

JUSTICE SANDRA DAY O'CONNOR

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Location: West Conference Room

Host: Susan Swain, C-SPAN

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SUSAN SWAIN, HOST, C-SPAN: Justice O'Connor, we're talking in the conference room at the Supreme Court on a very busy day that – just before the end of session, with many opinions being delivered today. I'm wondering how often you come back to the Court since you've retired?

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT (retired): My calendar has been rather haphazard since my retirement. I've not tried to set a specific schedule saying that, for instance, I'll be in Washington, D.C. one month and then Arizona another. I've instead accepted various specific engagements and have adjusted my calendar accordingly. In an ideal world, I think I would do it a little differently, but it hasn't settled down yet, and I hope it will.

I've been involved, as perhaps you know, with some projects concerning educating America a little bit about what the Framers of our Constitution had in mind when they established an independent judicial branch at the federal level. I think people have sort of lost sight of that over time. When our states first formed, they all followed the pattern set by the federal government with gubernatorial appointments of state judges and then with confirmation, typically by a state legislative action, either by the state senate or some larger action.

It was President Andrew Jackson who persuaded states to take a different approach. He was what we call a populist. It was his thinking that states should elect their judges in popular elections. What happened was that Georgia was the first state to say yes, that's a good idea, and they changed to popular election of judges. Many other states followed suit, and we can talk more about that later, but it hasn't been a wonderful development over time.

SWAIN: I referred back to the book that you wrote in 2002, I believe ...

O'CONNOR: Yes.

SWAIN: ... "The Majesty of the Law" ...

O'CONNOR: Yes.

SWAIN: ... in preparation of our interview today. In, early on in the book, you talk about the work of art in the Supreme Court courtroom, called The Majesty of the Law, Allegorical.

O'CONNOR: Yes.

SWAIN: ... and how it always had an important symbolism for you. Would you talk about that symbolism?

O'CONNOR: Well, it's just the symbolism that the Supreme Court itself has as the court in our country that has – whose opinions are binding on all of the lower courts, whether they're state or federal. Of course, the Court, the Supreme Court, is only responsible for deciding

issues of federal law, whether it's statutory or constitutional. The Court does not get involved in trying to interpret and apply state law. That's up to the states.

But the symbolism is that this is the highest court in the land, and the Framers created it after studying the great lawgivers in history, and taking a look at what they thought worldwide was important for the judicial branch to do and how it should be structured.

And as you know, the courtroom contains representative figures of great lawgivers in the past, and that concept was carried forward by the architects, I think, and with the knowledge that the Framers had also considered contributions from the great lawgivers of history. And so we have, I think, a very majestic courtroom representing indeed the majesty of the law in the process of governance.

SWAIN: You write in the book as that the first time you really experienced an oral argument was as a sitting – a brand new sitting justice ...

O'CONNOR: That's right.

SWAIN: Do you still have strong memories of that day, and if so, can you tell me about them?

O'CONNOR: Oh, my first day on the Court? It was such a remarkable feeling to have been sworn in as a justice of the Court, a position I never anticipated holding. I never aspired to that. I didn't think it was a realistic aspiration, and I never spent time thinking about it.

And all of a sudden out of the blue, here came inquiries about my availability to talk about a position on the Court. That was a shock. I didn't believe that it would occur because, in the first place, already serving on the Court was one of my classmates from law school, William Rehnquist. He had been a good friend. He lived in Arizona. I knew his wife as an undergraduate at Stanford. Nan and Bill Rehnquist were personal friends of my husband and mine, and it just was inconceivable to me that we would be asked to serve on the Court at the same time. There are many states that to this day have never had anyone serve on this court, and so for the small state of Arizona to all of a sudden have two at the same time was unimaginable to me.

And when I was interviewed by William French Smith and some of the cabinet members in the Reagan Administration, I didn't believe for a minute that I would be asked to serve. I went back to Arizona after those interviews and said to my husband how interesting it was to visit Washington, D.C., and to meet the people around the president, and indeed to meet the president himself and talk to him, but I said, 'Thank goodness, I don't have to go do that job.' I didn't want it. And I wasn't sure that I could do the job well enough to justify trying. I've often said it's wonderful to be the first to do something, but I didn't want to be the last. If I didn't do a good job, it might have been the last. And indeed, when I retired, I was not replaced then by a woman, which gives one pause to think, 'Oh, what did I do wrong that led to this?'

But I'm sure that the future will show that we have other women serving on the Court. It's hard to be the only woman on the Court, which I experienced for about 10 years or so, and in a population which these days produces at least 50 percent of law school graduates being women, it's realistic to think in terms of a number of women on the Court, not just one.

SWAIN: Back to that initial oral argument, having not come from the federal court system, sitting there and going through that process, high paced as it can be for the first time ...

O'CONNOR: Yes.

SWAIN: ... what was it like?

O'CONNOR: It had a sense of unreality about it for me because I still didn't believe that I was the person asked to serve on the Court. It just didn't seem real. And the arguments of the Court are not long. There's only an hour allotted for a case normally, unless extended time is granted. A half an hour goes very quickly for each side, particularly if the lawyers are asked a number of questions.

I discovered that indeed we did have members of the Court who liked to ask a number of questions. So the time at the oral argument went by very quickly. I was somewhat hesitant to ask questions at first because of my lack of experience in the courtroom at this level, and my lack of knowledge about how my new colleagues acted in that setting, and to learn how often they felt it was appropriate to ask questions and to learn how they asked questions, and how the whole process unfolded. I had a high learning curve at first. I had to see how the cases unfolded in the courtroom at oral argument and what was appropriate and what wasn't.

SWAIN: When you are sitting on the bench and watching the lawyers before you, are you cognizant of the public in the back or are you conscious of all that's going on in the room, or just focused on the lawyers making the case?

O'CONNOR: Normally the focus would be just on the lawyers making the case. There were a couple of times in the years I served when someone created a bit of a disturbance in the courtroom, and that was quickly resolved, and, of course, that would divert your attention.

For the most part, people in the audience are very quiet, and the staff at the Court escorts them in quietly and seats them and explains that they should try to be very quiet while in the courtroom. They're told not to even sit there taking notes. So, really, the focus is on the lawyers and what they have to say. And some focus is on your colleagues. If they're asking questions, you're interested in what it is that's troubling your colleagues. They can lead you into a new area of inquiry that perhaps you didn't have yourself.

SWAIN: Again, to the – your early days on the Court, everything you did was wrought with symbolism and creating new traditions. We talked with Justice Scalia about the fact that the members of the judiciary continue to wear robes.

O'CONNOR: Yes.

SWAIN: How did you make the choice about what your robe would look like as the first female justice?

O'CONNOR: Oh, I didn't make much of a choice. There were very few robes available. I didn't know anybody who made robes for women justices, and I think most of what was available was something like a choir robe or an academic robe for – often used for academic processions and graduations from universities. I think that was all that was available, and I

just got whatever was available, put it on. Harder was a choice for a woman, of a judicial collar.

I remember that when I first sat on the Court, I had a plain black robe that I'd used in Arizona in the courtroom, and I brought that robe with me. It was very simple. And I did not have a judicial collar in those days in Arizona. I just put it on over whatever I was wearing. And I was given a note that had been written by someone sitting in the audience one day in the courtroom, and it said, 'Dear Justice O'Connor, I've been in the audience watching the court today, and I noticed that you did not have a judicial collar. Now, all your colleagues were wearing white shirt collars, and they showed under the robe, and you just looked like a washed-out justice to me. What's happening here?' And so I took that note to heart. I thought, well, maybe I should try to find some kind of a white judicial collar of some kind that I could wear because I didn't always have a white shirt under the robe, and it was hard to find. Nobody in those days made judicial white collars for women. I discovered that the only places you could get them would be in England or France. I did manage to get a collar or two from France, and there was a woman who had been the first female judge in the state of Delaware. She was older at that time, and I had met her, and she gave me her judicial collar, which was kind of a lace thing that she had acquired somewhere down the line, and that was pretty elegant, so I used that as well.

But finding an appropriate judicial collar for a woman turned out to be quite a task.

SWAIN: Our cameras have visited the Robing Room.

O'CONNOR: Yes.

SWAIN: Obviously not when justices are there, but knowing that the Court is full of traditions, can you tell us what the procedure is like on a day when argument is being heard in the Robing Room?

O'CONNOR: First of all, on days of oral argument, a bell or buzzer is sounded in each chambers of a justice about 10 minutes ahead reminding you that in 10 minutes you're supposed to be on the bench. At that point, you need to go down to the Robing Room to get your robe on and be ready to go into the courtroom at the appointed hour. Chief justices don't like to be late, as you can imagine, into the courtroom. And the Robing Room just has a number of narrow little sections of a larger cabinet in which the justices' robe or robes are hung. Your judicial collar, if you have one, it can be on the shelf. And so you go there and there are attendants there, and you can pick out the robe that you're going to put on that day, if you have more than one, and they'll help you into the robe. You get it fastened in front, and in my case, then worry about getting the judicial collar on right, which can be a challenge in getting it out. And then, all the justices walk, as they are finished with that, into the conference room where we sit around a table and confer on the cases.

And at that place, it's the custom, happily so, that every justice shakes every other justice's hand before going in the courtroom. I think that's a great custom. Not all courts do that. I think it's wonderful. If you take someone's hand and shake it, you're much less likely, I think, to hold a grudge. There's something about human contact that matters.

SWAIN: In the pre-argument conference, what happens there? Are you discussing who might ask certain questions?

O'CONNOR: There isn't a pre-argument conference at all. You walk into the conference room. You put your robe on, and you shake every other justice's hand.

SWAIN: Just a gathering place before you go out ...

O'CONNOR: And when all nine are there and accounted for, the Chief Justice says it's time to go, and people line up in order of seniority. They're seated on the bench, and so you line up, cross the hallway to enter the back of the courtroom, and they divide-- three justices on the left, three in the middle, and three on the right, depending on where you're seated or where you're going to be seated.

And at -- when the chief justice gives the signal to some member of the staff, then the gavel drops in the courtroom by the marshal and people enter, the justices go up the two steps and stand behind their chairs until the formal introduction of the Court is made by the clerk of the Court.

SWAIN: And is it always a very solemn process?

O'CONNOR: Well, yes, it is. I mean, you don't go in there making a joke. You're not laughing. You're not talking. You're attentive until the Court -- the last gavel sounds and you're seated, and there may -- someone behind the chair helps you get your chair seated-- and the chief justice will normally call for the lawyers who are going to introduce and propose admission to the bar of some new member of the bar. That usually occurs first, and

then the chief justice will call upon the lawyer for the petitioner in the first case, and will call by name, and they come and proceed.

There are lights at the podium for the lawyer who's making the argument, and when the lawyer has only five minutes remaining, a yellow light goes on, and when the time is all up, a red light goes on, and depending on the chief justice, that can be closely observed or somewhat relaxed. When Bill Rehnquist was chief justice, he made them adhere to the time limits very strictly.

SWAIN: You mentioned that you line up in order of seniority. We've learned that seniority is important in the traditions throughout the operation of the Supreme Court. As the years progressed and you were able to move your seat ...

O'CONNOR: Yes.

SWAIN: ... along in seniority, does that make a difference in the way you approach the argument?

O'CONNOR: It makes a difference in what part of the line you're in when we're all lined up. You change your position. It doesn't change anything about the argument or what you do. You're still what you are, one of the justices, and some like to ask questions and some don't. We have justices who seldom ask questions, and we have justices who always ask questions. So that doesn't seem to change from whatever position they're in.

SWAIN: And what was your own approach to asking questions as the years progressed?

O'CONNOR: Well, I asked what I thought I needed to know. We all read the briefs before the oral argument. We spend a lot of time in advance of the oral argument preparing. We read the briefs filed by the parties to the case. And this court, unlike most courts around the world, allows the filing of Friend of the Court briefs by other interested groups or parties, not parties to this case, who want to weigh in on the issue. They can file an application asking leave to file a Friend of the Court brief, and if it's a timely request and there's no objection, it's granted.

And so we typically have a number of Friend of the Court briefs in addition to the ones filed by the parties. That means you've done a great deal of reading before ever coming into the courtroom, and the justices are thoroughly familiar with the arguments that are going to be made. And I'm sure that most of the justices, as did I, had a tentative opinion on every case before the argument began, how it should be resolved. I mean, we've done our homework, and you can't do that and not form some views about the particular case, the facts and the law.

And so when you go into the courtroom, you have tentatively concluded one thing or another about the case. But oftentimes, you still have questions. You'd like to know about some factual background or some legal position that's being urged and you have what-if kinds of questions, what if the facts were so and so instead of what they are in this case, how would it come out, there are lots of things you can ask.

SWAIN: You talked about justices having a tentative opinion before oral argument is heard. In other interviews we've learned about the initial vote that happens in conference after the

cases have been heard, a tentative understanding of which direction the final outcome might be.

But we've not gotten to the final stage of the process. How do you arrive at the final vote tally on any case? Take us from that conference room and the assignment of the writing of opinions to the final outcome.

O'CONNOR: All right. First of all, let me go back just a moment to the conference discussion on the merits of the case because that's very important. That discussion does not take place until later in the week during which the oral arguments are heard.

The nine justices get together around the table in the conference room and talk about the merits of the case. Normally there's only one discussion that takes place and it's that discussion. Sometimes there are cases where there isn't a clear consensus and there has to be a second discussion. That's the exception not the rule.

So normally it's the one discussion that occurs in that conference room in the week following the – in the week of the oral argument. And as you've heard, it starts with the chief justice and goes down the line to the junior justice.

And those discussions lead the justice to conclude tentatively to affirm or reverse in a particular case. Now that vote is not cast in concrete. You are not walking on wet concrete yet. You can change your mind.

Occasionally a justice will do that, but a writing assignment is made based on that first conference discussion. And if the chief justice is in the majority on the case, the chief justice

makes a writing assignment to someone in the majority asking someone, you write or I'll keep it myself or whatever it is.

Now, the dissenting view is also typically assigned by the most senior justice on the dissenting side if there's going to be a dissent. Sometimes the court is unanimous and that's a happy circumstance but that's in a minority of cases. I don't think – I don't know what it is at present but normally it runs about 15 or 20 percent of the cases being unanimous.

Now, once the person assigned to write for the majority opinion circulates an opinion draft, then the other eight have a chance to weigh in and normally they start acting within a day or two. They'll read it and say, "Dear Sandra, "I join," or, "Dear Sandra, I'll wait for the dissent," or "Dear Sandra, I want to give a little more thought to this before I act," or "Dear Sandra, if you will change A, B, C and D to E, F, G and H, I would be able to join."

I mean, it's something like that that happens. Now if there is a dissenting opinion to be written, often people will wait and look at the dissent before casting their vote. Now once the dissent circulates, it could be so powerful that it causes someone who tentatively had been with the majority to change their view to some extent.

So all of this, the details are worked out not around the conference table. It's in the writing of the opinions that the persuasion takes place. And that's appropriate because when you're sitting around with an oral discussion, it's too general, you can't be specific. When you have the words in front of you on a printed page and you read them exactly, then you can get specific about what it might be. If you see the words on a printed page then you can get very

specific on what it is that you might find some question about, so it really occurs in the writing.

SWAIN: Did you enjoy the intellectualism of the job? It seems as though there's so much that challenges one intellectually.

O'CONNOR: Yes, there is a lot. Deciding your view of the case itself is terribly challenging. Some of the issues are really tough. Some are not, some are clear cut, but some are enormously challenging. And some cause you to want to wait yourself until you see other views expressed before being firm in your own view, and it is a help to see it in writing. And it's a help when you have to write to have to put it down in words rather than just think it through. It's a real challenge and exciting.

SWAIN: Were there any particular types of cases that you were most attracted to?

O'CONNOR: No, I don't think so at all. Even a case on a subject that you think of as kind of boring can turn out to be enormously challenging at the end of the day. It could be anything, so I don't think subject matter determines the extent of your interest in it. It's the challenge of solving this particular question of law and making it work. It could be on any subject.

SWAIN: When the dissents or commentary written in the opinions, sometimes when you read them, they can be quite sharp and sometimes they sound a bit personal. Did you ever take them that way?

O'CONNOR: Yes and if I thought it was too unfortunate, I would go to the justice and say, you know, "I wonder if you really want to say that that way. Wouldn't it be a help if you removed this sentence or that sentence and said something a little more gentle?" I'm not averse, I was not averse, to making that request on occasion.

SWAIN: You write in "The Majesty of the Law" about the warm acceptance by the other justices of your arrival.

O'CONNOR: Yes.

SWAIN: As a whole, is this Court much like a family? Are the justices friends outside of the building as well as working in the hallways here?

O'CONNOR: Yes, by and large it is a very collegial group and I was very blessed for 25 years here to be at a Court where that was the case. It was not always that way and of course history, there have been times when certain members of the Court had strong antipathy to someone else on the bench. And that wouldn't be a happy time to be here. I was very grateful that during my years here people got along pretty well.

SWAIN: We have just about five minutes left and I have some sort of big and reflective questions for you. First about the building itself, you've had a bit of a distance and you've come back now to a place where you spend a quarter century of your life. What are your thoughts about this complex, and this building in particular, and its effectiveness as a symbol of the judicial process?

O'CONNOR: Well, the building's beautiful. You know, the architect, Cass Gilbert thought he had done such a great job that the U.S. Capitol should be moved so that people would have a better view of the Court, did you know that?

SWAIN: I didn't.

O'CONNOR: That was his view and I think he did create a beautiful building but there's no way the Capitol's going to be moved to provide a better view. It's built in the, I guess overall theme of a Greek temple and it has the beautiful steps up in front. It's marble from different places in the United States. And you walk through the marble hallway from the main entrance and into the courtroom, which is much like the Greek temple design. And it is an inspiring area. It's smaller than you might think if you hadn't been here before. It's not a huge courtroom. There are court of appeals courtrooms that are larger than this one.

And the offices of the justices are not large. There are many circuit court judges and even some district court judges in federal courthouses around the land that have larger chambers than those of a justice on this Court. So it isn't size that makes the grandeur or the specialness of the place. It's what it symbolizes and what goes on here that makes it special, and it is.

SWAIN: Do you have any favorite places inside this building that you tend to retreat to?

O'CONNOR: There's no place to retreat. You retreat to your own chambers if you want to get anything done. But we have a beautiful library upstairs, a reading room and there are tables up there.

There have been a few times when I had to use material from so many cases that we occupied two or three of those tables, leaving the books out so that the law clerks and I could go up there and sit up in the reading room and actually refer to all those passages in the preparation of an opinion. But that's not often. Normally we can put them on a cart and get them downstairs to use them downstairs, the books. In these times, you can find it on a computer screen, so you're more apt to use a computer screen.

When I first came to the court, we had very massive computers that were hard to use. They were called Atex machines. And they were not simple and you were not at all tempted to go to your computer. Today they tend to be small and agile and much easier to use.

SWAIN: You said at the outset that you've been spending a great deal of time hoping to educate people about the role of the court.

O'CONNOR: Yes.

SWAIN: As we conclude, will you reflect about the role of the Supreme Court in society and what you think people's opinions are that they should perhaps be educated about?

O'CONNOR: The Court, the Supreme Court in general has been respected by the American people. I think it's been one of the institutions of government that is most respected.

Obviously the legislative branch has a mix – creates a mixed impression among citizens because you have members from both political parties and offering very different views of things. And the president himself sometimes can be criticized by some groups and admired

by others. But the Court in general has had the respect and admiration of the people. I hope we can keep it that way.

There have been more criticisms of judges in general that I've heard in the last 25 years than has been typical in previous years with a few exceptions, and that distresses me. So I think it is time that Americans wake up to what it is the Framers had in mind when they tried to create an independent federal judicial branch.

They had a clear vision in mind and that was that the federal courts would be deciding issues of federal law, constitutional and statutory. And that those judgments would be binding on all courts, state and federal.

That was the Framers' concept, and they provided no term of years for the service. It says that federal judges will serve for good behavior. They provided that the salary of a federal judge could not be reduced during that term of service of a federal judge. So the Framers very much did not want the other branches of government imposing sanctions on federal judges by virtue of some decision with which they disagreed, and that was a remarkable concept.

SWAIN: You told us at the outset that when you came home from the interview with William French Smith, you – this was a job you didn't think you wanted.

O'CONNOR: Right.

SWAIN: Now that you've had the job and you have left it for a few years and look back, can you ever imagine if you had said no, what life would have been like?

O'CONNOR: Well my life would have been fine, thank you. But I have been very privileged to be here and it was a great privilege and it enabled me to see from inside just what a wonderful institution the Supreme Court of the United States really is.

SWAIN: Thank you for your time.

O'CONNOR: Thank you.

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