CONCERNS OF THE POOR

Senator METZENBAUM. Judge O'Connor, your testimony yesterday led us down some paths about which I would like to make a few comments.

Your thoughts for limiting attorney's fees in section 1983 cases and keeping the $10,000 jurisdictional prerequisite for other Federal question cases, in my opinion, actually strike at the heart of Federal jurisdiction.

I think that what disturbs me particularly is that apart from whether the Federal courts should have this jurisdiction in general, the attorney's fee and $10,000 limitations actually strike only one group of litigants, and that is the poor. That is one reason Congress created the right to attorney's fees in section 1983 cases just a few years ago, in 1976.

Since this is a matter that seems to me to be so relevant, since I am concerned that if there is any group of people in this country at the moment who are the forgotten people of the country and who are going to be even more forgotten in the months and years ahead, I am disturbed about that kind of expression or that direction.

I wonder if you would care to comment, because in your past legislative history, in all fairness, I see nothing to indicate that you have been indifferent to the concerns of the poor.

Judge O'CONNOR. Senator Metzenbaum, indeed I am not indifferent to the concerns of the poor.

The legislation in section 1988, as I read it, is certainly not limited to the award of attorney's fees to people who are impoverished. Indeed, I suppose a very wealthy individual can file a suit under section 1983 and seek attorney's fees under section 1988. So I do not believe that the legislation, as drafted at least, is in any way limited to a protection of the poor.

No doubt a portion of the motivation for its enactment was to enable suits to be brought by anyone regardless of their means to do so.

Senator METZENBAUM. But the attorney's fee question hurts them the most because those who are the "haves" can hire their own lawyers. It is the "have nots" who really have the difficulty of finding counsel, and counsel taking it then on an "if come" basis could get awarded attorney's fees under the law. Your article suggests a contrary point of view.

Judge O'CONNOR. Senator Metzenbaum, my article suggested that Congress should review very carefully its delegations of authority to sue in the first instance and also a review of those matters in which it thinks attorney's fees provisions are appropriate.

The article in no way suggested that that was a function of the judiciary, and I am sure that Congress in its wisdom will consider all of these factors as it makes this type of review.

I have not suggested, I think, that people who are impoverished be denied access to the courts. In fact, that would be a most unfortunate suggestion and one which I would not make.

But the extent to which Congress wants to authorize suits in the first instance in the Federal courts as opposed to the State court

and the extent to which Congress wants to authorize suits and have attorney's fees a possibility are appropriate things, it seems to me, for the Congress itself to consider as a matter of policy.

MORE LITIGATION IN STATE COURTS

Senator METZENBAUM. You mention the matter of the State courts. Actually you also suggest that more litigation ought to be in the State courts rather than just full access to the Federal courts.

But actually State courts really have had more experience in the constitutional issues where criminal matters were involved, and much less experience with respect to civil constitutional claims, which are the subject of all section 1983 civil rights cases and other Federal question cases. You would agree with that, would you not?

Judge O'CONNOR. Yes; I would agree generally that the expertise of the State courts in the constitutional area, while not exclusively confined to criminal cases, has been primarily in terms of numbers in that area.

I think that the State courts have developed a pretty good capacity to deal with those questions, and I see no reason why that capacity could not be extended to other areas as well.

Senator METZENBAUM. In view of your desire to shift Federal question and section 1983 cases to the State courts and to rely on the State legislatures as indicated by your response to the Judiciary Committee questionnaire, would you disagree with this statement by Justice Stewart speaking for a unanimous Court in *Mitchum* v. *Foster* in 1972 that, "the very purpose of section 1983 was to interpose the Federal courts between the States and the people as guardians of the people's Federal rights to protect the people from unconstitutional actions under color of State law whether that action be executive, legislative, or judicial"?

Obviously, he is saying that we need to have that Federal right and the right to go into the Federal court because in many instances the denial of rights occurred not alone at the executive level, not alone at the legislative level, but also at the judicial level.

If you force those cases back into the judicial level, then how does the litigant get a chance to protect his or her civil rights?

Judge O'CONNOR. Senator Metzenbaum, I do not disagree at all with the statement that you read. The framework of review could of course encompass making an initial presentation of one's case at the State level in any given situation, and if it were believed that a Federal right had been violated and that it was not adequately vindicated at the State level then to pursue the remedy further through the Federal courts. That certainly is a possibility, it strikes me.

Senator METZENBAUM. I am not sure I follow that. If you cannot get your rights litigated and the court has ruled against you in the State court, are you suggesting that you could relitigate the issue in the Federal courts?

Judge O'CONNOR. I am suggesting, Senator Metzenbaum, that to the extent that one is in a Federal court and believes that the

result on an issue of Federal law was erroneously received or determined one can raise that issue then in the Federal court.

Senator METZENBAUM. Do you not think res judicata would prevail to cause the Federal court to dispose of that matter rather summarily on the basis that the case had been decided and the constitutional issue had been raised in State court?

Judge O'CONNOR. Senator Metzenbaum, not if you are appealing from that very matter of course res judicata is not attached. If you are pursuing your remedy in Federal court, and you feel an error has been made, and you then go to the Federal court for review, no, you are not precluded from doing that.

If on the other hand you had litigated your case, and dropped it, and had taken no appeal or petition for review in the Federal system, and then tried to pursue it again, yes, then you would have a res judicata problem.

Senator METZENBAUM. If you had litigated the issue in the State court, and the State has ruled that you had no Federal right or constitutional right, and you do not appeal, and then you file suit anew in the Federal court, is it not entirely probable or logical that defense counsel would immediately file a motion to dismiss on the basis of res judicata?

Judge O'CONNOR. Yes, Senator Metzenbaum, if you do not pursue your immediately available remedies within the Federal system and let it be terminated at the State level. Yes, of course, you are thereafter precluded.

Senator METZENBAUM. What would be the immediately available remedy in that instance? You have lost in the State court; now what is your immediately available Federal remedy?

Judge O'CONNOR. You can file your petition for certiorari of course if it has been determined adversely on the Bederal issue. If you have gone to the highest State court you can certainly do that.

Senator METZENBAUM. Now you have to take your case all the way up through the appellate procedure and then file your petition for certiorari with the Supreme Court. That really is not really a very practical remedy for the average litigant because by that time he or she has pretty well run out of money, particularly if they are not well-heeled. That would mean you were in the fourth court: You had been in the lower court, the appellate court, and the supreme court of the State, and then you take the case on certiorari. Then you have to make out that Federal issue that is involved.

I just wonder whether realistically speaking, by moving more of the civil cases through the State courts and forcing litigants there and also denying them their attorney's fees, a great injustice would not be done to hundreds of thousands and maybe millions of Americans who might otherwise want to litigate a Federal question.

Judge O'CONNOR. Senator Metzenbaum, these are the precise things that I would assume this body would consider when it considers that issue. Of course you want to review all these matters very carefully. I am sure that the Senate in its wisdom will do precisely that.

JUDICIAL ACTIVISM

Senator METZENBAUM. All right. Let me change the subject. In your response to the committee's questionnaire and your other answers here you have made it very clear that you are opposed to "judicial activism."

Exactly what is and is not judicial activism is not that easy to define. It is very easy to say that the Supreme Court or the court should not make laws.

I would like to ask some questions about some of the major issues in some cases that have already been decided by the Supreme Court. Most of them are quite old and probably will never again come before the Supreme Court.

The *Baker* v. *Carr* case—this 1962 decision allowing the Federal courts to require local legislative bodies to be fairly apportioned—probably did more to reshape our political system than almost any other decision of the Supreme Court. It largely ended the gross malapportionment that existed in many States.

In your opinion was that decision an inappropriate exercise of judicial activism?

Judge O'CONNOR. Senator Metzenbaum, you are correct in your characterization of the dramatic results of that decision and its progeny. I think what the Court really did in *Baker* v. *Carr* was to reexamine the question of what is a political question which the Supreme Court will or will not consider.

I think before *Baker* v. *Carr* the Court had taken a more restrictive view, if you will, of what is of justiciability—of what is a political question—and in what case will the Court avoid deciding it at all because it is a political question.

In *Baker* v. *Carr* it really drew more liberal lines, if you will, in determining what is a political question which the Court will consider. That now appears to be the leading case on the subject of what is or is not a political question.

Senator METZENBAUM. And that is the case that established the one man, one vote rule.

Judge O'CONNOR. That is correct.

Senator METZENBAUM. Was that an inappropriate exercise of judicial activism?

Judge O'CONNOR. Senator Metzenbaum, I may have been heard to comment at the time that it concerned me but—that perhaps it was. Certainly the time that has intervened in the meantime and the acceptance of that decision has put it pretty much in place in terms of its present effect and application.

SEX DISCRIMINATION

Senator METZENBAUM. Do you think there was inappropriate judicial activism in 1971 for the Burger Court to rule for the first time in *Reed* v. *Reed* that sex discrimination was unconstitutional?

Judge O'CONNOR. Senator Metzenbaum, it was in my view an appropriate consideration of the problem of gender-based discrimination.

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.