

Out of Order



STORIES
from
THE HISTORY
of the
SUPREME
COURT



Sandra Day
O'Connor

Congress of the United States.

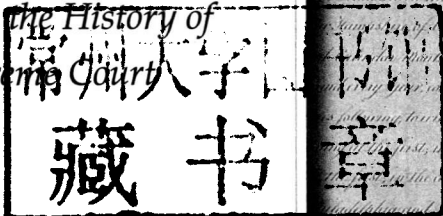
begun and held at the City of New York on
Wednesday the fourth of March one thousand seven hundred and eighty nine.

... An Act to establish the judicial Courts of the United States.

OUT of ORDER



Stories from the History of
the Supreme Court



SANDRA DAY
O'CONNOR



RANDOM HOUSE / NEW YORK

Copyright © 2013 by Arizona Community Foundation

All rights reserved.

Published in the United States by Random House,
an imprint of The Random House Publishing Group,
a division of Random House, Inc., New York.

RANDOM HOUSE and colophon are registered trademarks
of Random House, Inc.

Grateful acknowledgment is made to Hal Leonard Corporation
for permission to reprint an excerpt from “Ac-cent-tchu-ate the Positive”
from the motion picture *Here Come the Waves*, lyric by Johnny Mercer and
music by Harold Arlen, copyright © 1944 (renewed) Harwin Music Co.

All rights reserved. Reprinted by permission of
Hal Leonard Corporation.

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

O'Connor, Sandra Day.

Out of order: stories from the history of the Supreme Court /
Sandra Day O'Connor.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-8129-9392-9

eISBN 978-0-8129-9393-6

1. United States. Supreme Court—History. 2. United States.
Supreme Court—Anecdotes. 3. Courts of last resort—United States—
History. 4. Courts of last resort—United States—Anecdotes. I. Title.
KF8742.O276 2013 347.73'2609—dc23 2012025708

Printed in the United States of America on acid-free paper

www.atrandom.com

246897531

First Edition

Book design by Susan Turner

BY SANDRA DAY O'CONNOR

Lazy B

The Majesty of the Law

Out of Order

Chico

Finding Susie

OUT *of* ORDER

This book is dedicated to my law clerks, who helped me learn, research, and appreciate the Court's history, and to Craig Joyce, who encouraged me to write this book, *Out of Order*.

It is written after my retirement as a Supreme Court Justice and with the benefit of twenty-five years of service on the Court. I began my service there with admiration for the Court but trepidation about my role as a Justice. I look back on it with continued admiration for the Court and for my colleagues there. The Court is as much needed today as it was when it began. Long may it survive!

INTRODUCTION

ON SEPTEMBER 25, 1981, MY FIRST DAY AS A UNITED STATES Supreme Court Justice, I walked up the steps to the Supreme Court for only the second time. Decades before, I had visited the Court with my husband, John, as a simple tourist while John was attending army training in neighboring Virginia. It was a Saturday and the Court was closed. I snapped a picture of John as he stood on the marble steps. I remember thinking that that was the closest I would ever get to the Supreme Court. I could not have fathomed that, years later, I would walk down those marble steps as a member of the Supreme Court and serve for nearly twenty-five years.

The Supreme Court Building is an awe-inspiring sight. Many a visitor each year is stopped in his or her tracks by the grandeur and solemnity of the white marble staircase and the soaring inscription on the Court's façade, EQUAL JUSTICE UNDER LAW. An inspiring and profound image of permanence and continuity, the Court stands as a symbol of our commitment as a society to the rule of law. It stands for our Founding Fathers' uniquely American vision of an independent judiciary, in which judges and the



Chief Justice Warren Burger escorts Justice Sandra Day O'Connor down the front steps of the Supreme Court on the day of her investiture.

Court would stand alone, independent and not beholden to the will of political majorities in their interpretation of the laws and the Constitution.

Most people would say that the reasons for having the legislative and executive branches of government are obvious. After all, we need legislators to make the laws, and an executive to enforce

them. The Framers of the Constitution created a powerful national government to reflect and implement popular will. With the revolution against monarchical rule fresh in mind, the Framers saw legislatures of elected representatives answerable to the people as “the heart and soul of any system of truly ‘republican’ government.”¹ And while memories of King George III’s tyrannical reign fostered distrust of executive power, the Framers also recognized the need for a vigorous presidency rooted in the will of the people. Under the Articles of Confederation, a weak national government had struggled to provide for the country’s needs and speak for the people with a single voice.

But why did the Framers envision for the new government a judicial branch whose members, unlike those of the legislative and executive branches, would be unelected? And why was a *federal* judiciary necessary, given the extensive system of state courts in existence at the time of the Founding? Today, state courts can still decide nearly any issue of law and they still handle the bulk of the nation’s cases.

The Framers wished to create an independent federal judiciary because they knew that the new national political branches could not be left unchecked. Our congressmen and President serve as elected representatives. In that role, they are supposed to speak for and answer to the people. For that reason, the Framers did not rely on the political branches to protect minority groups with less popular, more marginal interests. And so they assigned federal courts primary responsibility in guarding against the overreaching and excesses of the political branches, recognizing the benefits of a judiciary that functions as an “outsider” to the system of majority will.

The majestic building on One First Street in our nation’s capital stands as a monument to our Founding Fathers’ vision. Erected across the street from the Capitol, and across town from the White House, the building stands as a physical testament to the Court’s status as an independent, coequal branch of govern-

ment. The Supreme Court today regularly reviews the legality of laws passed by Congress and enforced by the executive branch. And from time to time, the Justices find themselves compelled by the law to strike down invalid government action by the political branches. The Court's decisions today, though often the subject of public criticism, are followed and adhered to even by those who disagree. Indeed, the Court has withstood tests of its authority on matters as controversial as school desegregation in the 1950s and the conduct of the War on Terror in the first decade of this century.

I had the privilege of serving on the Supreme Court from 1981 until 2006, as it confronted issues running the gamut from states' rights and race-based affirmative action to a defendant's right to effective assistance of counsel. My colleagues and I always strove to reach the right answers, and I hope that we did. We were able to resolve tough questions in an atmosphere insulated as far as possible from political pressures.

In those years, I also grew accustomed to many things that facilitate the important role that the Supreme Court plays in our system of government. For instance, it went without saying that, at any given time, I had eight colleagues who were well trained in the law, committed to their jobs, and willing to spend years, even decades, as officers of the Court. It also went without saying that the Term followed a regular schedule, that we had personal chambers in which we could work, and that we had available clerk's and reporter's offices that ran like well-oiled machines. The staff at the Court are first-rate professionals, and I had my pick of wonderful, talented law clerks to assist in my chambers each year.

This was not always the case. Far from it. So many aspects of the Court were shaped and developed little by little, year by year, person by person. The Court was a daring, bold, but risky political experiment, and its beginnings were modest and uncertain.

In reflecting on the Court's humble early days, it is striking to note how dramatically the Court and its practices have evolved and how so much of that evolution was born of struggle and serendipity. I find it remarkable to reflect on how, for many decades of the Court's early existence, so much of what we take for granted was steeped in uncertainty. The many Justices who have come and gone have made contributions—dramatic and subtle, renowned and lesser known—to not only the law, but the institution and its internal operations.

In this book, I hope to shed light on some of those transformations. This book offers snapshots of the people and events that reflect the Court's evolution and journey.

From the array of characters who have served as Justices, to the law clerks who have aided them, the advocates who have argued before them, and the staff who have worked behind the scenes, the makeup of the community of the Court has changed dramatically. Just consider the criteria that Presidents have laid out for Supreme Court nominees. President George Washington was looking for men who were strong supporters of the Federalist cause and the Constitution, who had served in the Revolution, who were active in the political life of their states, and who had the blessing of well-known Federalists—the party that favored a strong national government. President Obama has stated that he looks for men and women with “a sharp and independent mind,” who understand “that justice isn’t about some abstract legal theory,” and who “identif[y] with people’s hopes and struggles as an essential ingredient for arriving at just decisions and outcomes.”²

The life of a Justice is very different, too. In 1791, Justice John Rutledge left the job less than two years into it because, frustrated by the Court's lack of activity, he preferred to serve on a lower court, the South Carolina Court of Common Pleas. In the early days, it was also not unusual for Justices to leave the Court

to assume or run for political office. Justice David Davis resigned in 1877 to take a seat in the Senate and Justice Charles Evan Hughes resigned in 1916 to run for President. (He returned to the Court in 1930.) Today, however, we are accustomed to having Justices serve out a full life tenure. And whereas the thought of seeing a woman Justice was hard to fathom until 1981, today we have three women sitting on the Supreme Court bench, left, right, and center.

In the early days, convincing good candidates that the job of a Justice was worthwhile was difficult. In the era of “circuit-riding,” Justices crisscrossed the country to preside over lower-court trials and appeals. Many Justices traveled up to ten thousand miles per year by horseback, stagecoach, and riverboat, enduring often hazardous conditions on the road.³ The Court did not even have a permanent home until 1935. In its early days, the Court moved from the Exchange Building in New York to the State House in Philadelphia to various short-term homes around Washington, D.C. Today, with no obligation to ride circuit, the Justices enjoy their impressive and comfortable quarters at One First Street.

The everyday operations and customs of the Court have evolved as well. The early Court had few cases on its docket. In the days of Chief Justice John Marshall, the Court often sat for cases for only six weeks.⁴ Today, the Supreme Court Term runs for nine months, from October each year through the following June. The Court’s role in picking the cases it hears has also changed dramatically. In the late nineteenth century, the Court’s docket was inundated with mandatory appeals—cases that the Justices were at least technically obliged to decide on the merits, regardless of their importance or the urgency for review. Today, the Court uses its discretion to select a small subset of cases from approximately eight thousand appeals, known as “petitions for certiorari,” filed each year.

Those who practice before the Supreme Court also face a very different scene. Early oral advocates were unconstrained by any time limitations, or indeed, any real rules of practice. When they presented their arguments, they were “heard in silence for hours, without being stopped or interrupted” by the Justices.⁵ High-style oratory inspired by Demosthenes and Cicero was in fashion and oral arguments could last for ten days.⁶ Today, oral advocates are strictly limited to thirty minutes of argument time per side. Classical oral exposition is discouraged, and advocates are lucky if they get more than two unbroken sentences out of their mouths before the Justices interject with difficult questions.

The Court’s dramatic evolution over time is humbling to review. In my nearly twenty-five years on the Supreme Court, I was always cognizant of how my tenure, lengthy as it was, was but one small part of a rich and unfolding tapestry. Each Justice plays merely a supporting role in the Court’s ongoing narrative, and each Justice’s experience is but a snapshot in time. I am reminded of this each time I walk through the Court and admire the succession of portraits—some famous, some less known—gracing its hallways. The Court as it exists today reflects the contributions of those who devoted their lives to it.

When I retired from the Court, I found myself increasingly being asked by people across the country and across the world for my “insider” perspective on the Court and its goings-on. Very often, the inquirer would have recently seen a newspaper editorial about a controversial case or read some supposed “tell-all” book on the Court. I would always answer that my years of service were a privilege, that I had great affection for my colleagues, and that the Justices strive to reach the right result in each case. I came to realize that what I wished to convey above all was my understanding of how the Court evolved, and how it represents so much more than what the day’s headlines can capture. It embodies the bold vision of the Framers of our Constitution, a tri-

umph of the rule of law, and the culmination of the hard work, risks, and sacrifices of many people.

I wanted to write about aspects of the Court's rich heritage that interested and inspired me. Hence this book. Only when we reflect on the Court's journey as a whole can we truly appreciate the remarkable feat of our Founding Fathers and the remarkable accomplishments of our thriving federal judiciary.

CONTENTS



INTRODUCTION

xi

LOOMING LARGE

Historic Intersections of the President and the Supreme Court

3

THE CALL TO SERVE

Judicial Appointments

21

A HOUSE IS NOT A HOME

The Journey to One First Street

43

HUMBLE BEGINNINGS

The First Decade of the United States Supreme Court

52

ITINERANT JUSTICE

Riding Circuit

59

THE SUPREME COURT'S CHANGING JURISDICTION

74

GOLDEN TONGUES

Oral Advocacy Before the Court

79

CUSTOMS AND TRADITIONS OF THE COURT

99

SOME LAUGHS ON THE BENCH

115

LARGER-THAN-LIFE JUSTICES

125

GONE BUT NOT FORGOTTEN

Judicial Retirement

143

SUPREME COURT "FIRSTS"

152

APPENDIX A

*The Declaration of Independence
of the United States of America*

167

APPENDIX B

The Constitution of the United States

173

Notes

201

Photograph Credits

217

Index

219

OUT *of* ORDER