

## CRUEL AND UNUSUAL PUNISHMENT

Senator METZENBAUM. Do you think it inappropriate judicial activism for a Federal district court to order major changes in a prison after finding that conditions in a penal system constituted cruel and unusual punishment? That was in the case of *Hutto v. Finney*, which reached the Supreme Court in 1978.

Judge O'CONNOR. Senator Metzenbaum, I think the constitutional provision against cruel and unusual punishment has been of course part of our Constitution for many years; and it is certainly not inappropriate for the Court to consider a case that alleges that a particular prison condition constitutes cruel and unusual punishment. I do not view that as any unusual exercise of judicial activism.

You can examine then the particular remedies that are selected by the Federal district court, assuminx it finds such a condition, and then begin to discuss the extent to which the district court remedies exceed what is regarded as an appropriate exercise of the Court's discretion once that condition is found. It seems to me that is a different question.

Senator METZENBAUM. I have just one last question. I have a number of other cases of this same kind of judicial activism, but my real question is this: Is not the matter of judicial activism a question of which side of the court you are on—and I mean tennis court, not the court in the other sense—a question of which way the ball bounces as to whether one man's or one woman's judicial activism is not another party's legalistic approach to what should or should not be done, and that overreacting to the question of judicial activism could be just as bad as overinvolvement by the courts in attempting to make new law?

I would just hope that this question of judicial activism would not be of such a nature as to cause you to lean over backward or forward with respect to the actions of the Supreme Court, because I think it is these cliches that get us all in trouble. I do not think they will get you in trouble, but I at least for one would hope that the Court would not do less in meeting its responsibilities than it has done in the past in order to protect constitutional rights of the people of this country.

Judge O'CONNOR. Senator Metzenbaum, there is always a danger in oversimplification and in sloganism, and I understand that.

Senator METZENBAUM. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kansas, Mr. Dole.

Senator DOLE. Thank you, Mr. Chairman.

Judge O'Connor, in your testimony yesterday you expressed your feeling that it is not the job of the Court to establish public policy through its judicial work. As a practical matter we know that the Court has frequently found justification for such policymaking by expansive readings of the constitutional or statutory law.

Today we find courts running school systems, apportioning legislatures, managing railroads, and generally involved in a whole host of activities which would have been unthinkable a generation ago.

Sometimes those of us in the Congress feel that the Court has gone beyond interpretation of law to an extent that it makes it difficult to know who, in fact, is setting policy for our Nation.

We have talked generally about your philosophy of judicial restraint. I wonder if you might be more specific on the question of how that philosophy can be imparted to lower courts. Is there something that the Supreme Court might do to impart some of that restraint to lower courts?

Judge O'CONNOR. Senator Dole, I suppose every time the Supreme Court acts in terms of publishing an opinion that expresses a point of view that point of view is read and heard and considered by all the other Federal courts and the State courts.

To the extent that the Supreme Court expresses concepts of judicial restraint I assume that those are addressed.

Obviously, the other very simplistic answer is that judges, like lawyers, enjoy attending training programs, seminars, and so forth; and all of these means are constantly available for dissemination of concepts of appropriate judicial management and action.

#### BAKKE DECISION

Senator DOLE. I think also it appears to many of us on the outside at times that the Court avoids controversy and attack from outside sources by avoiding decisions on difficult issues until it is presented with a very narrow, well-defined case. There are a number of examples of that.

One I recall is the affirmative action decision—the so-called *Bakke* decision. The Court avoided a decision on the constitutionality of reverse discrimination until presented with the issue of quotas in that case.

Do you have any opinion on whether or not the Court shirks its responsibilities by following this practice—by waiting for just the right case, a very narrowly defined case?

Judge O'CONNOR. Senator Dole, I have not participated of course in the discussions that surround that particular activity.

I believe that the Court had previously rejected an affirmative action case on the grounds that the issue was then moot—in other words, that the plaintiff who had filed was no longer attending the institution and the question had become moot. That was not the situation, I gather, in *Bakke*, and the Court took jurisdiction.

The doctrine of not accepting a case which is moot is not an absolute one. Exceptions have been made in the past, particularly for those instances in which otherwise the case could never get to the Court.

However, in general the Court has attempted to, I suppose, accept jurisdiction of those cases in which it feels an issue has been appropriately raised that would lend itself to resolution.

Senator DOLE. So you are not concerned that they may, in effect, sometimes avoid coming to grips with a matter by waiting for some narrowly defined case to come before the Court?

Judge O'CONNOR. Senator Dole, of course it is a concern. We all hope that matters of great significance and in which there is a need for a final voice, if you will, are given the opportunity to be heard.

These are very delicate questions, I am sure, that have to be addressed on a case-by-case basis; and applying all the normal principles of review, is this case appropriate for acceptance?

I am sure that another factor of course is the tremendous number of cases and the limitation inherently that exists because of the incapacity to accept more than a fairly limited number of matters each term.

#### ILLEGAL ALIENS

Senator DOLE. Let me shift to another matter which is of considerable interest and probably will become more of interest—and maybe for that reason you cannot fairly comment on it.

The Court has never decided whether aliens who enter the United States illegally should be afforded the full protection and rights guaranteed under the 14th amendment.

The dispute finds recent expression in a suit filed against the State of Texas by certain organizations who claim that the State must make educational facilities available to the children of illegal aliens.

Do you have any general views as to the extent to which due process and equal protection rights should be afforded to illegal aliens?

Judge O'CONNOR. Senator Dole, that is an issue that is currently either awaiting certiorari or has been accepted. It is a matter which is going to make its way I think soon to the U.S. Supreme Court and a matter of grave concern to many people.

Our country has, as you know, received within its borders in recent years large numbers of illegal aliens; and the question of the right of those individuals to a public school education, for instance, and other rights is a matter that is of concern to many and which does raise serious constitutional questions, and those questions are likely to be heard soon, I believe.

Certainly with regard to the subject of aliens generally the Court's primary reported decisions have really dealt with those who are legally in the country, and various standards for review—in fact, a rather strict standard for review—in many instances has been applied to cases arising in that area.

Senator DOLE. I certainly accept that answer. I am certain this case will find its way to the Court, and you will be asked at that time I assume to apply the proper principles of law or equity.

I addressed a question to you yesterday with reference to the exclusionary rule following a question asked by Senator Laxalt, and I think there was a question asked this morning by another member of the committee. You responded with an example of a case in which you had to exclude wiretap evidence under title 3 of the 1968 Omnibus Crime Control and Safe Streets Act.

In that legislation Congress attempted to provide for admissibility of wiretap evidence under a formula which called for court supervision over the use of electronic surveillance techniques by Federal and State enforcement authorities.

This statutory scheme has subsequently been upheld by the Supreme Court, and this scheme could well serve as a precedent for

other congressional efforts to limit the scope of the exclusionary rule.

I would be interested in receiving your thoughts on your problems with the 1968 act in the cases you referred to yesterday.

Judge O'CONNOR. Senator Dole, for one thing the act applied to information obtained by private individuals in addition to those who are peace officers. The exclusionary rule as we know it under the fourth amendment is applicable only to information or evidence obtained by peace officers. If a private individual obtains evidence illegally it is not excluded in court in a criminal action based on the exclusionary rule.

However, Congress in that act has applied it not only to peace officers but to information or evidence obtained by private citizens.

In addition, the act by its terms I believe makes a blanket prohibition of the use in court and provides for no "good faith" exception, if there is such a thing, as has been addressed in some of the Federal courts with regard to the criminal exclusionary rule.

Senator DOLE. Finally, I was not able to be here this morning, but we were monitoring the session, and I understand that Senator Thurmond asked a question concerning the second amendment right of citizens to keep and bear arms.

Your response, as I understand it, included the citation, *United States v. Miller*—one of the few instances where the Supreme Court has ruled in recent years on the scope and meaning of the second amendment.

In that case the Supreme Court upheld the constitutionality of the National Firearms Act of 1934. That act was based on Congress' power to place transfer taxes and national registration on gangstertype weapons such as machine guns and sawed-off shotguns.

These and similar weapons, however, certainly would be appropriate for use by militias or State militias, and it seems to me that the state of the art firearms technology of that decision would be open to question if the matter came before the Court again.

In these days—and I think as recently as yesterday—we hear announcements of increased crime rates, especially violent crimes committed with firearms.

Can the several States or the Federal Government impose restrictions on private possession and use of sporting firearms without violating the constitutional guarantees of the second amendment?

Judge O'CONNOR. Senator Dole, possibly there is a difference under the second amendment question with respect to what the States can do and what the Federal Government can do. At least that is a possibility.

The *Miller* case addressed the power of Congress to enact certain prohibitions under the commerce clause of the carrying of certain types of weapons.

In a very brief decision actually, the Court simply held that the second amendment did not guarantee the right of people to have a certain type of weapon but rather was addressed to a prohibition against Congress interfering with the maintenance of a State militia.

We just do not have additional determinations by the Court of the meaning of that act. We do know, however, that the States, acting in their police power, have adopted a wide range of statutes regulating the possession and use of firearms.

It is a matter of great concern to many people. In Arizona at least that regulation has been limited by and large to a regulation prohibiting the carrying of concealed weapons and provisions limiting the use of weapons at all in certain inhabited areas, regulations concerning the use of firearms by the very young, and also statutes that impose additional penalties on people who commit crimes involving the use of weapons.

It has been the view, at least in our State, of the legislators at this point that the legislative power if it exists to further limit the use or ownership of firearms by citizens for sport purposes or for self-defense should not be limited. I think that has been a policy decision at the legislative level and not tested under the second amendment that is applicable.

Senator DOLE. Judge O'Connor, the other questions I have you have addressed, I think, directly or indirectly. I yield back the balance of my time, and I want to indicate my strong support for your nomination.

Judge O'CONNOR. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Arizona, Mr. DeConcini.

#### PROBLEM OF CRIME

Senator DECONCINI. Mr. Chairman, thank you.

Judge O'Connor, thank you for your fine testimony today. It has been exceptional, as was yesterday's.

I would like to address a couple of general areas with you. If you can labor through them I would be most appreciative.

The problem of organized crime, violent crime, and drug-related crime in this country has surfaced once again as a primary subject and a primary objective of many of us in the Senate; and certainly now the administration has come forward with a, not termed a "war on crime," but some specifics; and I think some of them are very positive. A number of Senators here have suggested specific legislation.

I wonder, Judge O'Connor, if you could just characterize in a general sense what you believe—first of all, if you agree that it is the problem that I believe it is; and, second, what you believe the Court can do and should do to participate in a more active way or passive way, but in some way, to bear some of the burden of improving the safety of the citizens of this country?

Judge O'CONNOR. Senator DeConcini, you have done a tremendous amount of work in this particular area, perhaps because of your background in law enforcement in Pima County and your continued interest thereafter at the State level and this body.

It seems to me that it is a subject of tremendous concern to a tremendous number of people.

We have truly an unacceptably high crime rate in our Nation. We certainly have an unacceptably high crime rate in the State of