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The brilliant objectivity of Sandra Day O'Connor

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Moira Rayner

Unlike some, Sandra Day O'Connor resigned from her high-profile political office with dignity and grace, on 1 July. Her timing was impeccable, her reasons her own. She had every practical reason to retire now, at seventy-five, after twenty-four years on the US Supreme Court and with her husband in the early stages of Alzheimer's disease. She did not elaborate on the good policy reason to go before the anticipated resignation of her fellow jurist, William Rehnquist, who has throat cancer and is also expected to retire from the bench soon. President Bush is on notice. He has the power to reshape the Supreme Court to his own conservative ideology but if he mucks it up and there is a prolonged public battle over his nominee, who must be approved by the Senate, he will cripple his government's political agenda. Who is appointed will profoundly affect the cultural direction of American life, and the Common Law, and Australia.

Sandra Day O'Connor's moderate conservatism gave her the 'swinging vote' on a conservative but divided Supreme Court. In the last decade she effectively neutralised the narrowly conservative views of Justices Scalia and Thomas in a Court which, in the US, has enormous political influence and genuinely checks and balances the executive power of the President and the lawmaking powers of both state and federal lawmakers.

Sandra Day O'Connor receives an honorary degree: Clay Jackson

She was always independent. In the late 1980s she could have overturned the court's prior rulings on the constitutional right to choose an abortion. Instead she imbedded it more deeply. In 1965 the Supreme Court had ruled 7:2 that the states did not have the power to take away the right of married women to access safe and legal reproductive health services including contraception, because of a constitutional right to privacy found in the 'penumbra' (a shaded rim between darkness and light) of the US Constitution and the Bill of Rights, though neither explicitly speak of it.

The Court extended the right to unmarried people in 1972 and, the following year, to the liberty to

choose abortion, in *Roe v Wade*. Her decision, with Justices Kennedy and Souter, in *Planned Parenthood v Casey* provided streamlined rules for abortion decision making. O'Connor declared it was a woman's right to choose an abortion early in pregnancy because of her personal liberty to decide on private matters. It was not a simple decision: O'Connor ruled that states can regulate abortion, but only to the extent that this does not create an 'undue burden' on the woman. This has allowed legislatively imposed twenty-four hour waiting periods and parental-consent laws, which do restrict access. She also ruled that more stringent restrictions were permissible, later in the pregnancy when a foetus is 'viable' outside the womb, unless they endangered a woman's health. Though US women's groups fear the effect of her departure on the balance of the Supreme Court on their right to privacy, her achievement is such that, even if O'Connor were replaced by a strongly anti-abortion justice, the Court would, at this moment, still have a slim majority in favour of basic abortion rights, only its toleration of state infringements on that right in doubt. In 2003 the right of sexual privacy, which O'Connor defined as a personal liberty, was extended to gays. It is difficult to see how this could be easily undone.

In Australia, there is no right to privacy, which the Victorian Supreme Court has made clear. In late June it rejected the Royal Melbourne Women's Hospital's appeal against an order to deliver the private medical records of a woman who had a late-term termination of her pregnancy with a disabled foetus, to a Medical Practitioner's Board investigating a third-party complaint. The Hospital will appeal to our High Court, in which the US jurisprudence will come into play.

Abortion rights have assumed a remarkable, and history may judge extraordinary and philosophically unjustifiable, symbolic significance in the wider war over values and culture, which started with the broader sexual revolution. Sexual liberty versus privacy has become the real battle issue underlying abortion, extra-marital and same-sex sexual behaviour, the integrity of traditional families, and women's role in society.

The lack of any constitutionally guaranteed human rights and civil liberties in this country leaves a huge gap in the capacity of courts to address, outside the party-political and media domain, the tension between privacy and personal liberty, society and the law. Recent suggestions for a comprehensive law reform inquiry overlook the attempts, in the early 1980s, of all Australian Law Reform bodies to collaboratively review and recommend a proper approach to privacy as a fundamental principle of Australian law - and that they failed.

O'Connor was the first and only woman justice on the US Supreme Court, and experienced discrimination in legal practice (she was offered work as a legal typist instead), but she was no radical and took pride in her ability to 'have a life' - she married, had three sons, and took time out to raise them

- as well as a brilliant career.

Appointed by Reagan, O'Connor was often the 'majority of one' because the nine-personned court was almost equally divided between four 'generally conservative' and four 'generally liberal' ('leftish,' in Australia) judges. Her 'swinging' vote gave her great power, which she exercised judiciously. In her first term she voted with 'conservative' Justice William Rehnquist on 27 out of 31 decisions that were decided on a slim - 5:4 - majority vote. But she also voted with 'liberal' judges who by a 5:4 majority declared that a government-funded nursing school in Mississippi could not exclude men.

In 1984, she supported a decision that set the standard for determining whether 'nativity scenes' violated the constitutional prohibition on government-established religion. That year she also wrote the majority opinion that made it harder for death-row inmates to challenge their convictions because of mistakes their lawyers made. In 1989 she gave the court's opinion that government programs that set aside a fixed proportion of public contracts for minority-owned businesses violate constitutional equal protection guarantees. In 2003 she co-wrote the majority opinion that upheld the broadest restrictions on US campaign donations in thirty years. She also wrote a majority ruling that public universities could lawfully take 'race' partly into account in their admission policies. In 2004 she wrote the majority opinion that a US citizen seized in Afghanistan had the right to challenge his detention in US courts - to the chagrin of gung-ho US administrators. In 2004, too, she voted with the majority in determining the outcome of the federal election, which delivered a controversial second term to Bush. In 2005 she dissented from a majority ruling that local governments had the power to seize private property for private development.

In three plain sentences this remarkable woman quietly handed over to an uninspiring president a real political challenge: the most important lifetime appointment to the Supreme Court ever, and the potential to ram it through, because both parliamentary houses and the executive are controlled by one political party - at enormous political risk.

The new judge will hold the balance on the future of women's reproductive rights, the human and civil rights of detainees seized in the 'war against terror', and the integrity of the institutions of world's 'greatest democracy'. By not waiting until Rehnquist has to step down, O'Connor also publicly gave Bush a major political problem: whether to replicate, or neutralise, the example of her brilliant objectivity.

In her term, O'Connor made some of the most controversial and difficult decisions about human life, and sought practical, workable solutions from the letter of the law. She also gave speeches, took 'adventure' wilderness trips with women friends; socialised and spent time with her family, working like

a Trojan even while she was being treated for breast cancer in 1988. She wrote three books - on current legal issues, an autobiographical memoir, and a children's book - and became one of America's most admired women.

Politicians tend to leave their stage in flames of denial, disgrace or disappointment, though there are exceptions (I hesitate to compare Joan Kirner's quietly un-superannuated retirement from the Victorian Parliament in 1994 with Jeff Kennett's agonising public rotations on an electoral spit in late 1999, but why miss an opportunity?) but this jurist's possession of gratia et disciplina bona and her enduring judicial and political legacy is a reminder, that power is best possessed by being relinquished gracefully, and making a good end.

About the author

Moira Rayner is a lawyer and a writer, and Special Counsel to the consultancy Moira Rayner & Associates. Until recently she was deputy managing director of the Council for Equal Opportunity in Employment Ltd.

Published Comments

Quite a unique lady. Still obviously conservative. Though she will very probably seem very liberal compared with whom Bush will grab the opportunity to stack once again.

william glanfield

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