

The CHAIRMAN. Senator Leahy of Vermont.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Thank you, Mr. Chairman.

If I had to choose one moment to explain the most about the way the American system of government worked, it would probably be the moment when we choose a Justice of the Supreme Court. It is a moment when the interests of all three branches of Government join, also when the guardianship of the Constitution has to be safely conveyed.

The Supreme Court has succeeded as the interpreter of the Constitution, arbiter of great conflicts, not only because of wisdom and a sense of history but because even in the most divided times in this country, the American people have kept the sense and feeling of respect that the Court has earned. Above all, this has been a Court of fairness and a Court of competence. It is these qualities that must characterize any nominee to that Court.

I believe that Judge O'Connor comes to this committee with impressive credentials, and I praise President Reagan in making this appointment. I also praise his wisdom in picking somebody who has historical ties to the State of Vermont, and I am sure that that must have had something to do with the position you find yourself in today.

Her tenure on the appellate division bench has not been long in years but I think, to go back to some of the history that Senator Dole referred to earlier, we should realize that only 60 of the 101 Justices sitting now or in the past have had any prior judicial experience. Only 41 of these had over 5 years of service when confirmed, and among those who had no prior experience were included John Marshall and Joseph Story, Roger Taney and Louis Brandeis, and if you do not count his service as police judge, Hugo Black.

Our examination of Judge O'Connor's judicial philosophy, that is relevant and important, but we should not condition our confirmation on her agreement with any opinions of ours, so long as her philosophy is within the norms set down by the Constitution itself. We are a pluralist republic, no less on the bench than in a Vermont town meeting or a national election.

I enjoyed my own visit with Judge O'Connor. I told her at that time I really did not care whether she was a Republican or a Democrat, a conservative or a liberal. That is not the issue. The issue is one of competence and whether she has a sense of fairness. I am convinced on both counts.

No one can now safely forecast the issues that will dominate the coming years on the Court, but certain questions never will and never should go away—how to balance the powers among the branches of Government and how to maintain the Court's coequal status while serving as the ultimate forum on the actions of other branches and States, will always be perplexing. The right answers have never been obvious, and they will not be during the time you serve on that Court. So far in our history there has been a remarkable acceptance of judicial interpretations, a willingness to make the necessary changes to conform to judicial mandate.

Federalism is another issue that will never be settled for all time. However, Judge O'Connor's background as a jurist, a legislative leader, and a legal writer convinces me that she would bring to the Court a bounty of practical experience in dealing with these sensitive issues.

However, in the end the Court's highest duty is liberty. In the United States there is no national dogma, no unvarying platform, no orthodoxy save the notion that all other rights proceed from the right of free expression. Not every Supreme Court decision will be popular, and decisions upholding nonconformist expression will be particularly unpopular.

John Chipman Gray once wrote that "A court generally decides in accordance with custom because a community generally thinks its customs right.* * * The custom and the ethical creed are usually identical. But which of the two is the real source of the law is shown in the cases where they differ."

There may come times when the modern electronic revolution—television, political polls, and computer-armed direct mail experts on the right or the left—may demand instant consensus. However, one institution that must survive such times is the Supreme Court, where instant consensus must never result in instant justice.

In conclusion, as Justice Brandeis once said, "If we would guide by the light of reason, we must let our minds be bold." I think you have a mind that is and will be bold, Judge O'Connor. I welcome you here today, and I look forward to these hearings.

Thank you.

[Material follows:]