

RETROSPECTIVE

# O'CONNOR: After a year, showing a very conservative bent

By Kevin Costelloe

**S**andra Day O'Connor, after her first term as a Supreme Court justice, is a solid member of the court's conservative wing.

In the session that ended July 2, Mrs. O'Connor voted to:

✓ Give local school boards unlimited power to remove books they find offensive from high school and junior high libraries. Her side lost.

✓ Let Washington state voters bar a school busing plan voluntarily adopted by the city of Seattle to achieve racial balance. Again, she was on the losing end.

✓ Allow states to execute "non-triggerman" criminals whose crimes resulted in a death even though they did not intend to take part in a killing. Another minority view.

Mrs. O'Connor's overall voting record indicates just how much she has joined the court's conservative side since she was sworn in last September.

In the 31 cases decided by 5-4 votes — rulings that generally indicate the thorniest disputes between liberals and conservatives — Mrs. O'Connor sided with ultra-conservative Justice William H. Rehnquist 27 times.

She sided only four times in 5-4 decisions with Justice William J. Brennan, leader of the court's liberals.

Only once were the three justices on the same side in a 5-4 ruling, a relatively minor case.

In other key cases during the just-completed term, the 52-year-old Mrs. O'Connor voted to:

✓ Bar all lawsuits seeking monetary damages from U.S. presidents for misconduct in office. Her side prevailed.

✓ Deny illegal alien children a free public school education. A minority view.

✓ Expand the power of police to search automobiles without a warrant. Her side won.

The former Arizona appeals court judge thus showed herself to be far more conservative than her middle-of-the road predecessor, Justice Potter Stewart.

In fact, one justice said privately that Mrs. O'Connor has moved to the "far right" and that she was "throwing her weight around" more than most rookie members of the high court.

Mrs. O'Connor still has not had to face abortion, the single most controversial issue that arose during her Senate confirmation hearings. Some conservatives claimed she favored abortion during her days as an Arizona legislator.

The Supreme Court has agreed to decide a sweeping set of abortion issues, but a final ruling is not expected until next year.

In her only signed majority opinion dealing with the constitutional issue of sex bias, Mrs. O'Connor wrote that state-supported nursing schools cannot bar men from enrolling.

During the term that formally began last October, she also became a fervent champion of the notion that the federal government has taken over too many powers from the states.

In dissenting from a decision upholding a major federal energy law, Mrs. O'Connor wrote:

"Each state is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes."

She also authored a majority opinion trimming back the power of federal courts to override criminal convictions obtained in state courts in certain instances.

"Federal intrusions into state criminal trials frustrate both the states' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," she wrote.

Mrs. O'Connor also joined Justice Lewis F. Powell's dissent from a ruling that all boating accidents — including those involving pleasure craft — can be brought to federal court rather than state courts.

There were some surprises in her voting patterns, too.

In a highly emotional issue, Mrs. O'Connor said states cannot automatically bar the press and public from attending criminal trials when young victims of sex crimes are testifying.

She also agreed that under existing federal law victims of alleged civil rights violations do not have to exhaust all state administrative procedures before suing in federal court.

The justices do all their deliberations behind closed doors, generally with only occasional flashes of bitter disagreement creeping into their written opinions.

In Mrs. O'Connor's case, though, the sophisticated name-calling was noticeably harsher than usual.

Justice Harry A. Blackmun wrote that she had attacked his opinion in the federal energy case with "apocalyptic observations" that were "overstated and patently inaccurate."

Writing for the majority in an employment discrimination case, Mrs. O'Connor accused Blackmun of hurling an "ad hominem" argument at her in his dissent. The term "ad hominem" is used to describe a contention against an opponent rather than against his or her arguments.

In the case that trimmed some federal court oversight of state criminal actions, Brennan attacked Mrs. O'Connor's majority opinion at length. He said Mrs. O'Connor had employed "sentiments in reasons' clothing."

Associated Press

JUL 15 1982  
ARIZONA REPUBLIC  
PHOENIX, ARIZ  
MARICOPA CITY

## DRIFTING

### Unlike The Warren Court, The U.S. Supreme Court Shows No Tilt One Way Or The Other

James Kilpatrick  
Universal Press



Washington

A year ago, at the end of the 1980 term, a consensus developed among observers of the U.S. Supreme Court: The court was drifting.

With the end of the 1981 term, that view remains unchanged: The court is still drifting.

This past term saw no new landmarks, no great beacons of the law.

We had nothing to rank with the *Brown* case on school segregation, or the *Miranda* case on the rights of an accused, or the *Miller* case on pornography.

The court never painted with a broad brush on a big canvas. We wound up with small etchings, tightly framed.

A simple explanation — it is not intended to be cynical — accounts for the situation.

We pride ourselves on saying that

"ours is a government of law, not of men," but the boast is empty.

It is a myth, a shibboleth, a sham.

At the level of the Supreme Court, ours is emphatically not a government of abstract law, but a government of eight very mortal men and one woman.

As always, these nine human beings brought to their opinions the accumulated convictions, prejudices and attitudes of their lifetimes.

Members of the court detest the journalist's practice of putting them in ideological pigeonholes, but the custom gains in understanding more than it loses in precision.

With few exceptions, the three conservatives (Burger, Rehnquist and O'Connor) came down on the side of judicial restraint and narrow construction.

The three liberals (Brennan, Marshall and Blackmun) tended toward activism and expansion.

The three centrists (White, Powell and Stevens) tilted the teeter-totter first here, then there.

In a recent column, Joseph Kraft discerned a predominantly liberal tilt during the term just ended.

I think his eye deceived him.

Two or three of the criminal cases may have echoed the solicitude dis-



played by the old Warren Court, but most of the decisions in this field were made of sterner stuff.

One decision, involving the children of illegal aliens in Texas, was long on

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compassion and a little short on law; other cases with a particularly human angle, such as a case testing the educational rights of handicapped children, went the other way.

The statistics, tenuous as they are, indicate the drift.

By my count, the court handed down opinions in 146 cases that had been fully heard.

Of these, 26 were by unanimous vote; another 20 saw no dissents from the actual judgment; an even 100 times, the court divided.

The term saw 30 cases decided by 5-4 divisions and two others 4-3. Twice the court deadlocked 4-4.

Patterns developed. Rehnquist and O'Connor participated in 140 cases. (She recused in six cases.)

They disagreed 14 times, for a harmony rating of 90 percent.

At the other end of the spectrum, Marshall and Brennan participated in 144 cases. They disagreed only six times, for a harmony rating of 96.

Look at the clusters of three: Burger, Rehnquist and O'Connor participated in 139 cases. They voted alike in 102 of them, or 73 percent of the time.

On the other side, Brennan, Marshall and Blackmun participated in 142 cases. They voted alike in 105 of them, for an identical 73 percent.

The three conservatives collectively recorded 91 dissents, the three liberals

99. Nothing in these figures suggests a decisive tilt one way or another.

The most interesting human development on the court itself has to do with Justice Harry Blackmun.

When Blackmun came on the court in 1970, a year after Chief Justice Burger, the two voted so consistently together that they became known as the Minnesota Twins.

Both were Nixon appointees. Year by year, Blackmun has moved toward the liberal side.

In this past term, the two parted company on 52 of the 100 cases in which the court divided.

A word on Justice O'Connor: While she wrote only 12 opinions for the court, compared to 17 for Rehnquist and 20 for White, she pulled her weight in oral argument and in chambers.

Though not a gifted writer — a trait she shares with the other eight — O'Connor put together opinions of clarity and good organization.

Because I expressed much skepticism a year ago about her nomination, I would make amends.

The court's first woman justice cannot be identified forever as a woman justice; she is quite simply an associate justice, and a good one.

AZ BUSINESS GZT  
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SEP 14 1982



Notable panelists

U.S. Supreme Court Justice Sandra Day O'Connor, right, greets Coretta Scott King, widow of slain civil rights leader Dr. Martin

Luther King, at the Episcopal convention in New Orleans Sept. 8 where they appeared on a panel.

JUL 13 1982  
ARIZONA REPUBLIC  
PHOENIX, ARIZ  
MARICOPA CITY

## Sandra For Veep?

**W**HERE the rumor started, no one seems to know. But now *Baltimore Sun* Washington correspondent Lyle Denniston has published what had been mere gossip among politicians.

Denniston writes that it is "common speculation" that Justice Sandra O'Connor may be interested in running for vice president.

At the risk of trying to speak for Justice O'Connor, we suspect the speculation is more wishful thinking by some eager Republican political matchmaker looking for a so-called dream ticket.

Certainly none of Justice O'Connor's intimates takes the report seriously, nor have they heard any interest by her about leaving the Supreme Court.

In fact, Justice O'Connor is known to relish the potential of the career that lies ahead on

the nation's highest judicial body, which has more influence over national policy than the vice president does.

Moreover, Justice O'Connor chose long ago to abandon elective office in favor of the judiciary. When confronted with the opportunity some years ago of running for governor, she chose instead a career in the state court system.

Presidential and vice presidential politics are a risky business.

The American electorate is unpredictable, and there is no certainty that Republicans — of which Justice O'Connor is one — will retain the White House the next go-around in 1984.

On the other hand, Justice O'Connor has a lifetime seat on the court.

Speculation that she would leave that elegant position for the rowdy politics of a presidential campaign simply defy logic.