

Judge O'CONNOR. Well, Mr. Chairman, Senator Kennedy, I view with interest and concern the problems of the Native Americans, as I do every other discreet group which has suffered from disadvantages. I would approach each particular case involving a question of taxation or water rights or land ownership as I would any other case for any other citizen, I would hope, very evenhandedly. I would try to deal with it in as fair a manner as I know how. I am aware of the background and the heritage and the problems, and I would try to resolve the cases on the basis of the facts of the case and the law applicable to that particular situation.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah, Mr. Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have to apologize to you because I have to conduct my own committee this afternoon, so I will not be able to sit in and listen to your responses, but I have satisfied myself from our almost an hour discussion and other discussions subsequent to that, that you are an excellent choice for the U.S. Supreme Court and a long overdue one at that.

However, I do have some questions I think are important to put on the record, and I would like to just take a few minutes of your time and ask them here today.

In a number of decisions over the years, the Court has held that the 14th and 15th amendments require proof of intent or purpose prior to a finding of a constitutional violation. Given that this is the standard, and given that Congress chooses to use either of these amendments as the basis for a statutory measure, would you believe that the Congress might constitutionally adopt some lesser standard for identifying violations?

I might add, putting policy aside, do you believe that the Congress would have to have constitutional authority to do this?

AFFIRMATIVE ACTION

Judge O'CONNOR. Senator Hatch, I am not sure I quite understand yet the thrust of the question. Now this is in connection with affirmative action?

Senator HATCH. Yes; it would be affirmative action, and let's use that as a perfect illustration. I will give you an illustration: In recent years, some in the civil rights community and in the Justice Department have developed a test for determining the existence of discrimination that looks to the effects or disparate impact of an otherwise neutral action, rather than to whether there is some discriminatory intent or purpose or motivation, in other words, some wrongful state of mind.

Now considering that, and considering that the Court has held in a number of cases that the standard of proof generally requires some degree of intent or purpose, even circumstantially, do you believe that Congress could adopt a lesser standard than some proof of intent in these cases, and do you think that the Congress might constitutionally adopt some lesser standard in order to resolve some of these problems or identify violations?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, this whole area of affirmative action is one that has given rise, of course, to some fairly recent litigation touching upon both congressional enactments and State statutory enactments and policies.

In general, it appears to me that what the Supreme Court has done is to say that the enforcement clauses of the 14th and the 15th amendments, giving Congress the power to enforce those amendments by appropriate legislation, has been to acknowledge a power of Congress that goes beyond, if you will, the direct application of those amendments on their face.

In other words, if the 14th amendment or the 15th amendment on its face would have been held by the Court, as it has been, to require proof of discriminatory purpose, or intent, on the other hand the Court has said that Congress can apparently go beyond that in its enactments, to a degree.

I think the area of the law is still undeveloped in some respects but we are seeing several examples, at least, in court decisions that have been handed down where the power of Congress under the enforcement sections has extended beyond the bare applicability of the statutes. I would assume that Congress in its wisdom would be considering, as I know you are, the appropriate statutory resolution of these matters. I am sure that we will continue to see additional litigation.

DISCRIMINATORY INTENT

Senator HATCH. Let me put it another way: There seems to be a fundamental distinction between men and women of good will on the issue of identifying what constitutes "discrimination." To some, the act of discrimination requires some mental element, some demonstration of a mind purpose, or a motive. To others, statistical imbalance is enough to show racial or ethnic discrimination without any proof of intent whatsoever, even by circumstantial evidence or otherwise.

Do you have any views on this matter personally? In other words, can you brand somebody a discriminator or as racially motivated or a racist without some element of intent, whether it is circumstantial or otherwise?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, again without intending to represent that this is a legal decision on any of these very complicated matters that would come before the Court, my general personal approach would be to look for discriminatory intent, evidence of that.

Senator HATCH. Thank you.

Yesterday Senator Metzbaum asked you a series of questions about 42 United States Code 1983, which is a very volatile subject today in American jurisprudence. His questions, it seemed to me, may have left a lingering impression that I would really like to see resolved.

He maintained that Federal rights such as those arising in social security cases and the like should be accorded a right of access to the Federal courts. Now is there any particular type of claim or particular class of cases that give a claimant a right to have his claim adjudicated in the Federal courts?

Maybe I could clarify that even a little bit more. In the *McCurry* case of this year, the Court reversed a court of appeals holding that appeared "to be a generally framed principle that every person asserting a Federal right is entitled to one unencumbered opportunity to litigate that right in the Federal district court, regardless of the legal posture in which the Federal claim arises, but" the Court continues "the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee but leaves the scope of the jurisdiction of the Federal district courts to the wisdom of the Congress."

The Court then proceeded to reject every other "conceivable basis for finding a universal right to litigate a Federal claim in a Federal district court."

Now does this Supreme Court language seem to support your reading that the State courts are worthy of more credence in these type of cases?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I do not know whether that is what the Court had in mind when it wrote those words, but we have discussed I guess at length in these hearings my belief that indeed State courts can provide a hospitable forum for the hearing of Federal rights.

Certainly the Supreme Court in the recent session handed down several decisions in this whole area of examining Federal statutes to determine when those statutes created a cause of action for someone and when they did not. It appears to me to be an area in which the Court, at least more recently is looking more closely at the congressional legislation to determine if indeed there is such a right.

This is an area, I might add, in which I think the Congress has a very important role as well as the courts, Congress in its role to make clear whether it intends to be creating some cause of action, and if so, what.

Senator HATCH. Yesterday, in response to one of Senator Thurmond's questions, you noted that you supported a bill in the Arizona Senate, 1165, I believe, which disallowed funding for abortions unless medically necessary, but later you told Senator Dole that this bill basically reflects your views today, or at least that is the way I understood it. How did you understand the meaning of "medically necessary" in 1974, and can you draw a distinction, either in your past role as a State legislator or in your current role as a judicial nominee, between Federal rights and Federal funding to further rights?

Judge O'CONNOR. Mr. Chairman, my recollection is that that is not exactly the language of the bill, and I will refer to it.

Senator HATCH. I am not sure myself.

Judge O'CONNOR. It contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of the mother—

Senator HATCH. I see.

Judge O'CONNOR [continuing]. Or where pregnancy resulted from rape, incest, or criminal action. That was the language of the bill.

Senator HATCH. Therefore, you would limit it to that language.

Judge O'CONNOR. That was the provision to which I referred, which was adopted and passed. The other portion of your question was—

Senator HATCH. The other portion was, can you draw a distinction either in your past role as a State legislator or in your present role as a judicial nominee, between Federal rights and Federal funding to further rights?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, yes, I think that the establishment or recognition, if you will, of a particular constitutional right has been held by the Court not to carry with it a right to funding for the exercise of that right, if that is what you mean, and I believe that has been reasonably established.

Senator HATCH. I think that helps.

Several recent Supreme Court decisions have sharply—I will go back to that *Thibidoe* decision that I brought up prior because I think it is an important issue of today—several recent Supreme Court decisions have sharply expanded the liability of municipalities under section 1983. The *Thibidoe* case, for an example, extended the scope of 1983 to include violations of any Federal law instead of just civil rights law. The *Owens* case eliminated even the good faith defense for municipalities.

Now what distinctions would you make to prevent further expansion of 1983, or really can it be expanded any further?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I am not sure that I know that it can. Since the *Thibidoe* case the Supreme Court has handed down several additional cases to which you have referred this morning which have in fact not found a cause of action being created in those specific contexts of the legislation, so I think *Thibidoe* has been modified to a degree by subsequent cases.

Senator HATCH. It has been expanded, in many ways.

Judge O'CONNOR. It has been expanded in other areas. Certainly the municipalities have no good faith defense, although I think the other public officials and employees are still granted the good faith defense.

Another recent case has held that no punitive damages are allowable.

Senator HATCH. Of course, you cannot convince the municipalities of that because there are multibillions of dollars of actionable claims against municipalities all over this country today, as a result of *Thibidoe*, both the *Thibidoe* and the *Owens* cases.

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I think it is a matter of concern and I think it is a matter of concern not only within the context of individual cases to come before the Court but to the Congress itself as it reviews these provisions.

ATTORNEYS FEES

Senator HATCH. In your article in the *William & Mary Law Review*, you indicate that the attorneys fees statute, section 1988, might profitably be modified to reduce the number of section 1983 suits and to reduce the burden on State and local governments. Now since we are discussing that in our committee now—on the Subcommittee on the Constitution, which I chair—do you have any

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.