

The CHAIRMAN. The distinguished Senator from Massachusetts, Mr. Kennedy.

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

To follow along on the issue which Senator Mathias has raised but to approach it in a somewhat different manner—and that is the claim of national security and how you balance the national security interest versus the first amendment—I think at the time when I was going to law school a number of years ago, the general rulings at that time were that whenever the Executive claimed national security, a very heavy deference was given to the Chief Executive or to the Office of the President.

We have seen and recent history has taught us the need to scrutinize the claims of the executive branch with great care before contemplating the inhibition on free speech, free association, free press, and the right of dissent. These cases which involved the Pentagon papers, the Elsborg break-in, I think reflect that as really a different view or a different role by the Court in reviewing the claims of national security.

I was interested in hearing your own attitude, how you as an individual view the role: whether you view the role as an umpire in our Federal system, weighing the competing first amendment and national security claims. Are you going to give the complete, basic, and overwhelming presumption to those who make the claim? Are you going to examine in some detail the background for such claim? How will you approach this general issue?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I think I would not approach it by the application of presumptions but, rather, that it would be appropriate to know the basis upon which the claim is made as fully as possible.

Senator KENNEDY. Therefore, as I understand your answer, rather than just deferring to those that claim it, you would assume an active role in examining the underlying assumptions for such a claim.

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, yes, it would seem to me to be the appropriate role of the Court.

Senator KENNEDY. In another area that was raised by some of our colleagues on the issue of crime and law enforcement, and your responses to another Senator's inquiry about the doctrine of stare decisis, I wonder as you view the development of criminal law rulings that have been made over the last 20 years, whether you will follow the doctrine of stare decisis for the holdings of the Supreme Court in some of these important areas of preserving the individual rights of the defendant.

Will you follow that doctrine of stare decisis as closely as you may in some of the other areas? Whatever our definition of judicial activism will be, or how it has been established over the course of these hearings, is it your basic feeling that you will follow those criminal law holdings of the Court in the past as precisely as you might in other areas of policy?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I would expect to apply my view of the rule of precedent evenhandedly, without respect to the area of the law to which we are referring.

MIRANDA RULE

Senator KENNEDY. As a judge, and in your experience as a judge, how much impact has the exclusionary rule and the *Miranda* rule on confessions actually had on prosecutions that you have dealt with?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I want to distinguish the two because I had different experiences concerning them.

Senator KENNEDY. Well, I would be interested in both.

Judge O'CONNOR. I had many criminal felony trials on the trial court bench, many. That is all I did, all day long, for 2 years, and had others throughout the remainder of my time on the bench.

The *Miranda* rule was one which frankly those in Arizona did not greet with a lot of enthusiasm. It came from Arizona; it was an Arizona case and, of course, those in Arizona thought they had done the right thing, so it required a period of adjustment.

It requires the recitation of some rights which frankly can become rather mechanical in its recitation, and as applied to those criminals who have had extensive experience with the law, I think some of those defendants could recite the rights more easily than the peace officers assigned to do the task. However, for some it has had meaning, for some who are not experienced in the criminal law, being advised of their rights has had a substantive effect and a meaning.

My experience on a trial court is that the application of *Miranda* has not resulted in an inability of the police to still be reasonably successful in their efforts to gain information and obtain statements. It has, no doubt, precluded some but on a broad, general basis I cannot say that I think the police have been unable to cope with it.

We have had to have *Miranda* hearings in advance of every trial to determine to what extent these statements must be excluded, and it was seldom that we had to exclude the statements. People continued to make statements despite the fact that they had been warned of the consequences, in large measure. Therefore, I cannot say that I think the application of *Miranda* has simply tied the hands to the extent that police work is ineffective.

EXCLUSIONARY RULE

Senator KENNEDY. How about in the exclusionary rule? How many times did that come up, say, in the time of your 2 years?

Judge O'CONNOR. Many, many times. Almost always in a drug case.

Senator KENNEDY. I see. How many times did that really affect the outcome, either in an acquittal or a reversal?

Judge O'CONNOR. A number of times. I think the exclusionary rule, from my simple observation as a trial court judge, has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police.

I am not suggesting, and do not want to be interpreted as suggesting that I think it is inappropriate where force or trickery or some other reprehensible conduct has been used but I have seen examples of the application of the rule which I thought were unfortunate, on the trial court.

Senator KENNEDY. Do you think that either rule has had much of an impact on the rate of crime, for example, in Arizona?

Judge O'CONNOR. That is a very speculative sort of a thing for me to respond to. I would not think that the *Miranda* rule has actually affected the crime rate. Conceivably, the exclusionary rule has had some effect in some areas of the crime rate, possibly in the drug enforcement.

Senator KENNEDY. In an entirely different area, the Court has had increasing involvement in complex claims involving Native Americans, redress, broken treaties, and these have involved large tracts of lands and large sums sought for compensation. Your record shows an awareness of a special obligation to Native Americans. Could you give us some idea, in general, as a westerner, how you would approach these issues in order to try and deal with a sense of justice and equity to the Native Americans and still balance the legitimate claims of others, without unduly disrupting the lives and the economy of the rest of a State's citizens who are perhaps completely innocent bystanders?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, Arizona is fortunate in having approximately 14 Indian tribes and a great deal of reservation land in the State. I think it adds to the cultural diversity of Arizona and the interests that we enjoy.

It also has given rise to some litigation, as you have mentioned, in a variety of contexts and it has given rise to some disputes on the legislative level concerning the appropriate boundaries for representative bodies. As you know, on the reservation Indians are not subject to State taxation, and I would say that much of the litigation which I have seen arises out of the framework of the taxability of certain transactions which occur on the reservation, transactions involving non-Indians and Indians, or non-Indians but on the reservation, and so forth.

These matters have developed over the years a body of law dealing particularly with these relations, and the Indian tribes enjoy certainly a special status and special exemptions in the area of taxation and other State regulation.

Senator KENNEDY. I was thinking not only of taxation but water rights. Even in my part of the country, because of the failure of the Congress to pass enabling legislation, there still are some very serious questions about land distribution and the real title to various land.

I was just interested in your own concern about the fairness and equity to Native Americans, and how you balance some very solemn obligation responsibilities that we have with the rapid development in some parts of the country among agricultural interests and other types of interests. How you are going to approach these matters. Clearly you have had a strong interest in these issues in the past. I think for many Native Americans they would be interested in the concern that you will bring to the Court about their interests.