

Justice O'Connor's Indelible Stamp

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In the coming days, many will no doubt tout Sandra Day O'Connor as the pioneering first female Supreme Court justice. Most will point to her importance as the pivotal middle justice on a divided court. And some will accuse her of squandering her influence by not articulating and hewing to a unified theory of the law of their liking. In all this, the pundits may well be right in the description, but many will be wrong in ascribing merit or blame. Justice O'Connor is, quite simply, a great judge.

In 1995 I and my three co-clerks to O'Connor engaged in a heated discussion over some small point of law whose importance seemed transcendental at the time. This was the mother of all debates, several days of intense silences punctuated by heated discussions. The justice knew, of course, having carried awkward luncheon conversations and having interrupted several of our closed-door shouting matches. But she let us continue without intervention. The next morning, she handed us a two-page draft opinion -- concisely crafted, beautifully written and articulating a clear answer based on her writings and intimations in previous cases. Each of us combatants saw our conflicting points considered, answered or accommodated in her elegant draft. All that was left to do was to check the spelling, fill in the citations and go on with our coffee.

That example encapsulates O'Connor's approach to her work.

Without fanfare she hones her craft, deciding individual cases, answering concrete questions and in the process providing clear and enduring answers to the most important questions of the day.

Take, for example, the recent cases articulating the division of governmental power between state and federal governments. For more than 50 years, the constitutional enumeration of (and therefore implicit limitation of) the powers of the federal government went unheeded. On the Supreme Court, O'Connor spent over a decade dissenting from what she considered the court's abdication of its constitutional responsibility to rein in Congress. The justices agreed in 1995 and placed limits on Congress's power to regulate interstate commerce. O'Connor takes these limits so seriously that last month, contrary to her law-and-order instincts, she voted against federal authority, in the name of commerce, to prohibit in-state marijuana possession.

Given her leadership, many were surprised when O'Connor in recent years voted to affirm Congress's power to regulate family leave policies and access to courthouses. But her votes were perfectly consistent, because these latter cases dealt not with Congress's power to regulate commerce but rather with its separate authority to redress disability and gender discrimination. They are surprising only to those who would view O'Connor

through the lens of a states' rights ideologue or a lazy pundit.

Likewise, O'Connor has decried the tendency to adopt a grand unified theory of church-state relations. Instead, she reads the Constitution as prohibiting governmental actions that a reasonable observer would construe as endorsing religious beliefs. This is no "I know it when I see it" test. Rather, it relies on a common legal standard, the reasonable objective person, to guide decisions in concrete cases according to their facts.

Last year O'Connor brought her practical brilliance to bear on the most interesting and vexing current question of constitutional law, military detention of enemy combatants in the war against terrorism. Structural purists would perhaps prefer Justice Clarence Thomas's categorical reliance on the president's exclusive power to wage war. And human rights advocates no doubt cheered Justice John Paul Stevens's characterization of executive detention as akin to mild torture.

O'Connor, however, wrote the controlling opinion for the court, which recognized the president's wartime power to detain enemy combatants who would kill American soldiers and civilians. But even in war there is law, and due process requires that the president afford combatants with some opportunity to challenge their detention before an impartial tribunal. She is mindful that generals fight war, not judges and lawyers, and she prescribed procedures that deferred to military judgment and necessities.

I could go on and identify Justice O'Connor's indelible stamp in every area of the law spanning property rights, race relations, privacy, employment contracts, retirement benefits and so on. But that would be missing the point of her life, work and worth. She is not a crusader, a reformer or a philosopher. She has always tried to be a good judge, and by succeeding she has been a pioneer, sage and icon.