Opening Statement
of
Senator Patrick J. Leahy
Before the
Senate Judiciary Committee Hearings on
the nomination of Judge Sandra Day O'Connor to be
an Associate Justice of the Supreme Court
of the United States
September 9, 1981

If I had to choose one moment that explained 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 and a moment when the guardianship of the Constitution must be safely conveyed.

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

Judge O'Connor comes to this Committee with impressive credentials, having been active in the practice of law, in the leadership of the Arizona Senate, as a trial judge, and thereafter a state appellate judge. While her tenure on the Appellate Division bench has not been long in years, it is easy to forget that the Supreme Court demands a diversity of talent and experience, more than length of service in the judicial branch. Only 60 of the 101 Justices sitting now or in the past have had any prior judicial experience, and only 41 of these had over five years of service when confirmed. And among those with no prior experience whatsoever were John Marshall, Joseph Story, Roger B. Taney, Louis D. Brandeis, and Hugo L. Black (if you exclude his service as a police judge).

These next days will give us a chance to hear Judge O'Connor's views on a wide range of legal topics. But while our examination of her judicial philosophy is relevant and important, we should not condition her confirmation on her agreement with any opinions of ours, so long as her philosophy is within the norms set down by the Constitution itself. Ours is a pluralist republic, no less on the bench than in a Vermont town meeting or a national election.

IT MAY BE SAID THAT EVERY NEW JUSTICE COMES TO THE SUPREME COURT AT A PARTICULAR CONSTITUTIONAL MOMENT. IF THE WISDOM OF THE CONSTITUTION IS ETERNAL, THE TASK OF DISCOVERING THAT WISDOM IS NEVER-ENDING. NO ONE CAN NOW SAFELY DESCRIBE THE PRESENT CONSTITUTIONAL MOMENT OR FORECAST THE ISSUES THAT WILL DOMINATE THE COMING YEARS ON THE COURT. BUT CERTAIN QUESTIONS NEVER WILL AND NEVER SHOULD GO AWAY. ONE IS HOW TO BALANCE THE POWERS AMONG THE BRANCHES OF GOVERNMENT. THE SUPREME COURT ULTIMATELY DECIDES IF THE WILL OF CONGRESS HAS BEEN FOLLOWED WHEN LAWS ARE APPLIED OR, IN SOME INSTANCES, IF CONGRESS HAS FAITHFULLY FOLLOWED THE CONSTITUTION.

ALL WILL AGREE THAT THE POWER TO DECLARE THE ACTS OR RESOLVES OF OTHER BRANCHES OF GOVERNMENT INVALID HAS NEVER RAISED THE COURT OVER THE OTHER BRANCHES OR OVER THE STATES. MAINTAINING THE COURT'S CO-EQUAL STATUS WHILE SERVING AS THE ULTIMATE FORUM ON THE ACTIONS OF OTHER BRANCHES AND THE STATES WILL ALWAYS BE PERPLEXING. THE RIGHT ANSWERS HAVE NEVER BEEN OBVIOUS. FOR EXAMPLE, WHO WOULD HAVE QUIBBLED WITH THE WORDS OF THE COURT WHEN IT SAID IN 1946, "IT IS HOSTILE TO A DEMOCRATIC SYSTEM TO INVOLVE THE JUDICIARY IN THE POLITICS OF THE PEOPLE." YET I QUOTE FROM A CASE THAT DECLINED SUPREME COURT REVIEW OF STATE APPORTIONMENT DECISIONS, A CASE OVERRULED IN 1962 BY BAKER V. CARR. AND WHO WOULD ARGUE TODAY THAT FOR NEARLY 20 YEARS SINCE BAKER THE CAUSE OF EQUAL REPRESENTATION HAS DRAMATICALLY IMPROVED BECAUSE THE COURT DECIDED, RELUCTANTLY, THAT THERE ARE MOMENTS TO BECOME INVOLVED IN CONTROVERSIES GENERALLY LEFT TO THE STATES?

SO FAR IN OUR HISTORY THERE HAS BEEN A REMARKABLE ACCEPTANCE OF JUDICIAL INTERPRETATIONS AND A WILLINGNESS TO MAKE THE NECESSARY CHANGES TO CONFORM TO JUDICIAL MANDATE. THE WILLINGNESS COMES FROM A RESPECT FOR THE COURT AS AN INSTITUTION THAT PLACES JUSTICE OVER PERSONALITY AND PRESSURES OF THE MOMENT. THAT WILLINGNESS WILL BE RENEWED AND THE COURT'S READINGS OF THE CONSTITUTION WILL BE ACCEPTED AS THE LAST WORD SO LONG AS THEY CONTINUE TO MERIT WHAT LINCOLN ONCE REFERRED TO AS "CLAIMS TO THE PUBLIC CONFIDENCE." THAT CONFIDENCE MUST ENDURE, IF THE UNIQUENESS OF THE COURT IS TO ENDURE.

FEDERALISM IS ANOTHER ISSUE THAT WILL NEVER BE SETTLED FOR ALL TIME. CHIEF JUSTICE CHASE SAID MORE THAN A HUNDRED YEARS AGO

THAT "THE CONSTITUTION, IN ALL OF ITS PROVISIONS LOOKS TO AN INDESTRUCTIBLE UNION, COMPOSED OF INDESTRUCTIBLE STATES." TIME, CHANGE, AND THE MOBILITY OF OUR SOCIETY HAVE PUT TERRIBLE PRESSURES ON OUR UNION, AND THE GROWTH OF GOVERNMENT WEIGHS HEAVILY ON THE FABRIC OF FEDERALISM. JUDGE O'CONNOR'S BACKGROUND AS A JURIST, LEGISLATIVE LEADER, AND LEGAL WRITER CONVINCES ME THAT SHE WOULD BRING TO THE COURT A BOUNTY OF PRACTICAL EXPERIENCE IN DEALING WITH THESE SENSITIVE ISSUES.

BUT 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:

> "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 -- MAY DEMAND INSTANT CONSENSUS. ONE INSTITUTION THAT MUST SURVIVE SUCH TIMES IS THE SUPREME COURT, WHERE INSTANT CONSENSUS MUST NEVER RESULT IN INSTANT JUSTICE.

TODAY IS A TIME FOR THE COURT TO EXAMINE MORE DEEPLY THAN EVER THE LIMITATIONS ON ITS POWER AND ITS ROLE IN THE SCHEME OF OUR GOVERNMENT. BUT THE PRESSURES ON THE COURT TO YIELD UP THE GAINS OF THE PAST GENERATIONS IN LIBERTY AND EQUALITY MAY BE SUBSTANTIAL,AND IT IS THEREFORE ALSO A TIME TO BE WATCHFUL AND STRONG.

AS JUSTICE BRANDEIS ONCE SAID, "IF WE WOULD GUIDE BY THE LIGHT OF REASON, WE MUST LET OUR MINDS BE BOLD."

WE WELCOME JUDGE O'CONNOR AND LOOK FORWARD TO BEING WITH HER DURING THESE IMPORTANT HEARINGS.