

TUNE IN TO THE  
SOUND OF DEMOCRACY

## Justice Talking Radio Transcript

### **The Future of the Supreme Court – Air Date: 2/13/2006**

*With the appointments of Chief Justice John Roberts and Justice Samuel Alito, the Supreme Court is undergoing its most significant change in over a decade. Has the Supreme Court appointment process worked or should it be scrapped? Will the loss of Justice Sandra Day O'Connor affect the law on key issues like executive power, states' rights, abortion and gay rights? On this edition of Justice Talking we look at whether a changing court will change the law and the nation.*

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. To say it's been an interesting year on the Supreme Court would be an understatement. From Sandra Day O'Connor's retirement to the death of Chief Justice Rehnquist and the confirmations of Chief Justice Roberts and Justice Samuel Alito, on today's show we'll look at the recent changes in the Supreme Court and what that might mean for future cases and decisions. We'll also take a look at the nomination process for potential Supreme Court justices—does it need to change? Stay with us as we talk about the future of the Supreme Court.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. The Supreme Court has been in the news a lot this past year. With the death of Chief Justice William Rehnquist, the retirement of Justice Sandra Day O'Connor and the addition of justices Roberts and Alito to the bench, the court has changed dramatically. We'll take a look at the confirmation process to see if it's time for a change in the way justices are confirmed, and later on in the show we'll talk with two former Justice Department lawyers about how they think the new court might make decisions on important cases. And we'll talk about the life and legacy of Supreme Court Justice Sandra Day O'Connor with a long-time Supreme Court reporter who has written a book about the first woman on the Supreme Court. But first to talk

about the Supreme Court nomination process, how it works and whether it needs fixing, I'm joined by Michael Comiskey and Michael Gerhardt. Michael Comiskey is the author of "Seeking Justices: The Judging of Supreme Court Nominees." He is an associate professor of political science at the Penn State Fayette campus. Mike Gerhardt is a law professor at the University of North Carolina law school. He is the author of a book called "The Federal Appointments Process." Welcome both of you.

MICHAEL COMISKEY: Thank you.

MICHAEL GERHARDT: Glad to be here.

MARGOT ADLER: Michael Comiskey, let's get right down to it. We've seen three nominees to the high court in the last several months—Chief Justice Roberts, Justice Alito, and of course the failed nomination of Harriet Meiers. Did the Senate Judiciary Committee hearings and the public debate over these nominees reveal big problems with the confirmation process, or are criticisms of the process overblown?

MICHAEL COMISKEY: I don't think they revealed any big problems with the confirmation process. In fact, if you compare the confirmation process with the way it worked say 30 or 40 or 50 years ago, I think on the whole it works rather well. The Senate takes a very good, long, hard look at these nominees, which it didn't do 40 or 50 years ago. We find out a good deal about their judicial philosophies as well as their character and their professional credentials. Interest groups also help in that process, and on the whole, for that reason, because we find out so much about them, I think that the process on the whole works pretty well.

MARGOT ADLER: Mike Gerhardt, what do you think? What are the problems, in your view, with the confirmation process as it stands now?

MICHAEL GERHARDT: I think the history of the confirmation process has had its highs and its lows, and at present I think we're sort of somewhere in between those two extremes. But I do think there are some problems in the process—for example, a rather pervasive lack of candor about the issues that are being considered by senators, particularly those senators who are inclined to support nominees, and some lack of consistency. In some cases, the senators will say they'll not take judicial philosophy or religion into account and then in other cases they seem to do that. So there's a lack of candor and that lack of consistency I think is a problem. There are some other difficulties as well—the public's interest is not very strong in these hearings, which is unfortunate because after all they're very important.

MARGOT ADLER: Michael Comiskey, how does the confirmation process work? Walk us through what happens after the President nominates someone to the Supreme Court. Do you think that the framers wanted the process to be as political as it has become or has it always been political?

MICHAEL COMISKEY: Well, it's always been political, although today the process takes a lot longer than it used to. Today, after the president nominates someone and the nominee fills out a very long and detailed questionnaire for the Senate Judiciary Committee, the nominee is investigated by senators and their staffs. Nominees, as you know, also go around the Senate making courtesy calls on senators. There's a great deal of media attention to Supreme Court nominations, which, perhaps surprisingly, wasn't always the case.

I once looked at the New York Times coverage of President Eisenhower's nomination of William Brennan to the Supreme Court in 1956, and there were really just a few stories that didn't take up much column space, and most nominees back in those days were confirmed rather quickly, usually within two or three weeks of their nomination. The Senate Judiciary Committee's hearings were very short compared to what they are today.

MARGOT ADLER: So how did interest groups come to play such a big role, and how did it change?

MICHAEL GERHARDT: I think it changed a little bit in fits and starts. There's some evidence to suggest that in the latter part of the 19<sup>th</sup> century interest groups began to participate, particularly labor groups who were interested in President Hayes' nomination of Stanley Matthews. They seemed to have some influence over the outcome of that process.

Earlier in the 20<sup>th</sup> century, we see interest groups really becoming much more involved, and I think that sort of becomes really tangible with the nomination of John Parker by President Hoover to the U.S. Supreme Court. Civil rights groups in particular helped defeat that nomination, and then, of course, more recently we've seen interest groups on both the left and the right become heavily involved and really trying to sort of dictate what the public discourse is on those nominations.

MARGOT ADLER: Throughout both hearings, Chief Justice Roberts and Justice Alito were asked whether certain precedents were considered settled law, or what some have called "superprecedents." Is it appropriate to ask them whether cases like *Griswold vs. Connecticut*, which dealt with privacy and contraception, or *Roe v. Wade* should be considered settled law or not? I'll ask Michael Comiskey first.

MICHAEL COMISKEY: Yes, I think it's entirely appropriate. I think it's entirely appropriate to ask them about their constitutional philosophies, how they believe judges of the Supreme Court should go about deciding cases, what guidelines they would follow, what weight they give to the stare decisis and so forth. After all, these are people who are going to make important decisions impacting our lives, so I think it's incumbent on us to find out as much as we can about them for a number of reasons. First of all, they're going to impact our lives. Second, once they get through the confirmation process and they become justices, at that point, they're largely untouchable, largely unaccountable to anybody. The confirmation process is really the last chance we have to have a dialog with them and find out anything about them before it's too late. And lastly, if the Senate doesn't ask questions

of the sort that you just mentioned, then the Senate really can't check and balance the president, and our whole system is based on checks and balances.

MARGOT ADLER: Mike Gerhardt, do you agree?

MICHAEL GERHARDT: Precedent matters, I think, for several reasons. It has to do with just simply the willingness of nominees to respect what the people who came before them did. They're going to expect the same respect for their opinions, so we have to see to what extent they're willing to sort of give to others what they're going to demand for themselves. The second reason why precedent is important is stability. We all hope for some stability within the process, or we have to get a feel for how much instability this new nomination is going to create. And then the third thing, I think, is that we're trying to get a feel for a particular nominee's willingness to defer to something outside of himself or herself, something external. Precedent is one of those things and so we're trying to get a feel for the extent to which the nominee is willing to say: this thing that I didn't have a part in making is something I consider to be law and something worth deferring to.

MARGOT ADLER: Michael Comiskey, when and how did a nominee's ideology become so important? Is treatment of current nominees a result of the stormy confirmation hearings over Judge Bork and Justice Thomas?

MICHAEL COMISKEY: No, I think it goes back before that. Of course, ideology has always been important. As Mike Gerhardt said, presidents have always chosen nominees on the basis of ideology and senators have always voted on them on the basis of ideology. But still, attention to ideology has become much more important than it was previously in recent decades.

MARGOT ADLER: And why do you think that is?

MICHAEL COMISKEY: Some people trace it back to *Brown vs. Board of Education* in 1954, which was extremely controversial in its time. It was immediately after *Brown vs. Board of Education*, beginning with the appointment of the second Justice Harlan in 1955 that every Supreme Court nominee began appearing before the Senate Judiciary Committee to answer questions. Although even then, hearings were typically very short, senators didn't ask very many questions, and they didn't hear from outside interest groups. Even as late as 1969 when President Nixon nominated Warren Burger to be Chief Justice, the confirmation hearing on Burger lasted one hour and 40 minutes. Burger was the only witness and much of that one hour and 40 minutes was taken up by the exchange of formalities and pleasantries between the nominee and the senators.

MARGOT ADLER: What happened with the Harriet Meiers nomination? Was she given a fair shake, and if Ms. Meiers had been a man, would she have been treated differently? Let's start with you Mike Gerhardt.

MICHAEL GERHARDT: I'm still scratching my head over the Harriet Meiers situation. I would like to think that she might've been treated the same had she been a man, and the

reason I say that is because of her circumstances. I believe the problems that she had arose from two things, neither of which I think had anything to do with her gender. The first had to do with her close, personal friendship with the president; there was a sense of cronyism there. And then the second thing had to do with her credentials, her qualifications for the Supreme Court. And I think there the problem for her was probably more John Roberts. I mean, John Roberts' qualifications were extraordinary, quite exemplary. Well, in the wake of Roberts' nomination, she did not appear to be somebody who was on most people's lists of likely nominees to the Supreme Court.

MARGOT ADLER: But why were you scratching your head? You're still mystified, in some sense.

MICHAEL GERHARDT: I'm mystified because the reason that was cited for withdrawing the nomination doesn't seem to be credible. The reason was that the president was not prepared to release documents that she would've produced as White House counsel so people could see what she had done in that job. Well, that was something he could've predicted even before nominating her as White House counsel, and so I don't find that justification very credible.

MARGOT ADLER: Michael Comiskey, what do you think about the Harriet Meiers nomination?

MICHAEL COMISKEY: Well, I largely agree with what we just heard. One thing that makes me scratch my head about that nomination was why the Bush administration did not touch base with its base before nominating Harriet Meiers. One would think they would've run a possible Harriet Meiers nomination by Republican senators and by the important Republican interest groups that this president has been so close to. But they obviously didn't do so in this case and that's what puzzles me about the Meiers nomination.

MARGOT ADLER: Unfortunately, we have to wrap this up. Thank you both for joining me to talk about the Supreme Court confirmation process.

MICHAEL COMISKEY: You're welcome.

MICHAEL GERHARDT: It's been a privilege. Thank you.

MARGOT ADLER: Michael Comiskey is the author of "Seeking Justices: The Judging of Supreme Court Nominees." He is an associate professor of political science at the Penn State Fayette campus. Thanks also to Mike Gerhardt, a law professor at the University of North Carolina law school. He is the author of a book called "The Federal Appointments Process." Thank you both so much.

MARGOT ADLER: Coming up on Justice Talking, two constitutional scholars weigh in on whether they think the Supreme Court will overturn *Roe v. Wade*. Would justices Alito and Roberts vote to take away a woman's right to have an abortion? All this and more—don't go away.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We've just talked about the Supreme Court nomination process. Now we'll talk about how the recent changes on the Court will play out this term and in years to come. Dawn Johnsen and Doug Kmiec are here with me to share their different viewpoints. We'll look at how the two new justices will shape the future of the Court. Doug Kmiec is a constitutional scholar and former dean at Catholic University School of Law. He joins us from California where he teaches law at Pepperdine University. Welcome to Justice Talking, Doug.

DOUGLAS KMIEC: Very nice to be with you.

MARGOT ADLER: Dawn Johnsen is a law professor at the Indiana University School of Law in Bloomington. Formerly she was the legal director of the National Abortion and Reproductive Rights Action League—now NARAL Pro-Choice America. She joins us from Bloomington, Indiana. Welcome, Dawn.

DAWN JOHNSEN: Thank you.

MARGOT ADLER: In recent confirmation hearings, a great deal of attention was paid to the judicial philosophies of Chief Justice Roberts and Justice Alito. How would you define their judicial philosophies and how did the two of them differ? Let's start with you, Doug.

DOUGLAS KMIEC: Well, I think both John Roberts and Samuel Alito have an understanding of the judicial role that is a modest one, a belief that judges should interpret statutes and the provisions of the Constitution as they are written, to a large extent informed by the original understanding—that is, the usage of the words at the time of the statutory enactment or constitutional provision—and that judges ought not to be usurping the role of either the legislative or the executive branch. And while we all recognize that there are various ambiguities and phrases in the Constitution that require interpretation, judges are not to be reaching out for things that would be inconsistent with the history and the tradition and the customs of the people of the United States as they have informed the Constitution over many years.

MARGOT ADLER: Dawn, how would you define those philosophies?

DAWN JOHNSEN: I would put it a little differently, though in the same direction. Now that both Chief Justice Roberts and Justice Alito have been confirmed, those who want to move the Supreme Court to the right on a whole range of issues are not hiding the fact that they're jubilant. They have reached a culmination of their goal to change the composition of the court to move the future of doctrine significantly to the right, especially on issues like the role of the court in protecting individual rights and liberties. They want to narrow judicial protection of rights and limit access to the Court to vindicate rights.

Also on the agenda is limiting congressional power and expanding so-called states' rights. Now that the confirmation process is over for Justice Alito we see stories about how both

Alito and Roberts were on the short list of those that the conservative right wanted to put on the court, and they are celebrating.

MARGOT ADLER: And how, Dawn, do you think they are different from one another?

DAWN JOHNSEN: It's difficult to say. You know, they both come from the Reagan administration where this blueprint to move the court to the right was first created, so I believe that on most issues we can expect them to vote the same way. In the confirmation hearings they both emphasized their respect for stare decisis. I would expect that both would, at least in the beginning, take incremental approaches to cutting back on rights such as the right to choose abortion. They will uphold, I believe, restriction after restriction on abortion before reaching the big question that people I think are misguided in focusing on, which is will the court expressly and completely overrule Row.

MARGOT ADLER: Well, we're going to get to that a little later. I'm just wondering, Doug, do you disagree with her analysis?

DOUGLAS KMIEC: I agree with Professor Johnsen that there are not profound differences between the training and preparation and perspective of Justice Alito and Chief Justice Roberts. But we have seen Justice Roberts in action a bit in the early part of this term, and one of the things that we see is that he's being very faithful to the role of a modest, restrained judge. And one example of that is the fact that the Court, in the Ayotte case—a case dealing with the parental notice in the abortion context—that Professor Johnsen was alluding to, didn't reach out and decide the case in a way that struck down the choice of the legislature altogether, but rather remanded the case to the lower court, basically asking the court to do what it could, consistent with the statute that had been enacted to save as much as possible, if that was indeed possible. And that's an example of comity of the judicial branch respecting the outcomes of the people, and I think that is the primary philosophy of Roberts and Alito.

MARGOT ADLER: Doug, I want to go on. Former Justice Sandra Day O'Connor often provided the swing vote on the Court, particularly on what we might call culture war issues. What cases are coming up in the remainder of the Court's term that will give Justice Alito the opportunity to show us whether he will vote differently from Justice O'Connor?

DOUGLAS KMIEC: Well, there are a number of cases of the type you suggest, Margot. There is a case that was already argued, *FAIR vs. Rumsfeld*, which deals with whether or not law schools who want to disassociate themselves from the military because of the military's "don't ask, don't tell" policy can do so notwithstanding a spending condition, as it's called, on federal money that law schools and universities receive that mandates that those schools treat military recruiters on an even-handed and equal basis as other recruiters. And Justice Roberts would have an opportunity to play a role in that, but not likely Justice Alito since he wasn't there for the argument, unless the case is closely divided and re-argument is called for.

There are a number of others; let me briefly mention them. There is a case dealing with the scope of the Clean Water Act. In this particular area, Justice O'Connor was particularly strong in defending the perspective of the states in wanting to draw a distinction between what is national and what is local. And so if Justice Roberts and Justice Alito defend states in that sense, they will be carrying on her legacy.

MARGOT ADLER: The court is scheduled to decide whether it will hear a case concerning the federal ban on partial birth abortion. This is an issue the Court decided only a few years ago by a 5-to-4 vote, and all three courts of appeals have found that the law is unconstitutional. How do you think Chief Justice Roberts and Justice Alito will influence the outcome in this case?

DAWN JOHNSEN: The issue of abortion is at the top of the list of those in which the recent changes in the Court will make a difference in outcome. I believe that very strongly. Justice O'Connor cast the critical fifth vote in the most recent substantive abortion decision in the year 2000, the Stenberg case, where the Court struck down the so-called partial birth abortion ban out of Nebraska. So this federal law is virtually identical to that state abortion ban, and in looking at the state ban, the Court divided 5-4, O'Connor cast a critical fifth vote, Alito replaces O'Connor, and I have little doubt that Justice Alito would vote to uphold the federal abortion ban.

MARGOT ADLER: Doug, do you think Roe will be overturned, or do you agree with something that I think Dawn said, that so many restrictions have been placed on abortion already that overturning Roe isn't really even essential to people who want to put bans on abortion?

DOUGLAS KMIEC: I think Roe, by and large, has been superceded by the later case in *Casey vs. Planned Parenthood* which establishes the undo burden standard. I think it's largely a question now of calibrating what the state can and cannot do. So Roe has largely been superceded and I think the real issue is what level of state regulation is acceptable in light of the right that the Court has acknowledged. I don't think the Court is on a course set to disavow the right altogether.

MARGOT ADLER: Now I'd like to move on to another topic. We've heard a lot lately about domestic spying by the NSA and whether the president acted within his power when he ordered surveillance without court review. How might Justice Alito rule on questions of executive power and the role of Congress in relation to presidential authority? This time we'll start with you, Dawn.

DAWN JOHNSEN: Yes, I think that the issue of how and if the Court will restrict presidential power is one of the most important in the short run. I put it up there with the issue of whether it will restrict the right to choose abortion. When you ask Professor Kmiec a minute ago about what's currently pending before the Court, I don't think there is anything there now that's been argued or scheduled to be argued that will be particularly notable where Alito will make the difference.

But there are these two cases—Hamden and Padilla—that involve whether the Court will even hear challenges to aggressive assertions of presidential authority, and whether the Court will even provide any check or review of those extreme assertions of presidential authority.

MARGOT ADLER: Now the Hamden case will be argued on March 28<sup>th</sup>, and I know that the case challenges the government's use of military commissions in the war against terrorism, and Chief Justice Roberts has recused himself because he ruled on the case when he was still an appeals court judge. Doug, how do you think Justice Alito might vote on this one?

DOUGLAS KMIEC: Well, Hamden has many complexities to it—you're exactly right Margot. It deals with the authority of the president to set up military commissions in wartime, an authority that has great precedent and support to it in previous conventional wars. But it has other issues that may preclude the Court from getting to it, including the fact that Congress has passed an act called the Detainee Treatment Act, which on some people's interpretation suggests that Congress is exercising its power to define and make exceptions to the Court's appellate jurisdiction such that this case is outside of the Court's appellate jurisdiction.

Now there are very serious and very profound constitutional issues embedded in the issue of when Congress has the authority to withdraw the Court's jurisdiction over an alleged violation of constitutional right. And so even apart from the very interesting and important issue of presidential power in wartime is this, what you might call, definitional or structural issue of the relationship between the Court and Congress.

MARGOT ADLER: Looking at this in a broader way, looking at the relationship of, let's say, the Supreme Court to the government—you've both been government lawyers, do you think that Justice Alito is likely to favor the government more often than not, and Chief Justice Roberts, is he going to be deferential to the government in most of his rulings? Let's start with you, Dawn.

DAWN JOHNSEN: That was a big theme in Justice Alito's confirmation hearings—the fact that he did as a lower court judge favor the government. I'd like to mention in particular a speech he gave as a judge to the Federalist Society in the year 2000, where he embraced the doctrine of unitary executive. Now that's a phrase that has deep meaning to me and I'm sure to Professor Kmiec, having been government lawyers. That unitary executive theory is one of expansive presidential power and very limited ability on the part of Congress and the courts to check presidential power. So since Justice Alito, in his own words in the year 2000, quite recently, embraced that sweeping theory of presidential power, I would expect that he would say that the Court has a very limited role in reviewing and checking the president when he, for example, decides he needs to engage in wiretaps here in the United States without warrants and in violation of the federal FISA statute.

MARGOT ADLER: Doug, would you agree or not?

DOUGLAS KMIEC: I think what Judge, now Justice Alito, would say, is that he's going to be informed by the Youngstown case, where Justice Jackson outlined the various ways in which the president is either in agreement or in opposition to the Congress. And in this particular case where the president and the Congress seem to be marching in the same direction, that by and large the courts maybe should stay their hand at this point and allow the politically accountable branches which have to fight the war to fight it.

MARGOT ADLER: Let me ask you both: The Court clearly has changed with these two appointments. How do you think they'll change the strategy that both the right and the left will employ at this point forward? Let's start with you, Doug.

DOUGLAS KMIEC: I think the Court is even more carefully balanced today than it was prior to these appointments. The widespread public supposition is that Justice Kennedy is now the man in the middle and I think there's a fair amount of truth to that, if you see the conservatives and the liberals dividing closely otherwise. But I also think there is a likelihood that we'll see interesting coalitions emerge where Justice Alito and Justice Roberts will strike a coalition sometimes in the conservative direction, bringing on Justice Kennedy, who is I think by all accounts a moderate conservative, and sometimes bringing on Justice Brien, going in the somewhat more liberal direction. And I think we're going to see more consensus, largely because Justice Roberts and Justice Alito are people who are known for their ability to bring others over to their side by the force of their reasoning and ability.

MARGOT ADLER: Dawn, how do you see the strategies changing on the right and the left?

DAWN JOHNSEN: Well, I think the court clearly has moved far to the right now, and that is a new reality that we all will live with. The only question is how far to the right and for how long. So I think it's clear that those who care about the protection of rights and liberties and care about checking presidential abuses and extreme assertions of presidential power, will need to work less through the courts, do what they can there, but focus far more on elected representatives at the federal and state level. Politics is going to matter far more than it ever has. If the court will not check presidential abuses, then we need to try to get Congress to do that more effectively and that might require changing the composition of Congress. If the courts won't strike down onerous restrictions on abortion, we have no choice but to elect representatives at the state and federal level who will.

MARGOT ADLER: To some degree, everything we've done here is a guessing game. Only the future is going to tell us what will really happen. I want to thank you both for joining me.

DAWN JOHNSEN: Thank you for having me.

DOUGLAS KMIEC: Good to be with you, Margot.

MARGOT ADLER: Doug Kmiec teaches constitutional law at Pepperdine Law School and Dawn Johnsen is a law professor at Indiana University School of Law in Bloomington. Thank you so much.

Tell us what you think. What do you think about Justices Roberts and Alito and the direction of the Supreme Court? You can join the debate on our website, [justicetalking.org](http://justicetalking.org). Just ahead on Justice Talking we'll talk with the author of a new biography of Justice Sandra Day O'Connor, who just retired from the Supreme Court. Stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Sandra Day O'Connor was the first woman Supreme Court Justice. After serving almost 25 years on the Court, she retired this year at the age of 76. Joan Biskupic covers the Supreme Court for USA Today. Her new book, "Sandra Day O'Connor," tells the story of how a girl raised on an Arizona ranch became one of the most respected judges in the country. Joan, thanks so much for joining me. What made you want to write a book about Sandra Day O'Connor?

JOAN BISKUPIC: It's a good question. People think that maybe I was drawn to her because she was the first woman on the Court, but it was actually, Margot, because she is such a politician on the court. I found a note that Justice William Brennan had written to Thurgood Marshall in 1990 that said: "Sandra forced my hand by threatening to lead the revolution." And I thought, what would it be about Justice O'Connor that would give this master strategist, Justice Brennan, a run for his money in the criminal law case that he was writing about. And I decided to look at her as someone who brought her political skills from Arizona to the nation's highest court.

MARGOT ADLER: And did you find out what it was?

JOAN BISKUPIC: Yes. She had a real instinct for working with the brethren. You know, she, for 24 years, was the only member of the Supreme Court who was a former elected politician, so she knew how to work the back rooms of a state legislature and sort of figured out how to work the back rooms behind the velvet drapes at the Court, and sized up the brethren who were, as you know, first of all, all male, and practically a generation older than her in most cases. But she slowly figured out how to bring her centrist style on the law to build consensus and to become this key swing vote.

MARGOT ADLER: Now, did you spend a lot of time talking with her for the book?

JOAN BISKUPIC: She gave me two lengthy interviews before I signed the contract, but then once I decided to write the book, I sent her a note and said, I am going to do this—the book about you. And she first said, well what if I want to write another book myself? Because, as you know, she'd written about her life on the Lazy B. I tried to convince her that this would be an independent look at her that might validate some of the things she'd say. But she decided that as a sitting justice, she couldn't cooperate.

But, Margot, what was important was that she didn't stand in the way. All but one of her fellow justices agreed to sit down for interviews, most of them tape recorded. I went to the

ranch, I interviewed her sons, and her brother and sister. So while she didn't affirmatively cooperate, she did not interfere.

MARGOT ADLER: And what would you say were your most fruitful sources in learning about her life?

JOAN BISKUPIC: The papers of four different retired justices. I got special access to get into the papers of the late Justice Brennan who was a bit of a rival on the law with her. The other papers that were very important to me were Lewis Powell's. He has his archive down at Washington and Lee University in Lexington, Virginia, and they're essentially un-mined papers. But she was a very good friend of his and confided in him a lot, so those were two good sources for the Court. And then, finally, her legislative papers in Arizona which again are a very good un-mined source.

I found that, believe it or not, in 1971, she had worked very diligently to help get William Rehnquist on the Supreme Court. He was an old pal of hers from Stanford. And I found a lot that showed how she learned her political skills as a state legislator, and just what she was like in a more unguarded day.

MARGOT ADLER: Now we know she was born in 1930, she was raised on an Arizona ranch, she went to Stanford at 16 for college, which had always been her father's dream. What was notable about her childhood and about her as a young woman?

JOAN BISKUPIC: Two things: She grew up on this ranch that many of us can't identify with because here she was born at the start of the depression on a ranch where there was no running water or electricity until she was about 10 years old. Her father was a hard-driver. She paints him in her own memoir as sort of a self-taught, rugged individual, but he was very harsh and demanding and unpredictable. And what it did was it left her with a lesson of how to maneuver among tough customers and tough characters, and it gave her a competitive drive, I felt, that got her where she is today.

So she had that, but the other thing about her ranch life is that she was sent away from it. Back in those days there was really no good education option for a youngster on a ranch, so her parents sent her to El Paso to live with her maternal grandmother and go to what was a boarding school, even though she didn't board. And she was very lonely and homesick and I think that also built up a kind of character that, as I say, sort of sustained her for the journey to be the first woman on the Supreme Court.

MARGOT ADLER: How did O'Connor get from being a Republican senator in Arizona to becoming the first woman to get a seat on the Court?

JOAN BISKUPIC: Well, take yourself back to 1981 and think of the choices that a Republican president would have to put a woman on the Court. There just was simply a smaller pool than we have today. There weren't many women on the federal courts and few on the state courts. But O'Connor was known to key individuals in 1981, like Barry Goldwater of course, the influential conservative senator from Arizona.

She was also known to key people who could get her name to Ronald Reagan, and once Ronald Reagan met this woman who had grown up on a ranch and was a politician, he fell in love with her. And he didn't care that she was actually not as conservative as billed, and ran into a little bit of criticism from abortion opponents, but she got on the radar screen early and made her own case with the president's men.

MARGOT ADLER: So it was really President Ronald Reagan who wanted her, not any pressure for him to do this or nominate a woman.

JOAN BISKUPIC: Well, what happened in 1980 when he was running for president against Jimmy Carter was that he held a press conference and promised he would put a woman on the Supreme Court. Now this was politically motivated in the fall of 1980 because he had opposed the Equal Rights Amendment and he had many, many women's groups picketing at his appearances on the campaign trail, and his campaign manager suggested that he make this promise as a way of sort of shoring up some female support. Now the event in Los Angeles in 1980 was sort of a blip in the whole campaign story, but once Ronald Reagan made the promise of appointing a female justice, he was going to keep it. So when Potter Stewart secretly told the administration that he would be stepping down—this happened on March 26, 1981 and was a secret that ended up being kept until the following June—Reagan's aides decided, well he promised a woman, let's start looking for a woman.

The other person who helped bring Sandra Day O'Connor's name to the Reagan administration was Warren Burger, who was Chief Justice at the time. Sandra Day O'Connor happened to meet Warren Burger on a houseboat vacation through mutual friends in 1979 and Chief Justice Burger really took to Sandra Day O'Connor and helped bring her name to Washington also.

MARGOT ADLER: Now, when she got on the Court, how did the Court have to adjust to having a woman on board?

JOAN BISKUPIC: Well, Margot, they were old and they were old fashioned. Lewis Powell wrote a note to his family around the time that she was sworn in that said: "The town is agog over the lady justice." And I'd have to say that a lot of the brethren were sort of agog over the lady justice. I think there was some period of adjustment to accept this woman, although she certainly was smart, efficient, competent, and could hold her own on the law. But it took a while for them to see her as the key player that she was, both in a sort of social/cultural way and also on the law.

MARGOT ADLER: *Roe v. Wade* was decided in 1973. I'm wondering how the issue of abortion played into her nomination and whether you see any similarities between how abortion was used there and how it was so important in the Roberts and Alito nominations.

JOAN BISKUPIC: Yes. She had voted as an Arizona senator to actually decriminalize abortion. She had a bit of an abortion rights record that was sort of brushed away by Reagan's aides and minimized during her hearings. But it was an issue and she told

senators that she found abortion abhorrent. She said that it was something that she would never do herself. But it was interesting because she was 51 at the time and she said to senators in the first nationally televised hearings: "Well, I'm over the hill. It's nothing that I would do anymore." And, actually, at that point in her life she had had a hysterectomy so she wasn't going to get pregnant and even consider abortion in any way, but she said for as much as she doesn't like it, she said this is something that is a personal choice by people. So she gave a bit of an ambivalent answer, and then in her first abortion cases, Margot, in the '80s, she voted with the hard right to uphold abortion regulations in the states. Now, she was in dissent—at that point there was a very strong majority to vigorously uphold *Roe vs. Wade*. So her early votes were actually in keeping with the Ronald Reagan social agenda against abortion.

But then when it became critical for her right in the middle of this Court to almost determine single-handedly abortion rights, she started to move to the other side. And as we saw in 1992, she was a critical vote to uphold *Roe vs. Wade*.

MARGOT ADLER: So as the Court became more conservative, she became more centrist.

JOAN BISKUPIC: You know, that's exactly right, and that's a point I try to make in my book, that she was a reflection of the times and she also was concerned about the Court moving too far in one direction over another. When William Brennan was at the height of his power—the liberal William Brennan—she tended to be more conservative. But then after he left the court, and as you say we had more conservatives join—we had Antonin Scalia come on in 1986, we had Clarence Thomas come on in 1991—she started moving in the opposite direction. And I think it was part of her sort of general approach that she didn't want the court to be swinging in one direction over another.

MARGOT ADLER: So in what issues did she tilt to the right and on which to the left, and were her votes predictable at all?

JOAN BISKUPIC: It depended on the issue. For a long time her votes were very predictable in areas of criminal law and the death penalty. She herself really didn't like that condemned inmates were able to prolong their appeals, and as a former state court judge and a state legislator, she didn't like federal courts second-guessing the states. So she authored key opinions that restricted death penalty appeals. That has changed over time. I think she's responded to what we've seen with DNA cases and problems with competent counsel. She's now a swing vote sort of in the other direction to allow inmates a chance to challenge their counsel to make sure that capitol defendants are adequately represented.

In affirmative action we sort of saw the same thing. She comes onto the court being very skeptical of race-based policies, and being a key vote against affirmative action in, for example, voting rights districts or on the job in certain cases. But then when we get in 2003 to the big University of Michigan affirmative action case, she's the key vote that says wait, it's not time to end affirmative action in University admissions and she...

MARGOT ADLER: She said let's wait 25 years, or something like that, right?

JOAN BISKUPIC: Right. You remember this.

MARGOT ADLER: I do.

JOAN BISKUPIC: She's always putting deadlines on things. But now we know Sandra Day O'Connor won't be around in 25 years to cast any determinative vote.

MARGOT ADLER: You said in your book that she was often at odds with Justice Brennan and later with Scalia. Why did these justices have problems with O'Connor?

JOAN BISKUPIC: Well, I think in different ways. Justice Brennan, for as much as he did for women and women's rights in his rulings, was essentially a man's man. He was born at the turn of the century and he was one of the justices who rarely had female clerks. I think it was a little bit of a culture shock for him when she came on the Court. But then more substantively he was a really true blue liberal and Sandra Day O'Connor had very conservative views. So they clashed that way, and just as I noted when we were talking earlier about his comment that Sandra forced his hand in a particular 1990 criminal law case, I think he realized that she was going to be quite effective. They both had been state court judges and they both knew politics.

Now Antonin Scalia, when I met with him, he protested that he had any differences with her. He told me this great story about the first time they went off on a judicial trip to London together where he was late for the bus and she, the ever punctual Sandra Day O'Connor, made the bus leave without him. And he said, "I went running after that bus waving my coat saying, 'Wait for me!'" And he said, "That's when I learned not to mess with Sandra." But the truth was that he was always giving her a hard time publicly in his opinions. And I think his feeling was that this Ronald Reagan conservative, Sandra Day O'Connor, should be voting more conservatively. I think his frustration with her came from being the dissent as she won cases as a centrist.

MARGOT ADLER: What are some of the criticisms of O'Connor as a justice and how do you think she will go down in Supreme Court history?

JOAN BISKUPIC: Well, academics and lower court judges have complained that her rulings are so open-ended that it's often hard to translate them to related disputes in the lower courts. That she decides cases so narrowly and on the facts that it encourages litigation rather than shutting it down. So that's one key criticism. Another criticism comes, you know, certainly from various people's ideology, that maybe she should've been more liberal in terms of what she allowed for criminal defendants, and then obviously conservatives on the other side really resented her swing vote in favor of abortion rights. So she gets lots of criticism, most of it based on her ideology, but also in terms of the fact that she tends towards shades of gray rather than black and white rules.

MARGOT ADLER: How do you see her fairing right now and what do you think she's doing and thinking and feeling?

JOAN BISKUPIC: Remember on July 1<sup>st</sup> she said she was going to step down, she wanted to spend more time with her husband who was ill, and then we have this unusual turn of events where the Chief Justice passes away on September 3<sup>rd</sup> and the man who had been nominated to her spot, John Roberts, suddenly is put in that spot, and then we have Harriet Meiers come in and she's withdrawn then for Sandra Day O'Connor's position and now we're looking at Judge Alito. I think she's ready to wrap up her time on the Supreme Court. She sold her large house in Chevy Chase, Maryland and downsized to a small apartment here in town, she wants to spend more time with her husband, and she had lined up other activities off the bench. I think she was sort of tapping her foot, but you started this conversation by asking about her ranch life and if there's ever anything that she does, she does it. She signed up to stay on until her successor was confirmed and there was probably never a doubt in her mind that she would fulfill that promise.

MARGOT ADLER: Joan, thank you so much for joining me.

JOAN BISKUPIC: Thank you, Margot.

MARGOT ADLER: Joan Biskupic covers the Supreme Court for USA Today. She recently wrote a book about Supreme Court Justice Sandra Day O'Connor called "Sandra Day O'Connor." It's published by Harper Collins.

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MARGOT ADLER: You may realize that Justice Talking sounds different. We've been making changes to the show. What do you like about the show? Are there things you don't like? Do you have suggestions of topics you would like our show to explore? Let us know by e-mailing us at [comments@justicetalking.org](mailto:comments@justicetalking.org). Thanks for joining us. I hope you'll tune in next week. I'm Margot Adler.

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