

and the Supreme Court which conceivably could assimilate some additional number of the issues that need to be resolved, at least to the extent that we have differing opinions among the various Federal courts of appeal.

This is certainly one possibility, one that would have to be studied with a great amount of care in terms of determining what its jurisdiction would be, whether in fact it would alleviate the situation or not, what types of cases it would really handle. Justice James Cameron of our Arizona Supreme Court has done some work in this area as well and is publishing something on the subject currently.

Another possibility, it seems to me, would be to consider removal of the mandatory jurisdiction of the U.S. Supreme Court. As you know, some cases must be accepted on appeal. Possibly giving the Court the opportunity to have entirely discretionary jurisdiction on appeal could be helpful in the long run.

Whether there are other things that can actually curtail the tremendous problem we are having with numbers, I do not know. One would like to think that with less extensive regulation, that perhaps at some point some issues would become settled and would no longer become the subject of as much litigation as we have, so maybe we have to approach it from all aspects. Maybe we are encouraging litigation at the bottom level at the same time we are trying to solve the problem at the top.

Senator HEFLIN. Thank you.

The CHAIRMAN. Senator Denton of Alabama.

Senator DENTON. Thank you, Mr. Chairman.

Good morning, Judge O'Connor.

Judge O'CONNOR. Good morning.

Senator DENTON. We have had references to this being an ordeal, an inquisition. I do congratulate you on your endurance and your poise, your graciousness. I would like it known that I do not feel like an inquisitor; I do not feel condescending.

I had a little scrapbook of sayings which sort of guided my life. They were printed, three or four of them, in a newspaper article once and they were included in a book I wrote. One of them was, "An officer should wear his uniform as a judge his ermine—without a stain."

Therefore, I have a tremendous respect for your profession, for your position. I have a tremendous respect for you as a woman who has fulfilled the indispensable roles of wife and mother in such a successful way, and then has gone on to extrapolate into fields of professional accomplishment which would amount to, in my opinion, in sum constituting pretty much an ideal woman. I ask you these questions with that feeling toward you.

The other gentlemen here have asked you questions about such subjects as judicial activism, civil rights, separation of powers, because respecting you at least as much as I, they are concerned about matters which affect the welfare of this country vis-a-vis the prospect of your nomination.

I am compelled to ask, for the same reason, about abortion. As I ask, I have in mind the cultural shock of my returning to this country after almost 8 years away from it. We had changed in a lot of ways, as you could probably imagine—we talked about this

together—from 1965 to 1973. It was, I think, a devastatingly accelerated sort of self-degradation period which I believe we are tending to recover from.

Among the changes I noted was the abortion issue, abortion being totally accepted, although the ruling had been a little earlier. It was just an accepted thing, and it was appalling to me but not as appalling as it is today. In other words, I have gone through a recognition of how important abortion is, since 1973 to now, a much greater appreciation for what it consists of.

I did not understand why there was so much concentration on abortion, for example, by the Catholic Church in 1973 when I returned. I thought, "Why are they picking on that instead of some of the other things that are going on, the massage parlors, the absolute free sex thing, the perversion? Why abortion?"

I gradually found out, just from thinking about it, but I did note that, you know, for thousands of years in Judeo-Christian society abortion was about the worst word you could say. In the Navy we used to have an expression: "That plan is an abortion." It was the worst condemnation you could give to it in 1960, and all of a sudden when I come home in 1973, you do not say that any more. It is totally outmoded.

What remarkable enlightenment occurred to mankind to make that happen in Judeo-Christian society, I did not understand, and still do not. I am concerned about it in other ways, as I expressed yesterday and might express again today.

Based on my earlier conversation with you and your testimony up to this time, it is my belief that you have changed your position on abortion since you were in the Arizona Legislature. Under what conditions do you now feel abortion is not offensive?

Judge O'CONNOR. Mr. Chairman, Senator Denton, for myself it is simply offensive to me. It is something that is repugnant to me and something in which I would not engage. Obviously, there are others who do not share these beliefs, and I recognize that. I think we are obligated to recognize that others have different views and some would draw the line in one place rather than another.

Senator DENTON. That is the line I am asking you about: In your personal view, where do you feel abortion is not offensive in the respect of drawing that line? We here in the Congress have had to think in those nitty-gritty terms. Each individual in the world, really, and the United States in particular, is thinking in those terms now. It is an agonizing question, and I do respect the differing points of view of others. I do know that I came through several transition periods myself but I am asking you where you now are in drawing that line. Where is it inoffensive?

Judge O'CONNOR. Mr. Chairman, for myself I have to draw it rather strictly. I am "over the hill." I am not going to be pregnant any more, so it is perhaps easy for me to speak. For myself, I find that it is something in which I would not engage.

For those in the legislative halls, it poses very difficult problems for them in drawing those lines legislatively. They are presently constrained, of course, by the limitations placed on by the Court in the *Roe v. Wade* decision, and if you were to draft legislation today I suppose it would have to be drafted with that case in mind while it remains on the books.

Senator DENTON. Well, with all due respect, we are dealing with such nitty-gritty distinctions as rape, incest, and so forth, save the life of the mother. I am asking your personal reflection on the inoffensiveness with respect to those kinds of conditions. Where do you think it occurs? Where does it become inoffensive? I realize that this is not with respect to you, your personal body, but with respect to justice or compassion, the sum of which you view life with.

Judge O'CONNOR. Mr. Chairman, Senator Denton, it remains offensive at all levels. The question is, what exceptions will be recognized in the public sector? That is really the question.

Senator DENTON. Where do you feel that the possibility should occur?

Judge O'CONNOR. I find that it is a problem at any level. Where you draw the line as a matter of public policy is really the task of the legislator to determine. Would I personally object to drawing the line to saving the life of the mother? No; I would not. Are there other areas? Possibly. These are things that the legislator must decide.

Senator DENTON. Well, candidly, personally, in terms of a tubal pregnancy with the impossibility of delivering that fetus, the operation to take it from the mother can be viewed as an abortion to save the life of the mother. I want to confess that I am in favor of that activity. I would not refer to it as abortion, but I want to say that you are more conservative than I in the answer you just gave.

Do you feel that your present attitude will remain as a final position? If not, which way do you feel likely to trend on the issue?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I cannot answer what I will feel in the future. I hope that none of us are beyond the capacity to learn and to understand and to appreciate things. I do not want to be that kind of a person. I want to be a person who is open-minded and who is responsive to the reception of knowledge.

I must say that I do expect that in this particular area we will know a great deal more 10 years from now about the processes in the development of the fetus than we know today. I think we know a great deal more today than we knew 10 years ago, and I hope that all of us are receptive and responsive to the acquisition of knowledge and to change based upon that knowledge.

#### ROE VERSUS WADE DECISION

Senator DENTON. Retrospectively, do you feel comfortable about the correctness of the *Roe v. Wade* decision?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I do not quite know what that question means. If you mean, am I unaware of the concerns that have been expressed about it, of course I am aware of the concerns that have been expressed.

Senator DENTON. What I mean is, as a person are you comfortable with the status quo of sort of psychological environment, peer pressure about what is right and wrong, that that decision has left?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I am concerned about the extent of public concern about that issue. Obviously, law which does not have a broad consensus, if you will, is

always a concern to us because we are here in a broad sense in Government as servants of the people. Lawmakers, it seems to me, have to be concerned about the views of the public generally and about broad segments of the public who feel strongly about certain issues. That is vitally important in the lawmaking field.

I think that the judicial branch is, of course, designed to be not directly responsive to public pressure, and rightly so. I think all of us would concede that it would be unwise to have courts try to resolve public issues in a given case that is before the courts on the basis of public sentiment but, of course, it is always a concern to us and should be a concern to us when there is a broad level of public discontent about some issue.

Senator DENTON. Well, a great many people regard the *Roe v. Wade* decision as the most extreme example or one of the most extreme examples of judicial preference for "personal ideas and philosophy" over textual and historical sources of constitutional law. As I understood you earlier in your answers, you were in favor of a judge ruling from those bases rather than from what had become, perhaps temporarily, a public perception in terms of what is OK and not OK.

Judge O'CONNOR. Mr. Chairman, Senator Denton, yes, I do feel that a judge is constrained by the processes surrounding the judicial system to resolving issues based on the framework of the particular case that has come before the judge, the particular facts, the particular statute, and the law applicable to those.

#### WOMEN SERVING IN COMBAT

Senator DENTON. Would you give your present personal position with respect to women serving in actual military combat or ships and planes which would likely become involved in combat?

Judge O'CONNOR. Mr. Chairman, Senator Denton, it seems to me that consistent with the recommendation I made when I served on the Defense Advisory Committee on women in the service, that the term "combat" should be specifically examined with regard to specific assignments, and that women should be considered if they are in the military for service on assignments taking into account their ability and the specific mission to be performed.

I did not favor and do not favor today a complete exclusion, for example, of any women naval personnel from a ship merely because it is a ship and it is in the U.S. Navy. I think that it has to be examined much more closely than that, and that process has in fact been occurring and it is one which I think is appropriate.

Senator DENTON. My question was not directed toward the Dacowits testimony, with which I am familiar, but just your personal preference. Assuming that we knew whether or not a woman would be committed in combat, would you be for or against that commitment?

Judge O'CONNOR. Mr. Chairman, Senator Denton, speaking as a personal matter only, I have never felt and do not now feel that it is appropriate for women to engage in combat if that term is restricted in its meaning to a battlefield situation, as opposed to pushing a button someplace in a missile silo.

Senator DENTON. In other words, you would not want them to be in a position to be shot?

Judge O'CONNOR. To be captured or shot? No, I would not. [Laughter.]

Senator DENTON. Well, it may astound this audience, but at the Naval Academy not too many months ago there were young ladies standing up and demanding to be placed in just that position, and saying that that was their right to do so because they were accepted into the Naval Academy, so it really is not all this laughable, you know. I am glad to hear that is your opinion, Judge O'Connor.

Yesterday in describing yourself as a judge, you said that two of the characteristics that have stood you in good stead over the years are a short memory and a tough skin.

I see my time is up. I will be asking you something about the Starr memorandum in the next session. I thank you very much, Judge.

The CHAIRMAN. The Senator from Pennsylvania, Mr. Specter.

#### DEATH PENALTY

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge O'Connor, I compliment you on your tour de force of yesterday. I think that indirectly you have answered a number of questions, with respect to capability, by the preparation and legal skill that you have demonstrated with your answers, and with respect to your temperament, your good health, and stamina.

Did you have occasion while in the Arizona Senate to vote on the death penalty issue?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes, I did, I think more than once.

Senator SPECTER. How did you vote?

Judge O'CONNOR. Mr. Chairman, Senator Specter, after the *Furman v. Georgia* case, which basically overturned a good many State death penalty statutes for all practical purposes, Arizona along with other States engaged in an effort to reexamine its statutes and determine whether it was possible to draft a statute which would be upheld by the Supreme Court in the wake of *Furman v. Georgia*.

I participated rather extensively in that effort, in a subcommittee which actually put together the language that was ultimately adopted in the State legislature for reenactment of the death penalty in Arizona. I voted for that measure after it was drafted and brought to the floor. I subsequently had occasion to, in effect, apply it as a judge in the trial court in Arizona in some criminal cases.

I had previously participated in a vote on another death penalty bill that I recall that may have come about before the one in the wake of *Furman v. Georgia*, and that was a proposal to enact some mandatory penalties in certain situations. My recollection is that I voted against that proposal.

Senator SPECTER. Have you changed your views since you voted in favor of the death penalty?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I felt that it was an appropriate vote then and I have not changed my view.