Human Rights Hero - Sandra Day O'Connor

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human rights hero

Sandra Day O'Connor

By Michael S. Greco and Stephen J. Wermiel

Supreme Court justices usually leave the public stage when they retire. Not Sandra Day O'Connor. Since leaving the bench in January 2006, the widely respected jurist has been a leading voice for judicial independence. With a strong, clear focus, O'Connor, who continues to sit on federal appeals courts, forcefully and candidly voices her views about the importance of judicial independence and headlines conferences throughout the nation to spur others to confront the issue. Her message spotlights two main points: first, urging needed reforms in states that elect judges and criticizing the influence of campaign contributions on judges; and second, warning of the great danger in the rise in legislative and voter efforts to rein in or punish judges who issue unpopular decisions. “I’m increasingly concerned about the current climate of challenge to judicial independence,” she said in a 2006 San Francisco speech.

Her passion for this issue was evident in her hands-on, dedicated service from 2005 to 2007 as honorary cochair of the bipartisan American Bar Association (ABA) Commission on Civic Education and the Separation of Powers. The ABA adopted important new policies based on the commission’s recommendations to protect judicial independence and revitalize civic education throughout the nation.

O’Connor has long criticized the election of state and local judges, which occurs in varying degrees in thirty-nine states. She decries, as does the ABA, the vast sums of money being spent in increasingly shocking, acrimonious, and expensive judicial elections by special interest groups intent on electing (“buying”) judges who will advance their agenda. At an April 2008 conference in New York she said, “We put cash in the courtrooms, and it’s just wrong.”

While still on the Supreme Court, she voiced strong concern that judicial elections impair the public’s opinion of courts as being fair and impartial. She joined the 5-4 majority in Republican Party v. White, 536 U.S. 765 (2002), holding that Minnesota restrictions on what judicial candidates could say during a campaign violated the First Amendment. However, she warned in a concurring opinion that “[e]ven if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public’s confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.”

O’Connor has voiced deep concern when criticism of judges goes beyond legitimate debate about the wisdom of decisions and shifts to what she calls “judicial intimidation” or personal attacks. In a September 2006 op-ed in the Wall Street Journal, she criticized a South Dakota referendum proposal intended to punish judges for “wrong” decisions.

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**Indigent Defense**

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To achieve reform at the state level, it is vital that a coalition of partners be engaged as part of a comprehensive strategy. The judiciary, bar officials, community leaders, public interest organizations, national associations of lawyers, and others need to be enlisted as partners to persuade the legislature of the importance of an adequate statewide program of indigent defense. To succeed, empirical documentation of the problems, as well as favorable media coverage, will be needed to generate a positive climate of public support. All of these efforts are essential investments in America’s future because, as Judge Learned Hand said many years ago, “If we are to keep democracy, there must be a commandment: Thou shalt not ration justice.”

**Better Than Prison**

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Although community-based treatment and other wraparound social services do carry a price tag, their cost is much less than that of incarceration, especially when one considers the effectiveness of diversion and reentry programs at reducing recidivism. Many states are now confronting the crippling costs of an exploding prison population. The DTAP and ComALERT models can transform lives, improve communities, and save money. These programs deserve to be replicated in jurisdictions around the country, and Congress should ensure that adequate funding is appropriated for that goal.

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Stevens thus endorsed the use of statistics to demonstrate the racial inequality of capital punishment in *McClesky v. Kemp*, 481 U.S. 279 (1987). He candidly described the discriminatory effect of the drug war on African Americans in *United States v. Armstrong*, 517 U.S. 456 (1996), noting that while the drug laws themselves might be racially neutral, “the brunt of the elevated federal penalties falls heavily upon blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders... Eighty-eight percent of such defendants were black.” *Id.* at 479–80 (Stevens, J., dissenting).

Stevens also appreciated the real impact of repressive prison policies on the incarcerated, siding with inmates against prison officials in numerous cases, and understood that “restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. ‘Liberty’ and ‘custody’ are not mutually exclusive concepts.” *Hewitt v. Helms*, 459 U.S. 460, 483 n.7 (1983) (Stevens, J., dissenting) (quoting *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712–13 (7th Cir. 1973) (Stevens, J.)). In *Hewitt*, Stevens argued in favor of due process rights for inmates transferred to segregation. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), he advocated greater First Amendment protections for prisoners seeking access to publications.

Stevens noted how important such materials were to inmates and dissected the prison’s claims that prison safety demanded censorship, opining that the prison’s decision to ban certain publications was “based on personal prejudices or categorical assumptions rather than individual assessments of risk.” *Id.* at 430 (Stevens, J., concurring in part and dissenting in part).

More recently, Stevens has made headlines in the context of the death penalty. In *Atkins v. Virginia*, 536 U.S. 304 (2002), he authored the Court’s opinion striking down the death penalty for the mentally retarded, based on the reality of their limited criminal culpability and concerns about the fairness of capital prosecutions. And in last year’s *Baze v. Rees* decision, 128 S. Ct. 1520 (2008), Stevens again attacked the death penalty in pragmatic terms, calling it “the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits.” *Id.* at 1546 (Stevens, J., concurring).

A principled, practical, and moderate jurist, Stevens has been a stalwart and fair-minded supporter of the most reviled minority in America—the accused or convicted offender—even though doing so was often politically difficult or unpalatable. *Human Rights* is delighted to name him our Human Rights Hero.

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