

We had planned to recess at 12:30 until 2:30. We will still come back at 2:30. However, Senator Simpson has an emergency and he has to catch a plane, so the chairman is going to run on beyond 12:30 in order to accommodate Senator Simpson to propound his questions.

Senator Simpson, we will call upon you at this time. In that way, we do not discommode anybody of his regular place. In other words, we are taking that much time out of our lunch hour.

Senator SIMPSON. I do not think I will take the full 15 minutes.

The CHAIRMAN. That is all right. You go right ahead. We are glad to accommodate you.

Senator SIMPSON. Thank you very much. You certainly have always done that, Mr. Chairman, and I am deeply appreciative of it.

I am not going to get into issues about abortion, which is an anguishing personal decision, and those of us who have made public statements on that issue I think at least consistently try to stay with those public statements. I know that when I explained my position on it, it had very seriously been thought through by me with counsel with my remarkable family of a wife and three children too, so I will not delve into that because it is so critically personal.

I certainly recall very well in my legislative experience dealing with riders on bills. That is quite a process in itself, and especially as a majority floor leader in trying to keep a clean bill floating if one could without getting weighted down with riders, so I understand that one.

The issues of the Constitution are so critical to us all as legislators, and I remember so well so many discussions as we legislated, how someone would rise and say, "You cannot do that. That is unconstitutional." This always used to test us on the floor, and then we would say, "Pass it anyway and let the judge decide." I remember that ploy so well.

I was also interested, as Senator Biden was, in your article in the William & Mary Law Journal. There are, I think, 30 opinions of yours that have been reviewed by the examining authorities. Certainly your public commentaries in that article might be the freshest.

NO FINALITY IN THE CRIMINAL JUSTICE FIELD

Now in that there is one thing that I honed in on because it is of great interest to me, and that is trying to reach what I refer to as the "finality of judgment" in this land. I think your comment was that:

It is a step in the right direction to defer to the State courts and give finality to their judgments on Federal constitutional questions where a full and fair adjudication has been given in the State court.

I think that that is one of the things that has caused us to have such a general reflection of negativism about Federal and State courts, is a lack of finality in judgment, especially perhaps in the criminal field. I mean, how many times can one go on to exhaust due process. We also find this in an area in which I now have come to have a great interest, in immigration and naturalization mat-

ters, where we have procedures which, when you are through with them all, you can start over, procedures which do not really give confidence in the judicial system.

Anyway, on this issue of finality of judgment, how do we—given the concept that you state and this need for a determination of full and fair adjudication having been provided in the State courts—my question is, I guess, who would then make that determination? Would that then be a determination made by the Supreme Court? Would that be a request for certiorari upon an already burdened court? What might you share with me as to your view on that and how that might be carried out?

Judge O'CONNOR. Well, Senator Simpson, first of all I think it is a serious concern to a lot of people that there is no finality in the criminal justice field to a given decision, even after an appeal has been heard and resolved, long after the conviction in question, and even after one series of post-conviction petitions for relief, there are others that can be followed in an unending series. I think that is one thing that has caused the public to have some concern about the proper function of the judicial system in that area.

Now how we can attack the problem is something that I think has to be considered by both the courts and the Congress in this field because we are talking about the interrelationship between the State court system and the Federal court system as it relates to Federal constitutional issues. Both the State courts and the Federal courts have a role in determining Federal constitutional issues. State court judges take an oath to support the U.S. Constitution just as Federal court judges do, and there is a reason for that, because many of these issues are first raised at the State court level.

To the extent that we want to permit State court judgments to become final on the question, it then becomes a matter in part of how the Federal courts view the question and in part how Congress views it because each can play a role in saying, "Enough is enough." To the extent that a State court has given a full and fair adjudication on a given issue, even though it may involve a Federal constitutional issue, then perhaps we should be more willing at some point to give finality to that State court determination.

I have seen at least evidence in Supreme Court decisions that would indicate a move in that direction, the cases that have said, "All right, in the 4th amendment area, if there has been a full and fair hearing at the State level we will not grant a Federal habeas corpus to review it." Now that was a holding of the U.S. Supreme Court, in effect.

In addition, Congress could review it. Certainly the present structure requires the Supreme Court to take appellate jurisdiction of certain holdings, and perhaps the Congress would consider making that not mandatory in the future but consider at least whether that should be handled much like other petitions for certiorari are handled. Therefore, I think in response really that both the courts and the Congress could have a role.

Senator SIMPSON. That is of interest to me, I guess because it has piqued my interest as to how we might go about it legislatively, and I guess we will try to look into—and this does not have anything to do with your new duties—but whether there are other

methods short of an appeal to the Supreme Court to do this, other than bringing us back virtually to the same position we are in right now with regard to the ready access to the Federal courts through the one instance of the section 1983. Therefore, that is that, and I can visit with you later on that, and I shall.

There was a second point about your article which was thought-provoking to me, and that was a suggestion of a repeal of the Federal statute which would allow attorneys costs to be paid to successful plaintiffs in civil rights cases. In dealing with that, I have I guess a concern as to whether that might not deny access to the courts for some individuals with valid complaints but with, of course, the financial inability to proceed or obtain legal assistance.

Is there any middle ground, in your mind, short of total repeal of that provision that might be acceptable, some modification that would address that issue without cutting off the rights of a potential litigant?

Judge O'CONNOR. Senator Simpson, yes, and I think the point is well-taken. Obviously there are people whose rights have been abused or deprived in some fashion who are entitled to bring suit, and who if they do not have the means to do it need a provision whereby they can recover attorneys fees, else they are not likely to get the kind of legal advice that would be required to get them relief. Therefore, it is understandable that some provision be there.

I think in the article I mentioned that other avenues could be explored short of a total repealer, and so it is not inappropriate then for Congress to look at those provisions in section 1988 and see whether some limitations are appropriate, whether a different set of guidelines to the courts in allowing for attorneys fees would be helpful, something that might discourage the specious claim and the unwarranted one but not ever preclude the valid claim that might be made by the indigent claimant.

Senator SIMPSON. Well, certainly those are some of the problems with any type of public defender system or public prosecutor system, and that is an unfortunate opportunity viewed in some of the minds of my brethren—in my other life I was an attorney—who view that as an ability to raid the treasury of a State or the Federal Treasury.

Finally, just one other question that has to do with what Senator Mathias was referring to, and I guess just a wrap-up in that area with regard to your extensive experience at the State level. I think you bring to the bench or will bring to the Supreme Court Bench a fresh perspective on Federal and State relations which I think has been shunted somewhat in the last two or three decades because simply there is no information to be put into the Supreme Court by those who sit on the Supreme Court, a States' voice issue, if you would.

If I might just ask for you to give me a brief summary as to what general improvements you might see in Federal-State judiciary relationships, what do you see as desirable, and do you see yourself as having a role in bringing that about and bringing it to fruition?

Judge O'CONNOR. Well, Senator, speaking to the last first, I am interested in judicial administration. I have not, of course, had experience in the Federal system, and I have a great deal to learn with regard to the Federal bench and its system.

Certainly I hope that we can always recognize the very great importance that the State court system has in our overall system of justice in this country. Indeed, the vast number of all criminal cases and all other cases, for that matter, are handled in the State court system. That is the system that is doing the bulk of the work, even though I know that you here in the Senate are hearing a great deal about the great pressures that are being experienced in the Federal courts due to their increase in business. However, if you look at it overall it is the State courts that are handling such great bulk of our work.

It is important that those courts function well, that they have capable jurists, that they have an opportunity for training, and I believe in good training of judges. It is possible to go to school and learn something about being a judge, and we have programs like that that are available. They are good programs and merit support.

We have to be mindful of the interrelationship of the State and Federal courts, and I hope give some finality where it is possible to State court decisions, even in the Federal area. That is one of the points that we just discussed, so I think there are ways to improve it. Indeed, the occasion for that issue of the William & Mary Law Review to which you refer was an interesting one which brought together representatives of both the State and the Federal court systems to give an overall view of the problems of the interrelationships and to make some suggestions.

Senator SIMPSON. Well, to me it is an exciting prospect that you bring that additional dimension, which is not really discussed greatly but I think is very important.

Mr. Chairman, thank you for being very gracious to me in recognizing a special problem I have, and I appreciate that very much.

Thank you, Judge.

The CHAIRMAN. We will now stand in recess until 2:30.

[Whereupon, at 1:55 p.m., the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

After the gavel raps, the press and photographers will withdraw. Senator Kennedy?

DISCRIMINATION EXPERIENCE

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

Judge O'Connor, I do not think that there is any question in the minds of millions of Americans that your nomination represents a great victory for equality in our society, and millions of Americans obviously are looking to you with a rightful sense of pride. You have had a long and distinguished legal career.

I would like to ask you whether you have experienced discrimination as a woman over the period of that career and, if so, what shape or form that has taken.

Judge O'CONNOR. Senator Kennedy, I do not know that I have experienced much in the way of discrimination. When I was admitted to law school I was very happy that I was admitted to law school at a fine institution. My only disappointment I think came