

The CHAIRMAN. Judge O'Connor, the time has now come for you to testify. Will you stand and be sworn?

Raise your right hand.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge O'CONNOR. I do.

The CHAIRMAN. Judge O'Connor, we will now give you the opportunity to present an opening statement if you care to do so.

TESTIMONY OF HON. SANDRA DAY O'CONNOR, NOMINATED TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Judge O'CONNOR. Thank you, Mr. Chairman. I would like to do so, with your leave and permission.

Mr. Chairman and members of the Senate Judiciary Committee, I would like to begin my brief opening remarks by expressing my gratitude to the President for nominating me to be an Associate Justice of the U.S. Supreme Court, and my appreciation and thanks to you and to all the members of this committee for your courtesy and for the privilege of meeting with you.

As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, and I happily share the honor with millions of American women of yesterday and of today whose abilities and whose conduct have given me this opportunity for service. As a citizen and as a lawyer and as a judge, I have from afar always regarded the Court with the reverence and with the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines will always be honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the U.S. Supreme Court that we all turn when we seek that which we want most from our Government: equal justice under the law.

If confirmed by the Senate, I will apply all my abilities to insure that our Government is preserved; that justice under our Constitution and the laws of this land will always be the foundation of that Government.

I want to make only one substantive statement to you at this time. My experience as a State court judge and as a State legislator has given me a greater appreciation of the important role the States play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the State and the Federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.

If confirmed, I face an awesome responsibility ahead. So, too, does this committee face a heavy responsibility with respect to my nomination. I hope to be as helpful to you as possible in responding to your questions on my background and my beliefs and my views. There is, however, a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To

do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter. This would result in my inability to do my sworn duty; namely, to decide cases that come before the Court. Finally, neither you nor I know today the precise way in which any issue will present itself in the future, or what the facts or arguments may be at that time, or how the statute being interpreted may read. Until those crucial factors become known, I suggest that none of us really know how we would resolve any particular issue. At the very least, we would reserve judgment at that time.

On a personal note, if the chairman will permit it, I would now like to say something to you about my family and introduce them to you.

The CHAIRMAN. I would be very pleased to have you introduce the members of your family at this time, Judge O'Connor.

Judge O'CONNOR. Thank you, Mr. Chairman.

By way of preamble, I would note that some of the media have reported correctly that I have performed some marriage ceremonies in my capacity as a judge. I would like to read to you an extract from a part of the form of marriage ceremony which I prepared:

Marriage is far more than an exchange of vows. It is the foundation of the family, mankind's basic unit of society, the hope of the world and the strength of our country. It is the relationship between ourselves and the generations which follow.

This statement, Mr. Chairman, represents not only advice I give to the couples who have stood before me but my view of all families and the importance of families in our lives and in our country. My nomination to the U.S. Supreme Court has brought my own very close family even closer together, and I would like to introduce them to you, if I may.

My oldest son, Scott, if you would stand, please.

The CHAIRMAN. Stand as your names are called.

Judge O'CONNOR. Scott graduated from Stanford two years ago. He was our State swimming champion. He is now a young businessman, a pilot, and a budding gourmet cook.

Now my second son, Brian, is a senior at Colorado College. He is our adventurer. He is a skydiver with over 400 jumps, including a dive off El Capitan at Yosemite last summer. I look forward to his retirement from that activity [laughter] so he can spend more time in his other status as a pilot.

Now my youngest son, Jay, is a sophomore at Stanford. He is our writer, and he acted as my assistant press secretary after the news of the nomination surfaced and did a very good job keeping all of us quiet. If I could promise you that I could decide cases as well as Jay can ski or swing a golf club, I think that we would have no further problem in the hearing.

Finally, I would like to introduce my dear husband, John. We met on a law review assignment at Stanford University Law School and will celebrate our 29th wedding anniversary in December. John has been totally and unreservedly and enthusiastically supportive of this whole nomination and this endeavor, and for that I am very grateful. Without it, it would not have been possible.

I would like to introduce my sister, Ann Alexander, and her husband, Scott Alexander. They live in Tucson, and are the representatives of my close family at this hearing.

Thank you, Mr. Chairman and members of the committee. I would like to thank you for allowing me this time and this opportunity. I would now be happy to respond to your questions.

The CHAIRMAN. We will now have questioning of the nominee by members of the committee. I presume before we go into this, the members of the committee who accompany you there will prefer to return to their seats or elsewhere.

There will be two rounds of questions of 15 minutes each by the respective members of the committee; then, possibly it may be necessary to go a little further.

Judge O'Connor, the chairman will begin by propounding certain questions to you. We have a timing light system here, which will confine each member to 15 minutes. When the light turns yellow, it means we have 1 minute left; when it turns red, it means the time is up and the gavel will fall at that time.

EXPERIENCE IN ALL THREE BRANCHES OF GOVERNMENT

Judge O'Connor, you have been nominated to serve on the highest court in our country. What experience qualifies you to be a Justice of the U.S. Supreme Court?

Judge O'CONNOR. Mr. Chairman, I suppose I can say that nothing in my experience has adequately prepared me for this appearance before the distinguished committee or for the extent of the media attention to the nomination. However, I hope that if I am confirmed by the Senate, and when the marble doors of the Supreme Court close following that procedure, that my experience in all three branches of State government will provide some very useful background for assuming the awesome responsibility of an Associate Justice of the U.S. Supreme Court.

My experience as an assistant attorney general in the executive branch of State government and my experience as a State legislator in the Arizona State Senate and as senate majority leader of that body, my experience as a trial court judge in the Superior Court of Maricopa County and my experience as a judge in the Arizona Court of Appeals in the appellate process, have given me a greater appreciation for the concept and the reality of the checks and balances of the three branches of government. I appreciate those very keenly.

My experience in State government has also given me a greater appreciation, as I have indicated, for the strengths and the needs of our federal system of government, which envisions, of course, an important role for the States in that process.

My experience on the trial court bench dealing with the realities of criminal felony cases and with domestic relations cases and with general civil litigation has taught me how our system of justice works at its most basic level.

I hope and I trust that those experiences are valuable ones in relation to the work of the U.S. Supreme Court as the final arbiter of Federal and constitutional law as it is applied in both the State and the Federal courts throughout the Nation.

The CHAIRMAN. Judge O'Connor, the phrase "judicial activism" refers to the practice of the judicial branch substituting its own policy preferences for those of elected Representatives. Would you comment on this practice in the Federal courts and state your views on the proper role of the Supreme Court in our system of government?

Judge O'CONNOR. Mr. Chairman, I have of course made some written comments about this in the committee's questionnaire, and in addition to those comments I would like to say that I believe in the doctrine and philosophy of the separation of powers. It is part of the genius of our system.

The balance of powers concept and the checks and balances provided by each of the three branches of Government in relation to each other is really crucial to our system. In order for the system to work, it seems to me that each branch of Government has a great responsibility in striving to carry out its own role and not to usurp the role of the other branches of Government.

Certainly each branch has a very significant role in upholding the Constitution. It is not just the judicial branch of Government that has work to do in upholding the Constitution. It is indeed the Congress and the executive branch as well.

It is the role and function, it seems to me, of the legislative branch to determine public policy; and it is the role and function of the judicial branch, in my view, to interpret the enactments of the legislative branch and to apply them, and insofar as possible to determine any challenges to the constitutionality of those legislative enactments.

In carrying out the judicial function, I believe in the exercise of judicial restraint. For example, cases should be decided on grounds other than constitutional grounds where that is possible. In general, Mr. Chairman, I believe in the importance of the limited role of Government generally, and in the institutional restraints on the judiciary in particular.

PERSONAL AND JUDICIAL PHILOSOPHY ON ABORTION

The CHAIRMAN. Judge O'Connor, there has been much discussion regarding your views on the subject of abortion. Would you discuss your philosophy on abortion, both personal and judicial, and explain your actions as a State senator in Arizona on certain specific matters: First, your 1970 committee vote in favor of House bill No. 20, which would have repealed Arizona's felony statutes on abortion. Then I have three other instances I will inquire about.

Judge O'CONNOR. Very well. May I preface my response by saying that the personal views and philosophies, in my view, of a Supreme Court Justice and indeed any judge should be set aside insofar as it is possible to do that in resolving matters that come before the Court.

Issues that come before the Court should be resolved based on the facts of that particular case or matter and on the law applicable to those facts, and any constitutional principles applicable to those facts. They should not be based on the personal views and ideology of the judge with regard to that particular matter or issue.

Now, having explained that, I would like to say that my own view in the area of abortion is that I am opposed to it as a matter of birth control or otherwise. The subject of abortion is a valid one, in my view, for legislative action subject to any constitutional restraints or limitations.

I think a great deal has been written about my vote in a Senate Judiciary Committee in 1970 on a bill called House bill No. 20, which would have repealed Arizona's abortion statutes. Now in reviewing that, I would like to state first of all that that vote occurred some 11 years ago, to be exact, and was one which was not easily recalled by me, Mr. Chairman. In fact, the committee records when I looked them up did not reflect my vote nor that of other members, with one exception.

It was necessary for me, then, to eventually take time to look at news media accounts and determine from a contemporary article a reflection of the vote on that particular occasion. The bill did not go to the floor of the Senate for a vote; it was held in the Senate Caucus and the committee vote was a vote which would have taken it out of that committee with a recommendation to the full Senate.

The bill is one which concerned a repeal of Arizona's then statutes which made it a felony, punishable by from 2 to 5 years in prison, for anyone providing any substance or means to procure a miscarriage unless it was necessary to save the life of the mother. It would have, for example, subjected anyone who assisted a young woman who, for instance, was a rape victim in securing a D. & C. procedure within hours or even days of that rape.

At that time I believed that some change in Arizona statutes was appropriate, and had a bill been presented to me that was less sweeping than House bill No. 20, I would have supported that. It was not, and the news accounts reflect that I supported the committee action in putting the bill out of committee, where it then died in the caucus.

I would say that my own knowledge and awareness of the issues and concerns that many people have about the question of abortion has increased since those days. It was not the subject of a great deal of public attention or concern at the time it came before the committee in 1970. I would not have voted, I think, Mr. Chairman, for a simple repealer thereafter.

The CHAIRMAN. Now the second instance was your cosponsorship in 1973 of Senate bill No. 1190, which would have provided family planning services, including surgical procedures, even for minors without parental consent.

Judge O'CONNOR. Senate bill No. 1190 in 1973 was a bill in which the prime sponsor was from the city of Tucson, and it had nine other cosigners on the bill. I was one of those cosigners.

I viewed the bill as a bill which did not deal with abortion but which would have established as a State policy in Arizona, a policy of encouraging the availability of contraceptive information to people generally. The bill at the time, I think, was rather loosely drafted, and I can understand why some might read it and say, "What does this mean?"

That did not particularly concern me at the time because I knew that the bill would go through the committee process and be amended substantially before we would see it again. That was a

rather typical practice, at least in the Arizona legislature. Indeed, the bill was assigned to a public health and welfare committee where it was amended in a number of respects.

It did not provide for any surgical procedure for an abortion, as has been reported inaccurately by some. The only reference in the bill to a surgical procedure was the following. It was one that said:

A physician may perform appropriate surgical procedures for the prevention of conception upon any adult who requests such procedure in writing.

That particular provision, I believe, was subsequently amended out in committee but, be that as it may, it was in the bill on introduction.

Mr. Chairman, I supported the availability of contraceptive information to the public generally. Arizona had a statute or statutes on the books at that time, in 1973, which did restrict rather dramatically the availability of information about contraception to the public generally. It seemed to me that perhaps the best way to avoid having people who were seeking abortions was to enable people not to become pregnant unwittingly or without the intention of doing so.

The CHAIRMAN. The third instance, your 1974 vote against House Concurrent Memorial No. 2002, which urged Congress to pass a constitutional amendment against abortion.

Judge O'CONNOR. Mr. Chairman, as you perhaps recall, the *Rowe v. Wade* decision was handed down in 1973. I would like to mention that in that year following that decision, when concerns began to be expressed, I requested the preparation in 1973 of Senate bill No. 1333 which gave hospitals and physicians and employees the right not to participate in or contribute to any abortion proceeding if they chose not to do so and objected, notwithstanding their employment. That bill did pass the State Senate and became law.

The following year, in 1974, less than a year following the *Rowe v. Wade* decision, a House Memorial was introduced in the Arizona House of Representatives. It would have urged Congress to amend the Constitution to provide that the word person in the 5th and 14th amendments applies to the unborn at every stage of development, except in an emergency when there is a reasonable medical certainty that continuation of the pregnancy would cause the death of the mother. The amendment was further amended in the Senate Judiciary Committee.

I did not support the memorial at that time, either in committee or in the caucus.

The CHAIRMAN. Excuse me. My time is up, but you are right in the midst of your question. We will finish abortion, one more instance, and we will give the other members the same additional time, if you will proceed.

Judge O'CONNOR. I voted against it, Mr. Chairman, because I was not sure at that time that we had given the proper amount of reflection or consideration to what action, if any, was appropriate by way of a constitutional amendment in connection with the *Rowe v. Wade* decision.

It seems to me, at least, that amendments to the Constitution are very serious matters and should be undertaken after a great deal of study and thought, and not hastily. I think a tremendous amount of work needs to go into the text and the concept being

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