

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 responsibility 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 predictability 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