

specific recommendations for amending section 1988 with regard to attorneys fees?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, nothing specific other than to suggest that categories of types of actions perhaps could be considered and weighed with regard to it. To preclude appropriate causes of action or to discourage appropriate causes of action by removing the capacity to collect attorneys fees would no doubt be unwise, but to discourage causes of action that are specious, or in areas in which the Congress never intended, if you will, that the section be applicable would present another matter for consideration.

Senator HATCH. Judge, I would just like to say in closing that I have certainly enjoyed listening to you. I think this is a very difficult position to be in, with all these lights and all these people and all these questions and all these Senators, but I think you have acquitted yourself really well.

I personally am very proud of you, and I am going to support you, as I indicated quite a while ago, and be very proud to have you on the Supreme Court of the United States of America. I am very pleased with having you here during these hearings, and having you have this opportunity.

Judge O'CONNOR. Thank you.

Senator HATCH. Thank you, Mr. Chairman.

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

[Whereupon at 12:55 p.m. the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The Judiciary Committee will come to order. Questioning of Judge O'Connor by the members of the committee will continue.

Judge O'Connor, I would remind you that you are still under oath.

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

The CHAIRMAN. We will now hear from Senator Laxalt of Nevada.

PRESIDENTIAL AUTHORITY OVER INDEPENDENT AGENCIES

Senator LAXALT. Judge O'Connor, in 1972 legislation which was sponsored by you was enacted by the Arizona Legislature giving the State attorney general power to approve all regulations proposed by State agencies.

Here at the Federal level the experts have debated what inherent authority the President has over Federal agencies, including the so-called independent agencies, due to his constitutional role as Chief Executive.

We are in the throes now of attempting to enact and implement administratively as well as up here legislatively substantial regulatory reform. The essence of that problem is jurisdictional in part.

I would like to have your views as to what Executive authority over the so-called independent administrative agencies you believe a President of the United States has.

Judge O'CONNOR. Mr. Chairman, Senator Laxalt, I think it may depend on the legislation in each instance as to what role has been envisioned for the Executive with respect to some particular agency.

I recognize that Congress is dealing today in terms of legislative review of the relationship that would be appropriate in terms of agency regulation.

In fact, I think some consideration is being given—if I am not mistaken—to even having the legislative body itself involved by some sort of legislative review.

These proposals, of course, have not been tested yet; and I cannot speak to the constitutional validity of them, I think; but it involves essentially a question of the essential separation of powers concept and the extent to which, under the separation of powers at the Federal level, it is considered desirable to have some form of oversight of the administrative bodies, whether it be by the executive branch or the legislative branch.

To the extent that these administrative agencies are executive agencies or agencies under the executive branch of Government and that the executive branch is given some role of oversight in connection with them, it does not appear to involve a question of separation of powers.

To the extent that the concept or vehicle used is one of legislative review of the regulations or the actions, we have different questions at play.

In Arizona, as you have indicated, the State adopted a practice in the year that you mentioned of having the attorney general part of the executive branch review the regulations of agencies of the executive branch for legality prior to their adoption by those agencies. That system seems to have served reasonably well.

Senator LAXALT. If I understand you correctly, in the absence of some legislative prohibition there would be no constitutional bar on the grounds of separation of powers or otherwise, restraining a President from exercising direct authority and responsibility over the independent agencies if the legislation in question opened the door for him to do so?

Judge O'CONNOR. Mr. Chairman, Senator Laxalt, it would appear to me—again without attempting to express any legal opinion on a given case—that within the executive branch, provided the legislation allowed for it, the executive branch could be assigned certain roles for review of those executive branch agencies.

Senator LAXALT. As you indicated, a combination of proper oversight here of those agencies plus general supervision on the part of the Executive theoretically at least should get the job done?

Judge O'CONNOR. Senator Laxalt, we would hope so.

VENUE RULES

Senator LAXALT. Let us talk about venue for a moment. I do not know whether or not you have followed the progress of rather substantial venue legislation we are pursuing through this committee.

Under section 1391 of title 28 of the United States Code actions in which the Government is a party may be brought in one of four

places—I am sure you are already familiar with this—No. 1, where the plaintiff resides; two, where the defendant resides; three, where the cause of action arose; or, four, where any real property involved in the action is located.

As you probably already know from your previous experience in a Western State, many cases involving Federal land located in Western States are brought here in Washington, D.C. As a result, there is little opportunity for individuals vitally interested in the outcome to participate in such a proceedings effectively.

We have had land decisions decided here; we have had water decisions affecting our water decided here by district judges within the District of Columbia.

In addition, there is some feeling that the Federal judges in those Western States have a better understanding of the practical consequences of these lawsuits over land use.

Considering that the Federal Government owns or controls approximately 50 percent of the land in the Western States—and in your State and mine substantially more than that; ours is 87; I do not know exactly what yours is, but I think it is near that—people in those States increasingly feel that they have no say about significant matters that affect them on a daily basis.

Now, Judge O'Connor, do you consider a change in the venue rules which requires suits to be brought in the district where the outcome of the suit will have the greatest impact an appropriate action by this Congress?

Judge O'CONNOR. Senator Laxalt, it appears to me that that determination is one that is peculiarly appropriate, I suppose, to the legislative branch to determine.

If there were no other impediments involved normally we would want to consider in terms of where a cause of action is brought some of the factors affecting the convenience of the parties. In other words, if most of the parties find that it would be more convenient to have the trial brought in a particular location rather than another, that is a factor that normally one would want to consider.

As far as any statutory changes are concerned concerning the provisions for venue, that seems to me to be a policy question appropriate for the legislative branch to address certainly.

Senator LAXALT. Do you see that this poses any degree of constitutional question?

Judge O'CONNOR. Senator Laxalt, I do not know offhand whether any particular constitutional issue could be raised concerning it. I really have not studied that problem and would want to have the benefit of some research before I could answer that. None comes immediately to mind, but I have not researched the question.

JUDICIAL NOTICE

Senator LAXALT. I understand.

Let us talk about judicial notice for just a moment or so. Reviewing your own record, it has been very pleasant for this Senator as a former lawyer and one who has worked on this committee for quite a while to find that you have, in fact, as a judge, exercised considerable judicial restraint. You, in fact, in your position, have been a

judge rather than a public official or a legislator; and you have operated within those constraints.

One of the areas where license can be used, I would imagine, by any judge, is in looking beyond the record factually as a judge may or may not find that record and getting out into the labyrinth that we call judicial notice. This brings into play then, factually and otherwise, an independent situation which may or may not be proper.

In this general area I would like to ask you this, Judge O'Connor: In the context of several of your own opinions you have been called upon to address the permissible scope of judicial notice. As a matter of policy rather than one of statutory construction, what do you, as a judge who has sat on the State level and who now aspires to sit on our highest court, view as the proper range of judicial notice?

I suspect that in controversial cases that have been alluded to here previously *Roe v. Wade* and others—perhaps our Supreme Court in that situation did, I think, indulge in far too much latitude in this area. May I have your views?

Judge O'CONNOR. Senator Laxalt, with respect to the application of those things of which a court can take judicial notice I can share with you my views as a State court judge when I have had to face the question, and that basically is that the court was allowed to take judicial notice only of matters which were, in effect, beyond dispute—for example, a date or the time within which the Sun rose or set on a given date, or the location of a particular community geographically, or something of that sort.

These are the instances in which we would normally apply judicial notice at the State level—I would say very limited circumstances.

Senator LAXALT. Do you see an application of the doctrine in respect to the functions of the Supreme Court?

Judge O'CONNOR. Senator Laxalt, I have not had occasion to review all the instances in which the Supreme Court has been called upon to take judicial notice of something, so I would be perhaps not in a position to give you examples of where the Court may have adopted a broader view if it has. I can only speak from my experience as a State court judge in which the application of the doctrine would be very limited.

REGULATORY STATUTES MAY VIOLATE CONSTITUTIONAL DOCTRINE

Senator LAXALT. Judge O'Connor, as chairman of the Regulatory Reform Subcommittee within the framework of this general committee I am becoming increasingly involved with issues of lawmaking by administrative agencies.

Senator Heflin alluded to this during the course of his questioning but did not have an opportunity to pursue it further, so I would like to if I may.

Many have criticized the Congress for giving this power to agencies too broadly without sufficient guidelines, essentially abdicating congressional responsibility to legislate to the agencies.

That has been part of our problem here. We have passed legislation for many years in general form and, I think as a political

matter, passed the buck downtown and let them do the dirty work by fleshing it out with rules and regulations on the part of many agencies, none of whom in terms of personnel are responsive to the process—unelected people.

Some eminent legal figures have concluded—I guess eminent legal figures are ordinarily those who agree with you—that certain of these statutes violate constitutional doctrine that Congress may not delegate its lawmaking power without clear and adequate guidelines.

Now, Judge O'Connor, do you believe that some existing regulatory statutes may be unconstitutional because of the failure of Congress to adequately lay down the general policies and standards that animate those statutes?

Judge O'CONNOR. Senator Laxalt, it seems to me that there was a time in our Nation's history when the Supreme Court used to look under the separation of powers doctrine at the delegation of legislative power to the executive and administrative agencies and review very strictly those delegations. Those were the days of *Schechter Poultry v. United States* back in the 1930's.

Such an uproar arose at that time that ultimately the Court reversed that trend and began to approve very sweeping delegations of power to administrative agencies and has upheld agency regulations which had really a very tenuous basis of support in the legislation itself.

One can recall for example the *Red Lion Broadcasting* case where, under very limited delegation by Congress, very sweeping regulations were upheld.

My observation is that in recent years there are some indications at least that the Court is examining the legislative basis for agency regulations more carefully than had been the case for a while.

A very recent case dealt with whether an agency had to make a cost-benefit analysis of its regulations, and I believe the Court indicated that because that was not reflected as a duty in the legislation therefore none would be implied.

Certainly it would appear to me that the legislative branch has a very important role to play in this area in terms of determining for itself the extent to which it wants to be specific in its delegation and limitation of power to the Administrative agency to adopt regulations.

Just as a personal view expressed by one who has been in the legislative branch, it seemed to me then that very careful guidelines were appropriate to be drawn by the legislative branch in permitting agencies to adopt rules and regulations. Certainly the legislative branch has a terribly important role in this.

The Court's role then becomes one of examining the legislation to determine whether, in fact, the administrative agency is authorized to adopt the types of regulations that it has. In that regard I can only indicate to you what I may see as a trend of more careful study of that matter by the courts.

Senator LAXALT. I thank you very much, Judge.

Mr. Chairman, that concludes my time and my questioning. I thank the chairman. I thank the judge.

The CHAIRMAN. The distinguished Senator from Ohio, Senator Metzenbaum.