

Senator DeConcini?

EXCLUSIONARY RULE

Senator DECONCINI. Thank you, Mr. Chairman.

Judge O'Connor, we have had some discussion today on the exclusionary rule—something that is being focused on by this committee. I wonder if you could comment on a decision that has already been handed down by the Supreme Court in 1971—the *Bivins* decision?

I do not expect you to give us any insight—because I do not think you could fairly do that—on how you would vote on it, and I am not asking that question, but I want to quote from that decision.

Chief Justice Burger declared:

I see no insurmountable obstacle to the elimination of the suppression doctrine—the exclusionary rule—if Congress would provide some meaningful and effective remedy against unlawful conduct by governmental officials.

My question is, Do you generally agree that it is an area that Congress properly, or any legislative body, could delve into and make changes as far as the suppression doctrine is concerned?

Judge O'CONNOR. Senator DeConcini, if I understand what you were reading correctly from Justice Burger, it was the suggestion that indeed Congress could appropriately provide a remedy to a citizen from whom evidence had been illegally taken by way of a civil damage action, for example, against that individual.

As I recall, the *Bivins* versus six unknown agents case actually held that indeed there is a cause of action against the peace officer who unlawfully violates someone's fourth amendment rights.

So I understand that that cause of action exists today by virtue of that decision, and I think the Justice was perhaps talking about Congress implementing some kind of remedy. I do not know that he was talking about an enactment to eliminate the doctrine, and I would hesitate to express a view on that.

Senator DECONCINI. Do you think it is a proper area, Judge O'Connor, for Congress to delve into and consider; and maybe if they come to the conclusion, do you have any problem with Congress altering the present Supreme Court decision on the exclusionary rule? That is really my question.

Judge O'CONNOR. I do not know, Senator DeConcini, whether it would be valid for Congress to simply by congressional enactment eliminate this judge-made rule—I cannot say—but I can, I think, safely say that I understand it is not a constitutional doctrine which has been invoked; it has really been a judge-made rule.

Certainly the study of Congress about the problem, and the consideration of it, and the factfinding process that goes on are of great benefit, I would say, to all of us including the courts as the courts reexamine the problem.

It cannot hurt, and it could certainly help to have a great deal of examination of the problems that have ensued and from factfinding.

Senator DECONCINI. Judge O'Connor, my research indicates that probably the paramount reason for the exclusionary rule to exist

and to be handed down by the Supreme Court was for the purpose of deterrence.

It is also interesting to note that six out of seven extensive studies that have been conducted in the last several years have all come to an easy conclusion, I might say, that it has not deterred the police or other law enforcement officials of abusive or illegal searches and seizures, which draws me to the conclusion that perhaps it is a proper time for Congress to consider some other remedy and provide some statutory area where the exclusionary rule might at least be modified.

Be that as it may, I believe we will address that problem here.

Your article that is constantly referred to in the *William & Mary Law Review* is one of the finest works that I have had the pleasure of reading.

I gather from it—obviously—that you feel the State courts ought to play a greater role in the whole judicial area, perhaps providing a little less pressure on the Federal judiciary.

Let me ask you this: What do you think is the proper role for the Federal Government as far as encouraging the State court system to conduct and accept a greater role? In addition to limiting some of the jurisdictional areas that you touch on in your article, do you feel that financial assistance, or educational programs, or training for judges or prosecutors or law enforcement officials; or do you have any thoughts on that subject?

JUDICIAL TRAINING PROGRAMS

Judge O'CONNOR. I do, Senator. In addition to the adjustments, as you mentioned, of any jurisdictional aspects that would encourage the State court systems to operate, it seems to me that judicial training programs are really of enormous benefit to State court judges, as I am sure they are to Federal judges. I am a believer and a supporter of those programs.

Naturally, they cost money; and for the judges to attend them some help is needed, whether it be at the State level or with other assistance.

Likewise, training programs are vitally important in the criminal justice system for the prosecutors and defense counsel.

Our legal system works at the trial level and the appellate level only to the extent that we have capable lawyers representing both sides of the questions. It does not work or function very well if one side is poorly represented in the case before the court.

Certainly, to the extent that we want the criminal justice system to operate well, I think it is vitally important that we have skilled prosecutors as well as skilled defense counsel, and that takes training.

These are young people for the most part, and you have to give them training as a substitute, if you will, for years of experience.

Senator DECONCINI. Judge O'Connor, can I take it that you do not have any philosophical problem with the Federal Government participating in some educational program, obviously subject to the ability of the Government to pay its bills—which has not been very outstanding in the past number of years—but it does not trouble you if there is assistance, from the standpoint of education and

training, offered by Federal programs—if there happen to be some good ones left?

Judge O'CONNOR. No, I cannot say that it does.

PERSONAL PHILOSOPHY OF ABORTION

Senator DECONCINI. Returning to the subject—and I am sure it probably will never end—of abortion, you have expressed your views a number of times here today and just now with Senator Dole. I wonder if you could share with us for just a few minutes not the voting record—I know you have had no judicial decisions on the subject matter that we could find—but your personal philosophy or feeling as to abortion so the record would be clear today?

Judge O'CONNOR. OK, Senator. Again let me preface a comment by saying that my personal views and beliefs in this area and in other areas have no place in the resolution of any legal issues that will come before the Court. I think these are matters that of necessity a judge must attempt to set aside in resolving the cases that come before the Court.

I have indicated to you the position that I have held for a long time—my own abhorrence of abortion as a remedy. It is a practice in which I would not have engaged, and I am not trying to criticize others in that process. There are many who have very different feelings on this issue. I recognize that, and I am sensitive to it.

But my view is the product, I suppose, merely of my own upbringing and my religious training, my background, my sense of family values, and my sense of how I should lead my own life.

Senator DECONCINI. Judge O'Connor, along that line I have one last comment about it. This is not something that has come upon you in the last year or two or the last 6 or 7 weeks; this is a commitment and a feeling that you have had for a long period of time, I assume from the answer to the question.

Judge O'CONNOR. I have had my own personal views on the subject for many years. It is just an outgrowth of what I am, if you will.

Senator DECONCINI. Thank you. I appreciate that response in depth regarding your own personal background.

I regret to some extent that it is necessary to delve into that, but I believe—as you can appreciate here—it is a sensitive subject among many Members on the many sides of this issue. I think it is very important that it be laid out clearly and precisely, and I think you have done just that.

JUDICIAL DISCIPLINE

To turn to another subject, one of great concern to me, Judge—many references today have been stated about the uniqueness of the status of a Federal judge, including a Supreme Court Justice, mainly that you will serve on the Court for your life.

The Constitution provides a mechanism by which the Legislative branch of Government may remove Federal judges, and I refer of course to the impeachment process.

As a practical matter, impeachment has been used only infrequently because of its cumbersome nature; plus, there has been

virtually total lack of supervision over Federal judges and the Federal bench.

A number of highly respected constitutional scholars has argued that the impeachment mechanism is a corollary to the separation of powers in the sense that the extraordinary procedure must be established when one branch of Government seeks to remove members of another branch of Government.

However, this formulation leaves open the issue of whether or not it is constitutionally tolerable to allow for some sort of mechanism wholly within the judicial branch itself that would enable Federal judges to discipline and maybe even remove errant or mentally disabled colleagues.

It is manifestly unfair to the citizens of this country, it seems to this Senator, to allow incompetent or alcoholic judges to continue to hear cases.

Do you believe, Judge O'Connor, that there would be a proper procedure or mechanism that could be set up constitutionally?

I might add that some of your soon-to-be colleagues on the Bench have expressed positive views in this regard and one or two of them some negative views.

I am interested in your overall position regarding judicial discipline and whether or not a mechanism, in your judgment, might be created within the Judiciary.

Judge O'CONNOR. Let me speak from my experience at the State level. Of course, as a State court judge I have been subject to periodic review by the electorate; and that is a process that has certainly not distressed me at all. I think it has been satisfactory and indeed helpful to know how you are viewed by the citizens for your performance.

In our State we also have a system that incorporates a commission which is charged under our State constitution with review of the capacity of any judge who is alleged to be incapacitated from service and who should be removed or disciplined in some fashion.

I think that that commission has worked well within our State, and I think it is appropriate and useful.

Whether it would work equally well at the Federal level I am not in a position to say because of course I have not been involved at that level.

Whether it raises constitutional problems is a matter that would have to be reviewed from the standpoint of reviewing a particular proposal, listening to the arguments, and so forth.

But speaking just in terms of my own personal experience, that kind of a system has worked satisfactorily in Arizona.

Senator DECONCINI. Most States have adopted such a system in some manner or another, and Arizona—I cannot remember when it was adopted. You may have been in the legislature when that occurred.

Judge O'CONNOR. I was—yes.

Senator DECONCINI. And you were probably a supporter of that legislation?

Judge O'CONNOR. I was—yes—and I have watched its operation and have felt that it was sound.

Senator DECONCINI. The question that comes, of course, is the one you touch on: The constitutionality—something extremely sensitive.

We have had testimony here on the Judicial Tenure Act which has passed both Houses and been enacted, not nearly as restrictive as I would have liked to have seen it, being one of the cosponsors, but certainly a beginning, endorsed by the Chief Justice of the Supreme Court and providing for some procedure to handle complaints within the various circuits and then some procedure to take those complaints further up if there was some merit.

That particular legislation excluded the Supreme Court from its consideration.

History shows us that impeachment procedures are really impractical today, and the struggle that a legislator has—and you might have had the same struggle when you were in the State senate—is how do you attempt to provide the citizens with some way to have a grievance heard when there is indeed a judge.

There have been a number of instances written about, a number of instances provided before our committee when we had this bill—the Judicial Tenure Act—before us last Congress, where indeed there was no question but that the judge was misbehaving under the good behavior clause and there really was no way except through peer pressure.

I take it from your answer that you are committed on the State and your experience is that it is very positive and that barring constitutional prohibitions you are not adverse, at least philosophically, to an approach on the Federal level.

Judge O'CONNOR. That is correct, Senator. My experience at the State level with it has been a positive one.

The concern that I hear people generally express is that as our society has grown so large and as people feel that they are faced with some kind of faceless bureaucracy in the Executive branch and with a tenured Judiciary, if you will, which is not subject to review on the other hand, it can be a sense of frustration for the common citizen. I can well appreciate the concerns that have caused consideration to be given to the problem.

How it will work in practice and whether there are any constitutional problems with what Congress has proposed I am refraining from suggesting.

Senator DECONCINI. I thank you, Judge O'Connor.

Mr. Chairman, might I suggest a short break sometime this afternoon at the appropriate time?

The CHAIRMAN. We plan to stop at 5, but if Judge O'Connor would like to have a break before then we would be pleased to allow it.

Judge O'CONNOR. Mr. Chairman, it is fine with me for you to continue—as you wish.

The CHAIRMAN. You prefer to continue?

Judge O'CONNOR. That is fine with me, Mr. Chairman—at your pleasure.

The CHAIRMAN. The judge says she does not need a break. [Laughter.]

Senator DECONCINI. Mr. Chairman, I just want to be sure you are taking care of her.