

LIMIT SUPREME COURT JURISDICTION OVER CONSTITUTIONAL ISSUES

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I would like to touch upon a subject that has been addressed by most Senators this morning and this afternoon—namely, what the proper congressional or Presidential response should be when there is profound disagreement with a Supreme Court interpretation of the Constitution.

The classic traditional response has been for Congress and the States to attempt to amend the Constitution through the amendment process.

Another remedy of course would be for the President to try to appoint nominees who were in accordance with the public's view of the issue.

A third approach would be for Congress to attempt to impeach a nominee. Additionally, Congress might try to override the Supreme Court by statute—albeit *Marbury v. Madison* would pose a problem.

A final solution—which has been the subject of discussion in this body in the last couple of years would be for the Congress to try to limit Supreme Court jurisdiction of the particular constitutional issue.

Earlier this morning you discussed with Senator Laxalt and another Senator on this committee the *McCardle* and the *Klein* cases and how the precedents in this area have been ambiguous. Furthermore, those cases were decided many years ago anyway.

My question is: As a matter of public policy—as Sandra Day O'Connor, private citizen—what is your view as to whether Congress should attempt to limit Supreme Court jurisdiction over constitutional issues?

Judge O'CONNOR. Senator, I really would feel constrained about giving you my armchair advice on how you should handle these things that are before you.

Senator BAUCUS. Excuse me. I am not asking for you to advise us on how to handle it. I am asking you as an individual citizen what your personal view is.

Judge O'CONNOR. When I was in the State legislature, Senator Baucus, we had occasion to consider a particular proposal—a memorial to Congress asking in that instance that an amendment be constructed to remove jurisdiction of the Supreme Court over a certain subject matter.

I did not support that memorial for the stated reason that I did not feel, as a State legislator at that time, that I wanted to recommend that the jurisdiction of the Supreme Court be limited by subject matter in that fashion.

That was my own response as a State legislator when I had occasion to consider that question. I was concerned that if it started in one area I did not know where it would end and that we could be left without a court to determine the final state of the law in that or other areas.

Senator BAUCUS. Is that still your present view?

Judge O'CONNOR. Senator Baucus, it would be representative of some of the questions and concerns which I would want to address

if I were to consider that question as a legislator or Congressman today.

Senator BAUCUS. What are some of the public policy considerations that come to mind on this issue?

Judge O'CONNOR. That which I have indicated—to wit: I believe it was contemplated by the framers of the Constitution that the judicial branch, and acting through the Supreme Court ultimately, would determine the final meaning, if you will, of the Constitution and of Federal law and would resolve conflicts on the Federal law which arose in the other Federal courts.

To the extent that such power is removed by removing appellate jurisdiction of the Court, then it would have the potential effect at least of leaving unresolved those differences that might arise among the several Federal courts and among the State courts, and it would also have the potential effect in any event of leaving in place any of the decisions which had previously been handed down and which gave rise to the concern in the first place.

Senator BAUCUS. So one potential danger would be that the 50 States could have 50 different interpretations of the first amendment—of free speech or free press. That would be one unfortunate result that might occur—is that correct?

Judge O'CONNOR. I think that is probably exaggerated because I have to assume that even if jurisdiction were presently removed over an area we would still have in place those decisions that had previously been handed down. So it is not as though it would be leaving everyone to write on a new slate, if you will.

Senator BAUCUS. But if Congress removed Supreme Court review, wouldn't Congress really be winking at the State courts and saying, "States, go ahead and rule your own way because there is no other body to override any decision you might make"?

Judge O'CONNOR. These are among the questions that I think have to be asked and addressed when we consider proposals of the kind which you describe.

CONSTITUTIONAL AMENDMENT PROCESS

Senator BAUCUS. Do you think that the constitutional amendment process works?

Judge O'CONNOR. Well, it has worked of course about 26 times, and at least we have that many on the books. Some others have been proposed which were not approved.

Senator BAUCUS. But do you think that the process is too cumbersome or too laborious to address unpopular Supreme Court decisions?

Judge O'CONNOR. Senator, there have been several instances in the history of our Nation where Congress has attacked a particular holding of the Court by means of offering a constitutional amendment, and it has been successful to the extent that amendments have in fact been adopted.

For example, the income tax amendment was really in reaction to a holding of the Supreme Court.

So I guess I have to respond that it can achieve the stated goal.

Senator BAUCUS. That is correct. It is my understanding, too, that in that case Senator Robert Taft argued against any attempt

to limit Supreme Court jurisdiction on that issue because he felt it better to address it by constitutional amendment—which was ultimately accomplished by the 16th amendment.

I raise the question because, during the debate on whether or not Congress should limit Supreme Court jurisdiction, those who favor such legislation argue that the constitutional amendment process is too cumbersome and too laborious.

I again ask you whether in your view you think the process is too laborious or too cumbersome or whether it works well. Do you think it is well designed as it is, or does Congress need the additional tool of limiting Supreme Court jurisdiction?

Judge O'CONNOR. The amendment process takes varying amounts of time to accomplish and various amounts of effort to achieve.

Our most recent example is with the 18-year-old voting amendment. It did seem to take particularly long before that process was completed.

We have a number of other amendments in our Nation's history which did not take long to complete. Others have taken much longer and have been much more complex, in terms of dealing with them.

So I think it just depends on a case-by-case basis with the particular subject in mind whether the amendment process is the appropriate one to consider.

There is another means, of course, of resolving issues which the Supreme Court has addressed and which many find to be unsatisfactory; and that process involves asking the Court by means of other cases to reconsider or distinguish the holdings which were found to be unfortunate. This is another way in which, over time at least, changes in unpopular decisions, if you will, have been modified.

Senator BAUCUS. I take it from an earlier answer you gave to another member of this committee that the Court should not be influenced by attempts in Congress to limit its jurisdiction or by what it reads in the newspaper but more influenced by the briefs and oral arguments of the cases before it?

Judge O'CONNOR. It does seem to me that the Court should make its decisions based on legal principles and not on its assessment of outside opinion, if you will.

It seems to me that the Court should review the facts of the particular case and consider the arguments that are raised, which may indeed be reflective of public concern, but should consider those arguments in the proper setting within the framework of the Court itself and within the framework of the oral arguments and the briefing that is done on the cases.

PUBLIC CONFIDENCE OF SUPREME COURT

Senator BAUCUS. Thank you.

I would like to turn to a second subject. According to a Louis Harris poll, in 1966, 51 percent of the American public had a great deal of confidence in the Supreme Court. In 1980, 27 percent of the American public expressed a similar confidence—a drop from 51

percent to 27 percent in 14 years. What, in your view, explains that drop?

Judge O'CONNOR. I am not sure that I can explain it. I suppose that a portion of it would have to be reflective of public perceptions of the results of particular decisions which have been widely publicized and would cause concern.

Perhaps it is a reflection, if you will, of the manner in which the Court has been treated in some form in the media; I do not know.

Perhaps we have more public discussion of the Court, or perhaps we have less. I am not sure which aspects have led to the change in the polls.

SUPREME COURT PRESS CONFERENCES

Senator BAUCUS. Do you think the Court should have press conferences?

Judge O'CONNOR. Do I think they should as a general rule have press conferences?

Senator BAUCUS. Yes.

Judge O'CONNOR. As a personal view only, I probably do not think that that is a good plan.

The Court does attempt to speak by explaining its reasoning and rationale in the published opinions that it issues, and the hope at least is that in that process the reasons will be sufficiently expounded.

EPITAPH

Senator BAUCUS. Finally—I told you I would ask you this question, which is: How do you want to be remembered in history?

Judge O'CONNOR. The tombstone question—what do I want on the tombstone? [Laughter.]

Senator BAUCUS. Hopefully it will be written in places other than on a tombstone.

Judge O'CONNOR. I hope it might say, "Here lies a good judge."

Senator BAUCUS. What does that mean to you? Do you want to be known as the first woman judge or the judge from the West, the judge who upheld civil liberties—just what does that mean to you?

Judge O'CONNOR. If I am confirmed I am sure that I would be remembered, no doubt, as the first woman to have served in that capacity; and I hope that in addition if I am confirmed and allowed to serve that I would be remembered for having given fair and full consideration to the issues that were raised and to resolving things on an even-handed basis and with due respect and regard for the Constitution of this country.

I would hope that on occasion my opinions could reflect clarity of thought and of word and be a reflection of the appropriate values and analysis that I think is merited of these constitutional issues to come before the Court.

Senator BAUCUS. Are there any institutional changes that you think should be made within the Court?

Senator BIDEN. You might as well let them know before you get there. [Laughter.]

Judge O'CONNOR. As the newcomer on the block I would hesitate to offer all those opinions. It would probably be inappropriate.

I am aware though that the Court has a greatly increasing caseload, and this is a concern I am sure because there are ever more decisions that have the potential for review and that need review, and the Court is limited by sheer virtue of numbers and hours in what can be done; this is a concern.

Senator BAUCUS. What in your view will be the most difficult question the Court will face in the next 25 years—the death penalty? Abortion? What will it be?

Judge O'CONNOR. I do not think I can answer that. It hears all the major issues of the day in one way or another. Most of those land before the Court, and it ultimately addresses most of those grave and serious concerns that this Nation faces in one form or another. I would not know which of those on reflection would turn out to be the most significant.

Senator BAUCUS. Thank you very much.

The CHAIRMAN. Judge O'Connor, I am sure you would agree that our constitutional form of government is probably the greatest form of government in the world. Many people feel that the Constitution is the greatest document ever written by the mind of man for the governing of a people.

In view of that I guess a good epitaph for a judge would be, "Here lies a judge who upheld the Constitution."

Judge O'CONNOR. I think that would be very apt, Mr. Chairman.

The CHAIRMAN. Thank you very much.

In view of that I think we can now recess, as we planned to, until 10 o'clock tomorrow morning.

[Whereupon, at 5:10 p.m., the hearing was recessed, to reconvene on Thursday, September 10, 1981, at 10 a.m.]

[Biography of Sandra Day O'Connor follows:]

BIOGRAPHY OF SANDRA DAY O'CONNOR

Birth: March 26, 1930; El Paso, Texas.

Legal residence: Arizona.

Marital status: Married; John Jay O'Connor III; 3 children.

Education: Stanford University; 1950, A.B. degree; 1952, LL.B. degree.

Bar: 1952, California; 1957, Arizona.

Experience: 1952-53, Deputy county attorney, San Mateo County, Calif.; 1954-57, Civilian attorney, Quartermaster Market Center, Frankfurt/Main, W. Germany; 1958-60, Private practice, Maryvale, Ariz.; 1961-64, Homemaker and childcare; 1965-69, Assistant attorney general, State of Arizona; 1969-75, State Senator, Arizona State Senate; 1975-79, Judge, Maricopa County Superior Court; 1979-present, Judge, Arizona Court of Appeals.