

Commentary

... with encore

By Nelson Lund
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Now comes the long-awaited mother of all confirmation battles. The assumption driving much of the coming storm is a belief our constitutional law will take a sharp turn to the right if President Bush replaces Justice Sandra Day O'Connor with the kind of conservative jurist he has often said he favors. According to this view, Justice O'Connor, the moderate pragmatist, has been the sole obstacle to a legal agenda that fills the political left with fear and loathing while the political right licks its chops.

Not so fast. Though it is true Justice O'Connor has disappointed conservatives in some areas, such as abortion and affirmative action, she has done more than many people recognize to slow a strong leftist trend on the court. And if she is replaced with someone perceived as a moderate or pragmatist, we can expect to see that trend to the left continued and solidified.

First, even if one assumed the ideal replacement for Justice O'Connor would be another Justice O'Connor, the president could not possibly identify such an individual. Justice O'Connor's generally cautious and pragmatic approach to law means many of her significant votes depended on highly personal judgments about the likely practical effects of court decisions. Picking another pragmatist would actually guarantee we will not get the same judgments we got from Justice O'Connor. Every pragmatist is different.

Second, Supreme Court candidates perceived as moderate, or even moderately conservative, almost always turn out to be leftists. History is filled with illustrations, from Harry Blackmun and John Paul Stevens to David Souter. If President Bush tries to find "another O'Connor," we will almost certainly end up with someone much more like "another Souter." This matters a lot because the current court is precariously tilted to the left, with Justice Kennedy often joining the four solidly liberal members.

Much has been made of a handful of 5-4 decisions in which Justice O'Connor joined court liberals to prevent conservative victories on issues like partial-birth abortion and racial preferences. Equal attention should be given to many 5-4 decisions in which she joined her more conservative colleagues to stop outrageous lurches to the left. These precedents will be gravely endangered if the president chooses anyone except a principled conservative.

In 2002, for example, the court considered a government scholarship program that enabled poor children trapped in failing public schools to transfer to any private school their parents chose. Justices Souter, Stevens and their two liberal allies would have declared this program violated the Constitution because "too many" parents chose to use these scholarships at religious schools. Justice O'Connor's vote stopped this cruel and unprecedented distortion of the Constitution. That could change if we get another "moderate" like those appointed by previous Republican presidents.

Two years earlier, Justices Souter and Stevens were part of the same coalition that wanted to let state and local governments force Boy Scout troops to accept homosexual activists as scoutmasters. Justice O'Connor refused to go along with this destructive intrusion, but the next "moderate" on the court could very well share this faction's indifference to the rights of unfashionable minorities like the Boy Scouts.

Even in areas where Justice O'Connor has most disappointed mainstream conservatives, she has not followed the rigid and uncompromising approach of the court's committed liberals. She has, for example, never endorsed abortion on demand or the unbridled spread of racial preferences throughout American life. More important, in numerous other cases involving important issues of free speech, law enforcement and federalism, Justice O'Connor has been part of a narrow five-justice majority rejecting potentially disastrous proposals supported by Republican justices who were seen as moderates or even conservatives when they were appointed.

Justice O'Connor has been a great judge in many ways, not the least of which has been her unshakable independence. She cannot rightly be claimed by either the political right or the political left. Her new admirers on the left know very well the next "moderate pragmatist" is almost sure to turn out much more like John Paul Stevens or David Souter than like Sandra Day O'Connor. A less fitting tribute to her genuine moderation could hardly be imagined.

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