

Keynote Address

Justice Sandra Day O'Connor

I. GREETING BY FATHER STEPHEN SUNDBORG

Good afternoon everyone, I'm Father Steve Sundborg, the President of Seattle University. I'm delighted to be able to join you for this part of your Judicial Independence Conference here at Seattle University; a special welcome to all of you here and especially to Justice Sandra Day O'Connor. It's a wonderful group of people who are gathered here, Justice O'Connor. I've met many members of the state supreme court and of the legal and judicial community. We are proud to be able to hold this event at Seattle University.

I'd like to thank the presenting sponsor, Microsoft, for their generosity in helping sponsor this event. Our principle sponsor is the National Center for State Courts, and our advocate sponsors are the American Judicature Society, the Washington State Chapter, and the firms of Carney Badley Spellman, Davis Wright Tremaine, K & L Gates, and Wiggins & Masters. We thank you all.

This conference is a testimony to the stature, the values, and the service to the community of the Seattle University School of Law, which has organized and hosts this conference. We are proud of this law school. This month the law school celebrates its second decade here at the Seattle University campus and its second decade fulfilling the mission of this university by serving the legal and the judicial communities of our region. The mission of this Jesuit-Catholic University is dedicated to educating the whole person, to professional formation, and to empowering leaders for a just and humane world. Justice O'Connor, we recognize you as an outstanding example of that mission and as the kind of leader of both justice and humanity we seek to educate here. Your life's accomplishments are a result of your dedication to justice and to a world of compassion, beauty, and human dignity.

During the confirmation process of the most recent Supreme Court Justice, Justice Sonia Sotomayor, Jeffrey Toobin said that, in the history of the Supreme Court of the United States, we have had 148 Supreme Court Justices, and 144 of them have been white males. Our new Justice

was criticized that she would bring her full experience, her way of seeing things, perhaps seeing things differently, to the Court. At this university, we celebrate different perspectives; we celebrate and seek to educate the whole person. And, Justice O'Connor, we celebrate that you brought all that you are—your experience, your family, your education, and your career—to your service as a Justice of the United States Supreme Court. As a university, we strive to do the same. We welcome all of you to this very special gathering at Seattle University with our outstanding guest and pioneer of a just and humane world. Now, let me introduce Dean Annette Clark of the Seattle University School of Law.

II. INTRODUCTION BY DEAN ANNETTE CLARK

Thank you. It is my great pleasure to introduce Justice Sandra Day O'Connor. She received her B.A. and LL.B. degrees from Stanford University. She served as Deputy County Attorney of San Mateo County, California, from 1952–1953, and as a civilian attorney for Quartermaster Market Center in Frankfurt, Germany, from 1954–1957. From 1958–1960, she practiced law in Maryvale, Arizona, and served as Assistant Attorney General of Arizona from 1965–1969. She was then appointed to the Arizona State Senate and was subsequently re-elected to two two-year terms. In 1975, she was elected Judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals. President Ronald Reagan nominated her as an Associate Justice to the United States Supreme Court, and she took her seat on September 25, 1981. Justice O'Connor retired from the Supreme Court on January 31, 2006. She received the Presidential Medal of Freedom Award on August 12, 2009, from President Barack Obama.

Justice O'Connor is entitled to our respect and admiration as the first woman Justice on the United States Supreme Court, but more importantly, she has earned our respect and admiration through her twenty-five years of distinguished service on the Court. She may have retired from the bench, but she has been tireless in her efforts to bring civics education to the nation and in using teachable moments, such as this conference, to let us know what's at stake when financial and political considerations threaten to overrun state judicial impartiality and independence. She wants to make a difference. We just had lunch with twelve of our student women leaders, and one of the students asked her, "What do you think made the difference in your life that allowed you to be so successful?" Justice O'Connor said one of the secrets was growing up on a ranch where you had to be self-sufficient, where you had to have self-confidence, and where you had to do things on your own. I know she would say to us today that we need to follow her lead. We need to

roll up our sleeves and get to work on dealing with the problems that flow from our current system of judicial elections. It is my great honor and privilege to present to you Justice Sandra Day O'Connor.

III. KEYNOTE ADDRESS BY JUSTICE SANDRA DAY O'CONNOR

Thank you very much. Thank you Mr. President, Dean, and all of you for being here. This is quite a law school. To have a thousand students entering makes it one of the larger law schools in the country, and I think you're doing something right by attracting so many good students. I really did enjoy meeting with the students a little while ago. They were an impressive group, to say the least. And thank you to all of you for taking time to talk about an issue that has been very important to me since long before I became a judge.

When I retired from the U.S. Supreme Court, I had two goals that were high on my list of things to do. The first was to help recast our national discussion about judges and courts into something more constructive than just hurling labels such as "activist" or "elitist" at judges who, occasionally, make decisions that we don't like. I thought that was a pretty reasonable goal—the discourse didn't have anywhere to go but up. However, it quickly became clear that the only way to achieve that goal was through a second goal: to restore civics education in our nation's schools.

I admit I thought retirement was going to be a little bit of a break. Well, a few years in, I'm searching for a way to retire from retirement. There is a lot of work to do, and we need everyone's help. Because of this, I'm going to focus on those two topics: judicial independence and the civics education necessary to protect it. Now, the question of how we choose our judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judicial branch—the third branch of government—and our nation as a whole. Should our judges face recurring elections, or do their jobs require a higher degree of insulation from popular reprisal? We know how our Founding Fathers answered that question. They wrote a Constitution, which gave federal judges, in essence, life tenure—they're there for good behavior. It means they can be impeached and removed, but otherwise, there is no limit to the length of time they can sit on the bench. Plus, they are to have a salary that cannot be diminished during their term of office.

At the Constitutional Convention, John Dickinson of Delaware proposed that federal judges ought to be able to be removed through a more expedient means than impeachment, by a simple application by the Senate and the House of Representatives. The other delegates at the Constitutional Convention, however, said that it was fundamentally

wrong to subject judges to so arbitrary an authority and to weaken too much the independence of the judges. Dickinson's proposal received only one vote—his own. So it has been at the federal level for more than 200 years. There have been threats to the independence of federal judges: from the attempted removal by impeachment of Supreme Court Justice Samuel Chase in 1804, to Franklin Delano Roosevelt's court packing plan, which also failed as you recall, and to the more recent jurisdiction stripping legislation in Congress. But, by-and-large, the federal model has been a success, and it's been copied many places around the globe.

The states in our nation, however, have reached no consensus about how to select judges. They all opted initially for the federal model—gubernatorial appointment, and advice and consent of the state Senate. It was President Andrew Jackson, the great Populist, who persuaded states starting in Georgia to change that system to popular elections. We are still struggling with the aftermath of his efforts. There is no other place in the world that elects their judges. Our states, which hold such elections, do it either through partisan elections, or, as here in the State of Washington, through non-partisan elections. Some states do use legislative or gubernatorial appointment and some of those states use judicial nominating commissions to help in the appointment process. Most states use some combination of these selection methods. I have concerns about the judicial selections schemes in a number of our states.

As a former Judge on the Maricopa County Superior Court and the Arizona Court of Appeals, I can tell you that the health of our entire legal system—both state and federal—depends on having a competent and independent state judiciary. When individual citizens interact with the court, it's exceedingly likely it will be in a local court or a state court, not a federal court. The vast amount of litigation in this country is handled in state and local courts, not in federal courts. How we choose our state judges, and how we decide whether to keep them in office or not, is of critical importance.

Nearly a hundred years ago, President William Howard Taft realized this when he prevented my home state of Arizona's admission to the Union in 1911. Taft vetoed the Arizona Enabling Act that year because Arizona's draft Constitution contained a provision allowing for the popular recall of any judge for any reason and at any time. President Taft described that recall provision as subjecting judges to legalized terrorism. He said it was so pernicious in its effect, so destructive of independence of the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority that he vowed to block Arizona's statehood until the recall provision was removed. Well, like most

of us who hail from Western states, Arizonans are practical people, and, true to form, they responded to President Taft's ultimatum by getting rid of the judicial recall provision in November of 1911. They got admitted to statehood on Valentine's Day of 1912, and, within a month, they reinstated the recall provision. Terrible.

Well, President Taft revealed his feelings about this bait-and-switch a couple of years later in a letter responding to an Arizona warden of a prison who was trying to eliminate capital punishment in Arizona. Taft responded to the warden's plea with his typical curt, funny sense of humor. He wrote: "Dear Sir, I do not believe in the abolition of capital punishment, at least not for the people of Arizona." Oh dear! So, Arizonans got just what they deserved from President Taft.

President Taft, and later Chief Justice Taft, referred to the manner of selecting judges as the single most difficult question that faces a democratic government. Given the number of years, conferences, and articles spent debating this issue, you would be hard-pressed to disagree with him. The struggle has endured for a very long time, but the stakes are rising exponentially. We're now confronting greater threats to judicial independence than we did in the past. While our judiciary has always faced significant attacks, the single greatest threat to judicial independence now is fairly modern, and it's uniquely American. It's the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial election campaigns.

Washington has yet to suffer too much from this problem, but it is bound to if nothing changes. There has recently been a sharp rise nationwide in the percentage of heated judicial races. Of high court incumbents in states, only 50% had contested elections from 1880 to 1996, but 71% faced opponents from 1996 to 2007. One reason for this is that well-organized interest groups are now mobilized to help opposition candidates run effective campaigns in states that have election of judges. These groups—from plaintiff's attorneys, to corporations, to cultural warriors—have strong preferences about the outcome of certain types of cases, and they've mobilized to finance the judges whom they think will be sympathetic to their causes. The result has been an arms race in funding, making it so that campaigning for state judge is often as expensive, or more so, as campaigning for a U.S. Senate seat.

The first judicial race that cost more than one million dollars took place thirty years ago in Texas. At that time, it was thought to be an obscene amount for a judicial race, but by today's terms, it's fairly pedestrian. During this past election cycle, more than five million was spent on a race for a single seat on the Supreme Court of Alabama. Five years ago, there was a race for the Illinois Supreme Court that cost just over

nine million dollars. The winner of that race was Justice Lloyd Karmeier. He asked, “How can people have faith in the system when such obscene amounts of money are used to influence the outcome of judicial elections?” And, as you might have known or guessed, one of Justice Karmeier’s contributors had an appeal pending before the Illinois Supreme Court. During his term of office, Justice Karmeier would pass the deciding vote in favor of that contributor in a decision that overturned a \$450 million verdict.

These unseemly fact patterns are becoming commonplace, and they cast our whole judiciary in a negative light. What I mean when I say that state judicial independence is a national issue is that, when the public hears stories like these, it tends to think of judges as a group—not Illinois judges, West Virginia judges, or, of course, wonderful Washington judges—just judges, and that is not the type of exposure we want for our judicial system. Nobody knows if Justice Karmeier’s decision was unbiased. It quite possibly was, but that’s not really the issue because, overshadowing that question, is the single stark fact that you might have a very good reason to doubt whether it was fair. He got a lot of money from a contributor and then ruled in their favor. Now, I’m not sure that the public cares whether the contributor was Boss Tweed or Al Capone or State Farm or Massey Coal Company. While you can’t blame these people who are playing by the established rules, you can blame the rule-makers who allow this type of environment to infect our courtrooms. This is where you have a chance to make a difference.

This massive spending gives rise to difficult constitutional questions, such as the one the Supreme Court faced in the *Caperton* case. The policy questions are easy. Several studies have shown that roughly 70% of the public believes that judges are influenced by campaign contributions, and more than one-quarter of the judges themselves think campaign contributions affect their decisions. There have also been a number of studies telling us that judges are in fact affected or influenced by campaign contributions. Unsurprisingly, people who live in states that hold partisan judicial elections are considerably more distrusting of their judges, and they’re less likely to believe that the judges act fairly and impartially, and they’re more likely to agree that judges are just politicians in robes.

Now, consider the great United States Supreme Court decisions—the likes of *Brown v. Board of Education* or *Loving v. Virginia*—and consider whether those hugely unpopular decisions would have come to pass if the Justices faced upcoming elections. Or ask yourselves whether, as a litigant, you would want to be standing in front of a judge who

faced an upcoming election if your cause was legally right but politically unpopular.

The reason why judicial independence is so important is because there has to be a place where being right is more important than being popular, and where fairness trumps strength. That place in our country has been the courtroom; however, it can survive only so long as we keep out the worst of the political influences. In order to dispense the law without prejudice, judges have to be assured they won't be subject to retaliation for their judicial decision-making. I firmly believe that states ought to steer away from judicial elections and implement some form of selection system for choosing judges that relies on a commission selection with retention elections. The voters don't want to give up the right to vote—of course they don't. But a retention election scheme gives the voter a chance to vote up or down on a judge with a track record. They can tell from the information they get whether this judge ought to be retained or not, and that's a much better scheme. When you go into the ballot box and see a whole list of judges names on a ballot, and you don't know anything about them, it's just a hopeless mess. People just, in many cases, don't vote at all.

Now, in a typical so-called merit selection system, an independent commission of knowledgeable citizens recommends several qualified candidates suitable for appointment by the governor. The most successful of these schemes involve commissions that are comprised of only a handful of lawyers and a great majority of lay, but qualified, people. After several years of service under these schemes, the appointed judge then has the name submitted to the voters for an up or down vote in an uncontested retention election. This typically takes the big money out of selecting judges, but it still gives the public—the voters—a very real check-and-balance with their vote. Some worry that this just replaces electoral politics with the politics of the local bar association. But, in my home state of Arizona, once we satisfied President Taft, lay members outnumber the lawyers 2-to-1 in our commissions. We do know this to be true: no amount of reform will remove the politics that is inherent in a partisan election scheme because partisan elections specifically have the purpose of infusing politics into the law. They're designed to make judges responsive to electoral politics, and that's the flaw in the system.

I would love it if more states would move toward some kind of a selection system with appointments recommended by a commission and retention elections. But for those states that continue to elect judges, there are still some things that can be done to make those elections less nasty, expensive, and destructive. Lengthening the term limits of the judges is one step. Distributing voter guides that display or disclose per-

formance evaluations of the judges can help the public make better-informed decisions. And certainly, the public funding of elections or the strengthening recusal requirements for judges who sit on cases involving contributors would be helpful.

These are small steps that can help stop the bleeding a bit, but the long-term solution is education. We have to educate our children, our voters, our policy-makers, and lawyers about the importance of a fair and impartial judiciary. We have to bring real and meaningful civics education back into our classrooms. This knowledge is not handed down through the gene pool. It has to be learned by every succeeding generation of Americans. However, we are failing to impart the basic knowledge that young people need in order to become effective citizens and leaders in our system. Only a little more than one-third of Americans can even name the three branches of government, much less say what they do. That ought to scare you a little bit. Two-thirds of Americans know at least one of the judges on the Fox TV show *American Idol*, but only one-in-seven can identify the Chief Justice of the United States.

In part, this is because our nation's schools are not educating our diverse population to become responsible and empowered citizens. Our nation's public schools were started in the first place to help create citizens with the knowledge, skills, and virtues to sustain and strengthen our system of government. In the 1960s, the typical U.S. student had courses in American history, government, and civics and was tested on it for high school graduation. Today, civics is vanishing from the curriculum. Half of our states today no longer make civics, government, and history requirements for high school. In addition, programs that teach civics need a make-over. All too often, the students find the civics books boring! And it tends to be one of their least favorite subjects in school. The course just lacks relevance to the lives of the students.

So, I went to work on improving civics education in our country. I think I have a partial solution, and I want your help. I brought together a team of experts in law, history, civics, gaming, and web design. We did this at Georgetown University Law School and Arizona State University, and together we created www.ourcourts.org. It is a free, online, interactive program to teach middle-schoolers about civics, with an emphasis on the courts. This is the age—eleven through fifteen—when students *can* grasp complicated ideas of fairness and justice and when they want to be empowered to question the validity of rules and to understand why we have them in the first place. This is the age when we need to capitalize on the inherent curiosity of this age group, or we're going to lose the op-

portunity. The “Our Courts” website¹ has two components. The first is a series of interactive activities and resources to be used primarily in the classroom—it is very teacher-friendly. The second is for the young people to use in their own free time.

We know, from a recent poll, that children spend forty hours a week using media—whether it’s computers, TV, video games, or music. That’s more time than they spend in school or with their parents. If we can capture a little bit of that time to get them thinking about government and civic engagement, that’s a big step in the right direction. Two of the video games that are now on the website are pretty fun. On one of the games, you can act as a law clerk for a Supreme Court Justice who’s conflicted about a case that involves a student who was suspended for wearing a T-shirt featuring his favorite band. You can read some of the relevant law, listen to the other eight Justices’ arguments, and offer advice to your own Justice about what the law requires. Teaching students that judicial decision-making is different from policy-making is very important. I’ve watched students play this game, and they often end up reaching a different conclusion than they initially expected, and that’s all to the good. I can relate to that.

In the second game, called “Do I Have A Right?”, you manage your own law firm where clients are constantly bringing you constitutional issues. You have to determine whether or not they have a right—a claim worth pursuing—and, if so, which amendment to the Constitution is relevant. As you get better at identifying constitutional rights, you earn more money, which lets you hire more lawyers, decorate your office, or buy a coffee maker. I’ve had a chance to watch some young people play these games. They really enjoy them, and I think they learn a lot in the process. So, you help me! I want all the public schools—the middle schools in this State of Washington—to use that website. They don’t have to spend a whole lot of time on it. It’s short, but it’s creative, it’s feature-friendly, and the kids will love it.

I think we’re fortunate in this country to have a durable, democratic government, but we can’t take it for granted. It is the citizens who have to preserve our system, and, in order to do that, they have to understand what the system is all about. I hope you will help me make sure the citizens of Washington State and the citizens of other states across the nation have that understanding. Thank you.

1. Our Courts: 21st Century Civics, <http://www.ourcourts.org/> (last visited Feb. 26, 2010).