed to such a point of view. Why the qualifying adverb? Does that not imply that while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

He maintains:

Philosophy is everything in dealing with the spacious provisions of the first amendment, the due process clauses, equal protection, and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when in these vital areas of the Constitution there is really very little language to "strictly" construe. As to other areas of the Constitution, for example, article 1, section 4, "The Congress shall assemble at least once in every year," to speak of "strict construction" is also absurd since everything is already "constructed."

The more relevant thing that he says is that:

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too, and important would be questions to the candidate calling for agreement with, disagreement with, and discussion of major prior decisions of the Supreme Court. Not the slightest impropriety would be involved in, and much could be gained by public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made. Even these few considerations make it clear that the Senate's next job is not to confirm Mrs. O'Connor but instead to find out who she really is, that is, what convictions she possesses on great issues. I thus return to my theme that deliberativeness, not haste, et cetera.

He ends by saying:

Other vacancies may soon arise. The precedent of lightning-fast decisions in the matter of choosing our Supreme Court Justices would be a bad precedent indeed.

My only problem is that I do not feel I have made any progress personally in determining where you stand on the issue of abortion. I believe when you say "and there may be other matters," or issues, or however you stated that makes it totally vague, and therefore I find myself at a loss, considering this constitutional lawyer's opinion.

I have not determined your position, and William Bentley Ball seems to feel—that is the name of this gentleman—that it would have been desirable for you to comment on past Supreme Court decisions because in the future the precise case will not come up in that identical form. However, you have maintained that it would. I will have to defer to your position on that but I do so with regret because it makes it very difficult for me to understand where you are on that issue with which I was so concerned.

Thank you very kindly, Judge O'Connor, for your responsiveness. I have to respect your position on this. I must note that Alexander Haig took about a month to get through; Mr. Donovan in here did not receive quite the polite application of questioning that you have, but I do not regret politeness. I did not ask him any impolite questions either.

With that, Mr. Chairman, I conclude my questioning.

The CHAIRMAN. Senator, do you have any more questions you would like to propound?

Senator DENTON. I do not think they would be fruitfully put forward, sir.

The CHAIRMAN. I believe Senator Simpson, as I mentioned, is not here, and Senator Heflin has indicated he has no second round.

Senator Byrd of West Virginia.

OPENING STATEMENT OF SENATOR ROBERT C. BYRD

Senator BYRD. Judge O'Connor, I have observed the hearings from afar, to an extent, and I have been aware of the subject areas of the questions that have been asked and aware of your responses to a considerable degree.

The fact that I have not been able to attend the hearings does not in any way demonstrate a lack of interest in your nomination. I told you several weeks ago that it was my intention to vote for your nomination unless something developed which I did not foresee and which might otherwise cause me to change my mind.

I have listened to the questions about how you stood on various bills and why you voted for or against various bills in the legislature 10 or 12 years ago. I do not know of any more difficult question that can be asked than "Why did you vote for H.R. 1476," or "Why did you vote against 1415," 10 years ago or in my case 30 years ago, in the State legislature. I do not know of any more difficult question that can be asked than "Why did you vote for or against this or that bill 2 years ago?"

If someone were to ask me why I voted for the Panama Canal treaties, I can answer that question. It was a very controversial issue at the time. There was a great deal of opposition to the treaties on the part of a lot of people who had never read them, and who perhaps have not read them yet today. It was a matter that was before the Senate for a considerable length of time, very heatedly debated, and one which I can respond to questions on on the spur of any moment.

However, there are many bills which we voted on, many votes we took last year which did not command my attention to the extent that I can, at the drop of the hat, answer why I voted for this or that amendment. Sometimes it is even difficult to remember that such and such an amendment was called up.

That is not to derogate those who ask such questions. It is simply to say for the record that it is asking almost for the impossible in some instances to expect a former legislator or a current legislator to relate the details of why he reached such and such a decision on such and such a bill at such and such a time.

As a former State legislator in both houses of the West Virginia Legislature, I voted on some issues there undoubtedly in a way that I would not vote today if I were a member of that legislature. I voted against the 1964 Civil Rights Act, and spoke I believe 16 hours against it; it may have been 14 hours.

However, I voted my conscience at that time, and I voted against the Voting Rights Act when it was first enacted, but I was in good company when I voted against those pieces of legislation. Sam Ervin, who is an acknowledged constitutional scholar, Senator Russell, and other Senate greats who were steeped in the Constitution, for constitutional reasons opposed those acts, both of them.

For what I thought to be sufficient constitutional reasons—not only sufficient but for compelling constitutional reasons—I voted against those pieces of legislation, spoke against them, but I have since changed my mind on the Voting Rights Act. I voted for its extension and intend to vote for its extension again. The Supreme Court has upheld the act. The great constitutional scholars who presented what I thought were irresistible arguments in opposition to those pieces of legislation apparently were wrong, and I feel that I was wrong in voting against the 1964 Civil Rights Act.

Therefore, I think that is the position that you are in as a former legislator, and I have to take cognizance of those difficulties when it comes to answering the kinds of questions that have been asked of you. Again, I cast no aspersions or reflections on the Senators who are asking those questions. They are conscientiously pursuing a line of questions that they feel is necessary in order to put to rest certain concerns that they have.

Also, I can appreciate the fact that one's personal views need not be compelling when it comes to interpreting the Constitution. Your function will be to interpret the Constitution and to apply that interpretation or construction to the sets of facts that are before you from time to time.

I can appreciate the fact that you may personally have a feeling on this or that subject but, when it comes to interpreting the Constitution, you are not supposed to let your own personal biases, prejudices—if that is what they may be—enter in to it. I can say that in my case I do not claim to be one who is without some biases and prejudices but, if I were attempting to interpret the Constitution and construe it and apply it, I do not think I should let my personal feelings intervene. I think it would be my reponsibility under my oath to do the very best I could to avoid letting my own personal feelings sway my judgment.

It may be impossible. Perhaps one's subconscious feelings, his personal feelings may come through. However, I respect the position you have taken. Perhaps your personal views on many of these things do not parallel my own, but I have faith that you are going to attempt to interpret that Constitution and construe it and apply it in accordance with the oath which you will take, and that you will not let your personal views be the determining factor, difficult though it may be at some times.

STARE DECISIS

I can also understand the desire of Senators to understand what your philosophy is. For a long time I felt that the Supreme Court of the United States was a permanent constitutional convention and that it was setting itself up as a higher legislature than Congress. Therefore, from that standpoint I am interested in what your philosophy is, but it will go only to this extent: What is your philosophy, if I may use that word, with respect to the subject of stare decisis?

I understand that others have brought up the subject, and it seems to me that that is one of the very important questions that should be asked. Recognizing the difficulty in answering it to the satisfaction of any given Senator, I still would like to ask it again.

Just how much weight will you give to former precedents of the Supreme Court? I do not think that I would have been critical of the Supreme Court of the United States in the recent past if I had felt that the Justices on that Court were adhering to the doctrine of stare decisis a little more closely than what they apparently, to me at least, were demonstrating.

How do you feel about that doctrine? Is it going to be a doctrine that will be a supervening one, one that you will be always conscious of as you deal with cases that come before the Court? Just how will you be guided by previous decisions and by the previous precedents that have been laid down by the Court?

Judge O'CONNOR. Senator Byrd, I have addressed this same question previously, as you were aware, and will characterize again my thoughts on this concept.

The doctrine of stare decisis is a very significant and important one for the judicial system in our country. Indeed, it is a very basic concept in our system. The reason for it, of course, is to give predictibility and stability to the law, an effort so that the public generally and other judges can be guided by the knowledge that the law in a certain area has been decided. Indeed, as one previous famous judge has indicated, sometimes it is better that the law be decided than that it be decided correctly.

On the other hand, all appellate courts have recognized that there are instances when the judges become convinced in their own minds that a previous decision was decided incorrectly or was based on some flawed understanding of the previous judges of the issues or principles involved. We have examples throughout our system of instances in which a subsequent case has overruled a previous holding, so it happens. It happens perhaps not frequently but it occurs, and it is appropriate that it can occur.

Certainly, as Justice Cardozo pointed out, if we approached every case on a case-by-case basis the law would be hopelessly confused and the administration of justice would be impossible. We do not do that, but at the constitutional level there have been indications that only if the Court has the capacity to change its mind, if you will, on the correctness or principles of a previous decision, is it possible for an erroneous interpretation of the Constitution to be corrected. It is either that, or we amend the Constitution.

Therefore, we have instances in the Court's history, of the U.S. Supreme Court, in fact approaching perhaps 150 such instances in the Court's history in which the Court has in effect overturned a previous decision. We have, I think, an indication from the Court that in the case of statutory interpretation—for instance, when the Court has occasion to rule on the interpretation of a statute enacted by Congress—if indeed that interpretation is erroneous the Congress itself can take appropriate action, presumably, to make corrections. Therefore, the doctrine of stare decisis might indicate that one would be very much more reluctant to change.

I think in essence that sets forth my understanding of the concept.

Senator BYRD. Well, do I understand you to say that while you recognize that new precedents have to be set and that from time to time the Court has to reverse previous precedents, that nonetheless the doctrine of stare decisis is a sound one and that it establishes a

principle that you will constantly keep in mind, and as much as possible adhere to where the circumstances permit?

Judge O'CONNOR. Senator Byrd, it is an important and a sound concept in my view and one which will always be appropriately considered. Only when the judge or justice becomes convinced in his or her own mind that something was previously incorrectly resolved and that there are sufficient reasons for reaching a contrary result, would that obtain, but this is a very serious business.

Senator BYRD. Judge O'Connor, I think that we strict constructionists should feel very comfortable with that response. I am applying the term to myself, and I feel very satisfied with it. If I had been able to express it so eloquently and so succinctly as you, were I in your position, I would have said just what you said.

I think your responses reflect that you have been well prepared. I think they have indicated on your part a juridical approach to the questions. You have I think been as forthright as one can be and you have been honest, in my judgment, in your responses. You have at all times been conscious of the fact that you cannot go beyond a certain line in responding to questions, lest once you have been confirmed you would find you have created difficulties for yourself, in which case you either would have to act in a way that left others thinking that you broke your word, or on the other hand you would have to be untrue to yourself.

I compliment you. I think you have demonstrated the demeanor and the bearing that a Justice should have, and I intend to support your nomination enthusiastically. I congratulate you, and I will do everything I can to expedite the Senate confirmation of your nomination once it is reported from this committee.

Judge O'CONNOR. Thank you, Senator Byrd.

Senator BYRD. Thank you, Mr. Chairman.

The CHAIRMAN. Senator, do you have any other questions? Senator Byrd, do you have any other questions?

Senator BYRD. No.

The CHAIRMAN. Do you wish to confess any other errors of the past? [Laughter.]

Senator LEAHY. Mr. Chairman, if that happens you will find the attendance will really swell around here. [Laughter.]

The CHAIRMAN. Does any other Senator have——

Senator BYRD. Mr. Chairman, will you allow me to respond to that question? [Laughter.]

I have heretofore confessed to those errors, so it is not a matter of news but simply a matter that I thought was appropriate for this record in this particular instance.

The CHAIRMAN. Does any other Senator now request any additional time? We gave the Senator from Alabama additional time and we want to be fair to all Senators. Does any other Senator request any additional time on either side?

Senator BIDEN. Mr. Chairman, I would like 60 seconds to make a comment.

The CHAIRMAN. The Senator from Delaware.

Senator BIDEN. Mr. Chairman, I think that the line of questioning about the nominee's personal views on abortion is appropriate and has been appropriately directed to her. I think her distinction

between her personal views and what she would or would not do as a Justice of the Supreme Court is equally appropriate.

If I can make an analogy, I think it would be appropriate for us to ask the Justice, were it an issue, what her view on membership in the Nazi Party would be and whether or not that should disqualify her from the bench—and that is not an issue in that case, but to make the analogy—but it would be inappropriate for us to ask her how she would vote as a Justice of the Supreme Court on the Nazi Party marching through Skokie, Ill., or whatever the suburb was. I think it would be inappropriate to ask her to comment on that but I do think it would be appropriate, were it an issue of the day as abortion is, to ask her what her personal view would be on whether or not she should or should not be a member of the American Nazi Party.

Therefore, I think you have made the distinction well. I want to publicly compliment my colleagues. I must make a public confession also. I was not at all sure that there was going to be the judicial demeanor and the good manners and the good conscience displayed by some of my friends who are characterized by the press and me as the New Right. I compliment them on their demeanor. I think their questions were appropriate. I think they conducted themselves well, did justice to themselves and the committee, and that your answers were equally judicious and appropriate.

The CHAIRMAN. Does any other Senator have any further questions?

Senator DOLE. Mr. Chairman, if I may just comment, I think Senator Biden has done pretty well, too. [Laughter.]

The CHAIRMAN. Does any other Senator have any other questions?

Senator LEAHY. Mr. Chairman, was the Senator from Kansas asking for a vote on that last observation? [Laughter.]

Senator DOLE. I would not want to have a vote on Senator Biden. It would be too close. [Laughter.]

The CHAIRMAN. Senator Denton, did you want any additional time now?

COMMITTEE REPORT

Senator DENTON. No, sir. I would request that a written record be made, a written report, of these proceedings. Is that in order?

The CHAIRMAN. Well, all of this will be printed.

Senator DENTON. A report written by the committee staff is the request I am making, which I understand is distinct from the normal transcript and so on.

The CHAIRMAN. The entire hearing will be printed and reported, and the committee's report will be prepared by the staff. If you have any questions, why, you feel free to get in touch with the staff.

If we finish this hearing today, which I think we will do, then we will place this nomination on the calendar for Tuesday. Of course, any member can carry it over a week if he wants to, but at the same time we wish to expedite it and to get action as soon as convenient.

Senator DENTON. Sir, I was informed that there is a provision when you have a committee report for including supplementary views, and that was the reason for my request.

The CHAIRMAN. That is correct. Any Senator who wishes to state supplementary views to the majority of the committee report will have the opportunity to do so.

If no other Senator has any other questions now, we are going to excuse Judge O'Connor.

COMMENDATION OF WITNESS

Judge O'Connor, before you leave I want to say that the committee as a whole I am sure has been deeply impressed with your intellect and with your candidness, with your capacity, with your dedication. We feel if the Senate confirms you here that you will make an outstanding Associate Justice of the U.S. Supreme Court.

Judge O'CONNOR. Thank you, Mr. Chairman, and thank all the members of the committee and you for the courtesy shown to me during these proceedings. I appreciate that very much.

The CHAIRMAN. We will now hear from other witnesses. The next witness is the Governor of Arizona, the Honorable Bruce Babbitt, if he will come around and take the witness stand.

Governor Babbitt of Arizona, will you stand and be sworn?

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?

Governor BABBITT. I do.

The CHAIRMAN. Have a seat. Governor, we will be glad to hear any statement you wish to make.

TESTIMONY OF HON. BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA

Governor BABBITT. Mr. Chairman, committee members, it is a great honor for me to appear before you as Governor of Arizona to testify on behalf of the President's nomination of Judge O'Connor.

I have a written statement which I will submit for the record, and in lieu of reading that I would like to simply summarize briefly a few thoughts about this nomination.

The committee has heard and will continue to hear from many witnesses who will testify to Judge O'Connor's exemplary skills as a legislator, a judge, a lawyer, legal scholar, community leader, and family leader. I do not intend to cover that ground. I believe that even those who are appearing in ostensible opposition to this nomination concede her exemplary character, intellect, and personal qualifications to be confirmed to the Supreme Court of the United States.

In lieu of that I would like briefly to cover two other subjects: The first, why it is that I appointed her to the Arizona Court of Appeals several years ago; and, second, what I believe this nomination means to the Governors of the 50 States of this federal Union.

The name of Judge O'Connor came to me in October 1979 as one of three names on a merit selection list from which I had complete discretion to name a judge for the appellate court vacancy. Now I found myself at that time on ground somewhat similar to that