

THE O'CONNOR SUPREME COURT NOMINATION, A CONSTITUTIONAL LAWYER
COMMENTS

(By William Bentley Ball)¹

As one whose practice is in the field of constitutional law, one thing stands out supremely when a vacancy on the Supreme Court occurs: the replacement should be deliberate, not impulsive. The public interest is not served by a fait accompli, however politically brilliant. The most careful probing and the most measured deliberation are what are called for. Confirm in haste, and we may repent at leisure.

Unhappily, the atmosphere surrounding the nomination of Sandra Day O'Connor to the Supreme Court is one almost of panic. Considering that the liberties of the American people can ride on a single vote in the Supreme Court, any politically or ideologically motivated impatience should be thrust aside and time taken to do the job right. Plainly, there is no need for instantaneous confirmation hearings, and the most painstaking effort should be made to fully know the qualifications—including philosophy—of the candidate. My first plea would be, therefore: Don't rush this nomination through.

My second relates indeed to the matter of "philosophy". Some zealous supporters of the O'Connor nomination (who themselves have notoriety as ideologues) have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say, in other words, that it should be of no significance that a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recital that the candidate is "personally" opposed to such a point of view. Why the qualifying adverb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

Philosophy is everything in dealing with the spacious provisions of the First Amendment, the Due Process Clauses, equal protection and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when, in these vital areas of the Constitution, there is really very little language to "strictly" construe. As to other areas of the constitution (e.g., Article 1, Sect. 4—"The Congress shall assemble at least once in every year . . ."), to speak of "strict construction" is also absurd, since everything is already "constructed".

It is likewise meaningless to advance a given candidate as a "conservative" (or as a "liberal"). In the matter of Mrs. O'Connor, the label "conservative" has unfortunately been so employed as to obfuscate a very real issue. The scenario goes like this:

Comment: "Mrs. O'Connor is said to be pro-abortion."

Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

Comment: "John Smith is said to be a mathematician."

Response: "Really? But he is from Chicago."

Whether Mrs. O'Connor is labeled a "conservative" is irrelevant to the question respecting her views on abortion. So would it be on many another subject.

The *New York Times* editorialized July 12 on "What To Ask Judge O'Connor". The four questions it posed (all "philosophical", by the way) were good. To these many another question need be added. For example:

What are the candidate's views on:

The proper role of administrative agencies and the assumption by them of powers not clearly delegated?

The use by IRS of the tax power in order to mold social views and practices?

The allowable reach of governmental control respecting family life?

Busing for desegregation?

The proper role of government with respect to non-tax supported, private religious schools?

Sex differentiation in private employments?

Freedom of religion and church-state separation?

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too—and important—would be questions to the candidate calling for agreement with, disagreement with, and

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discussion of, major prior decisions of the Supreme Court. Not the slightest impropriety would be involved in, and much could be gained by, public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made.

Even these few considerations make it clear that the Senate's next job is not to confirm Mrs. O'Connor but instead to find out who she really is—that is, what convictions she possesses on great issues. I thus return to my theme that deliberativeness, not haste, should be the watchword respecting the confirmation inquiry. The fact that a woman is the present candidate must not (as Justice Stewart indicated) be dispositive of choice. It should certainly not jackknife basic and normal processes of selection. At this point, no prejudgment—either way—is thinkable.

Other vacancies may soon arise. The precedent of lightning-fast decisions in the matter of choosing our Supreme Court Justices would be a bad precedent indeed.

The CHAIRMAN. Senator Specter of Pennsylvania.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. In exercising the Senate's prerogative to advise and consent, I think we should evaluate Judge O'Connor on her capacity to interpret the Constitution with respect to the legal issues that will confront the next generation as well as this generation.

Among the many difficult matters facing our society, none is more important than bridging the "generation gap." The genius of our Constitution is that it provides a framework for government spanning generations, eras, centuries—which depends on the quality of judicial construction that is up to this tough task.

Judge O'Connor, if confirmed at age 51, is likely to have a pivotal part in applying the Constitution 10 years from now in 1991, 20 years from now in 2001, and perhaps even 30 years from now in 2011.

No one said it better than Justice Holmes in *Abrams v. United States*, in 1919, when he wrote: "Time has upset many fighting faiths." As highly charged and important as the issues of today are, and there are many which fit that description, there will be totally unpredictable matters which could confront this prospective Justice in the next two decades and beyond into the 21st century. Accordingly, as I see it, our task is to confirm a Justice who has the intelligence, training, temperament, and judgment to span that generation gap.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The President of the United States has designated the distinguished Attorney General of the United States, William French Smith, to present his nominee, Sandra Day O'Connor, to the Senate Judiciary Committee. I now request the Attorney General to present the nominee to the Judiciary Committee.

STATEMENT OF HON. WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General SMITH. Mr. Chairman and members of the committee, I am very pleased on behalf of the President to present Judge Sandra Day O'Connor to this committee and to the Senate, his nominee for the position of Associate Justice of the Supreme Court of the United States.

In assisting the President with this nomination, in the weeks before and the weeks after he made his decision, I had the occasion