

Judge O'CONNOR. Indeed, Senator, if the Congress felt that the civil rights litigation were the appropriate role and function for section 1983 cases it could restrict the application accordingly.

I think you are aware that, in fact, what has happened is that the Court has extended it far beyond civil rights cases and has applied it to virtually any violation of any Federal law. This is a far cry, I assume, from what was intended perhaps at the time that it was drafted. At least that is arguable.

Certainly what was being suggested in the article is that Congress take a look at this and, in fact, determine if that is the intent of the Congress and if it is being used in the manner that Congress feels is appropriate and proper.

To the extent that it is, then allowance of attorney's fees seems eminently appropriate. To the extent that it is not, of course Congress in its wisdom might see fit to make changes.

Senator METZENBAUM. As a matter of fact, the article indicates a conclusive point of view; and that is that such a move would be welcomed by State courts as well as State legislatures and executive officers and then goes on to refer to the fact that the Congress indeed has moved in the opposite direction to open the courts to more access.

I am frank to say that that attitude is a matter of concern to me—denial of access to the courts and denial of an opportunity to be represented by counsel who in turn would be paid, provided that the litigant was awarded fees by the court. It provides some concern for this Senator.

Judge O'CONNOR. Again, Senator, I would like to point out that that article in no way suggested that anyone should be deprived of a judicial forum for airing his or her grievance.

I think the thrust of the article was that we have two parallel court systems and it is really a question of choice: Should the litigants be encouraged to direct their inquiries and their remedies be sought initially through the State court system, or do we want to channel everything to the Federal courts?

Speaking as a State court judge, it was my view that perhaps we could safely encourage wider use of the State court system—that it was not necessary at every level and in every instance to have the choice, if you will.

That was simply a point of view being suggested from the perspective of one who has been involved in a State court system. That of course is a matter for Congress in its wisdom to debate.

Senator METZENBAUM. They have the choice, and they would lose the choice under your article. I hope they do not.

Judge O'CONNOR. But not their remedy or a forum.

Senator METZENBAUM. Not their remedy, but no choice of forum. I think my time has expired, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Dole?

DIVERSITY JURISDICTION

Senator DOLE. Thank you, Mr. Chairman.

I have one or two followup questions, one based on the same article on diversity that was alluded to by the distinguished Sena-

tor from Ohio, Senator Metzenbaum, in which you did indicate, as I understand it, that you favor the elimination of restriction of diversity jurisdiction as a ground for bringing a suit in Federal court.

My only question in that regard would be: What would you recommend to States to accommodate their increased caseloads if that in fact were done?

Judge O'CONNOR. Senator Dole, I do not think that my suggestion was conclusive in that regard. I simply offered that again as something which I think is appropriate for Congress to consider as it considers how to deal with the increasing caseload of the Federal district courts.

Obviously, to the extent that the diversity jurisdiction is reduced or eliminated, it will impact upon the State courts.

We do have some jurisdictions—and I think perhaps Los Angeles County is one—where there is a shorter time to get to trial in the Federal courts than there is in the State courts. Lawyers and litigants in that community would be particularly unhappy with that kind of a change.

So these raise very serious questions obviously, and that is probably why so little action has been taken over so long a time.

There are diverse views on it, and it is a very thorny issue, but I do think it legitimately is one of the things that Congress should be considering as it addresses this whole problem of State and Federal courts.

Senator DOLE. I have another question with reference to the same comment:

One of the traditional arguments for retaining diversity as a basis for Federal jurisdiction has been the fact that the State courts might have a bias in the favor of litigants who are also citizens of that State. Do you have any recommendations as to how we might address that problem if we abolish diversity?

Judge O'CONNOR. Senator, I certainly have not had experience in other States, but in our State it has not been my experience that that is the case—that a litigant need to be concerned about how long he or she has been a resident of that State or in fact whether he is a resident at all. In fact, I believe that justice is being administered very evenhandedly with regard to that, so I am not sure that that continues to be a valid concern in today's world.

APPLICATION OF EXCLUSIONARY RULE

Senator DOLE. Senator Laxalt and maybe others earlier today discussed the exclusionary rule. I want to follow up.

What is your opinion of whether or not the exclusionary rule should be applied to cases where law enforcement officers have committed technical violations of law which do not affect an individual's constitutional rights?

Judge O'CONNOR. These are among the examples that I referred to when I said a number of courts around the country within the federal system are beginning to approach the exclusionary rule in a different way and to eliminate, if you will, from the application of the rule the so-called technical violation.

We have not seen a full resolution of that approach yet by the U.S. Supreme Court, but there is every indication that perhaps some of those issues will again be addressed by that Court.

Senator DOLE. It would seem to me that, as you have indicated, based on maybe an invalid warrant or a misunderstanding of the facts, if it does not violate one's constitutional rights then I think we need to take a look at that aspect of it.

We used to talk about strict constructionists around here—it has been some time. I do not quite remember when that was, come to think of it, but what does that term mean to you? It was one that was widely discussed. I think it is well understood by those on the judiciary. Do you have any definition of that term?

Judge O'CONNOR. Well, I suppose, Senator Dole, to me it might mean someone who appreciates the difference between the policy-making functions of the legislative body and the judicial role of interpreting and applying the law as made by the legislative body; in other words, the difference between making the law and interpreting it.

Senator DOLE. You come down on the side of the interpreters, as I recall your statement and other statements that have been made?

Judge O'CONNOR. I have expressed the position that I know well the difference between the role of the legislator and the judge, and I understand the proper role of the judge as being one of interpreting the law and not making it, if you will, in very simplistic terms.

Senator DOLE. I agree with that. We supposedly make the law. We wonder sometimes if we do it effectively, but we have seen the Court also make law, and I think that has been the concern of many. I know it has been a concern of many on this committee when they talked about judicial restraint or judicial activism. Your view of that term would be in accord with the one I believe is the correct one.

Senator Mathias in his first round of questions asked about your views on the power of the Federal judiciary. Of course, we do limit judicial independence in many ways in Congress, whether it is through the appropriation process, the appointment of judges, oversight on appointments, or impeachment.

As Congress employs these powers granted to it under the Constitution, it frequently has an impact upon Court decisions.

My question would be: To what extent, in your view, should the Court as it sits be cognizant of public and congressional sentiment on issues before the Court?

Judge O'CONNOR. Senator, it seems to me that properly the Court would have to be considering really only the facts of the particular case and the law applicable to those facts.

It would seem to me rather a dangerous process in general, if you will, to go outside the record and outside the law for guidance in determining how a given matter should be handled or addressed.

I suppose that is why we strive to have judicial independence—so that cases are not based on current perception of outside activity but rather on the matters that appropriately come to the attention of the courts.

Senator DOLE. Rather than what may be the issue of the day before the Congress, whether it is busing or whether it might be some other issue. I think busing has been discussed. That is only

one of the issues where Congress, I think, sometimes felt that the Court had a hearing problem. We sometimes believe in this branch that the Court—maybe properly so—is oblivious to what happens in the outside world.

Judge O'CONNOR. Senator, I am sure that through the arguments of counsel and through the brief-writing process and the citation of appropriate authority the Court is never totally oblivious to what is going on. I have to assume that the litigants themselves are making known to the Court through the briefs and the arguments the realities of life.

It is just that I do not think the Justices on their own—or judges anywhere for that matter—should be in the process of going outside that judicial process for guidance in reaching decisions.

Senator DOLE. Senator Thurmond in his questions asked you three specific questions with reference to votes on abortion while a member of the Senate in the State of Arizona. You also mentioned your sponsorship of Senate bill 1165.

Is it fair to ask whether or not that particular legislation accurately represents your view on abortion? As I recall, in summarizing what Senate bill 1165 entailed, it was that no payment benefits be made unless the mother's life was threatened.

Judge O'CONNOR. In Senate bill 1165 I was not the drafter of the bill; it was the State medicaid bill.

The leadership had assigned the subject of Arizona's role in the field of medical care to the poor to a citizens' committee.

As I recall, Dr. Merlin Duvall headed up that committee at the time. He later became the dean of Arizona's medical school.

The committee, in any event, recommended the adoption of this particular bill; and it included that provision in it concerning the use of public funds; and I supported the bill and its provisions.

Senator DOLE. And that bill did become law?

Judge O'CONNOR. Yes, it did. It was never funded thereafter for the medicaid function. It is still on the books today.

Senator DOLE. But is it fair to conclude that that might reflect your views on that issue?

Judge O'CONNOR. Yes, Senator, it reflected my views on that subject when I voted for that measure.

Senator DOLE. What about today?

Judge O'CONNOR. Yes—in general substance, yes.

Senator DOLE. Senator Metzbaum also discussed the question of disallowing attorney's fees in certain areas brought under 42 U.S.C. 1983. I think you have addressed that question.

If the legislative reforms which were mentioned in the William & Mary article in civil rights suits are heard in State as opposed to Federal courts, would there be any danger of plaintiffs being victims of bias or prejudice—if they are limited to State courts rather than Federal courts? Is that a problem as you see it?

Judge O'CONNOR. It is a potential problem; and to the extent that it is there has to be a means for eventually removing the issue, if that occurs, to an appropriate forum where it would not be a problem.

Senator DOLE. Thank you, Mr. Chairman.

Thank you, Judge.

The CHAIRMAN. Thank you.