

“A Good Judge”

CRAIG JOYCE*

Senator BAUCUS: 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.”
—Justice O’Connor’s Confirmation Hearing (1981)¹

Sandra Day O’Connor will get her wish. For almost a quarter of a century, on an enormous range of issues—from affirmative action, to gender equality and opportunity, to reproductive freedom, to lawyer professionalism, to the powers of government in time of war, to the place of religion in a pluralistic society, to the very structure of our federalism, and more—when an anxious Nation awaited the Supreme Court’s latest pronouncement, what it most often got was a commonsense opinion from the most reasonable voice in American law.²

As the Justice herself, however, would be the first to observe, there are places other than Washington, D.C., and spheres of activity other than service on the Nation’s Court, where good judgment comes in handy on the journey through life.

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The future Justice can take no credit, of course, for her good fortune in being born into the family of Harry (“DA”) and Ada Mae Wilkey (“MO”) Day,³ or for the good company over the years of her sister Ann (who gave her parents their nicknames when she was learning to spell and always has spoken of her sister as a role model) and her brother Alan (who took time from his own busy life to write, with the Justice, the loving memoir, *Lazy B*, that bears the ranch’s name).⁴

The rest of her life, however, has been full of good decisions of her own making, as the footnotes to this tribute attest. There were educational choices, like the decision of a homesick cowgirl who had spent her early school years away from the *Lazy B* except for



Although Sandra Day O'Connor's appointment in 1981 as the first female Justice was a landmark in Supreme Court history, she asked in her confirmation hearings only to be remembered as a good judge.

summers and holidays, but who, after cajoling her parents into allowing her to spend eighth grade nearer the ranch, reluctantly decided to return to the better education offered in the distant metropolis of El Paso. There were the decisions to go to college at Stanford, to take early admission there at the law school when few other women were so inclined, and to marry John O'Connor.⁵

After law school, having failed famously—at least in the light of history—to secure a first job in private practice,⁶ she took a non-paying position as a county government attorney, hoping eventually to move up. She did.⁷

Following a brief stint as a federal government lawyer in post-World War II Germany due to her husband's assignment there by the U.S. military, she and John settled back in Arizona, where she further rounded her professional experience, this time in private practice in a two-person partnership.⁸

She stopped work for five years to raise small children, taking on volunteer work and political activities, thinking that otherwise she might never get another job as a lawyer.⁹

She need not have worried.¹⁰ In due course, she returned to the work world full-time, making a deliberate tour of all three branches of state government. First, there was service in the Attorney General's office.¹¹ Next

came the state senate, where, after an initial appointment to an unexpired term,¹² she was twice elected by her fellow citizens to serve in her own right and, in only her second full term, by her fellow legislators to become the majority leader.¹³ After that, having seen the politics of the Legislature, she moved on to the bench on the state trial and appellate courts¹⁴—spearheading, as one of her final acts as an elected official, a successful initiative drive to convert Arizona to merit selection of state court judges.¹⁵

Sandra Day O'Connor's final career move came in 1981, when President Reagan, in his own act of supreme good judgment, appointed her to serve as the Court's 102d Justice.¹⁶

* * *

Despite her busy career, the Justice has managed to balance work with family—family first. The methods work. The proof is in the sons. Scott, the best (traditional) athlete in the family, also has become a gourmet cook par excellence. Brian, the family adventurer and an extreme sports devotee, has climbed the Seven Summits—the tallest mountain on each of the seven continents—and dived the Titanic. Jay, the indispensable “Funky Unky” to his brothers' children, retains the most dangerous wit, and the best pen, in the family.¹⁷ Each



Sandra Day O'Connor posed with sons (top to bottom) Scott, Brian and Jay and husband John during her 1969 campaign for the Arizona state senate. She was re-elected to a second term.

is successful in business. None decided to essay law (with two tough acts to follow, if they had).

All three turned out well. Somebody did something right. Not surprisingly, the sons—and siblings—have strong views about Justice O'Connor's talents as a judge of things non-legal.

Her scrupulous fairness—a “hang-up,” almost—remains a marvel to all. Each of the sons always has received “equal justice [and Justice] under law”: dinners, Christmases, visits for their friends to the Chambers in D.C.—

all patently equal (a trait they believe carries over to her work on the bench as well).

She retains, too, from her Arizona days, a determination to work candidly and straightforwardly *with* others, despite occasional perplexity when others fall short of her own standard (usually signaled by “Goodness!”—the strongest word in her vocabulary). The family sometimes has found her recurring admonition about speaking *of* others—“If you don't have anything nice to say, don't say anything”—difficult to observe, but it is advice she herself follows. Other frequent advice,

this time about thank-you notes: always write them, always by hand, and always promptly. Again, not easy to do, but she always does.

She does not pre-judge. Always open to new and different experiences, people, jobs and activities in her own life, she never pushed any of her offspring in particular directions, instead supporting them, whatever their pursuits. Always inquisitive and a good listener, when forced to make judgments about people, it is always “100% on how they are, not who they are.”

Still, it was always family first. One evening in Arizona when the boys were young and she was state senate majority leader, a group of legislators sat hammering out the language of a bill. Discussion dragged on. Finally, Senator O’Connor, mother, announced: “Everyone, we’ve got five minutes to resolve this. My son is leaving for summer camp tomorrow, and I’ve got to finish getting him packed tonight!” Language resolved, meeting ended, duffel packed.

The family all testify that those qualities abide today. “Whether you are family or friend or acquaintance, she touches you in some way. She doesn’t see herself as the world sees her. She doesn’t know how unique she really is.” A life well lived.

* * *

And always along the way, of course, from Stanford on, there was John J. O’Connor, III. They met when assigned to edit a law review article together. John suggested they finish the project at a local pub. They dated for the next forty nights and married at the Lazy B in 1952.

But for that fateful edit, others, perhaps in her Stanford classes or in later life, might have merited her consideration. She chose John. Great choice. Smart, handsome, decent. Irish, and a storyteller. Wonderful husband, wonderful father. Superb counselor, strategist, and partner.

By the time I met John, he was effectively the managing partner at Arizona’s oldest law



Off the Bench, Justice O’Connor took a keen interest in the upgrading and preservation of the Supreme Court building and its furnishings.

firm. I was the junior-most associate. He introduced me to his wife, by then a state court judge. They had a beautiful adobe home they had built, partly with their own hands, in Paradise Valley. He told me once, proudly: “I like to keep things simple—one wife, one job, one house.”

In time, things changed. John’s wife got a better job on the East Coast. They left Arizona and moved to Washington, D.C. He got a new position himself—and, in his spare time, started up the Supreme Court Husbands’ Auxiliary. Founding member, and still president.

John remains the best practicing lawyer I ever met. But on the wife/job/house front, he is now batting only one for three. He picked the right one to hang onto.

In recent years, Sandra Day O’Connor and her husband had to face together the cruelty of his declining health. She was, by then, the most powerful woman in American law. Another decision. She again chose John.¹⁸

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The rancher’s daughter always believed in good breeding. She and John excelled in that department themselves. Along the way, they also helped others.

In 2005, Justice and Mr. O’Connor came to Houston to visit our family. Typically, she volunteered for extra duty, speaking not only to students, faculty and staff at the University of Houston Law Center and a dinner for 1,000 downtown, but also at the schools of our two sons. Will, 16 at the time, and Matt, then 12, introduced the O’Connors at their assemblies.

Will told this story. In 1978, then-Judge O’Connor and her husband decided to set up Will’s future parents—her cousin’s daughter and his bag-carrier at the firm—on a blind date, without warning either one. Dinner and an opera (Mozart’s *Don Juan*, as it was known then in Phoenix) followed. Marriage, too, and further extension of the family. “If it weren’t for the O’Connors, I wouldn’t be here today,” Will said. A good choice indeed.

Matt related a different story, and not about matchmaking. The summer before announcing her retirement, the O’Connors came to see us in the New Mexico mountains where she had visited long ago as a schoolchild in El Paso. I mentioned that a particularly pesky, overgrown apple tree by the front porch would need to be taken down soon. Sandra Day O’Connor, Associate Justice of the Supreme Court of the United States, the first woman ever, the “five” in so many 5-4 votes, put the youngest members of the family to work picking, then headed for the sink and the stove. Voila! An hour later, we were enjoying the world’s best homemade applesauce. That apple tree has a lease on life as long as the cabin, and our family, endure.

* * *

In all things, a good judge.

ENDNOTES

*Note: The author attended oral argument on the first Monday in October for twenty-five Terms as Justice O’Connor’s guest, and edited Sandra Day O’Connor, **The Majesty of the Law: Reflections of a Supreme Court Justice** (Random House, 2003). This tribute is based on the cited sources, and on the personal reminiscences of Ann Day, Alan Day, Scott O’Connor, Brian O’Connor, Jay O’Connor, Molly Joyce, Will Joyce, Matt Joyce, and the author himself.

¹Hearings Before the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, First Session, on the Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, Serial No. J-97-51, at 112 (Sep. 9, 1981).

²See Craig Joyce, “Lazy B and the Nation’s Court: Pragmatism in Service of Principle,” 119 *Harv. L. Rev.* 1257 (2006).

³Pronounced “Dee-ay” and “Em-oh.” Sandra Day O’Connor & H. Alan Day, **Lazy B: Growing Up on a Cattle Ranch in the American Southwest** xi (2002). As described in Lazy B,

DA had refined features—a straight nose, neither large nor small, and hazel eyes that were alert and twinkling. He went bald at an early age. Perhaps to compensate, he always wore a well-trimmed mustache. He was

five foot eleven and well built. His most distinguishing characteristic was his genuine interest in everyone he met, whether poor or rich, educated or illiterate, well dressed or in rags. . . .

MO was a tidy package of good looks, competence, and charm. She could fit in at a gathering of Arizona ranch wives or at an elegant party in Washington, D.C. She was the only female role model we had, other than Grandmother Wilkey. She made a hard life look easy. In a harsh environment where weather, the cowboys, and the animals were all unpredictable, she was unflinchingly loving and kind. She created an appealing and delightful life for her family all her days.

O'Connor & Day, *supra*, chs. 3 (“DA”) & 4 (“MO”) at 28, 49.

⁴The ranch’s name derives from the brand selected for the cattle by the Justice’s paternal grandfather: a B lying flat on its side – that is, a “lazy” B. *Id.* at viii.

⁵See generally *id.*, chs. 11 (“School Days”) and 27 (“A Wedding”); and see *infra* regarding John J. O’Connor, III.

⁶Here is the story in her own words:

[W]hen I entered law school, I didn’t even think about the future, whether I would want to practice law, and if I did, what the job opportunities would be. I just assumed I would be able to get a job, and that was a very naive position, looking back.

I finally called an undergraduate woman friend of mine at Stanford, whose father was a partner in a well-known, very large California law firm, headquartered in Los Angeles. I said, “Ask your father, if you would, if he could get me a job interview in the law firm.”

She did. And he did.

I made the trip to Los Angeles. I sat down with the law firm partner doing job interviews, and we chatted for a little while, and then he said, “Ms. Day, how do you type?”

I said, “Well, medium. I can get by but it’s not great.”

He said, “If you can demonstrate that you can type well enough, I might be able to get you a job in this firm as a legal secretary. But Ms. Day, we have never hired a woman as a lawyer here, and I don’t see the time when we will.”

So that was pretty much the situation.

Justice Sandra Day O’Connor, “Remarks at the University of Houston Law Center,” at 2 (Mar. 10, 2005) (on file with the Supreme Court Historical Society at Opperman House).

⁷Again, as told by Justice O’Connor:

I really wanted to work as a lawyer. But how was I going to get a job? . . . I heard that the [District] Attorney in San Mateo County, California, just north of Stanford, had once had a woman lawyer on his staff. . . . I went to see him . . .

He said that he thought I had a very good record in law school, and he would certainly be happy to have me in that office. However, he had no vacancy, had no money to hire another deputy, and had no available office. . . .

So I went back to the Lazy B Ranch to get ready for our wedding. I wrote him a letter. . . .

I said, “I know you don’t have any money, but I’d be willing to work for a while, without pay, in hopes that you will get funding.”

And I said, “I know you don’t have any space, but I would be willing to sit anywhere your secretary sits, if she will have me as a companion in that office.” . . . So he consulted his secretary, and she said, “Great, I’d love to put a desk in here with mine.” . . .

[So] I went to work in that office. . . .

[A]fter a brief time there[,] . . . the [District] Attorney was made the [Superior Court] Judge for the area. . . . That opened up a position for the [District] Attorney. My supervisor . . . was made [District] Attorney. That opened up a slot for me, and so all was well.

Id. at 2–3.

⁸Again, Justice O’Connor:

Our neighbors were a television repair shop, a grocery store, a dry cleaner, and so on. We opened our doors, and we took whatever came into those doors. . . . Not the sort of problem that usually makes its way to the United States Supreme Court!

We had to pay the rent . . .

I remember representing one [criminal defendant] who was charged with writing a number of bad checks . . .

He said, “I didn’t write those checks. That’s not my handwriting.”

I said, “Well, we can probably take it to court and you can say what you’re telling me, but it’s possible you won’t be believed unless we get an expert witness, a handwriting analyst, to say, ‘No, it isn’t your signature.’”

He said, “Well, I don’t have any money.”

I told him, “I’ve asked, and the county won’t pay for me to hire an expert. But I’ll tell you what I’ll do. I’ll hire one, and we’ll see what we get.”

I paid for the services of the handwriting expert, who assured me that my client's signature was on that check.

So you live and learn.

Id. at 5.

⁹"I thought," as she recalled later, " 'Goodness, I've been marginal so far. After five years without any legal work, who's going to hire me then?' " *Id.*

¹⁰Nor did she, much. Confident from her youth that she could handle whatever life threw at her, to this day she displays in her Chambers a pillow, made for her by a friend, that reads: "Maybe in error, but never in doubt." She decides, and moves on.

¹¹"Same old problem. I asked the Attorney General of Arizona to give me a job. He was from the opposite political party, and he declined. We had an election. He lost. I reapplied. I was hired." O'Connor, "Remarks at the University of Houston Law Center," *supra* note 6, at 6.

¹²"I thought, 'Well, that would be kind of interesting—to be in the Legislative Branch.' I had been working out of the Executive Branch of the government, so I said yes."

Id.

¹³"[I]t was quite a challenge," as she said later:

I learned how to develop legislation that I thought was needed. I learned how to organize support to get that legislation passed. I learned what it takes to develop and enact public policy in a state legislature—and I suppose that knowledge is transferable. . . .

How do you do that? I think you do that by making friends on both sides of the aisle. And how do you do that? Well, you can ask all of them over to your house and fix a barbeque for them. I did that on a regular basis. And I did everything else I could think of to make relationships across party lines that would enable me to get that legislation passed.

Id.

¹⁴Not everyone can give up the elixir of electoral politics easily, but the future Justice did:

So [the senate] was good, but after a few years I worried that I was hearing too much flattering

commentary. Everyone who wants something had to come to me and would try to flatter me as a means of getting my support and attention. I don't think that's healthy.

So I thought, well, I ought to try the Judicial Branch of government, because as a judge, one person always loses, and one side is always going to say, "Judge, you're wrong."

Id. at 6–7.

¹⁵"By a narrow margin, that constitutional amendment passed. I lived in Arizona long enough after that to see the great benefit that change made in the quality and caliber of the judges Arizona had—and has to this day. It made a difference." *Id.* at 7.

¹⁶As of this writing, she is the twenty-fourth longest-serving Justice in history—just ahead of the retired Harry A. Blackmun and counting the still-sitting John Paul Stevens—at twenty-four years, four months, and six days. Her life on the Court (and before) is described in detail in Joan Biskupic, **Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice** (2005). Readers with curiosity about the interplay between the Justice's life on and off the Bench will find of interest her judgment, courage and determination in fighting and beating breast cancer during the Court's 1988 Term.

In all, Justice O'Connor wrote 676 opinions, as the Court's Library and I count them. Lexis insists that there were 680. It appears to me that Lexis lists O'Connor opinions in three cases—*Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); and *Overton v. Ohio*, 534 U.S. 982 (2001)—in which she merely joined in others' opinions. Lexis also double-counts the single O'Connor opinion in *McConnell v. FEC*, 540 U.S. 93, a case so long that Lexis breaks its report in two and thus lists the case twice. In matters concerning the Court, it seems best to trust the Library.

¹⁷Regarding the foregoing thumbnails, *cf.* Confirmation Hearings, *supra* note 1, at 58 (descriptions of the sons in 1981, updated here).

¹⁸"I am 75 years old," she said through a Court spokeswoman. "I want to spend more time with my husband."