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

Senator HATCH. Yes.

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

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

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

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

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

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

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

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

ANTITRUST EXPERIENCE

The CHAIRMAN. Senator Metzenbaum?

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

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

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

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

Judge O'CONNOR. Right.

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

He stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALLOWANCE OF ATTORNEYS' FEES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I think my time has expired, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Dole?

DIVERSITY JURISDICTION

Senator DOLE. Thank you, Mr. Chairman.

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