expressed in any proposed amendment. I did not feel at that time that that kind of consideration had been given to the measure. I understand that the Congress is still wrestling with that issue after some years from that date, which was in 1974.

Thank you, Mr. Chairman.

The CHAIRMAN. Now the last instance is concerning a vote in 1974 against a successful amendment to a stadium construction bill which limited the availability of abortions.

Judge O'CONNOR. Also in 1974, which was an active year in the Arizona Legislature with regard to the issue of abortion, the Senate had originated a bill that allowed the University of Arizona to issue bonds to expand its football stadium. That bill passed the State Senate and went to the House of Representatives.

In the House it was amended to add a nongermane rider which would have prohibited the performance of abortions in any facility under the jurisdiction of the Arizona Board of Regents. When the measure returned to the Senate, at that time I was the Senate majority leader and I was very concerned because the whole subject had become one that was controversial within our own membership.

I was concerned as majority leader that we not encourage a practice of the addition of nongermane riders to Senate bills which we had passed without that kind of a provision. Indeed, Arizona's constitution has a provision which prohibits the putting together of bills or measures or riders dealing with more than one subject. I did oppose the addition by the House of the nongermane rider when it came back.

It might be of interest, though, to know, Mr. Chairman, that also in 1974 there was another Senate bill which would have provided for a medical assistance program for the medically needy. That was Senate bill No. 1165. It contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of the mother, or where the pregnancy had resulted from rape, incest, or criminal action. I supported that bill together with that provision and the measure did pass and become law.

The CHAIRMAN. Thank you. My time is up. We will now call upon Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

JUDICIAL ACTIVISM

Judge, it is somewhat in vogue these days to talk about judicial activism and judicial intervention, usurpation of legislative responsibility and authority, et cetera.

When those terms are used, and they are—although the chairman did define his meaning of judicial activism—I suspect you would get different definitions of judicial activism from different members of the committee and the academic and judicial professions. One of the things I would just like to point out as this questioning proceeds is that judicial activism is a two-edged sword.

There is the instance where the judiciary determines that although there is no law that the Congress or a State legislature has passed on a particular issue, that there in fact should be one, and

the judge decides to take it upon himself or herself to, through the process of a judicial decision, in effect institute a legislative practice.

There is also the circumstance where there are laws on the books that the judiciary has, in a very creative vein, in varying jurisdictions and on the Federal bench, constructed rationales for avoiding. However, today when we talk about judicial activism what comes to mind in almost everyone's mind is the Warren Court and liberal activists.

You are about to be confronted, I would humbly submit, by what I would characterize as conservative activists who do not believe they are being activists; who do not believe that they are in fact suggesting that judges should usurp the power of the Congress; who do not believe that they are suggesting that there should be a usurpation of legislative authority when in fact, I would respectfully submit, you will soon find that that is exactly what they are suggesting.

For example, in your William & Mary Law Review article you discussed the role of the State courts relative to the Federal courts and you believe, if I can oversimplify it, that Federal courts should give more credence, in effect, to State court decisions interpreting the Federal Constitution. You seem somewhat worried about the expansion by the Congress of litigation in the Federal courts under 42 United States Code, section 1983, the civil rights statute.

Then you go on to say, "Unless Congress decides to limit the availability of relief under that statute . . .," and you go from there. I am wondering whether or not you would consider yourself as a judicial activist if on the Court you followed through with your belief—as I understand the article—that there is in fact too wide an expansion of access to the Federal courts under the civil rights statute, whether or not you would implement that belief, absent the amendment by Congress of the civil rights statute to which you referred. Would you be an activist in that circumstance, if you limited access to the Federal courts under the civil rights statutes absent a congressional change in the law?

Judge O'CONNOR. Senator Biden, as a judge I would not feel that it was my role or function to in effect amend the statute to achieve a goal which I may feel is desirable in the sense or terms of public policy.

Senator BIDEN. Right.

Judge O'CONNOR. I would not feel that that was my appropriate function. If I have suggested that Congress might want to consider doing something, then I would feel that it is indeed Congress which should make that decision and I would not feel free as a judge to, in effect, expand or restrict a particular statute to reflect my own views of what the goals of sound public policy should be.

Senator BIDEN. I thank you for that answer because I fear that—although it probably would be clarified in subsequent questioning—my fear as this hearing began was that we would confuse the substantive issue of judicial activism, usurpation which should be addressed, and which I think has occurred in many instances, with a rigid view of an ideological disposition of a particular judge. A conservative judge can be a judicial activist. A conservative can be a judicial activist, just as a liberal judge could be a judicial activist.

In trying to examine the criteria which should be useds in terms of fulfilling our responsibility as U.S. Senators in this committee under the Constitution, performing our role of advice and consent, a professor at the University of Virginia Law School summarized what he considered to be some of the criteria. Let me just cite to you what his criteria are:

He says first, the professional qualifications are integrity, professional competence, judicial temperament and legal, intellectual, and professional credentials. Second, he mentions the nominee being a public person, one whose experience and outlook enables her to mediate between tradition and change and preserve the best of the social law and social heritage while accommodating law for the change in need and change in perception. Third, she would in some ways provide a mirror of the American people to whom people with submerged aspirations and suppressed rights can look with confidence and hope.

In a general sense, do you agree with those criteria as set out?

Judge O'CONNOR. Senator, I agree that it is important for the American people to have confidence in the judiciary. It appears to me that at times in recent decades some of that confidence has been lacking. I think it is important that we have people on the bench at all levels whom the public generally can respect and accept and who are regarded as being ultimately fair in their determination of the issues to come before the courts. For that reason, judicial selection is a terribly important function at the Federal as well as the State levels.

Senator BIDEN. Judge, in response to the questionnaire you stated—and I think you essentially restated it to the chairman a moment ago—that judges are "required to avoid substituting their own view of what is desirable in a particular case for that of the legislature, the branch of government appropriately charged with making decisions of public policy."

I assume from that you do not mean to suggest that you as a Supreme Court judge would shrink from declaring unconstitutional a law passed by the Congress that you felt did not comport with the Constitution.

Judge O'CONNOR. Senator, that is the underlying obligation of the U.S. Supreme Court. If indeed the case presents that issue, if there are no other grounds or means for resolving it other than the constitutional issue, then the Court is faced squarely with making that decision.

I am sure that such a decision, namely to invalidate an enactment of this body, is never one undertaken by the Court lightly. It is not anything that I believe any member of that Court would want to do unless the constitutional requirements were such that it was necessary, in their view. I think there have been only, perhaps, 100 instances in our Nation's history, indeed, when the Court has invalidated particular Acts of Congress.

Senator BIDEN. There have been many more instances where they have invalidated acts of State legislatures.

Judge O'CONNOR. Yes, that is true.

Senator BIDEN. The second concern I have with your view of what constitutes activism on the Court and of what your role as a Supreme Court Justice would be is that it seems, from the com-

ments by many of my colleagues on both sides of the aisle over the past several years and the comments in the press, that the Supreme Court should not have a right to change public policy absent a statutory dictate to do so.

I wonder whether or not there are not times when the Supreme Court would find it appropriate—in spite of the fact that there have been no intervening legislative actions—to reverse a decision, a public policy decision, that it had 5, 10, 20, or 100 years previously confirmed as being in line with the Constitution.

A case in point: In 1954, after about 60 years and with no major intervening Federal statute, to the best of my knowledge, the Supreme Court said in *Brown* v. *The Board of Education of Topeka* that the "separate but equal" doctrine adopted in the *Plessy* v. *Ferguson* case has no place in the field of public education.

Here is a case where, as I understand it, there was no intervening statutory requirement suggesting that "separate but equal" be disbanded, and where the Court up to that very moment—with a single exception involving a law student and where that law student could sit, to the best of my knowledge—where the Court had up to that time held consistently that "separate but equal" was equal and did comport with the constitutional guarantees of the 14th amendment, then decided that that is no longer right.

They changed social policy; a fundamental change in the view of civil rights and civil liberties in this country was initiated by a court. It was not initiated by a court, it was brought by plaintiffs, but the action of changing the policy was almost totally at the hands of the Supreme Court of the United States.

I wonder, first, whether or not you would characterize that as judicial activism and if so, was it right? If not, if it was not judicial activism, how would you characterize it, in order for me to have a better perception of what your view of the role of the Court is under what circumstances, so that you do not get caught up in the self-proclaimed definitions of what is activism and what is not that are being bandied about by me and others in the U.S. Senate and many of the legal scholars writing on this subject?

Judge O'CONNOR. The *Brown* v. *Board of Education* cases in 1954 involved a determination, as I understand it, by the Supreme Court that its previous interpretation of the meaning of the 14th amendment, insofar as the equal protection clause was concerned, had been erroneously decided previously in *Plessy* v. *Ferguson* so many years before.

I do not know that the Court believed that it was engaged in judicial activism in the sense of attempting to change social or public policy but rather I assume that it believed it was exercising its constitutional function to determine the meaning, if you will, of the Constitution and in this instance an amendment to the Constitution. That, I assume, is the basis upon which the case was decided.

Some have characterized it as you have stated, as judicial activism. The plain fact of the matter is that it was a virtually unanimous decision, as I recall, by Justices who became convinced on the basis of their research into the history of the 14th amendment that indeed separate facilities were inherently unequal in the field of

public education. For that reason it rendered the decision that it did.

This has occurred in other instances throughout the Court's history. I am sure many examples come to mind, and I think by actual count they may approach about 150 instances in which the Court has reversed itself on some constitutional doctrine over the years, or in some instances doctrine or holdings that were not those of constitutional dimension.

Senator BIDEN. If I can interrupt you just for a moment, I think you are making the distinction with a difference, and I think it is an important distinction to be made. I just want to make sure that I understand what you are saying, and that is that, as I understand what you are saying, social changes—the postulates that Roscoe Pound spoke of—those societal changes that occur regarding social mores must in some way, at some point, be reflected in the law. If they are not, the law will no longer reflect the view of the people.

It seems as though we should understand that when in fact the legislative bodies of this country have failed in their responibilities—as they did in the civil rights area—to react to the change, the change in the mores of the times, and see to it that that is reflected in the law, on those rare occasions it is proper for the Court to step in.

As Judge Colin Sites of the third circuit said, "It is understandably difficult to maintain rigid judicial restraint when presented with a citizen's grievance crying out for redress after prolonged inaction for inappropriate reasons by other branches of Government."

Judge O'CONNOR. Well, Senator, with all due respect I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed, and I did not intend to suggest that by my answer but rather to indicate that I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision. I was not intending to suggest that those changes were being made because some other branch had failed to make the change as a matter of social policy.

Senator BIDEN. Yes, I am suggesting that. My time is up. Maybe on my second round we can come back and explore that a little more.

Thank you very much, Judge.

The CHAIRMAN. Thank you.

Senator Mathias.

IMPACT OF LEGISLATIVE BACKGROUND

Senator MATHIAS. Thank you, Mr. Chairman.

Taking up, Judge O'Connor, where Senator Biden left off, I seem to recall that Blackstone—if it is not too conservative to quote Blackstone—once said that the law is the highest expression of the ethic of the Nation. Determining exactly what that law is or what that ethic is is, of course, the job that you will face.