

only, it seems to me that we do have in this Nation many very fine State courts and that we would do well to allow those State courts to function as indeed I think they are intended to function in considering a wide range of issues, including those of Federal constitutional principles as those cases arise. It is my belief that our State courts can serve us well in that regard, and I have confidence for the most part in their capacity to handle these very complex issues.

The CHAIRMAN. Thank you.

The distinguished Senator from Delaware, Senator Biden.

Senator BIDEN. Thank you very much.

To follow up on the question of the chairman about State courts, and the article you wrote in the *William & Mary Law Review*, Judge, isn't it true that historically the State courts have not done too well with regard to interpreting the Federal Constitution? The rationale for why the Supreme Court is better able to interpret the Constitution relates to the independence of that body, lifetime tenures, and the fact that many State courts are elected bodies and subject to political pressures. As for familiarity with the material, the fact of the matter is most State court judges do not regularly resolve constitutional questions, whereas the Federal judges do.

One of the things I would like to ask you is, do you truly believe that on balance the Federal judiciary is not more qualified than the State judiciary to interpret the Constitution of the United States of America?

Judge O'CONNOR. Senator Biden, we obviously in our system have adopted the notion that we do need a Federal court system and we do need a U.S. Supreme Court to be the final determiner of these issues. I do not quarrel with that. I think it is a wonderful system but what I have tried to point out is that we have a dual system of courts in our country.

We have State court systems that also deal day-in and day-out with these constitutional issues. Indeed, the vast bulk of all criminal cases are tried in the State courts, not the Federal courts, and there is not a trial in a criminal case in a State court that does not raise certain Federal constitutional issues with which those courts have to deal. State courts are in fact dealing day-in and day-out with Federal constitutional issues and it is my belief that they are well-equipped to do this, and that we should not assume that because their manner of selection may differ or their length of tenure may differ, that they are less independent. I have seen some really remarkable examples of courage among State court judges in dealing with issues.

LIFE TENURE

Senator BIDEN. I do not dispute that but if that is true—I do not dispute that there are remarkable examples, but if that is true then the need for life tenure on the Supreme Court becomes much less significant. Some of my colleagues right here in the Senate suggest that there should not be life tenure. Some suggest that there should be mandatory retirement. I even heard it suggested there should be election.

Therefore, if in fact that is true, Judge, you are undercutting the argument that in fact life tenure is essential to the independence

of the Supreme Court. There must, by definition, be some difference at least in degree.

I go back to the point again—I do not want to belabor this—but the reason the Federal courts got into this business in the first place is that the State courts did not—I emphasize, did not—interpret the Constitution in a way that the Federal courts felt proper.

They got into the business because citizens in the South and citizens in my State decided that they were going to keep some citizens in different positions than other citizens. They got into the business because they thought that they had to protect individual rights of citizens in certain States that the State courts obviously, on their face, refused to protect.

That is why they got into the business, and I just get sick and tired, quite frankly, of all this talk. Everything that has to do with the Federal branch of Government, whether it is the Federal courts or the Congress or anything Federal is bad, and States are good. I remind you and I remind my colleagues and I remind the audience that the reason the Federal Government got into 90 per cent of the business it got into is that the State courts did not do the job.

I do not want to debate it with you. You are welcome to respond if you would like but I just think it is malarky to talk about how State courts historically are so competent and State court judges are equally competent on balance as Federal court judges. If that is the case, then we should change the Federal system and make it much easier.

Judge O'CONNOR. Mr. Chairman, Senator, I have not suggested that there is not a need for the Federal courts, and I am sure you recognize that. That has not been suggested.

Senator BIDEN. No; I am not saying that, but do you think there is a need for life tenure? Is there a need for life tenure for Supreme Court Justices?

Judge O'CONNOR. Life tenure, of course, is provided in the Constitution and to change that would require a constitutional amendment.

Senator BIDEN. I know that. Is there a need for that? Let me ask you a direct question: Do you think there is a need for that? I know it is in it. Do you think there is a need for it?

Judge O'CONNOR. Mr. Chairman, Senator Biden, it seems to me that judges can function independently under alternate systems of tenure.

Senator BIDEN. I agree.

Judge O'CONNOR. I do not believe that it is essential to the integrity or function of a given judge that that judge have life tenure.

Senator BIDEN. I see.

Judge O'CONNOR. That is quite a different question from saying, should we with the U.S. Supreme Court amend the Constitution so that we do not have it? I think it has served us perhaps reasonably well through the years, and those are different questions, but I do truly believe that it is possible for judges to function independently and well under alternate systems.

Senator BIDEN. I agree that that is the case. We have examples of it. I also agree that there are a number of public officials who are destined to be in the second edition of Profiles in Courage. I believe that there are brilliant women and men in every field, but I would suggest that the Founding Fathers were pretty smart. They perceived the vulnerabilities that exist in human nature and the exigencies of the times and what pressures they bring on people, and decided that it was not worth the chance to count on exceptional courage.

Let me go to one other point, to follow up on what Senator Specter said. Judge, I am going to vote for you. I think you will make a very good judge but I am a little disturbed about the reluctance to answer any questions. [Laughter.]

I am not being facetious. I mean that sincerely.

Let me read you from the *Brown* case. In the *Brown* case it says: "In approaching this problem"—the problem referred to is whether or not "separate but equal" is an appropriate doctrine—"we cannot turn back the clock to 1868 when the amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in 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 of public schools deprives these plaintiffs of equal protection of the law."

I see nothing in the decision, there is no place in the decision where the Court said anything other than, straight up, "We are not reexamining the 14th amendment, we are not reconsidering it; we are saying that social changes, social policy, and social mores in America have changed to now make it reprehensible to allow any school board, any State, any jurisdiction, to say black folks cannot go to school with white folks for whatever the reason."

That was a fundamental change in the social mores of this country. The Court made no pretense about on what basis they were making it. They did not go back and say the 14th amendment was misinterpreted. They flat out said, "We are reflecting the change in social policy."

I know you know that, and I know it is difficult for you to respond to that because as soon as you respond to me you are going to have 14 other men jumping on you to say something else, so I will not even ask you to answer it, but I hope you know that I know you know. [Laughter.]

DISQUALIFICATION

However, I will ask you some specific questions that will not get you in trouble but have to be asked in my capacity as the ranking member. I guess these are the very dull questions that nevertheless should be on the record. They relate to the questions of recusal or disqualification. With all due respect, they relate to your distinguished husband.

Title 28, United States Code, section 455, requires disqualification of a judge when their spouse

(1) has a financial interest in the subject matter in controversy or any other interest that could be substantially affected by the outcome of a proceeding, or

(2) is a party to a proceeding or an officer, director, or trustee of a party, is acting as a lawyer in a proceeding, is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Now your spouse is a distinguished partner in a law firm in Phoenix, Ariz., and by virtue of the community property laws of Arizona, you have an undivided one-half interest in that partnership, as we understand it. What standards will you use to determine when to disqualify yourself? Will you make an effort to determine what cases your spouse has worked on in the past? Will you keep yourself aware of the names of clients that your spouse has represented in the past? Will you determine when deciding an issue in the future whether your spouse has any connection with the parties in that case?

Judge O'CONNOR. Mr. Chairman, Senator Biden, yes. These are very serious matters and of great concern to anyone serving on the bench. It is a concern when the judge is married to an attorney that the judge be informed about the clients that the spouse is representing, and indeed the clients that the firm is representing, and to exercise great care in avoiding participating in any case in which it might be said that there was some relationship there.

Senator BIDEN. I have no doubt you will do that, Judge, but give us an idea mechanically of how you plan on being kept apprised of what cases your distinguished husband's law firm is involved in. I mean, mechanically how does that happen? I know that is clearly your intent; I have no doubt about your integrity but, mechanically, how do you do that?

Judge O'CONNOR. Well, at the Federal level as I understand it and in the Supreme Court, the parties are required, for instance, in the case of a corporation to reflect and list for the benefit of the Judges of the Court all of the subsidiaries and related companies involved, so that you do have an opportunity to know in fact what the links are with that party. Then it becomes necessary for you to determine whether that is on any list of clients that the office has, and of course they maintain such lists, so that is fairly easily done in a mechanical sense.

In addition, if the law firm in any capacity had been connected with the case, that would appear in the record someplace in the case below. I mean, they would have appeared as parties; they would show up on the pleadings. You know who has been representing them, so you have the further question, then—assuming that neither the spouse nor the law firm had any connection whatever with the case—if it related to a client, an occasional client or even a frequent client of the firm but in this instance the client was dealing with a matter that arose in another State and with another law firm. Then you have to determine whether that connection is such that a disqualification is necessary.

Senator BIDEN. I appreciate your taking the time to go into that. I think it is important that it be on the record, and for the public who are watching this hearing and for those who have a more cynical view of our system, our Congress, our courts, that there is a mechanism, that you are aware of the mechanism, that you have every intention of maintaining in a very scrupulous fashion adherence to that mechanism. That is why I bothered to ask the question.

My time is running out, but let me ask you one other question, if I may, about the appropriateness to be involved in promotion of social issues. Would it be, in your opinion, inappropriate for you as the first and only woman at this point on the Supreme Court—if you are confirmed, as I believe you will and should be—to for example be involved in national efforts to promote the ERA?

Judge O'CONNOR. Mr. Chairman, Senator Biden; I believe that it would be inappropriate.

Senator BIDEN. Why would it be inappropriate for you to do that while it is appropriate for Justice Burger to be traveling around the country telling us and everyone else what State and Federal jurisdictions should do about prison construction and what attorneys should do about law schools and how they should be maintained, and whether or not we should have barristers and solicitors. I mean, what is the distinction? Is it a personal one or is there a real one?

Judge O'CONNOR. Mr. Chairman—

Senator BIDEN. I do not suggest he should not do that; I want to know what your distinction is. [Laughter.]

Judge O'CONNOR. It seems to me that it is appropriate for judges to be concerned and, indeed, to express themselves in matters relating to the administration of justice in the courts, and as to matters which would improve that administration of justice in some fashion. Certainly the court system is very heavily involved in the criminal justice system.

Senator BIDEN. However, doesn't he also speak not just about administration of justice? Hasn't he spoken—correct me if I am wrong—but hasn't he spoken about procedural changes in the law, not just for the administration of justice, in the broad sense of whether there are prisons or whether there are backlogs in the courts, but actually what should be the law relating to criminal matters and other matters? I mean, he has gone beyond and suggested legislation.

Judge O'CONNOR. Mr. Chairman, Senator Biden, yes, I think that the canons of judicial ethics do say that a judge may engage in activities to improve the law and the legal system and the administration of justice. I am sure that those statements which have been made are made in—

Senator BIDEN. I just do not want you to wall yourself off, Judge. You are a tremendous asset. You are a woman and the first one on the Court; don't let these folks, me included, run you out of being that. You are a woman; you do stand for something that this country needs very badly. We need spokespersons in positions of high authority. Don't lock yourself in, in this hearing or any other hearing, to do things that you are not proscribed from doing in the canons of ethics.

It is your right, if it were your desire, to go out and campaign very strongly for the ERA. It is your right to go out and make speeches across the country about inequality for women, if you believed it. Don't wall yourself off. Your male brethren have not done it. Don't you do it.

You are a singular asset, and you are looked at by many of us not merely because you are a bright, competent lawyer but also because you are a woman. That is something that should be adver-

tised by you. You have an obligation, it seems to me, to women in this country to speak out on those issues that you are allowed to under the canons of ethics. Don't let us intimidate you into not doing it.

[Applause.]

The CHAIRMAN. I will warn the audience there will be no clapping, and the police will remove anyone who attempts it again.

Senator BIDEN. Will they remove the person who causes it, Mr. Chairman? [Laughter.]

I apologize. My time is up.

The CHAIRMAN. I wish to tell the police to remove anyone who attempts to express himself in such a manner, if it occurs again.

The distinguished Senator from Maryland, Senator Mathias.

TV IN THE SUPREME COURT

Senator MATHIAS. Thank you, Mr. Chairman.

These last few moments, Judge O'Connor, have been recorded on television and transmitted to the world. In fact, not only these last few moments but these last 2 days we have all been basking in the bright lights that are required for television.

I am wondering what your attitude is towards the introduction of television cameras into the courtroom of the Supreme Court. Justice Potter Stewart recently said that—

Our courtroom is an open courtroom. The public and the press are there routinely. Since today TV is a part of the press, I have a hard time seeing why it should not be there too. As I understand the present technology, disruption is hardly a threat anymore, and I think it is difficult to make an argument to keep TV out when you allow everyone else in.

Of course, that is the conclusion that our chairman has made about this meeting, and I am wondering how you feel about TV in the Supreme Court.

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I would certainly want to wait until I had served on the Court, and discussed the situation with others and been privy to the concerns that others may have on the subject before I would formulate a position on it.

However, let me tell you that at least in Arizona we have been allowing cameras in the appellate courtrooms, television cameras, and I have participated as an appellate court judge in court with television cameras present. The experience has been reasonably satisfactory, I would say, as far as I am concerned. I have not yet participated in or did not participate in a trial in which television cameras were permitted in the courtroom.

It has been my thought that, as the technology improves and as it is possible to have that recorded without the necessity for the bright lights and with cameras which are not readily apparent, and without noise and interruptions, that it is conceivable to me that the technology will be such that we will conclude that it is less disruptive than perhaps originally might have been the case. Therefore, I would anticipate that we have not seen the last of the development in this area because, as you have correctly noted, television has become an important means of communication for people generally.