

tion. Have your positions changed at all over the years or are they the same as indicated in your votes and statements or comments?

Judge O'CONNOR. I have never personally favored abortion as a means of birth control or other remedy, although I think that my perceptions and my knowledge of the problems and the developing medical knowledge, if you will, has increased with the general explosion of knowledge over the past 10 years. I would say that I believe public perceptions generally about this particular area and problem have increased greatly over the past 10 years. I would have to say that I think my own perceptions and awareness have increased likewise in that interval of time.

Senator KENNEDY. Does that mean your position has altered or changed or just that you have developed a greater understanding and awareness of the problem?

Judge O'CONNOR. The latter I think, Senator, is what I was trying to express.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Laxalt?

#### EXCLUSIONARY RULE

Senator LAXALT. Thank you, Mr. Chairman.

You have discussed at length judicial activism, social philosophy, and so forth. I think I will spare you that for the next several moments and inquire into something that I deem to be very relevant for any judicial position, particularly the highest court—that is your legal philosophy.

We deal from time to time in this committee in the whole area of criminal law. I have been struck by the broad range of experience that you have had in this area as a judge, and most particularly with some of your rulings.

I would like to ask you about the exclusionary rule, if I may. You have touched on that in a couple of the cases that you have had.

Of course, with a dramatically increasing crime rate and an even greater rise in the number of violent crimes, increasing attention has been given to the laws governing law enforcement. Many of us on this committee happen to believe that perhaps some of the problems we have in connection with crime are procedural.

On that particular matter, in *State v. Morgan*—and I am sure you remember that—you ruled that the defendant had waived her right to appeal on the failure to exclude as “fruits of the poisoned tree evidence alleged to have been procured illegally.” I agree totally with that result.

As a matter of policy, do you believe that the exclusionary rule may be too narrow, overprotecting the rights of defendants while impeding the ability of the law enforcement people to enforce the law? I am talking about as a matter of general legal philosophy.

Judge O'CONNOR. Senator Laxalt, the exclusionary rule, of course, is one that has caused general public discontent on occasion with the function of the criminal justice system, to the extent that perfectly valid, relevant evidence is excluded solely on the basis that it was obtained in violation of some occasionally technical requirement.

I am sure that none of us would feel that a policy of encouraging the gathering of evidence by peace officers by the use of force, threats, or conduct of that kind is one which the courts would want to condone. On the other hand, we are seeing a number of cases today where the lower Federal courts are beginning to look at the exclusionary rule and the specific factual situation in that case—for example, in the case of evidence obtained by a peace officer in the mistaken belief that he held a valid warrant or evidence obtained in the mistaken belief that a particular case that had been previously decided was still valid law and it is subsequently overturned. We have seen examples in the Federal courts where under those circumstances the exclusionary rule is no longer being applied.

Senator LAXALT. Do you agree with that result? Do you agree with that construction?

Judge O'CONNOR. Let me say, first of all, that some of those things are going to come before the Supreme Court, Senator Laxalt. I certainly would not want to be accused of prejudging an issue that will come before the Court, as indeed I think that this one will.

I simply would like, if I may, to point out what I see as some trends and make some other observations about it.

There are other instances where peace officers who are acting in good faith, but in a mistaken belief as to the existence of certain facts, have taken evidence. We have instances, for example, in the fifth circuit where the fifth circuit has taken the position that that kind of a good faith mistake will not give rise to the application of the exclusionary rule to exclude the evidence. That has not been either approved or disapproved I believe by the U.S. Supreme Court. It is very likely to come before the Court.

As you point out, I have had a good deal of experience at the trial court level and some at the appellate court level with the application of the rule. It is in fact I think a judge-made rule as opposed to one of constitutional dimensions, as I understand it. As a result, the Supreme Court presumably could alter that judge-made rule without doing violence to some constitutional provision or principle.

There have been expressions by several of the sitting Justices that they would like to reexamine that. I think that the rule may well come before the Court and could well be the subject of a reexamination.

Senator LAXALT. Do you think then that there may be a solution in this general area within the judicial system rather than our having to deal with it here legislatively?

Judge O'CONNOR. May I say in response that I had perhaps one of the most unfortunate cases that I had in my years on the trial bench that involved a necessity to apply an exclusionary rule that was the result solely of congressional action, not court action at all. That was an application of one of the provisions of the Uniform Crime Control and Safe Streets Act that required the exclusion in court of evidence obtained that had been overheard on a telephone exchange. In the particular case I had it involved a murder which happened to be overheard by a telephone operator, and that evidence could not be entered. Now that ruling was mandated not by

any court action because we were not dealing with peace officers but private individuals. This was something imposed by Congress.

Yes, I think Congress already has enacted laws that affect this and it might want to consider itself some of those aspects.

#### FEDERAL COURT JURISDICTION

Senator LAXALT. Thank you very much.

Let's talk for a moment or two about Federal court jurisdiction. As you know, we have many social areas in which there is deep division in connection with the principle and certainly in connection with its application.

I think due in great part to the excesses of this Congress in conferring jurisdiction we now have a lot of judges actively engaged in operating prisons, school systems, and the rest, to their chagrin. I communicate with them frequently, and they would rather not be in the business. They would rather be in the business purely of being good judges sitting in their courtrooms or in their chambers rather than having to bother with these other institutions.

Added to all that, of course, we have the problem of our so-called social reforms traditionally enacted in which many feel that the courts did not belong to begin with, but that is the fact. I speak particularly of items such as right to life, abortion, and busing. We deal with that day in and day out. We are going to have a cloture vote on busing tomorrow on the floor.

In order to "obviate" or "circumvent," if that is the proper word, the judicial decision emanating from the highest Court, in the constitutional nature, of course, logically you approach it by way of constitutional amendment, which is a very, very difficult process, first of all, in getting it through the Halls of Congress and then securing ratification out beyond.

Recently there has been some thinking, shared by some of my colleagues on this very committee, that perhaps the way to attack that problem would be to utilize the general power of the Congress constitutionally to limit the jurisdiction of the Federal courts, so that by statute this Congress could define guidelines to exclude the Federal courts from acting in certain areas such as abortion and busing.

May I have from you, if you have had any opportunity to focus on this, your thinking as to what constitutional limits there are upon us as a Congress to limit Federal court jurisdiction?

Judge O'CONNOR. I touched on that briefly this morning, Senator Laxalt.

Senator LAXALT. I know you did.

Judge O'CONNOR. I would review briefly some of those thoughts with you.

You have two separate questions. One is the jurisdiction of the lower Federal courts. That, of course, invokes article 3, section 1. Then we have the appellate jurisdiction of the Supreme Court with article 3, section 2, powers of Congress to regulate, if you will, the appellate jurisdiction of the Supreme Court.

In neither instance do we have much in the way of case law to examine to guide us with respect to the role of the Congress in this

area. Certainly to the extent that the judicial branch of Government is supposed to be the ultimate source of determining what is the supreme law of the land, if you will, and the source of resolving conflict among the several Federal courts of the land, and indeed the State courts insofar as their addressing Federal questions is concerned, then we look to the Supreme Court for the capacity to resolve those issues.

To the extent that that capacity were to be withdrawn by the Congress, then it might result in a greater diversity of holdings at the Federal lower court levels or among the State courts. This raises certain policy considerations that I am sure would be of concern to the Congress.

To the extent that a jurisdiction were to be removed, assuming that it can validly be removed, it would leave in place, I suppose, those holdings and doctrines that had already been established by the Supreme Court prior to any removal of jurisdiction of that area.

Now, as I indicated earlier, I think that some of the constitutional scholars who have examined this question are in doubt as to whether indeed it is valid constitutionally for Congress to remove jurisdiction, for instance, of a particular subject matter as opposed to the type of limitation that has heretofore been utilized.

Therefore, to a degree these questions are not answered, although with respect to the appellate jurisdiction of the Supreme Court the *Ex parte McCordle* case in the 1800's upheld as valid a removal by the Congress of the appellate jurisdiction of the Supreme Court in habeas corpus appeals. That affected a pending case before the Court, as a matter of fact.

Not much more is known really about the possibilities. I would say there are some unanswered questions pertaining to these proposals.

Senator LAXALT. What you are saying in effect is, as you indicated, that there really are not any precedents to guide us casewise. If this Congress should see fit in its wisdom, or lack thereof, to move forward in these areas, it is pretty much an open question for later resolution, probably by the Supreme Court itself.

Judge O'CONNOR. Possibly; other than in *Ex parte McCordle* and the *Klein* case, and so forth.

Senator LAXALT. Yes.

How are we doing on time, Mr. Chairman?

The CHAIRMAN. You have a little time left.

#### STARE DECISIS

Senator LAXALT. All right. I will get into one other area if I may then, Judge. That is the area of stare decisis.

I feel—and I think most lawyers do—the stability of the judicial system rests principally on adhering to precedent. You are going to be presented with that sitting on the Supreme Court I suppose in a greater proportion than you have even been presented with it in the trial court and the appellate court.

Justice Brandeis wrote: "Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right."

May I have your views on this very important principle? I am sure you are familiar with the Justice's observation on stare decisis.

Judge O'CONNOR. Yes, I am, Senator Laxalt.

Senator LAXALT. May I have your views.

Judge O'CONNOR. Stare decisis of course is a crucial question with respect to any discussion of the Supreme Court and its work. I think most people would agree that stability of the law and predictability of the law are vitally important concepts.

Justice Cordozo pointed out the chaos that would result if we decided every case on a case-by-case basis without regard to precedent. It would make administration of justice virtually impossible. Therefore, it plays a very significant role in our legal system.

We are guided, indeed, at the Supreme Court level and in other courts by the concept that we will follow previously decided cases which are in point. Now at the level of the Supreme Court where we are dealing with a matter of constitutional law as opposed to a matter of interpretation of a congressional statute, there has been some suggestion made that the role of stare decisis is a little bit different in the sense that if the Court is deciding a case concerning the interpretation, for example, of a congressional act and the Court renders a decision, and if Congress feels that decision was wrong, then Congress itself can enact further amendments to make adjustments. Therefore, we are not without remedies in that situation.

Whereas, if what the Court decided is a matter of constitutional interpretation and that is the last word, then the only remedy, as you have already indicated, is either for an amendment to the Constitution to be offered or for the Court itself to either distinguish its holdings or somehow change them.

We have seen this process occur throughout the Court's history. There are instances in which the Justices of the Supreme Court have decided after examining a problem or a given situation that their previous decision or the previous decisions of the Court in that particular matter were based on faulty reasoning or faulty analysis or otherwise a flawed interpretation of the law. In that instance they have the power, and indeed the obligation if they so believe, to overturn that previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation.

What I am saying in effect is, it is not cast in stone but it is very important.

Senator LAXALT. It is still a highly persuasive consideration as a matter of principle.

Judge O'CONNOR. Very.

Senator LAXALT. That is all I have for now, Judge. Thank you very much.

Mr. Chairman, I waive the balance of my time, whatever it is.

The CHAIRMAN. Thank you very much.

Senator Byrd is next. I do not believe he is here.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have appreciated the answers you have given here today. I think you have acquitted yourself very well up until